



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-0301

STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v. _____

BRYAN M.,

*Defendant Below,
Petitioner.*

RESPONDENTS BRIEF

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RESPONDENT'S AMENDED BRIEF

I.

ASSIGNMENTS OF ERROR

- A. Trial court [sic] erred by allowing the prosecution to question the victim regarding petitioner's sexual past and portraying him as a past sexual predator.
 - B. The trial court erred by excluding statements made on Twitter by the alleged victim based on the Rape Shield Statute.
 - C. The trial court erred by refusing to strike juror number 38 Teresa Ferguson-Cross for cause.
 - D. The trial court erred by striking a potential juror for cause after the attorneys had selected a jury.
 - E. There was insufficient evidence before the jury to sustain a conviction of Count I of the indictment.
-
- F. The juries [sic] verdict was one of compromise and not based upon the evidence provided during the trial.

II.

STATEMENT OF THE CASE

Victim testified that the Petitioner asked her to give him a ride home. App. vol. IV, 114. When the pair got to the Petitioner's home, the Petitioner was persistent in asking if she would come in to watch a movie. *Id.* at 118. The Petitioner asked victim "to come in for a little bit[.]" *id.* at 119, to which she agreed. *Id.* at 120. The two went upstairs to the Respondent's bedroom. *Id.* at 121. Victim sat down in a chair. *Id.* at 121. While victim was still sitting in the chair, the Petitioner, turned on the television, lit 3 to 5 candles, and then turned off the lights. *Id.* at 122. Victim told the Petitioner that "nothing was going to happen[.]" *Id.* at 123. The Petitioner took off his shirt and pants, but kept on his boxers. *Id.* at 124-25. Victim was unconcerned because her father and brother-in-law walk around in their boxers. *Id.* at 125-26. Victim then told the Petitioner again that "nothing sexual was going to happen." *Id.* at 126.

The Petitioner then pulled victim by the hand from the chair onto the bed. *Id.* at 126-27. The Petitioner started to kiss victim and then took his hand and tried to touch victim crotch. *Id.* at 129. Victim pushed the Petitioner's hand away and said, in a loud voice, "No," several times. *Id.* at 130, 135. The Petitioner succeeded in placing his fingers into victim's vagina, *id.* at 132, while victim was trying to pull his hand away. *Id.* Victim never consented to the violation. *Id.* at 132. Additionally, victim claimed that the Petitioner also penetrated her with his penis. *Id.* at 138-39.

The Petitioner was indicted with two counts of sexual abuse in the second degree, one for the digital penetration and one for the penile penetration. App. vol. I, at 4. The jury convicted on the digital penetration and acquitted on the penile penetration. App. vol. V, 402-04.

III.

SUMMARY OF ARGUMENT

1. The Petitioner argues on appeal that the circuit court erred in allowing the victim to testify that she was aware of the Petitioner's reputation relating his sexual conquests. However, at trial he made a cryptic and enigmatic objection that did not clearly and specifically set forth that he was objecting on Rule 404(b) grounds. The Petitioner's objection below was, at best, one based on Rule 611(b)(2) or 401, neither of which preserves a 404(b) argument on appeal. Additionally, the evidence was relevant in that it showed that the victim would not have consented to have sex with the Petitioner.

2. The circuit court ruled that two statements that the victim made on her Twitter account were inadmissible. The circuit court's ruling was premised on the fact that the "tweets" were not relevant in that they were not shown to have related to this particular case. The circuit court did not abuse its discretion in excluding this evidence since the Petitioner did not carry his burden of showing the tweets' relevance.

3. The circuit court refused to strike a juror who was a clerk in the Hunting municipal court who apparently dealt with tickets and related items. The Petitioner was familiar with and knew the Huntington Police involved in the case, but never discussed the case with them and stated in voir dire that she did not know anything about the case, would be fair to all sides and would not be swayed by the fact she knew the officers. The Petitioner relies on *State v. West*, 157 W. Va. 209, 219-20, 200 S.E.2d 859, 866 (1973) for the proposition that "when the defendant can demonstrate even a tenuous relationship between a prospective juror and any prosecutorial or enforcement arm of State government, defendant's challenge for cause should be sustained by the court." But

the "tenuous relationship" language contained in the text of *West* cannot be taken to mean that any juror who is . . . acquainted socially with an employee of a law enforcement agency is automatically disqualified for cause. We believe that upon the disclosure of such a relationship the defendant must be permitted individual voir dire

to determine whether the juror has any possible bias or prejudice arising out of such relationship.

State v. Beckett, 172 W. Va. 817, 822, 310 S.E.2d 883, 888-89 (1983). *See also State v. King*, 183 W. Va. 440, 451, 396 S.E.2d 402, 413 (1990) (rejecting a claim that a juror should have been struck for cause “due to his friendship with Trooper Morgan, a key witness for the State” because “individual *voir dire* was conducted”). The individual *voir dire* here showed that the juror was not objectionable.

