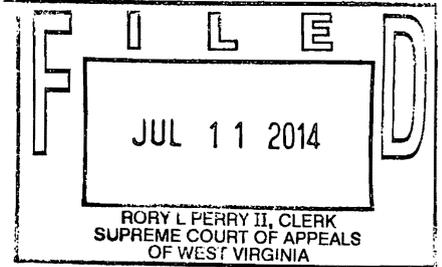


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0173



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

KENNETH SEEN,

Defendant Below, Petitioner.

BRIEF OF RESPONDENT
STATE OF WEST VIRGINIA

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v.

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BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

On August 31, 2012, at Roane General Hospital (“RGH”) in Spencer, West Virginia, Dr. Kenneth Seen (“Petitioner”) committed a battery on John Shafer, a patient at RGH, by placing his tongue inside of Mr. Shafer’s mouth. The facts and circumstances surrounding this battery are as follows:

In August 2012, John Shafer, who was 77 years old at the time, was a long-term care patient at RGH; Petitioner was Mr. Shafer’s attending physician on the long-term-care unit.¹ Trial Tr., Oct. 30, 2013 at 78-79, 84, 100, 249, 250. Around August 27, 2012, Mr. Shafer was transferred from RGH to Cabell Huntington Hospital (“CHH”), where he underwent hip replacement surgery due to a fall. *Id.* at 77-79, 91, 250-51. Following this surgery, on August 31, 2012, Mr. Shafer was

¹ It should be noted that Mr. Shafer died at RGH several months after the incident giving rise to this case occurred. Trial Tr., Oct. 30, 2013 at 157.

transferred from CHH back to RGH, where he was placed on the acute care floor. The purpose of his transfer back to RGH was to provide Mr. Shafer with rehabilitation from his surgery, as well as long-term care. *Id.* at 66-67, 77-79, 81, 250-51.

This same night, August 31, 2012, Dr. Timothy Metzger, a general practitioner, was on call at RGH. *Id.* at 76, 83. As the “on-call” physician, Dr. Metzger was in charge of admitting patients. *Id.* at 83. This night, however, Dr. Metzger did not admit Mr. Shafer to RGH; rather, Petitioner admitted Mr. Shafer. This came about when Petitioner spoke to Dr. Brent Watson, another doctor at RGH, and informed Dr. Watson that he wished to admit Mr. Shafer, as he had taken care of Mr. Shafer when he was on the long-term-care unit, they had developed a relationship with one another, and Petitioner felt that Mr. Shafer would be more comfortable with him. *Id.* at 84, 111, 249. Dr. Watson, in turn, called Dr. Metzger and informed him of the same, which Dr. Metzger found to be a little unusual.² However, hearing this, Dr. Metzger, who was away from RGH at the time, did not come to the hospital to admit Mr. Shafer. *Id.* at 84-85, 100.

On August 31, 2012, Christine Richardson, a registered nurse, was working at RGH on the same floor (acute care floor) that Mr. Shafer was located. At one point, Petitioner came onto the floor and he and Nurse Richardson began conversing with one another. *Id.* at 161-65. During this conversation, Petitioner told Nurse Richardson he was going to go into Mr. Shafer’s room and check on him. *Id.* at 165. In response, Nurse Richardson asked Petitioner whether he wanted her to help him, as Mr. Shafer’s surgery wound and bandage had not been checked. *Id.* Petitioner declined Nurse Richardson’s help and told her that he was just going to do an initial assessment of Mr. Shafer

² It should be noted that, at trial, Petitioner testified that he spoke to Dr. Metzger personally admitting Mr. Shafer to RGH. Trial Tr., Oct. 30, 2013 at 249-50.

and that he would let her know if he needed her. Trial Tr., Oct. 30, 2013 at 165, 186, 188. At this point, at approximately 8:00 p.m., Petitioner went into Mr. Shafer's room, during which time Mr. Shafer bit a portion of Petitioner's tongue off. Immediately thereafter, and without reporting this incident, Petitioner left Mr. Shafer's room, put a chart down on the nurses' station counter, and left the floor in a hurried fashion. *Id.* at 166, 167, 252, 257, 258.

Later, Nurse Richardson again came into contact with Petitioner when he returned to the acute care floor; Petitioner's mouth was covered with a paper towel/washcloth at the time. *Id.* at 168-69. Petitioner then motioned to Nurse Richardson to read what he had typed into his laptop computer, which she did. Charity Spencer, another registered nurse at RGH, who was present at the time, also read Petitioner's laptop. *Id.* at 169, 172, 189-91. Specifically, Petitioner's laptop read that he was doing an assessment of Mr. Shafer, who could not hear him, which prompted Petitioner to move his chair closer. Petitioner's laptop further read that when he bent down, Mr. Shafer grabbed a hold of his tongue and bit it. *Id.* at 169-70. After reading this, Nurses Richardson and Spencer took Petitioner into the closest room (a patient's room) to the nurses' station. *Id.* at 171, 189. In assessing him, Nurses Richardson and Spencer noticed that Petitioner was bleeding from his mouth and that a piece of his tongue was missing. *Id.* at 171-72.

During this same assessment, Nurse Richardson asked Petitioner why he did not come to her when the incident first occurred, to which Petitioner responded that he did not want to frighten her and Nurse Spencer. *Id.* at 173. Instead, as reported by himself to Nurse Richardson, Petitioner left the floor and went to his office at RGH, where he called Dr. Jason Fincham, the emergency room ("ER") physician at RGH. This call actually took place about an hour after the incident, at approximately 9:00 p.m., during which call Petitioner asked Dr. Fincham to work him into the ER.

