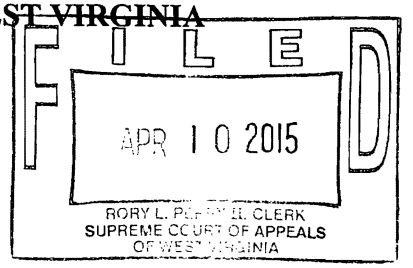
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



NO. 13-0421

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

vs.

WILLIAM F. FYKES,

Defendant Below, Petitioner.

BRIEF ON BEHALF OF THE RESPONDENT

PATRICK MORRISEY
ATTORNEY GENERAL

LAURA YOUNG
DEPUTY ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: (304) 558-5830
State Bar No. 4173
Email: Laura.Young@wvago.gov

Counsel for Respondent

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE 1

II. SUMMARY OF THE ARGUMENT 11

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION 13

IV. ARGUMENT 14

A. The circuit court did not err in how it handled the jury question 14

B. The prosecuting attorney did not comment impermissibly upon the petitioner's prearrest silence. As the comments were not only not objected to, but amplified in redirect, under the plain error standard, there was no reversible error. Further, in view of the petitioner's theory of the case and the overwhelming evidence against the petitioner, the questions were harmless beyond any doubt 20

V. CONCLUSION 27

TABLE OF AUTHORITIES

CASES **Page**

State v. Boso,
182 W. Va. 701, 391 S.E.2d 614 (1990) 20
State v. Bowling,
232 W. Va. 529, 542-43, 753 S.E.2d 27, 40-41 (2013) *cert. denied*, 134 S. Ct. 1772, 188 L. Ed.2d 603 (2014) 26
State v. Davis,
220 W. Va. 590, 595, 648 S.E.2d 354, 359 (2007) 17
State v. Donley,
216 W. Va. 368, 607 S.E.2d 474 (2004) 18
State v. England,
180 W. Va. 342, 376 S.E.2d 548 (1988) 23-24
State v. Guthrie,
194 W. Va. 657, 461 S.E.2d 163 (1995) 16
State v. LaRock,
196, W. Va. 294, 470 S.E.2d 613 (1996) 24
State v. Miller,
194 W. Va. 3, 17, 459 S.E.2d 114, 128 (1995) 23
State v. Ramsey,
209 W. Va. 248, 545 S.E.2d 853 (2000) 21
State v. Woods,
2013 WL 2157813, West Virginia Supreme Court of Appeals, Memorandum Decision, May 17, 2013 in No. 12-1409 19

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0421

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

vs.

WILLIAM F. FYKES,

Defendant Below, Petitioner.

BRIEF ON BEHALF OF THE RESPONDENT

The petitioner's brief on appeal asserts two errors: (a) that the circuit court improperly refused to give additional instruction to the jury in response to a question propounded to the court; and (b) under the plain error standard whether a line of questioning by the prosecutor about the petitioner's late revelation of the "staged" robbery was a comment on the petitioner's post-arrest silence, error of constitutional dimension, and not harmless beyond a doubt. The respondent replies that neither assertion constitutes reversible error.

I.

STATEMENT OF THE CASE

The petitioner was indicted by the grand jury of Cabell County for the following offenses, all arising from one incident on or about January 1, 2012: Count I, first degree robbery with the use of a firearm of Joseph Campigotto; Count II, kidnapping of Joseph Campigotto; Count III, first degree robbery of Eric Gorczyca by violence and with the use of a firearm; Count IV, kidnapping of Mr. Gorczyca, Count V, malicious wounding of Mr. Gorczyca, by striking,

stomping and grabbing; Count VI, first degree robbery of Keith Combs, Count VII, kidnapping of Mr. Combs; and Count 8, malicious wounding of Mr. Combs.

The defense from the beginning was that the robbery (and the other offenses) were staged. (App. vol. II at 77.) Further, that the police investigation was "lax" (*id.* at 81) and there were many other steps the police could have taken which would have yielded different results. (*Id.*) To that end, the defense wanted to call officers (none of whom were involved in the instant case) who had investigated a staged robbery at another time, of another business. (*Id.*) Although opening statements are not evidence, the defense started off by informing the jury that "this whole thing was staged." (*Id.* at 277.) Further, "you're going to see that the police did next to nothing to thoroughly investigate the case." (*Id.*) ". . . the police did nothing. They did nothing. They didn't even keep vital pieces of evidence they should have kept . . . you're going to realize that it had to be staged." (*Id.* at 284.)