3. The Petitioner claims potential juror Doutt was struck for cause but was actually unobjectionable. Striking jurors is never grounds for appeal. “[I]t cannot be overemphasized that no error is committed even when a qualified juror is struck as long as the remaining panel members are qualified. Rather, our cases demonstrate that a trial court risks error only when it refuses to strike jurors whose impartiality is questionable.” *State v. Phillips*, 194 W. Va. 569, 589-90, 461 S.E.2d 75, 95-96 (1995). *Accord O’Dell v. Miller*, 211 W. Va. 285, 291, 565 S.E.2d 407, 413 (2002). Further, given that Ms. Doutt had a criminal record which she did not disclose in *voir dire* and which only came to light after the State serendipitously became aware of it, the circuit court was within its discretion in striking the juror.

4. The Petitioner claims potential juror Call was struck for cause but was actually unobjectionable. Striking jurors is never grounds for appeal. “[I]t cannot be overemphasized that no error is committed even when a qualified juror is struck as long as the remaining panel members are qualified. Rather, our cases demonstrate that a trial court risks error only when it refuses to strike jurors whose impartiality is questionable.” *State v. Phillips*, 194 W. Va. 569, 589-90, 461 S.E.2d 75, 95-96 (1995). *Accord O’Dell v. Miller*, 211 W. Va. 285, 291, 565 S.E.2d 407, 413 (2002). In any event, Mr. Call’s answers apparently exhibited a hesitancy in answering the individual *voir dire*

questions. A hesitance in answering and its impact on the juror's credibility is vested in the sound discretion of the trial judge whose perspective is personal rather than from a detached and cold record.

5. There was sufficient evidence of second degree sexual assault here. Taking as accurate that a jury's conviction on only one count of a multicount indictment that is not a predicate or compound offense can constitute an inconsistent verdict, an inconsistent verdict is not grounds for appellate relief. The victim's testimony that she told the Petitioner she did not want to have sex and that she swatted his hand away and told him no repeatedly in a loud voice is sufficient to satisfy the sufficiency of the evidence standard.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

There is no need for oral argument in this case. This case is suitable for memorandum decision.

V.

ARGUMENT

A. The Petitioner's trial objection does not correspond to the legal grounds he asserts on appeal, and, therefore, his argument on appeal is waived.

At trial, the following exchange occurred:

Q. . . . When you kept saying you didn't know and you said he was persistent, was there a reason why you didn't want to go in in initially?

A. Yes.

Q. Okay. What was that?

A. I heard how he is.

MR. WESTON: Objection, Your Honor. "Heard how he is" is completely outside the scope of what is going on here.

THE COURT: I will let her answer that.

MS. NEAL: Okay.

BY MS. NEAL:

Q. And you said you knew?

A. Yes. And how he was that he just wants to be with -- he just wants to get one thing from girls.

App. vol. IV, 119.

On appeal, the Petitioner contends that "[t]he testimony is properly barred by Rule 404 of the West Virginia Rules of Evidence." Pet'r's Br. at 11. "He now says that which he didn't say to the court specifically that on the basis of [] R. Evid. 404(b) the testimony . . . was improper and prejudicial[.]" *United States v. McPartlin*, 595 F.2d 1321, 1353 (7th Cir. 1979). Because he does not argue in his brief from the objection below, the 404(b) issue is waived here.

"It must be emphasized that the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely." *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996). Thus, "[i]t is well established that where the objection to the admission of testimony is based upon some specified ground, the objection is then limited to that precise ground and error cannot be predicated upon the overruling of the objection, and the admission of the testimony on some other ground, since specifying a certain ground of objection is considered a waiver of other grounds not specified." *State v. DeGraw*, 196 W. Va. 261, 272, 470 S.E.2d 215, 226 (1996) (quoting *Leftwich v. Inter-Ocean Casualty Co.*, 123 W. Va. 577, 585-86, 17 S.E.2d 209, 213 (1941) (Kenna, J., concurring)). "An objection is clearly lacking in the requisite specificity when the objection is 'too

loosely formulated and imprecise to apprise the trial court of the legal grounds for the complaint.”

1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* 1-92 (4th ed. 2000) (footnote omitted). *Accord United States v. Parodi*, 703 F.2d 768, 783 (4th Cir. 1983).