Id. at 21, 23, 48, 115-16, 173-74. However, Petitioner did not inform Dr. Fincham why he needed to see him. *Id.* at 22, 23. After this call, Dr. Fincham received another panicked call from Nurse Spencer, who informed Dr. Fincham that he needed to come upstairs, as someone had received a laceration. *Id.* at 24-26, 48.

Feeling a sense of urgency, Dr. Fincham went upstairs where he encountered Petitioner, whose tongue had been partially amputated. *Id.* at 21-23, 25-28. Petitioner also had a contusion (bruising, swelling and bleeding) to his lips. Apart from this, Petitioner did not have any other significant injuries. *Id.* at 28-29, 35. In explaining what happened to his tongue, Petitioner told Dr. Fincham that he was seeing a new patient, John Shafer, had gotten close to Mr. Shafer to hear what he was saying, and was licking his lips when Mr. Shafer bit his tongue off and swallowed it. *Id.* at 29-32. Dr. Fincham found this incident, as relayed to him by Petitioner, to be “very unusual.” *Id.* at 37. After providing him with some initial treatment, Dr. Fincham transferred Petitioner to the Charleston Area Medical Center (“CAMC”) for further treatment. *Id.* at 36.

On August 31, 2012, after transferring Petitioner to CAMC, Dr. Fincham examined Mr. Shafer. *Id.* at 36-37, 38, 39. Dr. Fincham found Mr. Shafer to be alert, but confused, disoriented and unable to communicate; Mr. Shafer was also chewing on something, presumably Petitioner’s tongue, at the time. *Id.* at 37, 42. Although he had no visible injuries, Mr. Shafer did have blood around his lips and in his teeth. *Id.* at 39. Because of his underlying arthritic condition, the joints of Mr. Shafer’s hands were swollen, his fingers were drawn inward towards his palms, and he had very poor grip strength. *Id.* at 40-41. Dr. Fincham found that Mr. Shafer did not have the fine motor skills, strength and/or grasping ability to actually hold someone’s tongue. *Id.* at 43-44, 70. In fact, Dr. Fincham found that such an act would be very difficult for an average adult, as the reflexes that it

would take to grab someone's tongue before they brought it back into their mouth would be almost impossible. *Id.* at 44-45. Dr. Fincham likewise found that Mr. Shafer did not have the physical ability to reach up, grab the back of someone's head, pull them down, and then raise up and bite them on the face area. *Id.* at 45-46.

In examining him, Dr. Fincham had to get close to Mr. Shafer to listen to his heart and lungs, as well as to evaluate his hand strength. While doing so, Mr. Shafer did not become agitated with Dr. Fincham, did not raise up towards Dr. Fincham, and did not make any sudden and/or aggressive moves towards Dr. Fincham. *Id.* at 39. This nonaggressive demeanor carried over to Dr. Fincham's examination of the inside of Mr. Shafer's mouth. *Id.* at 46-47.

On this same night, August 31, 2012, Nurse Richardson also checked on Mr. Shafer after the incident. *Id.* at 177. Mr. Shafer was lying quietly in his bed. *Id.* On this night, and thereafter when she provided care to him, Mr. Shafer did not show any aggression towards Nurse Richardson. The same was true of Nurse Spencer when she provided care to Mr. Shafer in the days and weeks after the incident. Trial Tr., Oct. 30, 2013 at 178, 191-92.

On this same night, August 31, 2012, Nurse Richardson also evaluated Mr. Shafer's physical strength and found him to be weak and unable to sit up. In her experience with him, Nurse Spencer found likewise—i.e., Mr. Shafer was elderly, debilitated, and lacked the strength to sit up. *Id.* at 179-80, 182, 192. As found by Nurse Richardson, Mr. Shafer also did not have any real grasping ability, as his hands were very arthritic, stiffened and his fingers were curled inward towards his palms, which also made it difficult for him to open his hands. In fact, in the time that she cared for him, Nurse Richardson never saw Mr. Shafer extend or open his fingers. *Id.* at 181. Furthermore, as found by Nurse Richardson, given his lack of strength, Mr. Shafer was unable to grab a hold of

anyone and pull them down. Again, Nurse Spencer found likewise—i.e., Mr. Shafer’s hands were contracted and he did not have the ability to grab or hold someone with his hands. *Id.* at 181-82, 192-93.

Sometime after the incident, on August 31, 2012, April Miles, a Certified Nursing Assistant (“CNA”) at RGH, and another CNA, Angela Scott, went into Mr. Shafer’s room to give him a bath, shave him and brush his teeth, which was a routine procedure at RGH. At the time, Ms. Miles and Ms. Scott did not know about the incident between Petitioner and Mr. Shafer. *Id.* at 127-29, 131, 136. Upon entering his room, Ms. Miles and Ms. Scott saw fresh blood on the floor and on Mr. Shafer’s bedspread. After determining that he was not bleeding, Ms. Miles and Ms. Scott began bathing and shaving Mr. Shafer, as well as brushing his teeth. *Id.* at 129. During this process, Ms. Miles and Ms. Scott discovered and began pulling a meaty, bloody substance out of Mr. Shafer’s mouth. *Id.* at 129-30, 137.

