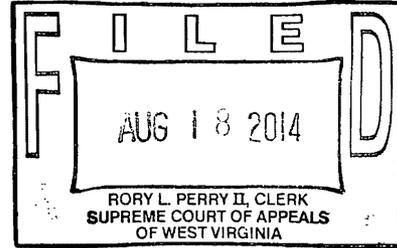

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0437



STATE OF WEST VIRGINIA,

*Plaintiff below,
Respondent,*

v.

ROY DALE MCKEAN,

*Defendant below,
Petitioner.*

SUMMARY RESPONSE

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ATTORNEY GENERAL**

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STATEMENT OF THE CASE

On November 2, 2013, Petitioner Roy Dale McKean, was riding his motorcycle in St. Albans, West Virginia, while carrying a duffel bag full of materials used to make methamphetamine. A West Virginia state trooper noticed that McKean's motorcycle was missing a tail light, and he followed McKean and attempted to pull him over. (Supp. App. 52-53.) McKean refused to pull over, however, and he sped away. (Supp. App. 53.) The pursuit was captured on the trooper's dashboard video camera. (Supp. App. 56.) After McKean turned into a residential neighborhood, McKean hit a bump in the road at a high speed and crashed. (Supp. App. 54.) When the trooper caught up with McKean, McKean resisted arrest by punching and biting the trooper. (Supp. App. 60-61.) It was not until passersby assisted the trooper that he was able to subdue McKean. (Supp. App. 62-63.) Following McKean's arrest, police found the meth-making materials in his duffel bag. (Supp. App. 97-98.) McKean was subsequently indicted on eight counts related to the incident. (Supp. App. 2-5.)¹ His case went to trial on February 10, 2014. (Supp. App. 11.)

McKean's appeal centers on an inappropriate statement made by a prospective juror during jury selection. As part of pretrial voir dire, the prospective jurors were asked whether any of them were "acquainted with Mr. McKean." (App. 4.) Prospective Juror James Elkins responded affirmatively, "I'm employed by the Kanawha County Sheriff's Office. I believe I

¹ The counts of the Indictment were as follows: Fleeing with Reckless Indifference to the Safety of Others, in violation of West Virginia Code § 61-5-17(f); Fleeing on Foot, in violation of West Virginia Code § 61-5-17(d); Operating a Clandestine Drug Laboratory, in violation of West Virginia Code §§ 60A-4-411 and -401; Malicious Wounding of a Government Representative, in violation of West Virginia Code § 61-2-10b(b); Second Offense Battery on a Government Representative, in violation of West Virginia Code § 61-2-10b(c); Obstructing, in violation of West Virginia Code § 61-5-17(a); Possession of Substances to be Used as Precursor for the Manufacture of Methamphetamine, in violation of West Virginia Code § 60A-10-4(d). (Supp. App. 2-5.)

have arrested Mr. McKean in the past.” (App. 4.) The Circuit Court immediately stopped voir dire, called counsel to the bench, and admonished Prospective Juror Elkins for making his statement. (*Id.*) The court excused Prospective Juror Elkins from the jury pool. (App. 5.)

Defense counsel then moved for a new jury pool, arguing that the statement had “obviously tainted the perceptions here of my client.” (App. 6.) The State countered that replacing the entire jury pool was not necessary. Rather, the State suggested that “the Court try to cure it with an instruction and do it that manner [sic] rather than do a whole new jury panel. And if necessary . . . we can do individual voir dire of each juror to determine, to make sure.” (*Id.*) Defense counsel replied, “They may not be able – I mean, I haven’t decided whether I’m going to call him to the stand or not. I mean, his priors may not come in.” (App. 7.)

The court denied the defense motion for a new jury pool and instead gave a curative instruction to the prospective jurors and asked them, collectively, whether any of them were biased by Prospective Juror Elkins’s statement:

All right, ladies and gentlemen, I’m going to instruct you to disregard what that last juror said. Just because one’s arrested doesn’t mean that they are guilty of anything.

