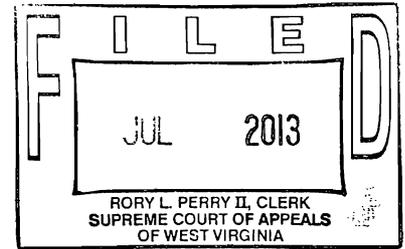


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1487



STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

THOMAS FITZWATER,

*Defendant Below,
Petitioner.*

BRIEF IN RESPONSE TO THE PETITIONER'S BRIEF

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BRIEF IN RESPONSE TO THE PETITIONER'S BRIEF

Comes now the State of West Virginia, by counsel, Laura Young, Assistant Attorney General, pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, and files the within Brief in Response to the Petitioner's Brief.

I.

STATEMENT OF THE CASE

On August 29, 2012, the Grand Jury sitting in Fayette County, West Virginia returned an indictment charging the petitioner, Thomas Fitzwater (hereinafter “the petitioner”) with one count of “possession of a controlled substance with the intent to deliver” of Oxycodone, a Schedule II, controlled substance in violation of W. Va. Code § 60A-4-401 (Count I) and one count of “possession of a controlled substance with the intent to deliver” of Oxycodone, a Schedule II,

controlled substance (Count II), Case No. 12-F-87. (App. at 1.) By order entered August 29, 2012, Count II of the indictment was dismissed. (App. at 12.)¹

Following a one day jury trial conducted on August 29, 2012, the petitioner was convicted of Count I as charged in the indictment. (*Id.* at 3.) By order entered October 29, 2012, the court invoked a sentencing enhancement contained in W. Va. Code § 60A-4-408, and sentenced the petitioner to two (2) to thirty (30) years in the penitentiary. (App. at 7.)

On December 11, 2012, the petitioner filed a timely appeal of his conviction. By order entered December 26, 2012, this Court directed the State to answer the petitioner's petition.

This is the State's response.

Evidence at Trial.

The testimony at trial was that during the late night hours of January 13, 2012, a Fayette County Sheriff's Deputy was patrolling Route 20 in Meadow Bridge, West Virginia as part of a task force assembled to combat a rash of burglaries in the area. The deputy noticed that a vehicle passing in the opposite direction applied its brakes but the third tail light at the trunk level of the rear glass was out. (Trial Tr. at 53.) The officer made a turn-around and pursued the vehicle to initiate a traffic stop.

The deputy testified that upon approaching the vehicle he observed the petitioner at the wheel but did not know of him prior to making the stop. (*Id.* at 53-54.) The deputy observed that the petitioner appeared very nervous about the stop. When the petitioner handed his driver's license to the deputy, his hands were shaking and he would not look the deputy in the eye. The petitioner also

¹According to the petitioner's brief, Count II was dismissed because of the wording of the indictment.

failed to ask the deputy why he was being stopped. The petitioner's nervousness, his failure to ask why he'd been stopped and his lack of eye contact, aroused the deputy's suspicions: "[t]hat's uncommon." (*Id.* at 54.)

When the deputy called in the stop to dispatch, the "task force officer" told the deputy he had "intelligence" on the petitioner. (*Id.* at 54-55.) At that point in the stop, the deputy made the decision to involve his "K-9" partner "Boss" to conduct an outside sweep of the petitioner's vehicle. (*Id.* at 55-56.) After Boss, the black lab crime dog, indicated a positive signal towards the rear passenger side of the vehicle, the deputy executed a physical search of the interior around the area where the dog indicated. The deputy immediately found a brown paper bag within the driver's reach; inside, it had a "plastic baggie full of prescription pills." (*Id.* at 58.) When questioned by the deputy about the type of pills in the baggie, the petitioner stated that the pills were Ibuprofen and Viagra.