In tending to him, Ms. Miles found Mr. Shafer to be conscious and placid, but unable to move much, confused, not saying anything, and weak. *Id.* at 130, 133, 135. Also, Mr. Shafer’s hands were contracted, he did not move his hands, he had missing fingers on each of his hands, and he was unable to grip or hold anything. *Id.* at 131. In fact, Mr. Shafer could not brush his own teeth, needed assistance in shaving, and could not grip eating utensils and needed assistance in feeding himself. *Id.* at 131-32, 134. Furthermore, during her time with him, Mr. Shafer did not act aggressively towards Ms. Miles. *Id.* at 134. In fact, when Ms. Miles and Ms. Scott were cleaning him, Mr. Shafer was calm, cool and collected. *Id.*

On the night of the incident, August 31, 2012, Mr. Shafer was also under the care of Vicki McNeil, a registered nurse and house supervisor (head nurse) at RGH. Trial Tr., Oct. 30, 2013 at

144, 145-47. Charged with his care, it was Nurse McNeil's job to assist the CNAs in caring for Mr. Shafer, as well as to give his medications to him. *Id.* at 147. In caring for him, Nurse McNeil found Mr. Shafer to be immobile, unable to feed himself on his own, and needing to have his body turned periodically to prevent bedsores. *Id.* at 148, 150, 153. Mr. Shafer's hands were also contracted with his fingers drawn inward towards his palms, he did not have the ability to open his hands, and he could not grab or hold anything. *Id.* at 148-49, 157. In caring for him, Mr. Shafer never acted physically aggressive towards Nurse McNeil and she never felt that she was in danger or threatened by him. *Id.* at 151. In fact, given his overall condition, Mr. Shafer would have been incapable of overpowering Nurse McNeil. *Id.*

The day after the incident, September 1, 2012, Dr. Metzger examined Mr. Shafer. *Id.* at 85. Although he was confused, Dr. Metzger found Mr. Shafer to be conscious and able to communicate. *Id.* at 85, 103. Although he was able to move his arms, Mr. Shafer's physical state was such that he was weak and did not move around very much or very fast. *Id.* at 85-87. In fact, because of his weakened condition, Dr. Metzger did not believe that Mr. Shafer had the strength to reach up and pull someone down. *Id.* at 104. Because of his underlying arthritic condition, Mr. Shafer also had knots on his finger joints and his fingers were curled inward towards the palms of his hands. *Id.* at 86. Furthermore, while being examined, Mr. Shafer did not act physically aggressive towards Dr. Metzger. Nor did Dr. Metzger, in examining him, ever feel intimidated or scared of Mr. Shafer. *Id.* at 87, 105.

Notably, however, Mr. Shafer was not compliant with Dr. Metzger when he attempted to conduct an oral examination of Mr. Shafer's mouth. *Id.* at 97-98. Mr. Shafer also became upset in speaking with Dr. Metzger about the incident between himself and Petitioner. *Id.* at 87, 92-96.

Specifically, when asked about the incident, Mr. Shafer indicated to Dr. Metzger that something had happened between himself and Petitioner, but Mr. Shafer refused to talk about it and stated that he did not want to dwell on it. At this point, Dr. Metzger did not question Mr. Shafer any further about the incident. *Id.* at 96-97, 101-02. Lastly, when Dr. Metzger was informed of what happened between Petitioner and Mr. Shafer, Dr. Metzger found the whole incident, as did the other employees at RGH, to be “bizarre.” *Id.* at 89-91.

After the incident, RGH conducted an investigation into the matter. *Id.* at 107. Douglas Bentz, the Chief Executive Officer (“CEO”) of RGH, took part in this investigation. *Id.* at 106-08. As part of his investigation, Mr. Bentz called Petitioner on September 1, 2012. *Id.* at 108. During this phone conversation, Petitioner reported that the incident occurred as he was leaning over to hear what Mr. Shafer was saying, when Mr. Shafer grabbed the back of his neck and bit his tongue. *Id.* at 109. Following this call, Petitioner and Mr. Bentz met with one another in Mr. Bentz’s office at RGH on September 7, 2012. *Id.* at 109-10. During this meeting, Petitioner reported that the incident occurred when he went into Mr. Shafer’s room to admit and examine him, leaned over to hear what Mr. Shafer was saying, at which point Mr. Shafer grabbed the back of his neck/head with one hand, reached up with his other hand and grabbed his tongue, pulled Petitioner towards himself, and bit Petitioner’s tongue. *Id.* at 111-12, 122, 124, 126.

Following the incident, on September 18, 2012, Mr. Shafer’s daughter, Yvonne Wright, filed a criminal complaint with the West Virginia State Police. Trooper Frederick Hammack, of the State Police, was the investigating officer for the case. *Id.* at 194-95, 201-03, 206. On October 1, 2012, as part of his investigation, Trooper Hammack went to see Mr. Shafer at RGH. *Id.* at 196-97, 199-200, 206. Upon his arrival at RGH, Trooper Hammack found Mr. Shafer unable to speak, but having

a pleasant demeanor about him. *Id.* at 197. When he went to shake his hand, Trooper Hammack noticed that Mr. Shafer did not have any grip whatsoever. *Id.* at 197-98. In looking at his hands, Trooper Hammack also noticed that the knuckles of Mr. Shafer's hands were bent, with his fingers pointing inward towards his body. *Id.* at 200-01. Trooper Hammack also found Mr. Shafer to be "as frail . . . a human being as [he had] ever attempted . . . to speak to about anything." *Id.* at 198.

On March 18, 2013, the prosecution filed a one count Information against Petitioner charging him with battery. J.A. 3.