Is there any juror here who cannot set that aside and judge this case strictly on the merits of the evidence presented in this case, or is the fact that he was arrested on some prior occasion that we don’t know when or what it was about or any of those circumstances of it, that would so preoccupy you that you would not be able to be fair and impartial to him? And it’s okay to tell me that it’s going to affect your judgment in this case, because that’s what I want to know, if it’s going to impact you in any way.

Is there any juror who that last juror’s statements might impact in any regard?

Okay. The record will reflect that there were no hands raised.

(App. 7-8.) With no bias identified, the court then continued with voir dire. Defense counsel did not object to the court’s instructing the jury as a whole rather than individually, nor did he ask

any additional questions related to this issue of potential bias. Later, during pretrial jury instructions, the court again asked the jury, “Does any member of this jury know of any reason why they couldn’t be fair and impartial in listening to the evidence and deciding the guilt or innocence of the defendant in this case?” (Supp. App. 27-28.) No juror responded affirmatively, and, again, defense counsel did not object.

Trial lasted one day. The jury was able to watch the high-speed chase on video, although McKean’s assault on the state trooper was off-camera. (Supp. App. 41-42.) McKean was convicted on all eight counts of the Indictment. He later filed a post-trial motion for a new trial on a claim of potential jury bias, and that motion was denied. (App. 9-11.) McKean was sentenced to consecutive terms in prison for his convictions. (Supp. App. 1.) This appeal followed.

SUMMARY OF ARGUMENT

McKean does not challenge the manner in which the Circuit Court conducted its voir dire of the jury pool following the statement by Prospective Juror Elkins, but instead argues that the court erred in not striking all of the potential jurors and granting his motion for a new jury pool. Striking the entire jury pool, however, was not required, and McKean’s claim must fail.

It is well-settled that “all that is required by a trial court when it determines that prospective jurors have been exposed to potentially prejudicial information is that the trial court ‘shall question or permit the questioning of the prospective jurors individually, out of the presence of the other prospective jurors, to ascertain whether the prospective jurors remain free of bias or prejudice.’” *State v. Knotts*, 187 W. Va. 795, 421 S.E.2d 917 (1992) (quoting Syl. pt. 1, in part, *State v. Finley*, 177 W. Va. 554, 355 S.E.2d 47 (1987)). Following the potentially prejudicial statement from Prospective Juror Elkins, the Circuit Court gave a cautionary instruction and conducted a voir dire of the prospective jurors as a whole to determine whether

any of them were biased by Prospective Juror Elkins's statement. Although defense counsel initially objected to Prospective Juror Elkins's statement and requested a new jury pool, he never objected to the manner in which the court conducted voir dire, requested that voir dire on this issue be conducted individually rather than collectively, or asked any follow-up questions on his own. And even on appeal, McKean does not challenge the manner in which the post-statement voir dire was conducted; he again claims that the court should have dismissed the entire jury pool. McKean can identify no reversible error, and his appeal must be rejected.

STANDARD OF REVIEW

A trial court's voir dire of prospective jurors is reviewed for an abuse of discretion. Syl. pt. 5, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994); *see also State v. Miller*, 197 W. Va. 588, 601, 476 S.E.2d 535, 548 (1995) ("It is apodictic that we review a trial court's determination as to the scope and method of jury voir dire for an abuse of discretion.").

