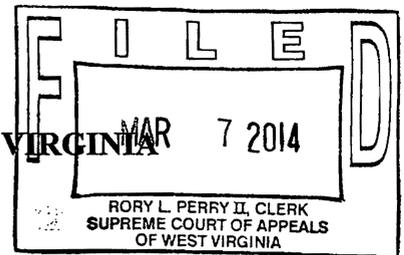


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



State of West Virginia, Plaintiff Below,

Respondent,

vs.

Docket No. 13-1264

Daniel L. Herbert, Defendant Below,

Petitioner.

**PETITIONER'S BRIEF IN SUPPORT OF APPEAL FROM JURY TRIAL
CONVICTION AND CIRCUIT COURT'S NOVEMBER 6, 2013 SENTENCING ORDER**

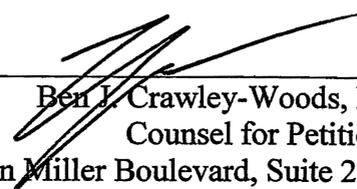

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Assignments of Error

- I. **The trial court committed reversible error by failing to exclude, or alternatively, failing to properly instruct the jury, regarding a State witness's improper remarks about Petitioner exercising his constitutional rights.**

- II. **Pursuant to *State v. Whitt*, the trial court committed reversible error in failing to permit the jury to see an alleged victim plead the 5th and refuse to testify.**
 - a. **Petitioner's 6th Amendment right to be confronted with witnesses against him and right to a compulsory process for obtaining witnesses in his favor was violated.**

 - b. **The trial court improperly refused to give a negative inference instruction, regarding the lack of testimony or appearance of a witness.**

- III. **The trial court committed reversible error by improperly instructing the jury on the doctrine of transferred intent and allowing its application to an attempted murder in the first degree charge/conviction.**

Statement of the Case

Procedural History

1. In the October 2012 term of the Berkeley County Circuit Court, Petitioner (Defendant below) was indicted on twelve (12) counts, arising from a shooting incident in War Memorial Park on July 4, 2012, including: Count One – Attempted Murder (with respect to Gabriel “Ziggy” McGuire); Count Two – Malicious Assault (with respect to Gabriel “Ziggy” McGuire); Count Three – Malicious Assault (with respect to Gabriel “Ziggy” McGuire), Count Four – Attempted Murder (with respect to minor, AC), Count Five – Malicious Assault (with respect to minor, AC); Count Six – Wanton Endangerment; Count Seven – Wanton Endangerment; Count Eight – Wanton Endangerment; Count Nine – Wanton Endangerment; Count Ten – Wanton Endangerment; Count Eleven – Person Prohibited from Possession of a Firearm; Count Twelve – Flee from Law Enforcement Officer by Means Other than Use of Vehicle. (See Indictment at Appendix “App.” pp. 1-5)
2. On May 16, 2013, the trial court ordered that Count Eleven (Person Prohibited from Possession of a Firearm) be severed from the remaining counts, and the State elected to proceed with trial on Count Eleven first. (See Order for Severance of Offense and Bifurcated Trial at App. pp. 34-35)¹
3. On May 29, 2013, Petitioner was convicted of Count Eleven after a trial by jury. (See Order of Conviction Upon Trial by Jury entered June 3, 2013, at App. pp. 43-45)
4. On July 25, 2013, Petitioner was sentenced to a determinate prison sentence of five (5) years for his conviction on Count Eleven, and pre-trial and trial dates on the remaining counts were

¹ The Court later vacated its order bifurcating the trial on Count Eleven, but the severance of said count from the remaining counts remained in effect. (See Order Vacating Order for Severance of Offense and Bifurcated Trial at App. pp. 36-38 and Order Denying Motion to Bifurcate Trial of Count Eleven at App. pp. 39-42)

set for August 29, 2013, and September 3, 2013, respectively. (See Sentencing Order entered July 29, 2013, at App. pp. 46-47)²

5. Prior to trial on Counts One through Ten and Twelve, the State filed a motion in limine, seeking *inter alia*, to exclude Petitioner from introducing evidence under WVRE 404 of prior specific instances of conduct or prior bad acts of the victim (Gabriel McGuire) without an *in camera* review of the evidence. (See Motion in Limine at App. pp. 66-68.)
6. At the August 29, 2013 pre-trial hearing the trial court found that if the Petitioner “intends to introduce evidence under WVRE 404(b), the Court is required to conduct an in camera review of the evidence.” (See Pre-trial Hearing Order of August 29, 2013 at App. p. 157-158) The trial court next considered the State’s request to exclude the defense from introducing evidence of specific instances of the victim’s (i.e. Gabriel McGuire’s) conduct to show the victim’s character of violence, finding “that the introduction of specific instances of conduct of the victim to show his violent character is not relevant or admissible because Defendant is not arguing self-defense.” *Id.* at App. p. 158.
7. After defense counsel noted that his client may argue self-defense, the trial court further found that “[u]ntil such time that the Defendant presents some evidence of self-defense, the victim’s character for violence is not relevant” but that the trial court “would revisit the issue as evidence in the trial is developed.” *Id.*
8. Trial by jury on Counts One through Ten and Twelve began on September 3, 2013, and concluded September 5, 2013. After the close of evidence, the State agreed to dismiss Counts Six, Seven and Eight (three separate counts of wanton endangerment). (See Order of Conviction Upon Trial by Jury entered September 12, 2013, at App. p.151-153.)

² Petitioner is appealing his conviction on Count Eleven in a separate proceeding before this Supreme Court. The instant appeal pertains solely to his convictions on Counts One through Five, Nine, Ten, and Twelve.

9. The trial court then considered the parties' proposed jury instructions and arguments regarding the same, ultimately adopting *inter alia* the State's proposed jury instruction regarding the doctrine of transferred intent and declining defense counsel's proposed instruction regarding the jury's ability to draw a negative inference from a witness's refusal to testify. (See *Id.* at App. p. 151-153, Jury Charge with Instructions at App. pp. 125-147, State's Proposed Jury Instructions at App. pp.71-94, Defendant's Proposed Jury Instructions³ at App. pp.102-120, and Trial Transcript , 9/5/13, at App. pp. 821-830.)
10. After deliberations, the jury found Petitioner guilty on Count One (Attempted Murder in the First Degree with respect to Gabriel McGuire), Count Two (Malicious Assault with respect to McGuire), Count Three (Malicious Assault with respect to McGuire), Count Four (Attempted Murder in the First Degree with respect to Amaya Cross), Count Five (Malicious Assault with respect to Amaya Cross), Count Nine (Wanton Endangerment), Count Ten (Wanton Endangerment), and Count Twelve (Fleeing from Law Enforcement Officer by Means Other than Use of Vehicle). (See Order of Conviction Upon Trial by Jury entered at App. p.151-153.)
11. Defense counsel then filed a post-trial motion seeking a new trial on the grounds that a State witness made impermissible remarks at trial about Defendant standing on his constitutional right to not consent to a search, the jury was not allowed to see Gabriel McGuire called as a witness to assess his demeanor, Defendant was denied the opportunity to confront Gabriel

³ The reader will note that the copy of Defendant's Proposed Jury Instructions included in the Appendix is unsigned. The undersigned retrieved this copy of the instructions from trial defense counsel and confirmed that the State also received a copy of these proposed instructions prior to trial. Upon review of the docket sheet and court file in this matter, it appears Defendant's proposed jury instructions were never actually filed with the court clerk. However, it appears from the trial transcript that the trial judge did receive and consider Defendant's proposed jury instructions. See Trial Transcript , 9/5/13, at App. pp. 821-830)

McGuire, and Defendant was prejudiced by these errors. (See Post Trial Motions at App. pp. 154-156)

12. At the October 24, 2013 sentencing hearing, the trial court denied Defendant's post trial motions, finding that Defendant did not raise any new issues that were not already argued during the course of the trial. (See Sentencing Order entered November 7, 2013, at App pp.164-166.)
13. Defendant then filed a notice of appeal, which was not received by this Supreme Court until December 9, 2013. Defendant subsequently filed a motion for leave to permit late filing and said motion was granted by virtue of this Supreme Court's January 30, 2014 order.
14. Petitioner (Defendant below) presents the instant filing has his brief in support of appeal from his jury conviction and the trial court's Sentencing Order entered November 7, 2013.