At trial, the Petitioner’s objection in full was, “Objection, Your Honor. ‘Heard how he is’ is completely outside of the scope of what is going on here.” App. vol. IV, 119. This cryptic and enigmatic objection is not specific nor clear. At best, an objection that testimony is “outside of the scope,” brings not to mind, Rule 404(b), but Rule 611(b)(2), *State v. Potter*, 197 W. Va. 734, 749, 478 S.E.2d 742, 757 (1996) (“See W. Va. R. Evid. 611(b)(2) (narrowing scope of cross-examination for non-party witnesses.)”); 1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers* 6-229 (4th ed. 2000) (“In most jurisdictions, the scope of cross-examination is generally restricted to the subject matter(s) (issues and events) testified to on direct examination and to the question of credibility.”), but which rule is limited to matters in cross-examination. *State v. Graham*, 208 W. Va. 463, 467 n.6, 541 S.E.2d 341, 345 n.6 (2000) (emphasis added) (“In accord, Rule 611(b)(1) of the West Virginia Rules of Evidence states that the *cross-examination . . .*”). And, perhaps, with the leisure of time and reflection (commodities that a circuit court does not enjoy in abundance, *McDougal v. McCammon*, 193 W. Va. 229, 235, 455 S.E.2d 788, 794 (1995) (“As the drafters of the rules appear to recognize, evidentiary and procedural rulings, perhaps more than any others, must be made quickly”), the objection could be made to appear as to one of relevancy. But a relevancy objection does not preserve a 404(b) argument, *State v. Tempest*, 651 A.2d 1198, 1216 (R.I. 1995); *State v. Hood*, 503 A.2d 781, 783 (N.H. 1985); *People v. Asevedo*, 551 N.W.2d 478,

481 (Mich. Ct. App. 1996); *State v. Kendrick*, 736 P.2d 1079, 1087 (Wash. Ct. App. 1987), and the evidence was relevant to show that the Petitioner did not consent to the Petitioner's conduct.¹

The objection below does not correspond to the argument made here. The Petitioner's "failure to raise a Rule 404(b) objection before the trial court precludes us from reviewing his Rule 404(b) argument." *DeGraw*, 196 W. Va. at 272, 470 S.E.2d at 226. *Accord State v. Simons*, 201 W. Va. 235, 240, 496 S.E.2d 185, 190 (1997) (per curiam) ("In light of appellant's failure to raise this issue before the court below, it is waived and therefore not reviewable by this Court on appeal.").

The circuit court should be affirmed.

B. The circuit court was within its discretion in excluding evidence of a statement apparently posted by the victim on Twitter.

"The West Virginia Rules of Evidence . . . allocate significant discretion to the trial court in making evidentiary . . . rulings." *McDougal v. McCammon*, 193 W. Va. 229, 235, 455 S.E.2d 788, 794 (1995). "[A] decision regarding the admission of evidence is within the broad discretion of the trial court and will be overturned only upon an abuse of that considerable discretion." *State v. Roy* 194 W. Va. 276, 286, 460 S.E.2d 277, 287 (1995). "An appellate court should find an abuse of discretion only when the trial court has acted arbitrarily or irrationally." *State v. Beard*, 194 W. Va.

¹The Petitioner's reliance on *United States v. Shelton*, 628 F.2d 54 (D.C. Cir.1980), Pet'r's Br. at 12, is misplaced. In *Shelton*, the evidence went only to show the defendant and the witness were "seedy and sinister characters." *Shelton*, 628 F.2d at 56. "[T]he fact that this court reversed a conviction on the grounds that the prosecutor, during cross examination of the defendant and another witness, 'by innuendo ... painted a picture of [the defendant and the witness] as seedy and sinister characters,' *United States v. Shelton*, 628 F.2d 54, 56 (D. C. Cir.1980), is not dispositive in this case." *United States v. Wilson*, 160 F.3d 732, 745 (D.C. Cir. 1998). The evidence here went directly to an issue in the case, the victim's consent and was not simply unrelated evidence that had no relevance to the case.

740, 748, 461 S.E.2d 486, 494 (1995). “[A]n appellate court should strive to uphold discretionary rulings made by trial judges and avoid in almost every case tampering with that discretion.” *State v. David D. W.*, 214 W. Va. 167, 178, 588 S.E.2d 156, 167 (2003) (Maynard, J., concurring), *maj. op. rejected by State v. Slater*, 222 W. Va. 499, 665 S.E.2d 674 (2008).

During her cross-examination, the Petitioner’s counsel asked the victim, about certain things she posted on Twitter.² Specifically a post that read, “I do things with people I shouldn’t although I am old enough to know better too young to care.” App. vol. IV, 170. The State objected asserting that “if he [i.e. the Petitioner’s trial counsel] is trying to get into anything that has anything to do with anybody else, that is protected by the Rape Shield. I don’t know where he is going.” *Id.* at 169. The Petitioner’s counsel responded, “It is what it is, Your Honor. I am not taking it anywhere.” *Id.* The Petitioner further asserted that “if she [i.e., the victim] is wanting to talk about her demeanor and how she is still affected by it, this goes straight to whether she is affected by it or not.” *Id.* at 169-70. The Petitioner also proffered a second “Tweet” the content of which was not voiced in the transcript. *Id.* at 171.³ The circuit court excluded both Tweets finding that “[w]ell, that can mean a lot of things. I am going to sustain the objection that it is not pertaining to this case.” *Id.*