Kenneth King was a bartender at the Stonewall, a nightclub in Huntington. (*Id.* at 286.) The bar closed at approximately 3:00 in the morning on January 1, 2012. (*Id.* at 287.) Mr. King left the bar around 3:30 after closing up. (*Id.* at 294.) He encountered the petitioner after he left through the employee's exit and started his car; they had a conversation about Mr. King's car having a misfiring plug. (*Id.* at 294-95.) Mr. King could not leave because his car was blocked by "Keith", the bar owner, (Mr. Combs). (*Id.* at 298-99.) Mr. King reentered the bar, and heard shouting. When he entered the show bar, Mr. Combs told Mr. King "We are being robbed." (*Id.* at 299.) A person said something like get over here, but Mr. King turned and left the bar. (*Id.* at 300.)

Officer Steve Fitz responded to a call of a robbery at the Stonewall. (*Id.* at 315.) The call came in from someone outside; an individual had run out of the bar saying they were being

robbed. (*Id.* at 317.) As he was responding, the officers were informed that the robbery was in progress, with the robber still inside the bar. (*Id.* at 318.) An officer could hear arguing from inside the bar. (*Id.* at 320.) One black male had three white males moving towards the door; the white males had their hands up. (*Id.*) A black male "runner" came out of the bar, and "just dropped a gun in a puddle." (*Id.* at 331.) The officers tried to get the individual to stop, let me see your hands, but the individual kept walking towards the police. An officer tried physically to stop him, and the person said "You're going to have to kill me." (*Id.* at 333.) The black male started running west. (*Id.*) From the time Officer Fitz arrived on the scene until the black male was running was a little over an hour. (*Id.* at 337.)

Officer Richard Kern also responded to the robbery. (*Id.* at 351.) Sometime after he arrived, an individual came out of the bar and started walking towards the police. He was repeatedly told to show his hands and stop. The individual told Officer Kern that the officer was going to have to kill him. (*Id.* at 354.) The officer tried to restrain the individual, who started running, with the officer following. (*Id.*) As the person was running, he dropped a white bag and a gun. (*Id.* at 356.) The petitioner was the individual who left the club carrying a bag and a gun; dropped those; and also told Officer Kern that the officer would have to kill him. (*Id.* at 360.)

Dr. Yung treated one of the victims, Keith Combs. (*Id.* at 371.) As part of his medical treatment, he obtained a history so he could determine what tests are needed for evaluation, to determine the area of injury, and if the person needs admitted for observation. (*Id.* at 374.) Keith Combs told the doctor he had been hit in the face with a gun. (*Id.* at 375.) Mr. Combs also stated to another doctor that he had been hit in the face with the butt of a gun during an armed robbery. (*Id.* at 376.) Mr. Combs had a black eye, and possibly a subdural hematoma. If a

subdural hematoma is large enough and severe enough, it can cause death. (*Id.* at 376-77.) No confirming test was done because the patient left. (*Id.* at 378.)

Sergeant Lucas responded to the robbery as a member of the SWAT team. (*Id.* at 382.) The victims were behind a locked door, which they opened after the SWAT team entered the building and announced their presence. (*Id.* at 392.) Two people were lying on the floor with their hands bound. (*Id.* at 393.) One was bleeding heavily from his head, the other appeared to have significant facial injuries. The officer said the injuries were "that severe." (*Id.* at 394.) The person who opened the door was scared and one person on the floor was unresponsive. (*Id.* at 398.)

Keith Combs owned the Stonewall. (*Id.* at 425.) Eric Gorczyca was the DJ; Joey Campigotto a manager. (*Id.* at 427-28.) The bar closed at three in the morning. The money was put in bags and then into the safe. (*Id.* at 430.) There were security cameras covering the inside and outside of the bar, upstairs and downstairs. (*Id.* at 433-36.) The employee door was not locked after the last of the employees had left. (*Id.* at 438.) The money made that night, some $20,000, was put in the safe. (*Id.* at 439.)