Trial on Counts One through Ten and Twelve

Day One

In its case-in-chief, the State first called Detective Scott Doyle, who testified that he was in War Memorial Park in Martinsburg, West Virginia, on the evening of July 4th, 2012, when he heard "pops" that were distinct from the normal popping firework sounds on the 4th of July. (See Trial Transcript, 9/3/13, at App. p. 370.) When Detective Doyle heard the sound, he ran toward the park pavilion, where there was a lot of commotion. *Id.* at App. p. 371. Officers were advised that there had been one shooter, and that it was a black male who had a red and white polo shirt. *Id.* Detective Doyle testified that officers responded to north Tennessee Avenue where they took a person into custody, who was later identified as Petitioner (Defendant below), Daniel Herbert. *Id.*

Detective Doyle testified that he was further advised that one of the other parties that was involved in the shooting incident had fled south on Tennessee Avenue. *Id.* at App. p. 372. Detective Doyle proceeded to that area and eventually came into a backyard where Gabriel McGuire a.k.a. “Ziggy” was found with two gunshot wounds. *Id.* at App. p. 372.

Detective Doyle then testified regarding gunshot residue testing that was conducted on Mr. Herbert as follows:

Prosecutor: Okay. Do you have any information as to what time the GSR was taken from Daniel Herbert?

Doyle: There was some time in the past several hours following. I believe if they do it like three or four hours afterwards that we took the GSR from Mr. Herbert. Maybe less. Three or four. Somewhere in that timeframe.

Prosecutor: Okay.

Doyle: Anyway it wasn't immediate.

Prosecutor: Okay. Anywhere from two to four hours, took the GSR from the defendant?

Doyle: That's correct.

Prosecutor: Is that ideal?

Doyle: Ultimately you would like to take them as quick as possible. Mr. Herbert was not cooperating with us at the time.

(See Trial Transcript, 9/3/13, at App. p. 396-397.)

At that point, defense counsel objected to Detective Doyle's testimony about Mr. Herbert's non-cooperativeness, arguing that Defendant had a constitutional right to not allow a search of his person as well as not give a statement. *Id.* at App. p. 397. Defense counsel requested the testimony be stricken and argued that the jury should be instructed that Mr. Herbert's exercise of his constitutional rights could not be held against him. *Id.* The trial court overruled the objection. *Id.*

After direct examination of Detective Doyle (and outside the presence of the jury), the trial court indicated:

Court: One thing I will say, although I, on that one objection about, although I overruled that one objection about . . . Fourth Amendment, I mean that's something that I would not expect to have any further comment about or anything whatsoever, you know. I think by the time I go to strike that off the record or something, I make more emphasis on it than anything else, but I don't . . . I would not expect to have any comment on that of any kind. I think it would be preferable maybe not to have that in there. Okay.

Prosecutor: Yes, sir.

Court: I mean, I assume nobody is going to make that in closing argument or anything over that.

Prosecutor: No. The state is not going to. We are going to make closing argument about how the defendant did not assist the police by running from them, but not the fact that he exercised his Fourth Amendment right to forcing them to get the search warrant.

Court: I don't think that it's overly prejudicial, but by the time I strike something, I'm putting more emphasis on it than anything else.

(See Trial Transcript, 9/3/13, at App. p. 405-406.)

On cross-examination, Detective Doyle testified that he did not see any interaction between Mr. Herbert and the victim, Gabriel McGuire (a.k.a. "Ziggy") *Id.* at App. p. 408. But he further testified that McGuire was uncooperative with officers at the scene and said that "he was just going to go to the hospital himself." *Id.* at App. p. 410. Detective Doyle indicated that officers "tried to ask him details about what had happened and his main concern was just going to the hospital, but he was angry that he had been shot." *Id.* at App. p. 410-411.

Within its case-in-chief, the State called a series of law enforcement officers to testify, including Lieutenant Justin Darby, who testified that he was not at the scene during the shooting, but rather, responded to the hospital and made contact with a second gunshot victim, eight-year old, Amaya Cross. *Id.* at App. p. 440. Lieutenant Darby indicated that he observed what appeared to be gunshot wounds through both Cross's right and left thigh. *Id.* at App. p. 441.

Lieutenant Darby further testified that he conducted gunshot residue testing on McGuire while at the hospital. *Id.* at App. p. 443. On cross-examination, Lieutenant Darby testified that McGuire was uncooperative at the hospital – “cursing” and “creating a scene” – although he did not recall having to physically restrain McGuire. *Id.* at App. p. 445-44.

Day one of the trial concluded with the State calling two additional law enforcement officers, Craig Richmond and Scott Shelton, who both testified that they were involved in apprehending Mr. Herbert but did not observe the interaction between Mr. Herbert and Mr. McGuire. *Id.* at App. pp. 447-455 (Craig Richmond) and App. pp. 455-463 (Scott Shelton).

After the testimony concluded on day one and the jury was excused for the day, the Court inquired whether there were any issues to be taken up before day two, and the prosecutor responded:

Prosecutor: Well, it’s not a complicated issue, Judge, and I may be calling Gabriel McGuire in the afternoon . . . tomorrow afternoon. I just don’t know how he’s going to react in the courtroom, and outside of the courtroom. I just want . . . I think I want to make the Court aware that he’s telling the state that he’s not going to cooperate with us, and no one’s going to get him on the stand, and I don’t know if there’s going to be physical resistance or what, but I just want to make the Court aware of that. I don’t know what’s going to happen tomorrow, so, I just wanted to let the Court know.

Court: Okay.

Prosecutor: I’ll probably call him either I may . . . I don’t know, either after the morning break or after the afternoon break so we’re prepared.

Court: Do I need extra bailiffs or anything?

Defense counsel: You may.

Prosecutor: You may need at least one, but I don’t want it to look . . . I don’t want it to look like he’s a dangerous person. I’m sure the defense would, so, I would still just request one bailiff. I wanted to advise the Court that we may have an issue getting him out here. I don’t know what he’s going to say, whether he’s going to . . . what he’s going to do when he comes out.

Id. at App. pp. 464-466.

Day Two

On day two of the trial, the State continued its case in chief with testimony from Officer Sarah Spiker, who testified that she was involved in the pursuit of Mr. Herbert, but did not see any interaction between Herbert and McGuire. (See Trial Transcript, 9/4/13, at App. p. 470-477.)

The State then called Dr. Ronald Best, who testified that he treated Mr. McGuire at the hospital for two gunshot wounds – “to the anterior chest on each side, and to the back on each side” – but could not specify where the entry and exit wounds were. *Id.* at App. p. 480-482. Doctor Eric Glass then testified that he treated minor AC for injuries consistent with gunshot wounds, but he could not tell from the injuries whether it was one or more gunshots. *Id.* at App. p. 494-495.

The State’s next witness was Anthony Campbell, who testified that he witnessed Mr. Herbert shoot a firearm on the evening in question. *Id.* at App. p. 500. He indicated that he witnessed Herbert and McGuire in an argument when Herbert lifted up his shirt and showed McGuire that he had a gun. *Id.* at App. p.503-504. Campbell testified that he did not see whether McGuire had a gun or any weapons. *Id.* at App. p. 504. He testified that after Herbert showed McGuire the gun the two men kept arguing.⁴ *Id.* at App. p. 505. Campbell indicated that he then saw Herbert pull the gun and start shooting at McGuire, at which point McGuire ran and Herbert chased him. *Id.* Campbell testified that Herbert shot at McGuire about fifteen seconds after showing him the gun. *Id.* at App. p. 517.

⁴ On cross-examination, Campbell admitted that he had previously told police that it looked like an altercation between McGuire and Herbert and thought that McGuire had put his arm around Herbert. (see Trial Transcript, 9/4/13, at App. p. 512). On re-direct, he indicated that it was an argument without any “fist fighting, pushing or anything like that.” *Id.* at App. p. 515-516.

After eliciting testimony from Andrew Moore (whose testimony focused mainly on the number of shots heard), the State indicated that it would call Gabriel McGuire. *Id.* at App. p. 534. The trial court asked counsel to approach the bench to address the issues raised by the prosecutor at the close of day one (*i.e.* McGuire's anticipated non-cooperativeness and potential physical resistance). *Id.* After discussions regarding the proper procedure for handling a potentially hostile witness, who may intend to invoke his 5th Amendment right not to testify, the trial court decided – over the objection of defense counsel – that he would excuse the jury while McGuire was brought in to be sworn and would then bring the jury back in to the courtroom. *Id.* at App. p. 534-539.

The following exchange then took place:

Defense counsel: Your Honor, are we going to do this for every witness from now that's called?

Court: Well, I don't . . . I don't think I've had the bailiffs tell me that it's a security problem with any other witness.

Defense counsel: Well, it might be when [AC's] mother comes in.

Court: Well, I'll take it up when it comes. I mean, if they can't get him in here I'll tell the jury that they can't get him in here. I'm not sure they're going to get him in here.