Petitioner's bench trial took place on October 30 and 31, 2013, and ended with the circuit court ("court") convicting Petitioner of battery. As part of this battery conviction, the court found that the crime was sexually motivated. Trial Tr., Oct. 31, 2013 at 15-16.

On December 16, 2013, the court suspended Petitioner's sentence, placed him on probation for two years, and ordered him to perform 300 hours of community service. The court further ordered that Petitioner register as a sex offender for 10 years and pay a \$500 fine, as well as other costs and fees, i.e., court costs, probation supervision fees, and community correction fees. Sentencing Hr'g Tr., Dec. 16, 2013 at 18-19. Thereafter, Petitioner brought the current appeal.

II.

SUMMARY OF ARGUMENT

The underlying charge for which Petitioner was tried and convicted was battery—not sexually motivated battery. At trial, Petitioner was able to defend himself against this underlying battery charge. Thus, the lack of pretrial notice that Petitioner was subject to a finding of sexual motivation did not rise to the level of plain error, as the lack of this pretrial notice did not affect Petitioner's substantial rights.

The court's sexual motivation finding in this case was not based on mere speculation. Before making this finding, the court thoroughly reviewed and analyzed the evidence. Also, before making this finding, the court found that Petitioner was guilty of battery, as he did stick his tongue in John Shafer's mouth. After so finding, the court logically concluded that this act was sexually motivated, as there was no other reason for such act, apart from Petitioner's own sexual gratification.

The court's conviction of Petitioner on the underlying battery charge was not based on insufficient evidence. Rather, this evidence, along with the reasonable inferences to be drawn therefrom, showed that Petitioner stuck his tongue in Mr. Shafer's mouth, which act certainly qualifies as a battery.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State does not believe that oral argument is necessary in this case, as "the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument." Rev. R.A.P. 18(a)(4). However, it appearing that Petitioner has requested oral argument, *see* Pet'r's Br. 8, and if so ordered by the Court, the State will be there to respond. The State, of course, defers to the discretion and wisdom of the Court on this point, as well as the Court's election to issue a memorandum decision or opinion in this case.

IV.

ARGUMENT

- A. **THE LACK OF PRETRIAL NOTICE THAT HE WAS SUBJECT TO A FINDING THAT HIS ACTIONS WERE SEXUALLY MOTIVATED DID NOT AFFECT PETITIONER'S SUBSTANTIAL RIGHTS, AS PETITIONER WAS STILL ABLE TO DEFEND HIMSELF AGAINST THE UNDERLYING CHARGE, WHICH WAS BATTERY—NOT SEXUALLY MOTIVATED BATTERY. THEREFORE, CONTRARY TO PETITIONER'S CONTENTION, THE LACK OF PRETRIAL NOTICE DID NOT RISE TO THE LEVEL OF PLAIN ERROR.**

“In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.”

Syl. Pt. 2, *State v. Hinchman*, 214 W. Va. 624, 591 S.E.2d 182 (2003) (quoting Syl. Pt. 2, *Walker v. West Virginia Ethics Comm’n*, 201 W. Va. 108, 492 S.E.2d 167 (1997)).

With this standard of review in place, W. Va. Code §§ 15-12-2(b) and (e)(1), as read together, provide that any person who has been convicted of a “qualifying offense” must register as a sex offender.³ Under W. Va. Code § 15-12-2(c), for all other crimes for which a person has been convicted and the sentencing judge has made a written finding that the offense was “sexually motivated,” such person shall also register as a sex offender. Furthermore,

[i]n order for a sentencing judge to make a finding pursuant to W. Va. Code, 15-12-2(c) [2001] that a defendant who has been convicted of a criminal offense that is not specifically identified in the Sex Offender Registration Act at W. Va. Code, 15-12-2(b) [2001]—after a trial or by means of a plea of guilty or *nolo contendere*—was “sexually motivated” in the commission of that offense, the defendant must have been advised prior to trial or the entry of a plea of the possibility of such a finding.

³ These “qualifying offenses” are identified in W. Va. Code § 15-12-2 (b)(1), (2), (3), (4), (5), (6) and (7).

Syl. Pt. 1, *State v. Whalen*, 214 W. Va. 299, 588 S.E.2d 677 (2003).

In the instant case, Petitioner was convicted of battery, in violation of W. Va. Code § 61-2-9(c). Battery is not a qualifying offense, as contemplated by W. Va. Code §§ 15-12-2(b) and (e)(1). Thus, this offense falls under W. Va. Code § 15-12-2(c), which requires, pursuant to *Whalen*, that a defendant must be advised prior to trial of the possibility that the sentencing judge may find that the offense was sexually motivated. Here, Petitioner was not made aware prior to trial that he was subject to such a finding, as the prosecution's notice that it was seeking such a finding from the court actually came on the first day of Petitioner's trial, during the prosecutor's opening statement. Trial Tr., Oct. 30, 2013 at 12. Given this, the State will not waste the Court's time in arguing that Petitioner was given pretrial notice in this case that he was subject to a finding that his offense was sexually motivated, as such pretrial notice did not occur and any argument to the contrary would be disingenuous and futile at any rate.