According to the testimony of Alicia Neal, a forensic analyst in the drug identification section of the West Virginia State Police Forensics lab, the pills recovered from the petitioner's vehicle amounted to 100 round blue tablets marked A215, weighing approximately 10.1 grams identified as Oxycodone, a Schedule II controlled narcotic. (*Id.* at 75-76.) Ms. Neal also identified the fifty maroon pills introduced as Exhibit 3, as being Oxycodone. (*Id.*)

In addition to the testimony of the arresting officer and the forensic analyst identifying the pills, photographs depicting where the pills were located in the vehicle were also introduced. (*Id.* at 86.)

At the conclusion of the State's case in chief, the defense moved for a judgment of acquittal on grounds the State did not prove "intent to deliver" within the meaning of the statute. Trial

counsel argued that there was no evidence, such as cash, individual packaging, scales or any other paraphernalia, that proved intent to deliver, beyond a reasonable doubt. (*Id.* at 94.) The State argued that the mere volume of pills in the petitioner’s possession was sufficient to prove intent when viewed in light most favorable to the State. (*Id.* at 95-96.)

The trial court denied the defense’s motion for judgment of acquittal. In so ruling the court cited to the volume of pills in the petitioner’s possession; the lack of any prescription for the medication; and the absence of any small containers indicating that the petitioner had procured the drugs for his personal use. The trial court also cited to the petitioner’s attempt to mislead the arresting officer by identifying the pills as Viagra and Ibuprofen. (*Id.* at 96-97.) The court further found that although there was sufficient evidence to show intent, a lesser included offense instruction on simple possession was warranted. (*Id.* at 108.)

The defense did not put on any evidence.

During closing arguments, the prosecutor opened with a reflection on the scourge of drugs in rural West Virginia. Without one time including or discussing the petitioner or the crimes he’d been charged with, the prosecutor argued that there was a “black cloud” over the State of West Virginia” that “kills people” . . . “kills our families” and “kills our friends.” (*Id.* at 131.) The prosecutor said he didn’t much like the black cloud of drug abuse destroying communities and he was “sick of it.” (*Id.* at 131.) The prosecutor went on to observe that the only way to eliminate the problem was to rid the streets of the “poison” that was destroying communities.

After the prosecutor had gone on a bit in this vein, trial counsel objected only at the point where he then decided the petitioner had been sufficiently prejudiced to require a mistrial:

He's making a "curing societal ills" argument, a larger one, which I believe is improper and prosecutorial misconduct. It's sort of "make an example" argument.

(*Id.* at 133.)

The trial court sustained the objection: "[H]e's gotten to the end of that road." But the judge denied trial counsel's motion for a mistrial. (*Id.* at 133.) Trial counsel noted his objection to preserve the record for appeal which the trial court acknowledged: "You've got your record. Step back." (*Id.*)

The jury returned a verdict of guilty on possession with intent to deliver a controlled substance as charged in the indictment.

II.

SUMMARY OF ARGUMENT

The petitioner argues in support of the present petition, that the prosecutor's closing argument was an improper and prejudicial plea to the jury to combat the drug problem in West Virginia by returning a guilty verdict against the petitioner. The petitioner is wrong.

Although the prosecutor's closing was arguably outside the scope of evidence introduced at trial, closing arguments are just that - arguments. In closing, both sides enjoy wide latitude in depicting and characterizing their respective cases to support their own theory of guilt or innocence. The prosecutor never once mentioned the petitioner during the challenged remarks. Nor did the prosecutor ask the jury to make an example of the petitioner in an attempt to substitute sentiment for evidence sufficient to convict.

The charge in this case was a simple one and it required the State to prove only that the petitioner was in a possession of a Schedule II controlled substance for the purpose of delivery.² In this case, the petitioner was found to be in possession of enough of a Schedule II controlled substance to show intent to deliver by the sheer quantity of the drug alone. The petitioner had a baggie filled with 150 doses of one of the most powerful pain killers in existence for which he had no prescription - not even a pill bottle.