Defense counsel: He doesn't have a choice, Your Honor. If you tell him to be here he has to be here. Your Honor, again, so that the record's clear, I know that she was typing while there was a lot of white noise, so I'm going to go over a few things while they're attempting to get him in here, but I would like the record to reflect that I think it's strongly prejudicial to my client that the jury had to be excused because the state didn't want them to see Ziggy McGuire brought into the court room, and how, you know, as the trier of fact they get to examine everyone's demeanor, which includes the way they walk; how they're presented; their defiance to the Court; their defiance finds to the prosecutor; their defiance to the defense attorney. All that's relevant. We're talking about a self-defense case here, and we can't even get in the daggone victim. How is that not relevant to my client? And . . . the character of the victim who as the aggressor?

Prosecutor: And, Your Honor, that's not what I said first of all. I think this is a court security issue. We do not need a fight in front of the jury, and what takes place until that witness gets on the witness stand is not evidence. What happens on the witness stand is

evidence, and this would be highly prejudicial to the state, and so it . . . what defense is saying what happens in the back; how the person walks in the back; how the person walks from the jail to the courthouse, none of that is evidence. It's only until he's sworn and testifies, but I think we've got a major court security issue here. We do not want any fighting. We don't want a mistrial. If we can get him to take the stand I think we should, and this is not a matter of he doesn't have a choice. This is a matter of whether we can physically put the body on the stand, and we might not be able to, Judge.

Court: Well, and just for the record I've been informed by the chief bailiff that it's a security issue.

Mr. McGuire: Get off me, man. How can you (inaudible) in the fucking courtroom, man? I don't care. I'm not coming in here man.

Court: Okay. You need to bring him over here to be sworn in. Right here. Okay. Right there. No, I'm going to bring in the jury.

Prosecutor: Judge, I object. This is too final. This is not evidence. He physically should not be in the courtroom with the jury. I think this is a court security issue, and I would say hold him in contempt and get him out of here. I do not want to see the officers tackle him in front of the jury. That's not evidence.

Clerk: Do you want me to swear him in?

Court: You can.

Prosecutor: Judge, I'm not going to call him to the stand now.

Court: What's that?

Prosecutor: I mean, if this is going to be an issue of court security issue, I withdraw him as a witness.

Id. at App. p. 540-542.

The trial court then inquired if Mr. McGuire was willing to take the stand, and McGuire indicated that he was not. *Id.* at App. p. 543. The Court indicated that it would hold McGuire in contempt and confine him in jail for ten days. *Id.* at App. p. 544. The parties then addressed how to explain what had just occurred to the jury, *Id.* at App. p. 544-550, and the following exchange took place:

Court: What I will say to the jury is that there was . . . Gabriel McGuire refused to cooperate or testify. He was subpoenaed by the prosecutor, and I deemed it was a security issue, a threat to the jury to force him to testify.

Defense counsel: Your Honor, I think it's also important to note that there was physical resistance.

Prosecutor: You have . .

Court: You don't like this, Mr. Jones?

Prosecutor: No, because you're telling the jury that he was a threat to them. If we just keep it simple, "Mr. McGuire was subpoenaed here to testify. He refused to even take the stand to testify, and based on that he was held in contempt, and so the state call your next witness".

Defense counsel: Your Honor . . .

Prosecutor: What I would request, because otherwise you're making . . . you're actually saying that he's a threat to the jury and providing the defense evidence, and that was the whole purpose of not having them in the courtroom.

Defense counsel: Your Honor, it's not a lie that the Court ruled that it was an issue of their safety. They need to be told that. It's highly unusual that someone's brought in this like this, and I think that they deserve to see it. My client needs them to see that, see how this guy acts.

Court: They may get a chance to see it when you bring in your . . . I don't know what's to happen.

Defense counsel: I mean, if you deemed that it was a juror safety issue, they need to be told that.

Court: Well, I think that what [the prosecutor] has said is well taken. I probably shouldn't get into the threats to the jury, however, I'll say that he was subpoenaed. He refused to cooperate, and we did not feel like I could physically force him to testify.

Id. at App. p. 550-551.

The jury was then brought back into the courtroom and the trial court advised:

I will inform the jury that Gabriel McGuire was subpoenaed by the prosecution to come in here and testify; that he refused to either take the oath or to testify; that he was physically brought in here, and I did not feel he could be physically forced to take the oath or to testify, and I held him in contempt, and with that I'm going to ask the state to call its next witness.

Id. at App. p. 552.

The State then called its next witness, Amanda Dorsey, who testified that she witnessed the encounter between McGuire and Herbert on the night in question, when “words were exchanged.” *Id.* at App. p. 557. Dorsey indicated that she was not close enough to tell exactly what was said, but then there was a “dap kind of hug thing” between the two men and Herbert pulled a gun.⁵ *Id.* Dorsey further testified that she witnessed Herbert chasing McGuire outside the park and shots were still being fired. *Id.* at App. p. 558. She indicated that she could not see whether McGuire had a weapon. *Id.* at App. p. 568.

The State presented several additional witnesses in its case in chief, including Jermaine Jackson, who testified that Herbert initially approached McGuire and there appeared to be a confrontation between the two men. *Id.* at App. p. 650. He testified that he then saw Herbert pull a gun, point it towards McGuire and immediately fire. *Id.* at App. p. 651-652. Jermaine Jackson further testified that McGuire took off running and Herbert pursued him, still shooting. *Id.* at App. p. 652-654. He also testified that he saw the two men “hug up” after the exchange of words but prior to the shooting. *Id.* at App. p. 662-663.

Michael Jackson also testified in the State’s case-in-chief, indicating that he saw McGuire flash a knife while McGuire and Herbert were exchanging words. *Id.* at App. p. 671. He described the knife as a folding knife with a blade of about four or five inches. *Id.* at App. p. 671-672. Jackson testified that after McGuire took out the knife, he had it out for about five seconds before folding it back up and putting it in his pocket. *Id.* at App. p. 673. He then indicated that both men left the pavilion, still holding a conversation, and about thirty or forty seconds after that he heard a gun go off. *Id.* Jackson further indicated that he did not see any weapons in McGuire’s hand at the time of the shooting. *Id.* at App. p. 676.

⁵ On cross-examination, Dorsey admitted that she had described the “dap huggy” thing between the two men as a “tussle” in her statement to police, but “not really like, you know, like a fight tussle.” (See Trial Transcript, 9/4/13, at App. p. 580).

After the close of the State's case in chief, defense counsel moved for a judgment of acquittal under West Virginia Rule of Criminal Procedure 29, arguing that Herbert had been denied due process under the 6th Amendment with respect to being unable to cross-examine McGuire and the jury not being allowed to witness McGuire brought into the courtroom. *Id.* at App. p. 701. Defense counsel further moved for a mistrial or judgment of acquittal based on State's witness Detective Doyle referencing Herbert not consenting to a gunshot residue testing. *Id.*

In response, the State argued that the 6th Amendment was not violated because McGuire was not an "accuser" and the State was not required to call Mr. McGuire to the stand to testify. *Id.* at App. p. 702. The State further argued that the reference to Herbert not consenting to gunshot was not grounds for dismissal and that defendant had not asked for a cautionary instruction. *Id.* at App. p. 703.

The following exchange then took place:

Defense counsel: A few corrections. I did ask for a cautionary instruction on the Fourth Amendment issue at the time of the objection, and when the jury . . .

Court: I haven't necessarily ruled on it. I mean, I could still give a cautionary instruction.

Defense counsel: And I would ask this Court to do so.

Prosecutor: State has no objection.

Court: Okay.

Defense counsel: You give one for the Fifth Amendment. Also I'm just going to make . .

Court: I don't remember you asking, well, I do. You asked to strike it.

Defense counsel: Or for a . . .

Court: Okay

Defense counsel: An instruction to disregard it. . .

Id. at App. p. 705.

The trial court then denied the motion for judgment of acquittal, finding that there was sufficient evidence presented by which the jury could return guilty verdicts. *Id.* at App. p. 706. The trial court further noted that it agreed with the State's position on the confrontation issue regarding McGuire because the "witness did not testify" but it "might have been a different story if the state had not withdrawn its request to ask him to testify . . . but he did not testify, and the state wasn't compelled to produce him as a witness, and said at the last moment it was withdrawing him as a witness." *Id.* The trial court continued "with respect to the constitutional right to search, I think that statement was incidental to an explanation of why a search warrant was obtained, and I think it was harmless at this point in time. . . . *Id.* at App. p. 706. The trial court noted that "if the defendant wants a cautionary instruction on that, the state's already just said it would agree to it, so, I think I'll give a cautionary instruction in the jury instructions if that's requested." *Id.* at App. p. 707.

The prosecutor then asserted that he thought he had mentioned he was going to withdraw McGuire as a witness but then took that back for the trial court to ask him if he was going to testify. *Id.* The following exchange then took place:

Court: So you were not withdrawing him as a witness?