First, the circuit court’s ruling is not premised on the Rape Shield Statute. Rather, the circuit court’s ruling here specifically concluded that the Tweets were not shown to have pertained to the

²“Twitter is a public, real-time social and information network that enables people to share, communicate, and receive news. Users can create a Twitter profile that contains a profile image, background image, and status updates called tweets, which can be up to 140–characters in length on the website. Twitter provides its services to the public at large. Anyone can sign up to use Twitter’s services as long as they agree to Twitter’s terms.” *People v. Harris*, ___ N.Y.S.2d ___, ___ 2012 WL 2533640, at *1 (N.Y. City Crim. Ct. 2012) (footnote omitted).

³The circuit court marked the two Tweets as Defendant’s Exhibits 1 and 2. The second Tweet at issue read “I ‘love’ them & leave them the best way to do it . . . Bawchickwawa . . . Now sleepy time! Ha. FINAL tomorrow!”

instant case. *Id.* If evidence is not shown to pertain to the case, it is not relevant, i.e., it has no “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” W. Va. R. Evid. 401. The burden of demonstrating relevance lies with the proponent of the evidence. *Dowling v. United States*, 493 U.S. 342, 351 n.3 (1990) (“the burden is on the introducing party to establish relevancy”). *See also DesRosiers v. Moran*, 949 F.2d 15, 23 (1st Cir. 1991) (“it is the proponent’s burden to demonstrate the relevancy of proffered evidence”). “[T]he burden is upon . . . the defense in this case, to establish . . . relevance.” *United States v. Simmons*, 48 M.J. 193, 196 (C.A.A.F. 1998). This rule applies to cross-examination, the questioning party must show the relevance of the cross-examination. *State v. Guthrie*, 194 W. Va. 657, 682 n.35, 461 S.E.2d 163, 188 n.35 (1995) (“no party has a right on cross-examination to offer irrelevant and incompetent evidence”), *accord State v. Price*, 92 W. Va. 542, 115 S.E. 393, 399 (1922); *State v. Beall*, 769 A.2d 708, 715 (Conn. Ct. App. 2001) (citation omitted) (“While it is correct that cross-examination tending to show those conditions is a matter of right that may not be unduly restricted; it is the party offering the testimony who has the burden of establishing its relevancy”); *People v. Helton*, 506 N.E.2d 307, 312 (Ill. Ct. App. 1987) (“We are of the opinion the defendant did not meet his burden of showing relevancy, and thus the trial court did not err in limiting cross-examination in this regard”); *Watson v. Artuz* No. 99 Civ. 1364(SAS), 1999 WL 1075973, 4 (S.D.N.Y. Nov. 30, 1999) (“the burden of showing the relevance of the excluded cross-examination is on the defendant”).

Here, the Petitioner’s Brief never explains why the Tweets are relevant evidence—it simply argues that the Tweets do not come within the ambit of the Rape Shield Statute. But even if the evidence does not fall within the Rape Shield Statute, “[t]he evidence remains subject to all other applicable evidentiary requirements and considerations.” *State v. Quinn*, 200 W. Va. 432, 438, 490

S.E.2d 34, 40 (1997). And one of those “requirements and considerations” is, of course, relevancy.

The circuit court should be affirmed.

C. The circuit court did not abuse its discretion in not striking Juror Teresa Ferguson-Crossan.

“‘[J]uror impartiality’ is a ‘factual issue,’ the resolution of which ‘depends heavily on the trial court’s appraisal of witness credibility and demeanor.’” *State v. Miller*, 197 W. Va. 588, 605 n.22, 476 S.E.2d 535, 552 n.22 (1996) (quoting *Thompson v. Keohane*, 516 U.S. 99, 111 (1995)).

“‘[A] trial court is better positioned to make decisions of this genre, and has therefore accorded the judgment of the jurist-observer ‘presumptive weight.’” *Id.*, 476 S.E.2d at 552 n.22 (quoting *Thompson*, 516 U.S. at 111 (citations omitted). As such “[t]he trial court has broad discretion in determining whether to strike jurors for cause, and we will reverse only where actual prejudice is demonstrated.” *Id.*, 476 S.E.2d at 552.