This was not an impassioned case that required the jury to grapple with credibility determinations of witness or to choose between competing experts or to evaluate the validity of evidence or to even to link the petitioner to evidence of guilt. None of it was present. The drugs were found on the petitioner and him alone. He lied about the pills and had no justification for why he had them. There was too much of it to amount to what one human being would keep for personal use whether legally or illegally obtained.

The prosecutor's challenged statements in closing were no more than generalities. The evidence was sufficient to convict and even were the prosecutor's statements improper, they were not prejudicial.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State does not request oral argument in this matter. In accordance with Rev. R.A.P. 18(a), the State notes that the dispositive issues have been authoritatively decided and the facts and legal arguments have been adequately presented in the briefs and record. The claim raised herein

²W. Va. Code § 60A-1-1-101 defines "delivery" as the "actual, constructive or attempted transfer from one person to another".

falls under well settled law and the decisional process would not be significantly aided by oral argument.

IV.

ARGUMENT

A. Standard of Review.

Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Syllabus Point 6, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995).

In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de nova* review.

Syllabus Point 3, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000).

The decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is a matter within the sound discretion of the trial court. A trial court is empowered to exercise this discretion only when there is a "manifest necessity: for discharging the jury before it has rendered its verdict." This power of the trial court must be exercised wisely; absent the existence of manifest necessity, a trial court's discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy.

State v. Williams, 172 W. Va. 295, 304, 305 S.E.2d 251, 260 (1983) (citations omitted).

B. The Trial Court Did Not Err in Denying Petitioner's Motion for Mistrial.

Initially, it should be noted that: "A prosecutor is allowed to comment on the prevalence of crime, the necessity of law enforcement as a deterrent, and the evil results which may befall the

community when a jury fails in its duty.” *State v. Moorehead*, 875 S.W.2d 915, 918 (Mo. App. 1994). *See also Brown v. State*, 573 S.E.2d 110, 114 (Ga. App. 2002): “Moreover, the State may argue to the jury the necessity for enforcement of the law and may impress on the jury, with considerable latitude in imagery and illustration, its responsibility in this regard.” (Citations omitted.)

Even where a prosecutor’s statements are indeed improper, there must be a showing of resulting prejudice before a conviction merits reversal:

Prosecutorial misconduct does not always warrant the granting of a mistrial or a new trial. . . . [A] conviction will not be set aside because of improper remarks and conduct of the prosecution in the presence of a jury which do not clearly prejudice a defendant or result in manifest injustice.

State v. Guthrie, 194 W. Va. 657, 684, 461 S.E.2d 163, 190 (1995).

In *State v. Graham*, 208 W. Va. 463, 541 S.E.2d 341 (2000), this Court addressed the principles that should be used to evaluate allegedly improper prosecutorial comments during closing argument:

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).

Id. at W. Va. 468, S.E.2d 346 (emphasis added.).

The bar for prejudice on grounds of prosecutorial misconduct is a high one:

It is not enough that prosecutorial remarks are “undesirable or even universally condemned.” *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144, 157 (1986), quoting *Darden v. Wainwright*, 699 F.2d 1031, 1036 (11th Cir.1983). The test is whether the remarks “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431, 437 (1974)

State v. Sugg, 193 W. Va. 388, 395, 456 S.E.2d 469, 486 (1995).

In the case of *Darden v. Wainwright*, adopted and applied by this Court in *Sugg, supra*, the prosecutor, during closing arguments in sentencing proceedings, referred to the defendant as an “animal” who should not be allowed out of a cell without a “leash” and that he wished the defendant was “sitting here with no face, blown away by a shotgun.” *Id.* at nn. 12. The prosecutor said “I wish he had been killed . . . but he wasn't.”