Prosecutor: No, I said that initially because I thought the Court was going to force him to take the stand, and I didn't want that. I thought that it was going to be . . . it just wasn't safe in the courtroom . . . in this courtroom, so I wasn't going to take the chance. I was going to withdraw him, but then after that I said, well, I wanted to see if the Court gives its ruling, and the Court gave the ruling.

Court: Well, he still did not testify, so I don't think there's a right to cross-examine somebody who did not testify, and I think that the Court did instruct the jury what was going on. I didn't think it was necessary to put the jury in harm's way, especially when the bailiffs are telling me they don't think they could protect the jury.

Defense counsel: Your Honor, for the record I would note that he was shackled and handcuffed.

Id. at App. p. 708.

The trial court then reiterated that the defense was free to call McGuire as a witness the next day, indicating that the issue may be handled differently then, but that the trial court thought that the state was withdrawing him as a witness. *Id.* at App. p. 709. The trial court concluded day two of the trial, indicating that it had not made up its mind on how to properly handle the situation, had not been able to find any case law directly on point and was giving the parties until the next morning to provide case law. *Id.* at App. p. 711-712.

Day Three

On the third day of trial, proceedings began with testimony from defendant, Mr. Herbert. (See Trial Transcript, 9/5/13, at App. p.723). Mr. Herbert testified that he went to War Memorial Park on July 4, 2012, with several other folks. *Id.* at App. p. 724. Herbert testified that he approached the pavilion at the park and saw Gabriel McGuire, who he had known since 2008 from working with him at American Tent. *Id.* at App. p. 724-725. Herbert indicated that he considered McGuire a friend, but they did not hang out all the time. *Id.* at App. p. 725. Herbert testified that he stuck out his hand to shake McGuire's hand, and immediately, McGuire was confrontational towards him. *Id.* at App. p. 726. Herbert testified that he could tell McGuire was drunk from his slurred speech and "if he gets drunk, he is confrontational, unpredictable, violent. He is aggressive." *Id.* Herbert further indicated:

I guess he wanted to fight me, for some reason. To this day, I can't honestly tell you what it was all about, and, yes, was angry at me and we had a few words. And as we was going back and forth, I seen him go into his pocket and pull out a knife. When he did this, I admit I did flash it. I had a firearm on me at that time, and I flashed it, and I was trying to diffuse the situation. . . he told me "I'm not worried about that little-ass gun." At that point, I walked away from him, you know what I mean. I could see that it was something bothering him and this wasn't going anywhere good.

Id. at App. p. 727.

Herbert continued:

When I went to walk away, he did grab me by the arm, with a knife, walked me down a path. At this point, I felt like I didn't know what he was going to do. He is unpredictable and I reacted . . . I tried to snatch it away from [McGuire]. He held me. And at that point, that's when I reached for the gun and I pulled it out and I started shooting.

Id. at App. p. 728.

Herbert testified that he could not say exactly what was going through his mind at the time, but at no point was he making a deliberate calculated decision. *Id.* at App. p. 729. He indicated that he was scared at felt like he had to protect himself. *Id.*

Defense counsel then inquired of Herbert how he could explain the testimony of multiple witnesses, indicating that they saw him chasing and shooting at McGuire. *Id.* at App. p. 736. Herbert replied:

I can try to explain it, to the best of my ability. Like I said earlier, I reacted to the situation. I don't know if anybody's ever been in this type of situation, but if you're in fear for your life, you kind of react. It's not something that you get the opportunity to think through. You are just reacting to the situation, and that's what happened.

Defense counsel: Were you purposely trying to chase him down and shoot him; did that thought come to your mind?

Herbert: No sir, it was a reaction. Like I said, it was all one act. It wasn't like I was intentionally trying to chase him down and shoot him. At the time, everything happened so fast. It was so sudden, and I reacted to it like that. And I remember still seeing him with a knife in his hand.

Id. at App. p. 737.

Herbert indicated that he knew McGuire would use the weapon because McGuire is a violent person, and Herbert had witnessed McGuire pull a gun on somebody in the past. *Id.* at App. p. 738.

After Herbert's testimony concluded, the trial court then addressed Gabriel McGuire's anticipated non-cooperativeness as a witness and the proper procedure for handling the issue, stating:

I can't state what he is going to do, but I'm going to bring him in, not in the presence of the jury . . . and establish whether he is going to testify. And if he does refuse to testify, as he did yesterday, I will not do that in front of the jury. However, I'm going to inform the jury more than I did yesterday, I'm going to lay out in the record that he was brought in, outside of the presence of the jury, and that there is a matter of Court security involved, and that he is in the federal penitentiary, and that I have held him in contempt . . . So I'm going to try to disclose all the facts to the jury, but I'm not going to bring him out in front of the jury, but I will tell the jury that he had to be physically restrained and that there is an issue of Court security.

Id. at App. p. 776-777.

Defense counsel inquired whether the Court was going to grant McGuire immunity, stating “under the Wit [*sic*] case, it seems like for me to get a negative inference instruction, there has to be no statutory or constitutional barrier between him testifying, and I kind of meet a grant of immunity. That leaves no stone unturned, whether he is cooperating.”⁶ *Id.* at App. p. 776. Defense counsel also reiterated his prior objection to the trial court's procedure on the basis that the jury needed to see McGuire brought out into the courtroom and asked questions. *Id.* at App. p. 779. Among his concerns was that the jury could potentially infer that McGuire's reason for not coming into the courtroom and testifying was fear of Herbert. *Id.* The trial court noted the objection but decided that it would still not let the jury see McGuire brought into the courtroom and asked questions. *Id.* at App. p. 781.

⁶ With this argument, defense counsel brought the Court's attention to *State v. Whitt*, 649 S.E.2d 258, 220 W. Va. 685 (2007) (outlining the proper procedure the trial court should follow when a defendant desires to call a co-defendant to the stand who intends to invoke the 5th amendment privilege). Defense counsel also cited the *Whitt* case in proposing defendant's jury instruction No. 4 as follows: “Where a witness has no constitutional or statutory right to refuse to testify, jurors are entitled to draw a negative inference from witness' refusal to testify.” *State v. Whitt*, 649 S.E.2d 258, 266 (2007) (See Defendant's Proposed Jury Instructions at App. pp. 104) However, the trial court refused to give any such instruction. See Trial Transcript, 9/5/13, at App. pp. 825-827 in transcript. The trial court reasoned: “I think that the case is not directly on point and also I just think it's kind of confusing, a negative inference from the witness's refusal to testify.” *Id.* at App. p. 825.

Prior to calling McGuire as a witness, the defense called three law enforcement officers: Lieutenant Daniel Steerman, Sergeant Michael Cole, and Detective Scott Doyle. *Id.* at App. p. 781-801. Lieutenant Steerman testified that he arrested Gabriel McGuire for brandishing a weapon, and McGuire pled guilty to the charge. *Id.* at App. pp. 782-783. Steerman further testified that McGuire had a reputation for being armed with a weapon and believed him to be an aggressive person with a potential for violence. *Id.* at App. pp. 785-786. Sargent Cole then testified that he was familiar with Mr. McGuire from a prior assault investigation, wherein the victim indicated that McGuire threatened to “cut [her] guts out with a knife.” *Id.* at App. p. 788. McGuire pled no contest to the charge. *Id.* Sargent Cole also indicated that that McGuire had a reputation for being armed and violent. *Id.* at App. p. 790.

Detective Doyle was then called by the defense and testified that the police were not advised that there was a knife involved in the incident until the Thursday before trial when Doyle spoke with Michael Jackson. *Id.* at App. p. 794. He indicated that there was never a search for the knife. *Id.* Doyle also testified that McGuire had a reputation for carrying a weapon and that he is treated differently when he comes up in an investigation because it is an officer safety issue. *Id.* at App. p. 797.

On cross-examination, Detective Doyle indicated that he had interviewed Mr. McGuire at least twice in the case, including about a week before trial. *Id.* at App. p. 800. Doyle testified:

I was trying to find out if he was going to be willing to testify. He said he was going to testify, it was going to be difficult. And his exact words to me, he said, “You can tell the prosecutors they can shit in one hand and wish in the other and see which one fills first.”

Id. at App. p. 801.

The defense then called Gabriel McGuire as a witness, but the trial court decided to take a recess and dismissed the jury. *Id.* at App. p. 802. Defense counsel again objected to the

witness being brought in without the presence of the jury. *Id.* Mr. McGuire was brought into the courtroom and the following exchange occurred:

Court: Are you prepared to testify today?

McGuire: I plead the Fifth.