Juror Teresa Ferguson-Crossan was apparently an employee of the Huntington Municipal Court that, according to the circuit court Judge, worked with “tickets and all that kind of stuff.” Trial Tr. Vol. IV, 23. She stated that she knew the Huntington Police Officers involved as potential witnesses. *Id.*

“When a defendant seeks the disqualification of a juror, the defendant bears the burden of ‘rebut[ting] the presumption of a prospective juror’s impartiality [.]’” *State v. Phillips*, 194 W. Va. 569, 588, 461 S.E.2d 75, 94 (1995) (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961)). The Petitioner relies on *State v. West*, 157 W. Va. 209, 219-20, 200 S.E.2d 859, 866 (1973) for the proposition that “when the defendant can demonstrate even a tenuous relationship between a prospective juror and any prosecutorial or enforcement arm of State government, defendant’s

challenge for cause should be sustained by the court.” *West* does not bear the weight the Petitioner would give it.

In *State v. Beckett*, 172 W. Va. 817, 822, 310 S.E.2d 883, 888-89 (1983), this Court explained:

the “tenuous relationship” language contained in the text of *West* cannot be taken to mean that any juror who is . . . acquainted socially with an employee of a law enforcement agency is automatically disqualified for cause. We believe that upon the disclosure of such a relationship the defendant must be permitted individual voir dire to determine whether the juror has any possible bias or prejudice arising out of such relationship.

See also State v. King, 183 W. Va. 440, 451, 396 S.E.2d 402, 413 (1990) (rejecting a claim that a juror should have been struck for cause “due to his friendship with Trooper Morgan, a key witness for the State” because “individual *voir dire* was conducted”).

The Petitioner cites no West Virginia law discussing whether a municipal court clerk falls within this rule. However, the Colorado Court of Appeals dealt with this very issue in *People v. Fields*, 697 P.2d 749 (Colo. Ct. App. 1984), *aff’d*, 732 P.2d 1145 (Colo. 1987). This case should prove persuasive in that the Supreme Court of Colorado in *In re R.A.D.*, 586 P.2d 46, 47 (Colo.1978) stated that “[t]o insure that a jury is impartial in both fact and appearance, a prospective juror who has even a tenuous relationship with any prosecutorial or law enforcement arm of the state should be excused from jury duty in a criminal case[.]” and did so specifically citing, inter alia, *State v. West*.

In *Fields*, the court rejected a claim that a juror should be struck because she was a municipal court clerk finding that such action was not warranted as the juror “had only a passing acquaintance with various police officers in Aurora and that she never discussed their cases or work with them

[and that the juror] stated that any familiarities with the faces of any officers who might testify would not affect her impartiality.” *Fields*, 697 P.2d at 756.

When asked about how her job might affect her performance, Ms. Ferguson-Crossan replied that she thought she could be a fair juror to both sides. App. vol. IV, 25. Ms. Ferguson-Crossan also testified that she would not give the testimony from officer’s she knew any greater weight than other witnesses and that simply because she knew them that she did not think that would make her more likely to believe them. *Id.* She never heard the officers talk about the case. *Id.* at 26. She also stated that she would have no problem telling the officers that they failed to carry the burden of proof. *Id.* She also said that she would listen to both sides of the case and base her decision solely on the evidence. *Id.* She also agreed that all people have probably been accused of saying or doing things that did not do. *Id.* at 58. And, the fact of the matter is that Ms. Ferguson-Crossan voted to *acquit* the defendant on one count, undercutting a claim she was biased. See *Skilling v. United States*, 130 S. Ct. 2896, 2923 (2010) (“The jury’s not-guilty verdict . . . meanwhile, suggests the court’s assessment[] [that the juror was impartial] were accurate.”). The Petitioner has not shown that Ms. Ferguson-Crossan falls within *West* or that the circuit court abused its wide discretion. The circuit court should be affirmed.

D. The circuit court did not abuse its discretion in striking a juror for cause and substituting another one when it became clear that a the original juror misstated her criminal history and was confused with other issues relating to her past conduct.

During *voir dire*, Mary Doutt responded to the question of whether any juror ever was accused of something they did not do, that she was accused of stealing. *Id.* at 59. When asked “did you have any criminal charges or just at work?” she responded, “No.” *Id.* And when asked if there was a process by which the business determined if she was guilty or not, she stated it was shown she

did not do it. *Id.* Subsequently, the State became aware that Ms. Doutt’s answers were not correct in that she actually pled guilty to misdemeanor embezzlement. *Id.* at 65, 70. Ms. Doutt said, “they said there were no charges and I didn’t have a record.” *Id.* at 65. And in response to the question from the circuit court that, “Well, these show you pled guilty. So, you didn’t think you did?” Ms. Doutt responded, again, “They told me I didn’t have a record.” *Id.* at 65-66. And when asked “Did you get fired from your job as a result of this?” she answered, “I was terminated. Yes, I was just suspended.” *Id.* at 67. While stating she felt that she had been fairly treated by the justice system, *id.* at 69, and that the issue would not have any influence on her in the case, *id.* at 67, the circuit court granted the State’s motion, over the Petitioner’s objection, to remove Ms. Doutt. *Id.* at 71-72.