However, once the notice came, during the prosecutor's opening statement, that he was subject to a finding that his battery upon the victim, John Shafer, was sexually motivated, Petitioner⁴ did nothing. That is, Petitioner did not object to the prosecution's proposal that the court find that Petitioner's battery upon Mr. Shafer was sexually motivated; nor did Petitioner ask the court for a continuance so as to allow him some time to reflect upon and prepare to defend this allegation. Instead, the case proceeded on to trial, at the end of which Petitioner was convicted of battery, which battery the court found to be sexually motivated. Furthermore, even after the court made this sexual motivation finding, Petitioner did not object to such finding. *See generally* Trial Tr., Oct. 31, 2013 at 15-16. The same is true when the court ordered that Petitioner register as a sex offender. *See*

⁴ By "Petitioner," the State is, of course, referring to Petitioner's counsel.

generally Sentencing Hr'g Tr., Dec. 16, 2013 at 19.

Because of his failure to do anything at the, if you will, “moment of truth,” Petitioner has waived any error on the court’s part in finding that his battery upon Mr. Shafer was sexually motivated, although he did not receive pretrial notice that he was subject to such a finding. Generally, so too has been the finding of this Court in other cases. *See State v. Whittaker*, 221 W. Va. 117, 131, 650 S.E.2d 216, 230 (2007) (“Ordinarily, a party must raise his or her objection contemporaneously with the trial court’s ruling to which it relates or be forever barred from asserting that that ruling was in error.”); *State v. Proctor*, 227 W. Va. 352, 359, 709 S.E.2d 549, 556 (2011) (“This Court has consistently held that ‘silence may operate as a waiver of objections to error and irregularities at the trial which, if seasonably made and presented, might have been regarded as prejudicial.’”); *State v. Myers*, 204 W. Va. 449, 456, 513 S.E.2d 676, 683 (1998) (“This Court has held that ‘[w]here objections were not shown to have been made in the trial court, and matters concerned were not jurisdictional in character, such objections will not be considered on appeal.’”).

Here, to get around all of this, Petitioner asserts that his failure to object to the lack of pretrial notice that he was subject to a finding that his battery upon Mr. Shafer was sexually motivated constitutes plain error and thus is reviewable by this Court. *See generally* Pet’r’s Br. 9-12. The State disagrees.

As the Court is well aware,

[t]he raise or waive rule is not absolute where, in extraordinary circumstances, the failure to object constitutes plain error. The plain error doctrine grants appellate courts, in the interest of justice, the authority to notice error to which no objection has been made. Under plain error, appellate courts will notice unpreserved errors in the most egregious circumstances. Even then, errors not seasonably brought to the attention of the trial court will justify appellate intervention only where substantial rights are affected.

Whittaker, 221 W. Va. at 131 n.18, 650 S.E.2d at 230 n.8 (internal quotations and citations omitted).

“To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

Syl. Pt. 7, *State v. LaRock*, 196 W. Va. 294, 299, 470 S.E.2d 613, 618 (1996).

Assuming that an error is “plain,” the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. Normally, to affect substantial rights means that the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court.

Miller, 194 W. Va. at 18, 459 S.E.2d at 129.

In asserting that his failure to object is excepted by the plain error doctrine, Petitioner argues that all four of the prongs of this doctrine, as enunciated by the Court in *Miller, supra*, are met in this case. *See generally* Pet’r’s Br. 11-12. More specifically, Petitioner argues as follows:

The error was plain. There is no factual dispute that pretrial notice was not provided. The failure of notice affected Petitioner’s substantial rights; his right to notice of the nature of the case, the elements the prosecution had to prove, and what he needed to defend. He needed to know so he could prepare to defend himself. Dr. Seen defended the battery case involving an alleged insulting or provocative physical contact. The crime of battery, however, does not encompass an essential element that is “explicitly sexual.” Review of the trial transcript demonstrates that the defense did not plan to, and did not offer at trial, evidence calculated to counter a claim of sexual motivation. For example, had the State provided pretrial notice as required by Whalen, Petitioner could have considered developing qualified expert evidence to prove he was not attracted to men, or to elderly or ill men, and that he would not get sexual gratification from kissing such a person. Petitioner could have presented

witnesses to testify about his relevant personal characteristics and conduct. The fact that Petitioner and his counsel did not offer any evidence to rebut a claim of sexual gratification and sexual motivation proved Petitioner was denied notice. Petitioner, therefore, was profoundly prejudiced by the lack of notice. The fairness of the trial was affected and the Court and public cannot be assured the result was valid or reliable.

Pet'r's Br. 11-12 (footnotes omitted). Again, the State disagrees.

To begin with, as noted above, the State will not waste the Court's time in arguing that Petitioner was given pretrial notice that he was subject to a finding that his battery upon Mr. Shafer was sexually motivated—such notice was not given. Thus, the State agrees with Petitioner that error was committed and that such error was plain. Beyond this, however, the State and Petitioner part company.

Simply put, Petitioner's substantial rights were not affected by the complained of lack of pretrial notice in this case, as Petitioner was tried and convicted of the crime of battery—not sexually motivated battery. Nothing about the lack of pretrial notice prevented Petitioner from defending himself against the crime for which he was tried and convicted—battery. In fact, Petitioner did defend himself against this charge by, among other things, testifying that he was attacked by Mr. Shafer who, in turn, bit off his tongue. Had the court believed Petitioner on this point, then it would have acquitted him of the battery charge. Obviously, had it so acquitted Petitioner, then the court would not have made a sexual motivation finding in this case. Thus, the lack of pretrial notice did not affect Petitioner's substantial rights. The same can be said of the lack of pretrial notice as seriously affecting the fairness, integrity, or public reputation of Petitioner's trial.