As they were closing, the petitioner entered and was told he had to leave. (*Id.* at 441.) Neither Mr. Combs nor Joey had much, if anything to drink that night; Eric was intoxicated. (*Id.* at 443.) The petitioner pulled out a gun and started yelling. (*Id.*) The petitioner moved them to the spotlight stand and hit Eric with the gun. The petitioner said it was a robbery and asked about the money. (*Id.* at 444.) Mr. Combs denied having any money and said it had already gone to the bank. (*Id.* at 445.) The petitioner hit Eric two or three times in the head with the gun. (*Id.* at 447.) Mr. Combs described himself as scared to death. (*Id.* at 451.) Eric was slammed to the floor. (*Id.* at 452.) The petitioner threatened to kill all of them. Mr. Combs saw

"Ed" come in, and told him they were being robbed. Ed disappeared, despite the petitioner yelling at him to get back there. (*Id.* at 453.) The petitioner demanded their cell phones. (*Id.* at 454-55.) The surveillance videos were played for the jury. Apparently the audio included at least one "smacking" noise when Eric was hit with the gun. (*Id.* at 465.)

At some point, the petitioner told the victims to go upstairs. At that time Eric was bleeding so profusely he couldn't see. (*Id.* at 471.) The victims were moved into the office. (*Id.* at 480.) The petitioner had the recording system dismantled and placed in a bag. (*Id.* at 487.) Mr. Combs got money out of the safe and handed it to the petitioner. The petitioner tied Eric up with the DVR cords. (*Id.*) The petitioner ordered Joe to tie Mr. Combs up. (*Id.* at 489.) The petitioner asked Joe why he kept looking at him, are you trying to recognize me or remember what I look like. The petitioner also reminded Joe that he (Joe) had seen the petitioner's ID a bunch of times. (*Id.* at 490.) The petitioner hit Mr. Combs in the back of his head and face with the gun. (*Id.* at 493.) When Eric started screaming, the petitioner stomped him in the head. (*Id.* at 494.) The petitioner took the money from the safe, and money, wallet, and a cell phone from Mr. Combs. (*Id.* at 497.)

After the petitioner left, Mr. Combs managed to stretch the cords on his hands enough to grab the bar keys and lock the office door. (*Id.* at 506.) When the police came in, Joe was still tied up and Eric was on the floor "unconscious." (*Id.* at 507.) Mr. Combs stated he had never noticed the petitioner being in the club before. (*Id.* at 514.) Mr. Combs further testified, generally, identifying photographs of the club and the victims from the date of the robbery, and identifying property taken—the DVR, wallets, keys and cell phones—that were taken from the victims and recovered. (*Id.* at 516-17.) He further identified the money bags taken from the club. The club did not have insurance to cover money stolen during theft or robbery at the time

of this incident. (*Id.* at 534.) Mr. Combs reiterated on re-direct that he had not seen the petitioner before that night. (*Id.* at 600.)

Dr. Holmes treated Eric Gorczyca in the emergency room immediately after the robbery. (*Id.* at 610-11.) The patient told the doctor that he was held hostage at a bar and pistol whipped. The patient believed he was knocked out. (*Id.* at 612.) The patient apparently exhibited some disorientation, as well as alcohol use. (*Id.* 614, 616.) Mr. Gorczyca had a laceration to his head which was stapled and one between his eyebrows which was stitched. (*Id.* at 619.) His nose was fractured. (*Id.* at 620.)

Eric Gorczyca testified. He was the life partner of Mr. Combs and also worked at the Stonewall. (*Id.* at 638.) He was intoxicated the night of the robbery. (*Id.* at 642.) As they were closing the bar, he was talking on the phone to a friend, and heard Combs say that "we're getting robbed,". (*Id.* at 645.) He turned his head and saw the petitioner holding a gun and screaming, waving and pointing the gun. (*Id.* at 646.) He was scared. (*Id.* at 647.) As to the money, Eric said he stuck to telling the petitioner that the money had been dropped in a safe. The petitioner made multiple demands for money. (*Id.* at 649.) Eric, too, noticed Ed the bartender enter, and leave immediately even as the petitioner screamed at him to return. (*Id.* at 651.) The petitioner took Eric's cell phone during the robbery. (*Id.* at 652.) Eric was hit over the head with the gun, and picked up and slammed down. (*Id.*) The petitioner repeatedly demanded money and threatened to kill the victims. (*Id.* at 658.) Eric was "very scared." (*Id.*) They were moved upstairs, and back down to the office. They were tied up with the cords taken from the DVR. (*Id.* at 661.) Eric knew that Mr. Combs opened the safe for the petitioner. (*Id.*) The petitioner took Eric's wallet and cell phone. (*Id.* at 662.)