First, this Court has addressed the situation where an allegedly qualified juror is struck and has concluded, “it cannot be overemphasized that no error is committed even when a qualified juror is struck as long as the remaining panel members are qualified. Rather, our cases demonstrate that a trial court risks error only when it refuses to strike jurors whose impartiality is questionable.” *State v. Phillips*, 194 W. Va. 569, 589-90, 461 S.E.2d 75, 95-96 (1995). *Accord O’Dell v. Miller*, 211 W. Va. 285, 291, 565 S.E.2d 407, 413 (2002).

Second, even if this Court could address the issue, there was cause to strike Ms. Doutt. While Ms. Doutt stated in *voir dire* that she felt she was treated fairly by the judicial system and would not let her experience affect her decision, “[a] prospective juror’s eligibility to serve is not ordinarily to be determined by an isolated remark or answer to a single question. Rather, when confronted with a challenge for cause, the trial court should base its decision on the entire *voir dire* examination and the totality of the circumstances.” Syl. Pt. 8, *Messer v. Hampden Coal Co.*, 727 S.E.2d 443, 445 (2012).

Ms. Doult claimed that her embezzlement did not result in criminal charges when it did and that it was shown she did not commit the offense, even though she pled guilty to it. Then when asked if she was fired because of the conviction, she responded with the following inconsistent answer, “I was terminated. Yes, I was just suspended.” App. vol. IV, 67. Either (1) Ms. Doult was lying about what occurred with her criminal proceeding, being her statements were contradicted by her case file, which would authorize her dismissal, *United States v. Fryar*, 867 F.2d 850, 854 (5th Cir. 1989) (“The district court has the discretion to excuse an untruthful juror”); or, (2) Ms. Doult was extremely confused about what had occurred or had a bad memory about what occurred, neither of which would bode well for her ability to consider the evidence in this case fully and fairly, which would authorize her dismissal. *See Fearance v. State*, 771 S.W.2d 486, 501 (Tex. Cr. App. 1988) (“The trial court had to glean from [the venireman’s] answers whether he would be prevented or substantially impaired from following his oath and instructions.”). Here, the juror was excused before a petit jury was even sworn to try the case. *Compare* App. vol. IV, 73 *with id.* at 83. “A district court has the discretion to question a juror whose qualifications have been called into doubt during trial in order to resolve such matters as they arise and ensure an impartial and competent jury.” *United States v. Campbell*, 845 F.2d 782, 785 (8th Cir. 1988).

In a criminal prosecution where a jury has been impaneled and accepted by both the state and defendant, but, before evidence is introduced, the court may, in the exercise of sound discretion, examine a juror as to his qualifications where the alleged disqualification was not known at the time of impaneling and accepting the jury by the state or the defendant, and, if such examination leaves it doubtful as to whether the juror is qualified or not, the court may stand him aside or sustain a challenge for a cause; and, unless there is an abuse of the discretion, such action will not cause a reversal of the case.

Sullivan v. State, 125 So. 115, 115 (Miss. 1929).

The “[e]ffective administration of justice means not only a fair trial for a defendant, but also a fair trial for the State.” *Matzner v. Brown*, 288 F. Supp. 608, 612 (D.N.J. 1968). The State has a right to a trial by a free and fair jury as much as does the defendant. *Mack v. Commonwealth*, 15 S.E.2d 62, 65 (Va.1941). *Cf. Putnam v. State*, 537 S.E.2d 384, 386 (Ga. Ct. App. 2000) (“it is true that the defendant has a valuable right to be tried by the original impaneled jury. But that right is not paramount to the state’s equal right to a fair trial”). Thus, “[i]t is not an abuse of . . . discretion to remove a juror who fails during *voir dire* to provide accurate information that the State has a legitimate right to know.” *Johnson v. State*, 713 S.E.2d 376, 380 (Ga. 2011).⁴ The circuit court should be affirmed.

E. The circuit court committed no error in striking potential juror Mark Call.

This Court has addressed the situation where an allegedly qualified juror is struck and has concluded, “it cannot be overemphasized that no error is committed even when a qualified juror is struck as long as the remaining panel members are qualified. Rather, our cases demonstrate that a trial court risks error only when it refuses to strike jurors whose impartiality is questionable.” *State v. Phillips*, 194 W. Va. 569, 589-90, 461 S.E.2d 75, 95-96 (1995). *Accord O’Dell v. Miller*, 211 W. Va. 285, 291, 565 S.E.2d 407, 413 (2002).

