

ARGUMENT DOCKET

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-0270

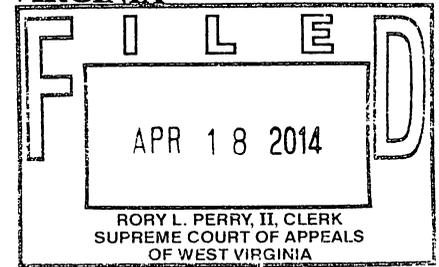
STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

BYRON BLACKBURN,

Defendant Below, Petitioner.



THE STATE'S RESPONSE TO THE AMICUS BRIEF

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The State has four brief responses to the submission filed by the West Virginia Innocence Project on the issue of eyewitness identification.¹ *First*, this Court must reject the amicus's invitation to disregard United States Supreme Court precedent and overhaul the jurisprudence of this Court. *Second*, even if the amicus is correct on the contours of due process, Petitioner waived his argument as to the prosecutor's alleged "verbal pointing" by failing to raise the argument before the Circuit Court. *Third*, even if this Court addresses the "verbal pointing" argument, the argument is without merit under a plain error analysis. *Finally*, to the extent this Court finds an error occurred, it was harmless. Accordingly, the Circuit Court should be affirmed on this issue.

- 1. This Court must reject the amicus's invitation to adopt a whole menu of items that it believes are constitutionally required.**

Critically, the amicus fails to cite—much less discuss—a recent, near-unanimous decision of the United States Supreme Court that broadly rejected the numerous arguments amicus now asks this

¹ By order dated March 27, 2014, this Court rescheduled oral argument in this matter to April 23 and granted leave for filing of an amicus brief. The State was permitted to respond no later than April 18. The State was served by U.S. mail on April 14 with an amicus brief authored by the West Virginia Innocence Project at West Virginia University College of Law.

Court to accept. See *Perry v. New Hampshire*, ___ U.S. ___, 132 S. Ct. 716 (2012). In *Perry*, an 8-1 decision authored by Justice Ginsburg, the Supreme Court reaffirmed its longstanding rule governing the admissibility of eyewitness identification evidence, reiterating that “the jury, not the judge, traditionally determines the reliability of evidence.” *Id.* at 728; see also *id.* 723-24. In that case, a defendant had challenged the identification made by a witness who identified the defendant from her window while she was speaking to police. *Id.* at 721-22. The Court upheld the identification, reasoning that the constitutional safeguards generally available in criminal trials—such as the right to cross-examine witnesses and the right to counsel, among others—satisfied due process. *Id.* at 728-29. “The Constitution,” the Supreme Court explained, “protects a defendant against a conviction based on evidence of questionable reliability, *not by prohibiting introduction of the evidence*, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit.” *Id.* at 723 (emphasis added). “Only when evidence ‘is so extremely unfair that its admission violates fundamental conceptions of justice’ . . . [has the Supreme Court] imposed a constraint tied to the Due Process Clause.” *Id.*

Perry is controlling here. This Court applies the decisions of the United States Supreme Court when faced with due process challenges to eyewitness identification. See *State v. Casdorph*, 159 W. Va. 909, 230 S.E.2d 476 (1976) (adopting test from *Neil v. Biggers*, 409 U.S. 188 (1972)); *State v. Boyd*, 167 W. Va. 385, 395, 280 S.E.2d 669, 678 (1981) (following *Biggers* and *Manson v. Braithwaite*, 432 U.S. 98 (1977)). The *Perry* decision essentially reaffirmed the *Biggers-Manson* line of cases, see *Perry*, 132 S. Ct. at 724-25—the same cases that this Court has consistently relied upon since *Casdorph*. Amicus explicitly asks this Court to abandon these cases wholesale. See Amicus Br. at 35 (“The balancing test by the Supreme Court in *Manson* and by the West Virginia

Supreme Court in *Boyd* . . . is inadequate.”); *id.* at 36 (explaining “several flaws in the existing *Manson/Boyd* approach”).

This Court should not accept the amicus’s invitation to overhaul the jurisprudence of this Court and reject established United States Supreme Court precedent. This Court, like the United States Supreme Court, has consistently recognized that absent a “very substantial likelihood of misidentification,” reliability is an issue of fact for the jury. *State v. Boykins*, 173 W. Va. 761, 767, 320 S.E.2d 134, 139 (1984); *see also State v. Smith*, 225 W. Va. 706, 714, 696 S.E.2d 8, 16 (2010) (“[W]e are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill.” (quoting *Manson*, 432 U.S. at 116)).

2. Assuming without conceding that the amicus is right about the requirements of due process, there is no suggestive eyewitness identification evidence in this case.