As for Petitioner's argument that, had he been given pretrial notice, he could have introduced other evidence—i.e., expert testimony, as well as character evidence testimony—showing that he was

not attracted to men, and certainly not elderly or ill men, and that he would not get any sexual gratification from kissing such a person, the State believes such argument to be disingenuous. The only real defense available to Petitioner in this case was—I didn't do it, I was attacked. Petitioner did put on this defense and the court, and understandably so given the rest of the evidence in the case, did not “buy” it.

B. THE TRIAL COURT'S FINDING OF SEXUAL MOTIVATION, ON THE PART OF PETITIONER, WAS NOT BASED ON MERE SPECULATION. RATHER, THIS FINDING WAS BASED ON THE TRIAL COURT'S COMMONSENSE, REASONABLE INFERENCE AFTER HEARING THE EVIDENCE AND THOROUGHLY REVIEWING AND ANALYZING THE SAME.

“[T]he term ‘sexually motivated’ means that one of the purposes for which a person committed the crime was for any person’s sexual gratification.” W. Va. Code § 15-12-2(j). “The statutory language defining ‘sexual motivation’ at W. Va. Code, 15-12-2(j) [2001] must be read and applied strictly and narrowly to assure that an offense’s gravity, dangerousness, and sexually illicit nature is comparable to that of the specific offenses that are identified in W. Va. Code, 15-12-2(b) [2001].” Syl. Pt. 3, *Whalen, supra*. “The evidentiary standard for a finding of ‘sexual motivation’ pursuant to W. Va. Code, 15-12-2(c) [2001] is proof beyond a reasonable doubt, and a defendant must be given the opportunity to oppose and contest such a proposed finding with evidence and argument.” Syl. Pt. 2, *Whalen, supra*.

With this backdrop in place, the court, in its final ruling, found as follows:

I’m satisfied he [Mr. Shafer] was victimized [by the defendant], and I’m satisfied it was for sexual purposes because there is no other reason for committing an act like this that comes to my mind.

So I’m going to make the findings requested by the State, and it is adjudged that the defendant is guilty of battery, sexually motivated.

Trial Tr., Oct. 31, 2013 at 15-16.

One appeal, Petitioner asserts that this ruling is erroneous and must be vacated, as it is based on speculation, rather than sufficient evidence. *See generally* Pet'r's Br. 13-15. In support of this assertion, Petitioner argues that the court was hampered by the prosecution's failure to notify him prior to trial that it was seeking a sexual motivation finding from the court. This failure, as argued by himself, prevented Petitioner from presenting evidence to rebut such a finding, which the court could have considered. Pet'r's Br. 13. Petitioner additionally argues that the prosecution only presented evidence of battery, which evidence only raised the possibility that this offense was sexually motivated. Pet'r's Br. 13. Petitioner further argues that the court made its ruling in the absence of other evidence proving sexual motivation and without making any further findings or analysis that support such sexual motivation finding. *Id.* Backing this up, Petitioner argues that there was no consideration, analysis or finding, on the part of the court, concerning sexual motivation being present in this case other than the court's inability to comprehend another reason for his actions. *Id.* As part of his overall argument that the court's sexual motivation finding was speculative, Petitioner also argues that the court failed to strictly and narrowly interpret and apply the definition of "sexual motivation," as given in W. Va. Code § 15-12-2(j). More specifically, as further argued by Petitioner, the court failed to compare the gravity, dangerousness and sexually explicit nature of the offense in the current case with the sexual offenses listed in W. Va. Code § 15-12-2(b). In other words, as additionally argued by Petitioner, the court violated syllabus point 3 of *Whalen, supra*. *See generally* Pet'r's Br. 13-14.

Again, the State will not waste the Court's time in arguing that the trial court made a detailed comparison between the conduct/action of Petitioner in this case, i.e., sticking his tongue in Mr.

Shafer's mouth, with the sexual offenses listed in W. Va. Code § 15-12-2(b). To make any such argument would, again, be disingenuous and futile at any rate. Thus, the State agrees with Petitioner on this point. However, the State disagrees with Petitioner that the court's sexual motivation finding in this case was based on nothing more than speculation. First, before making this finding, as readily admitted by Petitioner, the court "engaged in a thorough review and analysis of the evidence." Pet'r's Br. 13. *See also generally* Trial Tr., Oct. 31, 2013 at 3-16. Also, before making this finding, the court found that Petitioner was guilty of battery, as he did indeed stick his tongue in Mr. Shafer's mouth. After finding such, the court took the next logical step of concluding that this act was sexually motivated, as there was no other reason for such act. This Court should find that the trial court's conclusion on this point is well taken, as there was no other reason for Petitioner to stick his tongue in Mr. Shafer's mouth, apart from his own sexual gratification. One thing is for certain, he sure didn't do it for "kicks" or as a practical joke. In other words, as poignantly stated by the court, "you can't throw your commonsense out the window here." Trial Tr., Oct. 31, 2013 at 4. This is exactly what happened here—the court carefully listened to, reviewed and analyzed the evidence presented at trial, and then used some "good ol'" commonsense and reasonably inferred that Petitioner's act of sticking his tongue in Mr. Shafer's mouth was sexually motivated.

[W]hen a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt.

LaRock, 196 W. Va. at 304, 470 S.E.2d at 623 (footnote omitted).

C. CONTRARY TO HIS CONTENTION, THE TRIAL COURT'S FINDING THAT PETITIONER WAS GUILTY OF BATTERY WAS SUPPORTED BY SUFFICIENT EVIDENCE.