Defense counsel: Your Honor, I would ask that he be granted immunity. You have heard the State also speak earlier that there isn't any crime that he could be convicted of in State Court. And his presence is necessary, he was the victim. He was beside my client whether this incident happened. It could be potentially exculpatory. The testimony puts a knife in his hand and it is essential for my client that he be compelled to testify and the ends of justice do serve so and would permit the Court to grant preliminary immunity.

Id. at App. p. 803-804.

The State indicated that it had no objection to a grant of immunity, and defense counsel continued:

Defense counsel: Your Honor, this needs to be done in the presence of the jurors.

Court: Not this part.

Defense counsel: Your Honor, State versus Wit [*sic*], right of a fair trial, includes the right to offer testify in support of defense may constitute favorable evidence.

Court: Well, if he takes the Fifth, that needs to be done in the presence . . . We're in the preliminary legal proceeding to determine whether he has immunity. I don't think the jury has the right to watch proceedings as to whether or not he is going to have immunity.

Defense counsel: Your Honor, the case of State versus Wit [*sic*] supports that the jury should be compelled to do that in front of the jury.

Court: Compelled to do what, take the Fifth?

Defense counsel: Take the Fifth.

Court: We are not at that stage yet.

Id. at App. p. 804-805.

The trial court then granted Mr. McGuire immunity for any state charges arising out of the incident at issue, and inquired of McGuire:

Court: Based on that, sir, do you have any reason to think that your testimony would somehow implicate federal charges against you?

McGuire: I mean, I have no intentions on testifying. I am not taking the stand and I am not testifying.

Court: Are you saying that you refuse to take the stand?

McGuire: That's what I'm saying, I refuse to take the stand and I refuse to testify.

Court: Are you saying - - so you are no longer taking the Fifth. You're saying - -

McGuire: I refuse to talk, period, that's what I'm saying, I refuse to talk. I refuse to take the stand and I refuse to testify.

Id. at App. p. 806-807.

The trial court then inquired as to whether McGuire would be sworn in and McGuire stated "No, I am not." *Id.* at App. p. 807. The trial court declined to make any further inquiry of McGuire and sent him back to the holding cell. *Id.* The parties then discussed how the jury would be informed of what transpired, and defense counsel asked that they be told that McGuire had "no legal or constitutional or statutory right" to remain silent. *Id.* at App. p. 809. The trial court continued:

The Court: I don't even think we reached that point because he doesn't have any grounds not to testify. He doesn't have grounds to refuse to take the stand and to refuse to take the oath. I can say that, if you want me to.

Mr. Harvey: That's fine, Your Honor. I'll tell you why it's important, is for my jury instruction that I plan to introduce about the jury may take a negative inference from him not cooperating. I have provided a case on that.

Mr. Jones: And that's the big one that the State says there is no criminal grounds.

The Court: That's the big one.

Mr. Jones: And that case says you don't have any grounds in criminal law to get a negative inference. We could argue that when we have the instructions, but that case was only about whether a defense attorney can call somebody to the stand solely to take the Fifth. That's all that was about. I would request that we get the jury so they can break for lunch and we can argue instructions.

Mr. Harvey: I'm going to rest now.

The Court: Now, if you don't think I said something right, don't blurt out something that says what you want to say in front of the jury. This is minor. Approach the bench.

(Jury Seated.)

The Court: While the jury was out, Mr. McGuire was brought into the courtroom in custody. He was physically restrained. Both sides have sought to call him as a witness. Yesterday, the State sought to call him as a witness. Today, the defendant sought to call him as a witness, and they both have a right to compel witnesses to come before the Court. As with yesterday, Mr. McGuire refused to take the oath and said he would refuse to testify. He does not have grounds to refuse to take the stand and he does not have grounds to refuse to take the oath. However, my powers are limited to holding him in contempt until he testifies and because he is in federal custody and he is here for purposes of testimony only from federal custody, I don't have much force or influence in terms of doing that since he is already in federal custody. The bailiffs have determined yesterday that it was a Court security issue in bringing him here in the presence of the jury and that it would be a safety issue for those involved. And I think it's kind of pointless to go through the exercise again today when it's already been determined and I determined that he is not going to testify today, even if both sides wish for him to testify. I don't see how we can do it. . . . I did grant him immunity for his testimony. That did not make any difference.

Id. at App. p. 810-812.

The defense then rested its case and the State offered no rebuttal evidence. *Id.* at App. p. 812. Defense counsel renewed his Rule 29 motion on the same grounds as he had raised at the close of the State's case in chief and the same was denied. *Id.* at App. pp. 815, 820.

The trial court then considered the parties' proposed jury instructions and arguments regarding the same, ultimately adopting *inter alia* the State's proposed jury instruction regarding the doctrine of transferred intent⁷ and declining defense counsel's proposed instruction regarding the jury's ability to draw a negative inference from a witness's refusal to testify. (See Order of Conviction Upon Trial by Jury entered September 12, 2013 at App. p. 151-153, Jury Charge with

⁷ It does not appear from the record that defense counsel objected to the State's proposed jury instruction regarding the doctrine of transferred intent and its applicability to attempted murder in the first degree charges. However, Petitioner asserts the trial court's instruction in this regard was plain error.

Instructions at App. pp. 125-147, State's Proposed Jury Instructions at App. pp.71-94, Defendant's Proposed Jury Instructions at App. pp. 102-120, and Trial Transcript, 9/5/13, at App. pp. 821-830.) Defense counsel cited *State v. Whitt*, 649 S.E.2d 258, 220 W. Va. 685 (2007) in proposing defendant's jury instruction No. 4 as follows: "Where a witness has no constitutional or statutory right to refuse to testify, jurors are entitled to draw a negative inference from witness' refusal to testify." (See Defendant's Proposed Jury Instructions at App. pp. 104) In refusing to give any such instruction, the trial court reasoned: "I think that the case is not directly on point and also I just think it's kind of confusing, a negative inference from the witness's refusal to testify." See Trial Transcript, 9/5/13, at App. pp. 825-827.

After deliberations, the jury found Petitioner guilty on Count One (Attempted Murder in the First Degree with respect to Gabriel McGuire), Count Two (Malicious Assault with respect to McGuire), Count Three (Malicious Assault with respect to McGuire), Count Four (Attempted Murder in the First Degree with respect to minor, AC), Count Five (Malicious Assault with respect to AC), Count Nine (Wanton Endangerment), Count Ten (Wanton Endangerment), and Count Twelve (Fleeing from Law Enforcement Officer by Means Other than Use of Vehicle). (See Order of Conviction Upon Trial by Jury entered at App. p.151-153.)

Defense counsel then filed a post-trial motion seeking a new trial on the grounds that a State witness made impermissible remarks at trial about Defendant standing on his constitutional right to not consent to a search, the jury was not allowed to see Gabriel McGuire called as a witness to assess his demeanor, Defendant was denied the opportunity to confront Gabriel McGuire, and Defendant was prejudiced by these errors. (See Post Trial Motions at App. pp. 154-156). At the October 24, 2013 sentencing hearing, the trial court denied Defendant's post trial motions, finding that Defendant did not raise any new issues that were not already argued

during the course of the trial. (See Sentencing Order entered November 7, 2013, at App pp.164-166.)

Summary of the Argument

Petitioner argues that he was denied a fundamentally fair trial in violation of his constitutional due process rights for the following reasons.

First, at the beginning of its case in chief, the State introduced evidence of Petitioner's failure to cooperate with law enforcement (by exercising his constitutional rights). This error unfairly prejudiced the jury against Petitioner straight out of the gate. The trial court then failed to take corrective action on the improper admission of the evidence, despite multiple requests from defense counsel to for a cautionary instruction.

Second, the trial court refused to permit the jury to be in the presence of a witness that was called within both the State's and defense's cases. The basis for preventing the witness from being seen by the jury was improper and had the effect of violating both Petitioner's right to confront and right to compel witnesses under the 6th Amendment. The constitutional problem expanded when the trial court failed to properly instruct the jury regarding the witness's lack of appearance and testimony, allowing improper inferences to be drawn against Petitioner.

Finally, the trial court failed to advise the jury of the limitations of the doctrine of transferred intent, resulting in Petitioner being convicted of a crime (attempted first degree murder of minor AC) for which there was absolutely no evidence presented at trial

Petitioner believes these errors, both individually and cumulatively, entitle him to a new trial.

Statement Regarding Oral Argument and Decision

Petitioner believes oral argument is necessary pursuant to Rule 18 of the Revised Rules of Appellate Procedure and requests the case be set for argument under Rule 20. Although the issues presented within Petitioner's appeal are relatively straightforward, Petitioner does contend there are constitutional errors within his underlying trial, as well as an issue of first impression regarding the application of doctrine of transferred intent.

Argument

I. The trial court committed reversible error by failing to exclude, or alternatively, failing to properly instruct the jury, regarding a State witness's improper remarks about Petitioner exercising his constitutional rights.