ARGUMENT

It is axiomatic that every defendant has a right to the meaningful voir dire of potential jurors prior to trial. *Carpenter v. Hyman*, 67 W. Va. 4, 6, 66 S.E. 1078, 1079 (1910). The purpose of voir dire is "to allow litigants to be informed of all relevant and material matters that might bear on possible disqualification of a juror and is essential to a fair and intelligent exercise of the right to challenge either for cause or peremptorily." Syl. pt. 1, *Thornton v. CAMC, Etc.*, 172 W. Va. 360, 305 S.E.2d 316 (2000). Voir dire "must be meaningful so that the parties may be enabled to select a jury competent to judge and determine the facts in issue without bias, prejudice or partiality." *Id.*

But a new jury pool is not required when a prospective juror says something potentially prejudicial about the defendant in front of the other prospective jurors. Instead, "[w]hen a trial

court determines that prospective jurors have been exposed to information which may be prejudicial, the trial court, upon its own motion or motion of counsel, shall question or permit the questioning of the prospective jurors individually, out of the presence of the other prospective jurors, to ascertain whether the prospective jurors remain free of bias or prejudice.” Syl. pt. 1, *State v. Finley*, 177 W. Va. 554, 355 S.E.2d 47 (1987).

In *Finley*, two prospective jurors made prejudicial statements about the defendant in front of other prospective jurors during voir dire. The defense objected and moved for a mistrial, but the circuit court rejected the motion and, without conducting any further voir dire, continued with trial. On appeal, this Court reversed the defendant’s convictions, explaining that “[b]ecause of the limited record before us, we have no way of knowing the effect the responses of [the prospective jurors] regarding the defendant had upon the other jurors. The trial court should have conducted or allowed an individual *voir dire* to ascertain the impartiality of each remaining prospective juror.” *Id.* at 558, 51. This Court has affirmed the *Finley* rule on a number of occasions, most recently, this past term. Syl. pt. 3, *State v. Anderson*, 233 W. Va. 75, 754 S.E.2d 761 (2014) (per curiam).

Here, although the Circuit Court did not conduct individual voir dire, its actions were consistent with the purpose of *Finley* and served “to elicit information which will establish a basis for challenges for cause and to acquire information that will afford the parties an intelligent exercise of peremptory challenges.” Syl. pt. 2, *Michael on Behalf of Estate of Michael v. Sabado*, 192 W. Va. 585, 453 S.E.2d 419 (1994). The court cautioned the jury to disregard Prospective Juror Elkins’s statement, and then it asked whether any prospective juror was prejudiced by the statement. It proceeded with trial only after the jurors denied any bias. Thus, unlike *Finley*, the

record here reflects that the offending statement did not affect the impartiality of the other jurors. Swapping out the entire jury pool was not necessary or required by this Court's precedent.

Again, McKean has not challenged the Circuit Court's method of collective (versus individual) voir dire. He neither objected below nor does he raise it as error in his appeal. Therefore, any such challenge has been waived. *See Barker v. Benefit Trust Life Ins. Co.*, 174 W. Va. 187, 324 S.E.2d 148 (1984) (describing the "raise or waive" rule); *Miller*, 197 W. Va. at 603, 476 S.E.2d at 550 ("[I]t is difficult to perceive how the right to an adequate voir dire can be denied when, given the opportunity, a defendant fails to request additional or supplementary voir dire questions.").

The Circuit Court's voir dire here was proper, and a new jury pool was not required following the offending statement. McKean's claim must therefore fail.

CONCLUSION

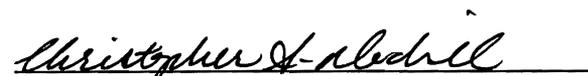
For the foregoing reasons, the judgment of the Circuit Court of Kanawha County, West Virginia, must be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel,

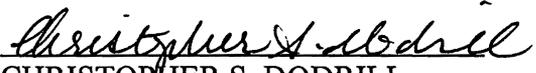
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Counsel for Respondent

CERTIFICATE OF SERVICE

I, Christopher S. Dodrill, counsel for the Respondent, verify I have served a true copy of *Summary Response* upon counsel for the Petitioner by depositing it in the United States mail, with first-class postage prepaid, on August 18, 2014 addressed as follows:

Rick Holroyd, Esq.
Holroyd & Yost
209 West Washington Street
Charleston, WV 25302


CHRISTOPHER S. DODRILL