Even though the Supreme Court in *Darden* characterized the prosecutor’s closing statement as “offensive comments reflecting an emotional reaction to the case” (*id.* at 179) that “deserve[d] the condemnation it has received from every court to review it” (*id.* at 181) the Court found that the prosecutor “did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent.” (*Id.* at 182.) In upholding the conviction, the Court found the prosecutor’s statements to be error but harmless when viewed in light of the record as a whole and in consideration of the trial court’s instruction to the jury not to consider closing arguments as evidence. (*Id.*)

In perhaps the only case cited by the petitioner wherein this Court actually reversed a defendant’s conviction based solely on prosecutorial misconduct in closing, this Court cited its grounds for reversing - none of which are present in the case *sub judice*:

The prosecutor injected his personal opinion as to the guilt of the defendant, asserted his belief in the honesty, sincerity, truthfulness, and good motives of his witnesses,

while attacking the honesty and veracity of the defendant's witnesses. He compared the defendant to a vulture and appealed to local prejudice by indicating the defendant came to West Virginia to victimize dumb hillbillies. On several occasions during the course of the argument he pointed to and directly addressed the defendant. He also argued facts not in evidence. For example, he suggested that Mrs. Finch used some of the money obtained by the false pretense to take ski trips to Show Shoe, and he argued that defendant had never worked a day in his life. Defendant's testimony on this latter point was to the contrary. The prosecutor's manifest purpose could only have been to inflame the minds of the jury in order to gain a conviction based on emotions rather than evidence. The defendant made objection throughout the course of closing argument and requested the trial court to grant a mistrial based on the prosecutor's remarks.

State v. Critzer, 167 W. Va. 655, 659, 280 S.E2d 288, 292 (1981).³

This Court has consistently refused to reverse convictions on the ground argued in support of the present petition. Indeed in nearly every case cited by the petitioner in support of this claim - even where the prosecutor's remarks are found to be improper - this court upheld the challenged convictions: "[a] judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney in his opening statement to a jury which do not clearly prejudice the

³ Most cases reversed due to prosecutorial comment on credibility involve either categorical assertions that a witness is lying or intimations of the prosecutor's personal belief or disbelief of particular witnesses. *E.g.*, *Powell v. United States*, 455 A.2d 405 (D.C.App.1982) (defendant's story was "concocted" and "ridiculous"); *Wilson v. People*, 743 P.2d 415 (Colo.1987) (repeated references to defense witnesses as "liars"); *State v. Bujnowski*, 130 N.H. 1, 532 A.2d 1385 (1987) (extensive use of first person, i.e., "I believe" and "I think."); *State v. Marsh*, 728 P.2d 1301 (Haw.1986) (testimony of defendant and alibi witnesses referred to as "lies"); *State v. Ayers*, 148 Vt. 421, 535 A.2d 330 (1987) (extensive use of first person, i.e., "I believe" and "I think."); *Browder v. State*, 639 P.2d 889 (Wyo.1982) (same).

State v. England, 180 W. Va. 342, 346, 376 S.E.2d 548, 562 nn. 13 (1988)

accused or result in manifest injustice.” Syl. pt. 1, *State v. Dunn*, 162 W. Va. 63, 246 S.E.2d 245 (1978).

As noted consistently by this Court, any analysis of prejudice flowing from the remarks of the prosecutor must be performed in light of the record as a whole.

In this case, the petitioner was found to be in possession of a quantity of controlled substances for which he had no explanation. The petitioner lied to the arresting officer. The petitioner had no prescription or vessels holding an amount of the pills consistent with procuring them for personal use. The petitioner had no paraphernalia or cash or other evidence of distribution but this Court has consistently held that a jury can infer intent to distribute from quantity alone. *State v. Drake*, 170 W. Va. 169, 170, 291 S.E.2d 484, 485 (1982) (noting, “intent to deliver a controlled substance can be proven by establishing a number of circumstances among which are the quantity of the controlled substance possessed . . .”). There is absolutely no doubt that the evidence at trial was sufficient to convict.