⁴The Petitioner attempts to make an argument relating to the sequence of the removal. Pet’r’s Br. at 25. First, this argument cites no legal support as required by West Virginia Rule of Appellate Procedure 10(c)(7) and should be deemed waived. *See also State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996) (“Although we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.”). Second, regardless of when a juror is found to be disqualified, either before testimony, or up to the retiring of the jury, the juror should be struck. Here, “no proceedings had been taken except the selection of the jury and the substitution was timely.” *Gillars v. United States*, 182 F.2d 962, 981 (D.C. Cir. 1950). *See also United States v. Zambito*, 315 F.2d 266, 269 (4th Cir. 1963) (“Nor is there any conceivable merit . . . that the District Court erred when midway through the trial it dismissed a juror who belatedly admitted in chambers that he had not truthfully responded to the Judge’s inquiry on *voir dire*”).

Additionally, the court otherwise committed no error. “[T]he ‘determination of impartiality, in which demeanor plays such an important part, is particularly within the province of the trial judge.’” *Ristaino v. Ross*, 424 U.S. 589, 595 (1976) (quoting *Rideau v. Louisiana*, 373 U.S. 723, 733 (1963) (Clark, J., dissenting)). “We defer to a trial judge’s rulings regarding the qualifications of jurors because the trial judge is able to personally observe the juror’s demeanor, assess his/her credibility, and inquire further to determine the juror’s bias and/or prejudice. *Black v. CSX Transp., Inc.*, 220 W. Va. 623, 627, 648 S.E.2d 610, 614 (2007). “A trial judge is entitled to rely upon his/her self-evaluation of allegedly biased jurors when determining actual juror bias. The trial judge is in the best position to determine the sincerity of a juror’s pledge to abide by the court’s instructions. Therefore, his/her assessment is entitled to great deference.” Syl. Pt. 12, *State v. Salmons*, 203 W. Va. 561, 509 S.E.2d 842 (1998).

Apparently during *voir dire*, Mr. Call’s answers were, as characterized by the Assistant Prosecuting Attorney, “hesitant.” App. vol. IV, 34. The hesitancy of a juror in answering a question is grounds for a circuit court to exercise discretion in striking the juror. *State v. Mercer*, 672 S.E.2d 556, 561 (S.C. 2009) (“Even the cold record before us reflects Juror Doe’s hesitancy and profound unease with the prospect of performing his duties as a juror in accordance with his oath and the court’s instructions”); *Morris v. State*, 837 A.2d 248, 261 (Md. Ct. App. 2003) (noting that among the things that a trial court may consider that do not come across on a cold record are “firmness of intonation and quickness of speech versus equivocation and hesitation”). See also *United States v. Lancaster*, 96 F.3d 734, 743 (4th Cir. 1996) (“throughout the course of *voir dire* the district court probed potential jurors carefully regarding their answers to *voir dire* questions, being particularly alert to signs of hesitation”). Like the defendant, the State is entitled to a fair trial on its behalf as well. “Effective administration of justice means not only a fair trial for a defendant, but also a fair

trial for the State.” *Matzner v. Brown*, 288 F. Supp. 608, 612 (D.N.J. 1968). The circuit court should be affirmed.

F. An inconsistent verdict is not subject to appellate review and there was sufficient evidence presented that a rational jury could have found all the elements of the offense of Second Degree Sexual Assault.

The Petitioner “base[s] his motions for a judgment of acquittal on inconsistency of the verdicts. We find this to be unconvincing[.]” *State v. Green*, 187 W. Va. 43, 50, 415 S.E.2d 449, 456 (1992) (per curiam). First:

the verdicts are actually not inconsistent. Because the jury, as the trier of fact, has the duty to determine the credibility of witnesses, it may determine which parts of the testimony establish a particular charge beyond a reasonable doubt, and which do not. In this case, the jury simply decided that [the victim’s] testimony proved beyond a reasonable doubt that [the Petitioner] was guilty of the sexual assault ([finger]-to-vagina) charge, but not the other . . . charge[.]

State v. Whitney, 650 N.W.2d 559 (Wis. Ct. App. 2002) (Table) (text available at 2002 WL 1551482, *3). *See also People v. Sullivan*, 839 N.Y.S.2d 256, 257 (App. Div. 2007) (citations omitted) (“We likewise reject defendant’s contention that the verdict rendered here is legally inconsistent. [T]he jury was free to credit or reject any portion of the victim’s testimony, which they obviously did in rejecting the allegations of rape, but accepting those allegations constituting sexual abuse and endangering the welfare of a child”); *State v. Colbert*, 41980, 1980 WL 355329, at *2 (Ohio Ct. App. Nov. 13, 1980) (citations omitted) (“We find nothing inconsistent in the verdict which was rendered. The jury was free to attach whatever credibility it deemed appropriate to Scott’s testimony, including believing only part of it. Therefore, the jury could have concluded that appellant raped Scott only two times on June 1979, instead of four as testified to by Scott. Accordingly, the verdict of guilty on two of the four counts of rape, but not guilty on the other two, was not inconsistent.”). *See State v. Haid*, 721 S.E.2d 529, 538 (W. Va. 2011) (per curiam) (“We

do not believe that the acquittal on four counts, and conviction of the remaining two counts, is indicative of anything other than that the jury diligently sifted through the conflicting testimony and properly rendered its decision.”).