In exercising his constitutional rights, Petitioner did not cooperate with law enforcement following the shooting incident. (See Trial Transcript, 9/3/13, at App. p. 396-397, wherein State witness, Detective Doyle testified "Mr. Herbert was not cooperating with us at the time.") Defense counsel objected to Detective Doyle's testimony about Mr. Herbert's non-cooperativeness, arguing that Defendant had a constitutional right to not allow a search of his person, as well as not give a statement. *Id.* at App. p. 397. Defense counsel requested the testimony be stricken and argued that the jury should be instructed that Mr. Herbert's exercise of his constitutional rights could not be held against him. *Id.* The trial court overruled the objection. *Id.*

Subsequently, defense counsel reiterated that he was requesting a cautionary instruction on the issue, the State did not object, and the trial court indicated that it would do so. (See Trial Transcript, 9/4/13, at App. p. 705.) Unfortunately, it does not appear that any cautionary

instruction was ever given.⁸ (See Jury Charge at App. pp. 125-147, and Trial Transcript, 9/5/13, at App. pp. 830-866.)

In *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977), this Supreme Court held:

Under the Due Process Clause of the West Virginia Constitution, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury.

The Court reasoned:

The basis for the rule prohibiting the use of the defendant's silence against him is that it runs counter to the presumption of innocence that follows the defendant throughout the trial. It is this presumption of innocence which blocks any attempt of the State to infer from the silence of the defendant that such silence is motivated by guilt rather than the innocence which the law presumes. *Pinkerton v. Farr* . . . articulates this point and holds that under our law the presumption of innocence is an integral part of criminal due process and that such presumption is itself a constitutional guarantee embodied in Article III, Section 10 of the West Virginia Constitution. . . The constitutional right to remain silent also compels the State to remain silent about such silence.

233 S.E.2d at 716.

Likewise, in this case, the State witness's reference to Petitioner not cooperating with law enforcement officers destroyed the presumption of innocence to which he was entitled. The jury was left to infer that Petitioner's non-cooperation was motivated by guilt rather than the innocence the law presumes and the rights that the Constitution guarantees. The trial court compounded this error by refusing to give a cautionary instruction at the time the impermissible evidence was introduced and again failing to give a cautionary instruction at the close of

⁸ After the first and second times that defense counsel requested a cautionary instruction, it does not appear he submitted a written, proposed cautionary instruction to the trial court nor was there any objection lodged after the instructions – sans a cautionary one – were read to the jury. See Defendant's Proposed Jury Instructions at App. pp. 102-120 and Trial Transcript, 9/5/13, at App. p. 866. However, under the circumstances of this case, Petitioner argues this Supreme Court should notice plain error with respect to the trial court's failure to give a cautionary instruction.

evidence. Because Petitioner's exercise of his constitutional rights was used against him at trial, he was denied a fair trial as required by the Due Process Clause. *Boyd*, supra.

"Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." *State v. Blair*, 214 S.E.2d 330, 158 W.Va. 647 (1975). Such a showing cannot be made in this case. The impermissible evidence was introduced within testimony from the State's very first witness and improperly prejudiced the jury's view of the Petitioner straight out of the gate. A cautionary instruction could have potentially reduced the harm caused by the constitutional violation, but the trial court failed to take such corrective measures.

The error made by the trial court is further illustrated by *State v. Cozart*, 352 S.E.2d 152, 177 W.Va. 400 (1986), wherein the Court held in Syllabus Point 3 that:

In certain circumstances, evidence of a defendant's refusal to take a breathalyzer test will be admissible in a criminal trial for driving under the influence of alcohol as evidence of the defendant's guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge, upon request by either the State or the defendant, should hold an in camera hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect.

Analogously, to the extent Petitioner's non-cooperation with law enforcement included a refusal to submit to gunshot residue testing, the trial court should have held an in camera hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect. No such hearing was held.

In the event such "refusal evidence" is admitted – as it was in this case – a cautionary instruction is warranted which "should explain that this refusal evidence has only a slight tendency to prove guilt because such refusal does not have a direct bearing on the issue of guilt." Syl. Pt. 4, *Cozart*, supra. No such instruction was given, despite multiple requests by defense counsel. To the extent defense counsel failed to request such an instruction again at the close of

evidence, this Supreme Court should notice the issue as plain error and grant petitioner a new trial.

II. Pursuant to *State v. Whitt*, the trial court committed reversible error in failing to permit the jury to see an alleged victim plead the 5th and refuse to testify.

The jury in Petitioner's trial was never permitted to see one of the alleged victims, Gabriel McGuire. The exact reasons behind the trial court's decision to remove the jury before bringing Mr. McGuire into the courtroom are not entirely clear, although the trial court made repeated references to there being a "security issue." (See trial transcript, App. p. 540, where the trial court stated "just for the record I've been informed by the chief bailiff that it's a security issue" prior to Mr. McGuire being brought in the first time; App. p. 550, where the trial court stated "I deemed it was a security issue, a threat to the jury to force him to testify"; and App. p. 776, where the trial court stated "I'm not going to bring him out in front of the jury, but I will tell the jury that he had to be physically restrained and that there is an issue of Court security.")

Despite general testimony from Petitioner and law enforcement officers regarding Mr. McGuire's violent reputation (said testimony only occurring after the first time the trial court refused to let the jury see McGuire), there does not appear to be any valid basis for the purported "security issue" that allegedly would have arisen if the jury was permitted to remain in the courtroom when Mr. McGuire was brought in. On the contrary, Mr. McGuire was in custody, shackled and handcuffed around the legs, arms, and waist. See trial transcript at App. p. 708-709. If McGuire was such a security threat under those conditions, why was anybody allowed to stay in the courtroom when he was brought in? Why was he even taken out of his holding cell?

At times, the trial court also seemed doubtful of any "security issue", stating "I was leaning towards bringing him in to this point here, not over by the jury, and I didn't see from what I saw that he put up that much of a physical fight . . . There were two of them, and let the

jury see that he refuses to testify . . . I don't think that I'm required to put the jury in a place where it's physically in danger, but I don't think they would be physically in danger doing that . . ." *Id.* at App. p. 712. In actuality, there was no reason to believe the jury would have been in any danger at all if the trial court simply treated Mr. McGuire like any other witness and let the jury see him. The record is completely devoid of any indicia that Mr. McGuire had any animosity towards the jury, threatened them or would attack them if they were in the courtroom when they were brought in. Indeed, the only party (other than the prosecutor) that McGuire may have demonstrated any animosity towards was Petitioner. Notably, on both occasions that McGuire was brought into the courtroom – in the presence of Petitioner but in the absence of the jury – absolutely no “security issues” arose.

Even assuming the presence of some possible “security issue” with respect to Mr. McGuire, Petitioner is unaware of any authority supporting a finding that such a circumstance trumps a defendant's constitutional rights under the 6th Amendment to be confronted with witnesses against him and compel the attendance of witnesses in his favor.⁹ These rights must necessarily be exercised in the presence of the jury – the trier of fact and decider of defendants' guilt; otherwise, such rights would be mere useless illusions. See e.g. *State v. Blair*, 214 S.E.2d 330, 158 W.Va. 647 (1975) (holding “the fundamental right to confront one's accusers, which contemplates the opportunity of meaningful cross-examination, is guaranteed by Article III, Section 14 of the West Virginia Constitution) and Syl. Pt. 2, *State v. Harman*, 165 W.Va. 494, 270 S.E.2d 146 (1980) (holding the constitutional right against self-incrimination does not extend to prevent the physical appearance of a witness at trial.)

⁹ It would be quite an interesting state of the law if a defendant's 6th Amendment rights could be denied because of a possible security concern. Could an indigent, accused serial killer (or convicted serial killer) be denied the right to court-appointed defense or habeas counsel on this basis? Petitioner thinks not. Officers of the court are appointed to represent and jurors are required to be in the same room with people far more violent and dangerous than Mr. McGuire all the time.

In this case, Petitioner was not afforded the opportunity to exercise these rights in the presence of the jury, and thus, was not provided a fair trial as required by the Constitution.