As an initial matter, Petitioner has *waived* the eyewitness identification argument that he asserts on appeal because it was never presented to the Circuit Court. Here, Petitioner advances a new argument that the suggestive identification occurred when the prosecutor “verbally pointed” to Petitioner when he asked the eyewitness, Mr. Back, to identify the assailant. *See* Pet. Br. at 8-12. Even though this claim of error lacks support, the argument was *not* raised below in any form and thus the Circuit Court never had an opportunity to address it. When the prosecutor allegedly “verbally pointed” to the Petitioner, counsel for Petitioner *made no objection*—contemporaneous or otherwise. *See* Pet. App. 220-222 (in camera hearing); 257-58 (direct examination). Nor did Petitioner assert the argument in his motion for a new trial. *See* Pet. App. 26. Thus, Petitioner has waived appellate review of the argument. *See Hanlon v. Logan Cnty. Bd. of Educ.*, 201 W. Va. 305, 315, 496 S.E.2d 447, 457 (1997) (“Long standing case law and procedural requirements in this State

mandate that a party must alert a tribunal as to perceived defects at the time such defects occur in order to preserve the alleged error for appeal.”); *State v. LaRock*, 196 W.Va. 294, 316, 470 S.E.2d 613, 635 (1996) (“raise or waive rule” is “premised on the notion that calling an error to the trial court’s attention affords an opportunity to correct the problem before irreparable harm occurs”).²

Although not raised before this Court, Petitioner argued below that the tainted identification occurred when Mr. Back saw Petitioner’s booking photo on a website. *See* Pet. App. 26-33. This argument fairs no better because the police were not involved when Mr. Back observed Petitioner’s photo. The requisite suggestive procedure was absent. *See* Syl. Pt. 3, *Casdorph*, 159 W. Va. 909, 230 S.E.2d 476; *Perry*, 132 S.Ct. at 721 (stating that the due process prohibition “turn[s] on the presence of state action and aim[s] to deter police from rigging identification procedures”).

3. Even if this Court were to address the identification argument Petitioner now advances on appeal—the alleged “verbal pointing”—the argument is without merit.

It is not difficult to see why counsel for Petitioner failed to object during or after trial to the alleged “verbal pointing” by the prosecutor—it simply did not happen. Viewing the facts in the light most favorable to the State, *State v. Lacy*, 196 W. Va. 104, 109, 468 S.E.2d 719, 724 (1996), the circumstances of the *in camera* hearing do not show that the prosecutor communicated to the witness as to whom he should identify as the assailant. Indeed, *before* the alleged pointing occurred, Back testified that he had already identified the Petitioner by his booking photo. *See* Pet. App. 220-21 (“I was able to tell when I saw the picture and I was like yeah that’s him.”). Although unclear from the face of the record, a fair inference may be drawn that Back physically pointed, looked at, or nodded toward the Petitioner when Back stated “that’s him.” *Id.* at 221. Attempting to capture Back’s

² Alternatively, should this Court conclude that the claim of error was not waived, the claim must be rejected under a plain error analysis for the reasons explained in Section 3. *See* Syl. Pt. 2, *State v. White*, 231 W. Va. 270, 744 S.E.2d 778 (2013).

statement for the record, the prosecutor then asked the witness if by “that’s him,” Back meant Mr. Blackburn, and if the witness could describe where the Petitioner was seated in the courtroom. *See* Pet. App. 221. Back then did so successfully. *Id.* There was no constitutional error here—a conclusion supported by the acquiescence of Petitioner’s counsel at that time.

4. Assuming for the sake of argument that the Circuit Court erred by allowing Mr. Back’s eyewitness identification, the error was harmless.

In this case, the body of evidence was more than sufficient to support the jury verdict. *See State v. Foddrell*, 165 W. Va. 540, 269 S.E.2d 854 (1980). *First*, the Petitioner confessed to the crime after being read his *Miranda* rights. *Second*, the jury heard the Petitioner’s ex-wife testify that the person in the Wendy’s surveillance video shared certain mannerisms with her ex-husband and acknowledged that the person in the video “[c]ould be” the Petitioner. *See* Pet. App. 279. *Third*, Officer Crook told the jury that when he watched the video with Ms. Blackburn, she immediately identified Petitioner as the culprit. *See id.* at 373 (“She told us that upon watching the video that she could tell that it was Byron Blackburn. She said that their son could even tell it was him by watching the video.”). *Fourth*, the jury saw physical evidence indicating that Petitioner’s boots matched the prints recovered from Wendy’s. *See id.* at 367-68. Accordingly, this Court need not grapple with the arguments advanced by the amicus because the facts of this case do not require it.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel

PATRICK MORRISSEY
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "J. Zak Ritchie". The signature is fluid and cursive, with a horizontal line drawn through the middle of the letters.

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CERTIFICATE OF SERVICE

I, J. Zak Ritchie, Assistant Attorney General and counsel for the Respondent, hereby verify that I have served a true copy of **THE STATE'S RESPONSE TO THE AMICUS BRIEF** on counsel for Petitioner and the amicus curiae by depositing a copy in the United States mail on April 18, 2014, addressed as follows:

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