Petitioner stands convicted of battery in violation of W. Va. Code § 61-2-9(c). This provision provides, in pertinent part, that "[i]f any person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of another . . . , he shall be guilty of a misdemeanor[.]" On appeal, Petitioner asserts that the court lacked sufficient evidence to support its conviction of him on this charge. *See generally* Pet'r's Br. 15-17. The State disagrees.

As the Court well knows, and as readily admitted by himself, Petitioner takes on a "heavy burden' in challenging the sufficiency of the evidence supporting the battery charge." Pet'r's Br. 15. The Court, "many times over," has expressed this heavy burden in the following manner:

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Syl. Pt. 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.

Syl. Pt. 3, in part, *Guthrie, supra*.

Bluntly stated, the evidence relied on by the court in convicting Petitioner of battery was more than just sufficient—it was compelling. This evidence, which was thoroughly reviewed and analyzed by the court, can be summed up as follows:

1. On August 31, 2012, Petitioner went into John Shafer's room at RGH, during which time Mr. Shafer bit a portion of Petitioner's tongue off.

2. Rather than immediately reporting this incident and getting medical attention, Petitioner, in a hurried fashion, left the area—i.e., Mr. Shafer's room and the acute care floor where Mr. Shafer was located—and went to his office. There, an hour after the incident occurred, Petitioner called the ER physician (Dr. Fincham) and asked him to work him (Petitioner) into the ER. However, Petitioner did not inform Dr. Fincham why he needed to see him.

3. Thereafter, Petitioner reported the incident and received treatment for his injuries. Petitioner's report of the incident basically consisted of him saying that Mr. Shafer reached up and grabbed a hold of him with his hands, that Mr. Shafer overpowered him by pulling him down, that Mr. Shafer rose up from a lying position, and that Mr. Shafer then bit his (Petitioner's) tongue off. Dr. Fincham found this occurrence, as relayed by Petitioner, to be "very unusual." Dr. Metzger, along with the other employees at RGH, likewise found this occurrence, when they were informed of such, to be "bizarre."

4. In speaking to some of the employees of RGH, Petitioner gave varying and inconsistent accounts of his story. Specifically, Petitioner told Nurses Richardson and Spencer, by way of showing them what he had typed into his laptop, that the incident occurred when he was doing an assessment of Mr. Shafer, who could not hear him, which prompted Petitioner to move his chair closer. Petitioner further told Nurses Richardson and Spencer that when he bent down, Mr.

Shafer grabbed a hold of his tongue and bit it. In explaining what happened to his tongue, Petitioner told Dr. Fincham that he was seeing Mr. Shafer, had gotten close to Mr. Shafer to hear what he was saying, and was licking his lips when Mr. Shafer bit his tongue off and swallowed it. Petitioner, on two occasions, also spoke with the CEO of RGH, Mr. Bentz. During their first conversation, Petitioner told Mr. Bentz that the incident occurred as he was leaning over to hear what Mr. Shafer was saying, when Mr. Shafer grabbed the back of his neck and bit his tongue. During their second conversation, Petitioner told Mr. Bentz that the incident occurred when he went into Mr. Shafer's room to admit and examine him, leaned over to hear what Mr. Shafer was saying, at which point Mr. Shafer grabbed the back of his neck/head with one hand, reached up with his other hand and grabbed his tongue,⁵ pulled Petitioner towards himself, and bit Petitioner's tongue.

5. Simply put, as clearly reflected by the reports of numerous persons at RGH, Mr. Shafer did not have the mental and/or physical wherewithal to carry out such acts. These persons included two doctors (Drs. Fincham and Metzger), three registered nurses (RNs Richardson, Spencer and McNeil), two certified nursing assistants (CNAs Miles and Scott), as well as the police officer in charge of investigating the case (Trooper Hammack).

6. Again, as reflected by the reports of these persons, Mr. Shafer was completely mentally and physically debilitated and did not have the ability to carry out such acts. That is, from a mental standpoint, although conscious, Mr. Shafer was confused, disoriented and unable to communicate. From a physical standpoint, Mr. Shafer was in such a weakened overall condition,

⁵ At trial, Petitioner attempted to explain away this near impossible act of Mr. Shafer grabbing his tongue with his hand as being a poor choice of words on his part, and that what he was trying to convey was that Mr. Shafer grabbed his tongue with his teeth. Trial Tr., Oct. 30, 2013 at 270, 271.

and suffered from an arthritic condition of the hands, such that he did not have the ability to grab a hold of someone with his hands, pull them down, and then raise up from his bed and bite their tongue off.

7. Furthermore, during their interactions with him, Mr. Shafer did not act aggressively towards, "let alone" attack, any of the above-named persons on the day of the incident or, for that matter, at any time before or after the incident.

Based on all of this evidence, and much more, including the reasonable inferences to be drawn the evidence, the court, and correctly so, convicted Petitioner of battery. Despite this, Petitioner asserts in this appeal that the court lacked sufficient evidence to convict him of battery. In his quest to convince this Court of this so-called "insufficient evidence," Petitioner points to several instances, all of which involve weight and credibility matters, which matters were for the court, as the trier of fact in this case, to determine.