- a. Petitioner's 6th Amendment right to be confronted with witnesses against him and right to a compulsory process for obtaining witnesses in his favor was violated.**

In *State v. Whitt*, 649 S.E.2d 258, 220 W. Va. 685 (2007), this Supreme Court set for the following holdings:

1. "[A] trial judge may not make an evidentiary ruling which deprives a criminal defendant of certain rights, such as the right . . . to offer testimony in support of his or her defense . . . which [is] essential for a fair trial pursuant to the due process clause found in the Fourteenth Amendment of the Constitution of the United States and article III, § 14 of the West Virginia Constitution." Syl. Pt. 3, in part, *State v. Jenkins*, 195 W.Va. 620, 466 S.E.2d 471 (1995).
2. "Under the Sixth Amendment to the United States Constitution and Article III, Section 14 of the West Virginia Constitution, the defendant has a constitutional right to have compulsory process for obtaining witnesses in his favor . . ." Syl. Pt. 3, in part, *State v. Harman*, 165 W.Va. 494, 270 S.E.2d 146 (1980).
3. To establish the denial of the right to compulsory process afforded to criminal defendants pursuant to article III, section 14 of the West Virginia Constitution, there must be a showing that the witness' testimony would have been both material and favorable to the defense.
4. For purposes of establishing a denial of the right to compulsory process, a proffer regarding the events to which the witness might testify along with a demonstration of the relevance of such testimony may be relied upon to meet the requisite showing that the testimony would have been both material and favorable to the defense where circumstances prevent a criminal defendant from interviewing a witness.
5. An exception to the general rule against allowing a witness to take the stand solely for the purpose of exercising his or her Fifth Amendment privilege against self-incrimination may be warranted in cases where the testimony sought to be compelled by a defendant in a criminal case is exculpatory in nature.
6. Where a defendant in a criminal case seeks to call a witness to the stand who intends to invoke his or her Fifth Amendment privilege against self-incrimination and the defendant has presented sufficient evidence to demonstrate the possible guilt of the witness for the crime the defendant is charged with committing, the

trial court has the discretion to compel such witness to invoke his or her Fifth Amendment privilege in the presence of the jury.

7. In making its decision as to whether a witness should be called to the stand for the purpose of invoking his or her Fifth Amendment privilege against self-incrimination, the trial court should consider whether the defendant will be unfairly prejudiced by not allowing the potentially exculpatory witness to invoke this privilege in the jury's presence.

The *Whitt* case is not completely on point with the instant case because it dealt with a defendant calling a co-defendant to testify. In Petitioner's case, the witness at issue is not a co-defendant, but rather one of the victims of Petitioner's alleged crimes who was called as a witness (and then apparently withdrawn) by the State, as well as a witness called by the defense. Thus, both the right to confront witnesses against and the right to compel witnesses in favor are implicated under the circumstances of this case. Additionally, because McGuire was an alleged victim of Petitioner's crimes but there was evidence indicating that Petitioner may have been defending himself from McGuire, the interest in Petitioner being able to confront and compel his attendance is greater than if McGuire was simply a co-defendant.

First, the denial of the right to confront a witness against Petitioner is clear. The State called Gabriel McGuire as a witness. (See trial transcript at App. p. 534, wherein the prosecutor stated "State would call Gabriel McGuire.") Then, after discussions about what procedure to follow after the State calls a witness, the trial court decided "I'm going to excuse the jury, have him brought to where he's sworn. I'm going to bring the jury back in." *Id.* at App. p. 539. The judge then dismissed the jury from the courtroom. *Id.* Mr. McGuire was brought into the courtroom, and then the following exchange occurred:

Court: Okay. You need to bring him over here to be sworn in. Right here. Okay. Right there. No, I'm going to bring in the jury.

Prosecutor: Judge, I object. This is too final. This is not evidence. He physically should not be in the courtroom with the jury. I think this is a court security issue, and I would

say hold him in contempt and get him out of here. I do not want to see the officers tackle him in front of the jury. That's not evidence.

Clerk: Do you want me to swear him in?

Court: You can.

Prosecutor: Judge, I'm not going to call him to the stand now.

Court: What's that?

Prosecutor: I mean, if this is going to be an issue of court security issue, I withdraw him as a witness.

Id. at App. p. 542.

Petitioner avers that the State's indication that it was withdrawing McGuire as a witness was not based on a security concern as represented by the prosecutor, but rather, was based on the prosecutor's belief that the State's case would be harmed if the jury witnessed McGuire non-cooperation. (See App. p. 541, wherein the prosecutor stated "I think this is a court security issue. We do not need a fight in front of the jury, and what takes place until that witness gets on the witness stand is not evidence. What happens on the witness stand is evidence, and this would be highly prejudicial to the state.") Prejudicial to the State or not, this Supreme Court held in Syl. Pts. 3 and 4 of *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977):

3. The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with this position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so doing he must not abandon the quasi-judicial role with which he is cloaked under the law.

4. The standard of fair and impartial presentation required of the prosecutor may become more elevated when the offense charged is of a serious or revolting nature, as it is recognized that a jury in this type of case may be more easily inflamed against the defendant by the very nature of the crime charged.

Thus, a request that the jury not be permitted to see a State witness because it would hurt the State's case would be improper, and as outlined above, Mr. McGuire presented no real security threat.

Additionally, the State's suggestion that Mr. McGuire's presentation in the courtroom could not be considered evidence until he got on the witness stand is also without merit. For example, West Virginia Rule of Evidence 404 provides that evidence of a pertinent trait of character of the victim of the crime offered by an accused, as well as evidence of the character of a witness, as provided in Rules 607, 608 (providing specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility may not be proved by extrinsic evidence), and 609 is admissible. In this case, a pertinent character trait of Mr. McGuire is his propensity for violence (in light of the self-defense evidence presented). What better evidence of that trait would there have been for the jury other than if McGuire had been combative in being brought into the courtroom to take the stand to testify? Likewise, what better evidence would there have been for attacking Mr. McGuire's credibility other than the specific instance of his flippant conduct while being brought *inside* the courtroom?

In sum, either the State called McGuire as a witness (in which case Petitioner's right to confront witnesses against him in the presence of the jury was violated), or the State did not call McGuire as a witness (in which case the jury should have been instructed that the failure of the State to call an available material witness may give rise to the inference that had that witness testified, his/her testimony would have been adverse to the State's case per *State v. James*, 211 W. Va. 132, 563 S.E.2d 797 (2002) (per curiam).)

Furthermore, Petitioner's right to compulsory process afforded to criminal defendants pursuant to the 6th Amendment and article III, section 14 of the West Virginia Constitution was

violated when the defense called McGuire to the stand during its case-in-chief and the jury was again dismissed from the courtroom. See trial transcript at App. p. 802. The very first thing McGuire said that second time he was brought in was “I plead the Fifth.” *Id.* at 803.

Pursuant to *Whitt*, if there is a showing that McGuire’s testimony would have been both material and favorable to the defense; the testimony sought to be compelled by a defendant is exculpatory in nature; and the defendant will be unfairly prejudiced by not allowing the potentially exculpatory witness to invoke the 5th Amendment privilege in the jury’s presence, then the trial court should compel such witness to invoke his or her Fifth Amendment privilege in the presence of the jury. See Syl. Pts. 3, 4, 5 and 7, *Whitt*, supra.

As a threshold matter, Petitioner questions whether this showing is required in his case because the witness who invoked the 5th Amendment privilege was the alleged victim of his crime, rather than a co-defendant. Petitioner reasons that when the alleged victim in a shooting incident (where self-defense is asserted) invokes the 5th Amendment, the invocation of the privilege should automatically be done in the presence of jury because the victim’s pleading of the 5th necessarily implies that he was at fault in some manner during the incident at issue for which the defendant is being charged. It would be unfairly prejudicial to not let the jury see that implicit admission. Why else would he plead the 5th under these circumstances? If somebody else shot him through no fault of his own, why would he not testify against that person?

Even if the *Whitt* requirements were necessary in this case, Petitioner met them. McGuire’s testimony was obviously material in light of the fact he was one of the alleged victims of Petitioner’s crimes and could have testified regarding the basis for the incident between the two men. The testimony would have been exculpatory and favorable to Petitioner to the extent McGuire could have confirmed he was armed with a weapon at the time of the

incident (as both Petitioner and witness Michael Jackson testified.) Finally, by not letting the jury see McGuire plead the 5th the trial court unfairly prejudiced Petitioner because the jury was unable to see McGuire's implicit admission that he held some criminal responsibility in the incident and left the jury to infer a baseless negative conclusion from McGuire's refusal to testify (i.e. that he was scared of Petitioner.)

Under these circumstances, the trial court should not have dismissed the jury to begin with and should have compelled McGuire to invoke the 5th Amendment privilege and refuse to testify in the presence of the jury (which could have simply been accomplished by not dismissing the jury in the first place). See *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), holding:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. at 19; *Taylor v. Illinois*, 484 U.S. 400, 409, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988) (holding "[t]he right to compel the witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact.") (emphasis added); and *State v. Harman*, 165 W.Va. 494, 270 S.E.2d 146 (1980), determining that the trial court had committed reversible error by allowing a witness to refrain from taking the witness stand based on his invocation of a Fifth Amendment privilege and explaining "[B]y universal holding, one not an accused must submit to inquiry (including being sworn, if the inquiry is one conducted under oath) and may invoke the privilege [Fifth Amendment] only after the potentially incriminating question has been put. Moreover, invoking the privilege does not end the inquiry and the subject may be required to invoke it as to any or all

of an extended line of questions." 165 W.Va. at 504, 270 S.E.2d at 153 (quoting McCormick, Evidence § 136 (2d ed.1972).)