Second, even if the verdicts were inconsistent, “[w]ith respect to inconsistent verdicts, this Court has observed that generally, appellate review is not available.” *State v. Cecil*, 221 W. Va. 495, 503, 655 S.E.2d 517, 525 (2007) (per curiam). To the extent that the “petitioner argues that the jury verdict was contradictory, as he was acquitted of other charges arising out of the same chain of events . . . this Court has stated that “[a]ppellate review of a claim of inconsistent verdicts is not generally available.”” *State v. Reed*, No. 11-0502, 2011 WL 8197424, at *1 (W. Va. Dec. 2, 2011) (Memorandum Decision) (quoting *State v. Hall*, 174 W. Va. 599, 328 S.E.2d 206 (1985) (quoting Syl. Pt. 5, *State v. Bartlett*, 177 W. Va. 663, 355 S.E.2d 913 (1987)). *Harris v. Rivera*, 454 U.S. 339, 345-46 (1981) (citing *Dunn v. United States*, 284 U.S. 390 (1932)) (“Inconsistency in a verdict is not a sufficient reason for setting it aside. We have so held with respect to inconsistency between verdicts on separate charges against one defendant[.]”). “Each count in an indictment is regarded as if it was a separate indictment.” *State v. Hall*, 174 W. Va. 599, 602-03, 328 S.E.2d 206, 210 (1985) (quoting *Dunn*, 284 U.S. at 393)). Sufficiency of the evidence “review should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. This review should be independent of the jury’s determination that evidence on another count was insufficient.” *United States v. Powell*, 469 U.S. 57, 67 (1984) (citations omitted).

Third, there is sufficient evidence here to sustain the conviction. 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).”). Under *Jackson*, a court asks, “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” 443 U.S. at 318–19.

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).

Jackson does not simply supplant the jury with the reviewing court. Sufficiency of the evidence review does not give a court the power to usurp or supplant the trial jury and sit as a second jury under the guise of discharging a judicial function. See *State v. Stowers*, 66 S.E. 323, 326 (W. Va. 1909) (“We are not jurors”). “[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. & Surg. Sup. 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). A jury is free to credit, all, some, or none of a witness’s 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) (“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.”)). “Thus, in considering a constitutional sufficiency challenge, a . . . court disregards (as it must assume the jury did) any evidence that does not support the jury verdict.” *Policano v. Herbert*, 453 F.3d 79, 96 (2d Cir. 2006) (Raggi, dissenting from denial or rehearing en banc). See also *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 . . . disregarding all evidence and inferences to the contrary.”); *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 favoring the defendant must be disregarded”). Indeed, the only time the defendant’s evidence is considered is “in those instances in which it is favorable to the State[.]” *State v. Lyons*, 459 S.E.2d 770, 776 (N.C. 1995). “A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury.” Syl. Pt. 5, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981).

“A person is guilty of sexual assault in the second degree when: Such person engages in sexual intrusion with another person without the person’s consent, and the lack of consent results from forcible compulsion[.]” W. Va. Code § 61-8B-4(a)(1). Sexual intrusion, in pertinent part, is

“any act between persons involving penetration, however slight, of the female sex organ . . . by an object for the purpose of . . . gratifying the sexual desire of either party.” *Id.* § 61-8B-1(8). Forcible compulsion is, in pertinent part, “[p]hysical force that overcomes such earnest resistance as might reasonably be expected under the circumstances[.]” W. Va. Code § 61-8B-1(1)(a), with “resistance” being defined as “includ[ing] physical resistance or any clear communication of the victim’s lack of consent.” *Id.* § 61-8B-1(1).

There was sexual intrusion, the victim testified that the Petitioner placed his finger into her vagina. App. vol. IV, 132. The Petitioner did this in a bedroom, on a bed, with the lights out and candles flickering after having kissed the victim. *Id.* at 122, 129.

There was no consent due to physical resistance and a clear communication of lack of consent. The Petitioner started to kiss victim and then took his hand and tried to touch victim crotch. *Id.* at 129. Victim clearly communicated her lack of consent by pushing the Petitioner’s hand away and saying, in a loud voice, “No,” several times. *Id.* at 130, 135. The Petitioner succeeded in placing his fingers into victim’s vagina, *id.* at 132, even while victim was trying to pull his hand away. *Id.*

VI.

CONCLUSION

For the forgoing reasons, 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 "*RESPONDENT'S AMENDED BRIEF*" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 13 day of March, 2012, addressed as follows:

To: Richard W. Weston, Esq.
Connor D. Robertson, Esq.
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SCOTT E. JOHNSON