At any rate, to show that the condition of Mr. Shafer's hands did not prevent him from grabbing him (Petitioner), Petitioner first points to an incident, as characterized by himself, where Mr. Shafer, hours before biting his tongue off, grabbed a hold of a pair of T.E.D. hose ("stockings")⁶ with his hands, stuffed them in his mouth, and would not let them go. Pet'r's Br. 15-16. However, Petitioner fails to inform the Court that the nurse, Susan Lane, and aide, Hannah Wilson, that saw and were involved in this incident were able to get Mr. Shafer, in a short period of time, to release the stockings with relative ease. Specifically, with a little coaxing, Mr. Shafer allowed Ms. Lane and Ms. Wilson to remove the stockings from his mouth, and they had little trouble in taking the

⁶ T.E.D. hose are actually stockings which are placed on a person's legs to give support and promote circulation. Trial Tr., Oct. 30, 2013 at 184, 221, 227, 234.

stockings from Mr. Shafer's hands. *See generally* Trial Tr., Oct. 30, 2013 at 222-23, 225, 231, 236, 241-42.

Petitioner also makes much of some prior incidents between Mr. Shafer and the staff on the long-term care unit at RGH, where Mr. Shafer exhibited verbal and physical agitation, vivid sexual hallucinations, made sexual comments and verbal threats, told one staff woman that she looked like one of his ex-wives and asked her for a gun, and touched another staff woman's breast. Petitioner complains that the court did not discredit these incidents, but disregarded them as being remote in time to the incident giving rise in this case. Again, these incidents involve issues of credibility and weight, which were for the court to determine. In determining such, the court correctly found as follows:

Now, there was evidence while he [Mr. Shafer] was on the extended care unit of agitated behavior, somewhat aggressive behavior, of sexual comments. If you -- there was put into evident [sic] these behavior flow charts for a 12-month period. If you look at those carefully, you could see that for the last several months leading up to the date that this incident occurred, that there was little, if any of this sort of aggressive conduct noted in these charts. Julie Carr who did the investigation here and gave that to Mr. Bentz also noted that in her report.

Trial Tr., Oct. 31, 2013 at 7.

On appeal, Petitioner also argues as follows:

The trial court found Mr. Shafer could not communicate. However, Dr. Metzger testified that when he examined Mr. Shafer on September 1, 2012, he asked Mr. Shafer whether he had seen Dr. Seen last night, and whether something had happened. Mr. Shafer answered yes to both questions. When Dr. Metzger asked Mr. Shafer "What happened?" Mr. Shafer refused to answer, saying "I really don't want to dwell on it." This statement could be read to imply guilt or innocence.

Pet'r's Br. 16 (citations omitted).

To begin with, the court's finding that Mr. Shafer could not communicate is correct, as most

of the persons who interacted with Mr. Shafer on the day of the incident, and thereafter, found likewise. Furthermore, the State is at "a bit of a loss" in trying to understand Petitioner's point. In other words, if Mr. Shafer's statement can be read to imply guilt or innocence, then anyone, such as the trial court and this Court, could find that the statement points to Mr. Shafer's innocence in this whole "affair." At any rate, what to make of this statement was, again, a matter for the court.

Lastly, Petitioner argues that the court "pushed aside" evidence establishing his innocence. In making this argument, Petitioner takes issue with the court's conclusion that he engaged in a cover-up following the incident. Based on his trial testimony, Petitioner argues that his actions after the incident were due to him being humiliated and concerned with the possible professional consequences of having his tongue bitten. Petitioner acknowledges that he made varying statements after the incident, but argues the court focused too finely on his precise words and found inconsistencies, when it was equally likely that he, over the course of time and in different physical and emotional states, tried to accurately relate what happened during the incident, but did vary in his choice of words. Pet'r's Br. 17.

Once again, these matters were for the court and it used a very reasonable and commonsense approach in addressing them. For example, as part of his assessment of these matters, the court found as follows:

I listened to Dr. Seen's lengthy testimony, and I read the reports here. I noted the inconsistencies in statements made by Dr. Seen to various officials about what had happened, and I come back to application of what I think is just commonsense.

I mean, I think it is highly unusual, highly bizarre that a physician in these circumstances could get the tip of their tongue bitten off. . . . [T]he attending physician at Roane General said one-half to three-quarters of an inch of the man's tongue was bitten off but he didn't see him [the attending physician] for an hour. He didn't see him for at least an hour after the event[.]

Trial Tr., Oct. 31, 2013 at 8-9.

I am of the opinion that when Dr. Seen left Mr. Shafer's room that night, . . . his actions there afterwards were simply designed to cover-up what had happened. That is the consistent explanation from the uncontradicted evidence in this case.

Id. at 9.

If this had happened as Dr. Seen suggest in his testimony, there would have been, maybe, an outcry; if not, when he came out of the room, he knew he was injured, . . . there was blood on the floor, there was blood on the man's [Mr. Shafer's] bedspread. He knows he is injured. He didn't say a thing, didn't report this at all to this lady. On the contrary, he sets the chart down and wheels away, wheels away from where this RN was and walks quickly down the hall.

Id. at 10.

And there's an hour delay here. And I think what happened is he immediately goes back to his office and the cover-up continues with the computer. He is coming up with a story about what had happened here, how he can rationally explain to hospital staff, hospital administration, how this happened.

Id. at 11.

In short, the court's analysis and findings on these matters were "on the money."

V.

CONCLUSION

Petitioner's conviction for battery, the trial court's finding that Petitioner was sexually motivated in committing this battery, and the court's order that Petitioner register as a sex offender should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,

Respondent,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0173

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

KENNETH SEEN,

Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

I, Benjamin F. Yancey, III, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *Brief of Respondent State of West Virginia* upon Petitioner's counsel by depositing said copy in the United States mail, with first-class postage prepaid, on this 11th day of July, 2014, addressed as follows:

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