The violation of Petitioner's rights in this case is of constitution magnitude and therefore constitutes reversible error "unless it can be shown that the error was harmless beyond a reasonable doubt." *State v. Blair*, 214 S.E.2d 330, 158 W.Va. 647 (1975).

b. The trial court improperly refused to give a negative inference instruction, regarding the lack of testimony and appearance of a witness.

Defense counsel cited *State v. Whitt*, 649 S.E.2d 258, 220 W. Va. 685 (2007) in proposing defendant's jury instruction No. 4 as follows: "Where a witness has no constitutional or statutory right to refuse to testify, jurors are entitled to draw a negative inference from witness' refusal to testify." (See Defendant's Proposed Jury Instructions at App. pp. 104) In refusing to give any such instruction, the trial court reasoned: "I think that the case is not directly on point and also I just think it's kind of confusing, a negative inference from the witness's refusal to testify." See Trial Transcript, 9/5/13, at App. pp. 825-827. Although the *Whitt* Court did not specifically approve of the above-referenced instruction, it did ultimately agree with the defendant's argument that he should not be denied the potential benefit of a witness's silence and was entitled to have the jury draw a negative inference from a witness's refusal to testify. 649 S.E.2d at 266, 270-271. Likewise, Petitioner in this case should not have been denied the benefit of McGuire's potential silence before the jury. And, at the very least, he should have had the benefit of an instruction to the jury that they were entitled to draw an inference *against the State's case* from McGuire's silence.

The one problem with the proposed instruction above is that it does not specify which side the negative inference is allowed to be made against. In the per curiam opinion of *State v.*

James, 211 W. Va. 132, 563 S.E.2d 797 (2002), this Court noted that the “missing witness” instruction approved by this Court in *McGlone v. Superior Trucking Co. Inc.*, 178 W.Va. 659, 363 S.E.2d 736 (1987) for use in civil cases was disapproved of by some other jurisdictions for use in criminal cases – but only to the extent the instruction allowed an adverse inference against the defense (i.e. impermissibly shifting the burden to the defense to produce evidence.) There is no impediment to instructing a criminal jury that “The unjustified failure of the State to call an available material witness may, if the trier of the facts so finds, give rise to an inference that the testimony of the “missing” witness would, if he or she had been called, have been adverse to the State.” Such an instruction should have been given in Petitioner’s case to the extent the State did not call (or called and then withdrew) McGuire and objected to the jury seeing him because “it would be highly prejudicial to the state.” App. p. 541.

Petitioner believes the trial court abused its discretion in refusing to give a negative inference instruction against the State as a result of McGuire not being called as a witness or permitted to be seen by the jury. The jury was left without any guidance on the impact of the McGuire situation and could have easily – and incorrectly – inferred that McGuire refused to testify out of fear of Petitioner. This error resulted in a fundamentally unfair process, entitling Mr. Herbert to a new trial.

III. The trial court committed reversible error by improperly instructing the jury on the doctrine of transferred intent and allowing its application to an attempted murder in the first degree charge/conviction.

The jury was instructed on the doctrine of transferred intent as follows:

If an illegal act, yet unintended act, results from the intent to commit a crime, that act is also considered illegal. Under the doctrine of transferred intent, original malice is transferred from one against whom it was entertained to the person who actually suffers the consequences of the act. For example, if a person intentionally directs force against one person wrongfully, but instead hits another, his intent is

said to be transferred from one to the other and he is liable to the other, though he did not intend that in the first instance.

So, where the State of West Virginia introduces evidence that shows beyond a reasonable doubt that the defendant intended to kill or injure someone under circumstances which you do not believe afforded the defendant excuse, justification or provocation for his or her conduct, but in the course of attempting to commit that crime, accidentally injures or kills another person, the jury may find that the defendant's criminal intent will be transferred to the injured or killed unintentional victim.

See Jury Charge with Instructions at App. pp. 125-147, State's Proposed Jury Instructions at App. pp.71-94. In support of the instruction, the State cited *State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1(1991), which does hold "[t]he doctrine of transferred intent provides that where a person intends to kill or injure someone, but in the course of attempting to commit the crime accidentally injures or kills a third party, the defendant's criminal intent will be transferred." *Id.* at Syl. Pt. 6. However, the extent of the doctrine is not unlimited.¹⁰ It only serves to transfer the *intent* element of any respective criminal charge. The instruction should have been qualified to inform the jury that even if they found a transfer of intent was appropriate with respect to a particular charge (*e.g.* the attempted murder in the first degree of minor AC), they still had to find all the remaining elements of that charge beyond a reasonable doubt (*e.g.* that there was premeditation and deliberation, the victim was person, etc.)

Consider the absurdity that would result if the doctrine of transferred intent served to establish all the elements of a respective crime; for example, attempted murder. If one pulled a

¹⁰ It appears a number of jurisdictions have actually rejected the doctrine's application to attempt crimes, although *Julius* specifically contemplates its usage in such cases. See *e.g.* *Bell v. State*, 768 So.2d 22, 28 (Fla. Dist. Ct. App. 2000), citing *Jones v. State*, 159 Ark. 215, 251 S.W. 690 (1923); *People v. Chinchilla*, 52 Cal. App. 4th 683, 60 Cal. Rptr. 2d 761, 765 (1997); *People v. Calderon*, 232 Cal. App. 3d 930, 283 Cal. Rptr. 833 (1991); *State v. Hinton*, 227 Conn. 301, 630 A.2d 593, 602 (1993); *Ford v. State*, 330 Md. 682, 625 A.2d 984 (1993); *State v. Williamson*, 203 Mo. 591, 102 S.W. 519 (1907); *State v. Mulhall*, 199 Mo. 202, 97 S.W. 583 (1906); *People v. Fernandez*, 88 N.Y.2d 777, 650 N.Y.S.2d 625, 673 N.E.2d 910, 914 (1996); *State v. Shanley*, 20 S.D. 18, 104 N.W. 522 (1905).

gun, pointed it at another person, pulled the trigger with the intent to kill, but missed their target and hit a stray dog, could the doctrine of transferred intent be utilized to convict the shooter of attempted murder? Of course not, because a separate element of the crime of attempted murder is that the intended victim must be *a person*, and there is no legal doctrine that can transfer a dog into a person.

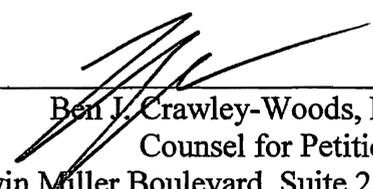
Likewise, the element of premeditation and deliberation is separate and distinct from the malice and intent element of a murder charge. See e.g. Syl. Pt. 5, *State v. Jenkins*, 191 W.Va. 87, 443 S.E.2d 244 (1994) (holding “[in] a homicide trial, malice and intent may be inferred by the jury from the defendant’s use of a deadly weapon, under circumstances which the jury does not believe afforded the defendant excuse, justification, or provocation for his conduct. Whether premeditation and deliberation may likewise be inferred, depends upon the circumstances of the case.) Thus, in order to properly convict Petitioner for the attempted murder in the first degree of minor AC, they would have had to not only transfer Petitioner’s alleged intent to kill McGuire to the minor AC, but also separately determined that Petitioner intended to kill the minor AC after premeditating and deliberating to do so.

Thus, the jury was improperly instructed on the elements of the charge of attempted murder of minor AC, which resulted Petitioner’s conviction on the charge of attempted murder in the first degree on minor AC when there was absolutely no evidence presented that Petitioner ever intended to kill her with premeditation and deliberation.

Conclusion

Petitioner believes the above-discussed errors, both individually and cumulatively, resulted in a constitutionally unfair and unreliable trial process. Petitioner prays this Supreme Court grant him a new trial, as well as any additional relief deemed necessary and proper.

Petitioner, by counsel:

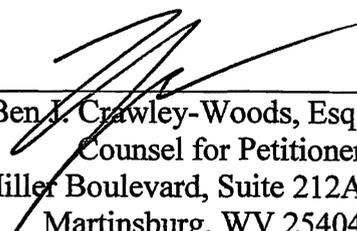


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CERTIFICATE OF SERVICE

I, Ben Crawley-Woods, counsel for Petitioner did serve the foregoing Petitioner's brief along with Appendix by hand-delivering a copy of the same, to the following persons at the following address, on this 7th day of March, 2014:

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