In the instant case, the prosecutor’s remarks arguably could be characterized as veering into the dramatic. However, there is nothing to indicate that the jury would have acquitted or returned a verdict on a lesser offense had the prosecutor not made the challenged remarks. Nor did the prosecutor’s remarks amount to a personal opinion on evidence introduced at trial, or a comment meant to bolster a witness’s credibility.

The *Sugg/Darden* analysis is a fact based analysis conducted on the record as a whole. Neither this Court nor any court has ever held that the statements of a prosecutor in closing alone are sufficient to create structural error separate and apart from the trial court proceedings as a whole. None of the factors of the *Sugg/Darden* analysis are present here. The prosecutor chose to comment

on the effect of the petitioner's crimes on the community. No controlling authority suggests that such comments are reversible error per se.

Also, for the reasons discussed above, there were no circumstances present in the instant case to warrant the granting of a mistrial by the trial court. *See e.g. State v. Williams*, 172 W. Va. 295, 304, 305 S.E.2d 251, 260 (1983). (“[A]bsent the existence of manifest necessity, a trial court's discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy.”)

Therefore, the petitioner is not entitled to reversal of his conviction.

C. **The Jury Instructions Were Sufficient to Prejudicially Cure any Impact of the Statements of the Prosecutor.**

Under the *Darden* analysis adopted by this Court in *Sugg*, the Supreme Court evaluates the record as a whole in determining error flowing from a prosecutor's remarks. Among the chief factors considered by the Court in *Darden* was the trial court's instructions to the jury.

In this case, the trial court gave extensive instructions to the jury delineating what should be considered as evidence sufficient to convict. The trial court specifically instructed the jury that they were not to consider the opening statements or the closing arguments of the State or trial counsel to be evidence.

The trial court instructed the jury in pertinent part:

[T]he Court instructs the jury that if they find from the evidence in this case that the defendant had possession of an amount of a controlled substance that was more than a person would normally keep for his own personal use, they may infer from that fact and other facts and circumstances in the case the intent to deliver.

(Trial Tr. at 128.)

[B]y the same token, it is not the policy of the law to convict people when the evidence is insufficient merely for the purpose of upholding the law and to make examples of persons to deter crime, nor is it the policy of the law to convict merely because an indictment has been returned or to satisfy public demand that crime be prevented. . . . All your deliberations should be based solely upon the evidence.

....

All your deliberations should be based solely upon the evidence.

(*Id.* at 129.)

[A]t the conclusion of evidence] the lawyers will make their final arguments to you. They'll tell you what they think the evidence shows. Again, what they say is not evidence, but it's to help you determine what that evidence shows in this particular case.

(*Id.* at 41-42.)

The trial court's instructions were not only sufficient but particularly diligent. The trial court *specifically* instructed the jury that it was to arrive at a verdict based on the evidence and not on community sentiment or to make an example out of the defendant - the very argument the petitioner claims was at the root of his conviction. Moreover, the petitioner has failed to sufficiently prove that the jury disregarded the instructions of the court. "[J]uries are presumed to follow their instructions." *State v. Miller* 197 W. Va. 588 , 606, 474 S.E.2d 535, 553 (1995) citing *Zafiro v. United States*, 506 U.S. 534, 540, 113 S.Ct. 933, 939, 122 L.Ed.2d 317, 326 (1993).

Therefore, without any evidence to the contrary, the presumption that the jury followed the trial court's instructions, has not been rebutted.

V.

CONCLUSION

For the reasons herein stated, the State respectfully requests that this Court uphold the rulings of the trial court below and affirm the conviction and sentence of the petitioner.

Respectfully submitted,

STATE OF WEST VIRGINIA
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CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *BRIEF IN RESPONSE TO THE PETITIONER'S BRIEF* upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 8th day of July, 2013, addressed as follows:

To: Gregory L. Ayers, Esquire
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LAURA YOUNG