Mr. Gorczyca denied using cocaine, buying cocaine from the petitioner, or having seen the petitioner anywhere other than court. (*Id.* at 675.) He further specifically denied being in a conspiracy to rob the Stonewall. (*Id.* at 693.)

Detective Williams went to Cabell Hospital, but was unable to speak with Mr. Gorczyca because he was "out of it." (*Id.* at 699.)

Joe Campigotto was the manager of the Stonewall. (*Id.* at 704.) He helped close the bar, and at some point, he, Mr. Combs and Mr. Gorczyca were the only ones left in the bar. (*Id.* at 714.) Later, the petitioner walked in with a weapon. (*Id.* at 714-15.) Mr. Campigotto did not know the individual, and did not believe he had seen him before. (*Id.* at 715.) The petitioner told them to get behind the bar, while holding a gun, and asking where the money was. (*Id.* at 718.) They were told to sit on the floor. During the course of the robbery, the petitioner took Mr. Campigotto's cell phone and keys. (*Id.* at 719.) The petitioner kept asking repeatedly for money. (*Id.*) Mr. Campigotto witnessed Eric being hit with the gun and slammed down on the concrete floor. (*Id.* at 724.) Mr. Campigotto was instructed to go to the bathroom and turn on the lights, which he did. The witness specifically stated that he knew if he did "anything funny" the petitioner would shoot "them". (*Id.* at 728.) The three of them were moved to the office, where the safe was, and the owner got the money out of the safe. The entire time, the petitioner kept the gun in his hand, and the witness believed "there's murderous intent." (*Id.* at 736.) Mr. Campigotto was directed to tie up Mr. Combs with the DVR cords and to tie the cords tight enough. (*Id.* at 738.) Mr. Campigotto was not injured save for his hands being bruised from the ligature. (*Id.* at 743.) A gun clip was found in the office after the robbery. (*Id.* at 749.) Mr. Combs had an injury to his face where he was kicked by the petitioner. (*Id.*) Mr. Gorczyca was hit in head and blood was everywhere. (*Id.* at 750.)

After the police entered the building, and untied him, Mr. Campigotto went to police headquarters. (*Id.* at 752.)

Officer Fitz recovered the gun that petitioner ditched when he fled the bar. (*Id.* at 777.) The officer also found a plastic bag and a set of car keys. (*Id.*) He was present when the petitioner left the bar and heard the petitioner say "You all are going to have to fucking kill me". (*Id.* at 786.) The officers kept yelling at the petitioner to stop, but he took off running. (*Id.* at 787.)

Officer Wright searched the petitioner's pockets after he was apprehended and found wallets (plural) and cell phones (plural) along with other items. (*Id.* at 794.) One of the wallets belonged to Mr. Gorczyca. (*Id.* at 799.) Another belonged to Mr. Combs. (*Id* at 800.)

One of the petitioner's shoes had blood on it. (*Id.* at 803.)

Betty Young, the insurance agent for Mr. Combs and the Stonewall bar testified that as of January 1, 2012, there was no policy in effect that would insure the bar for robbery or theft of money. (*Id.* at 832.)

At the conference on instructions, the Court accurately noted that the petitioner was not charged with conspiracy, and trial counsel specifically withdrew a conspiracy instruction. (*Id.* at 861.) When asked to articulate the conspiracy, trial counsel stated that Fykes and Gorczyca conspired and possibly all four of them (not probably or definitively the four). (*Id.*)

Pictures of the office revealed a lot of evidence of physical struggle. There were blood stains present on the floor and furniture. The safe door was open, surveillance equipment, a monitor and speakers were overturned; there was a handgun magazine on the floor, things overturned, and cut power cords. (*Id.* at 890.) The clip contained live rounds. (*Id.* at 892.)

The petitioner testified, and proffered his theory. He was "in the drug game." (*Id.* at 955.) The petitioner testified that he provided cocaine to another individual to sell to Gorczyca and also sold to him directly. (*Id.* at 959.) According to the petitioner, Eric came up with the idea to rob the bar. (*Id.* at 971.) The petitioner did not state that he had discussed this "plan" with either Joey or Keith, and the plan was to "make it look good." (*Id.* at 979.)

He admitted hitting Eric in the head more than once. (*Id.* at 989.) He denied hitting anybody else. (*Id.* at 993.) The prosecutor did ask "So this story that you are telling me today, wouldn't you agree that this is the first time you have told this story to anyone other than your lawyers?" and the petitioner answered "Well, nobody ever asked for it. I mean, I didn't get an interview from a detective." "But this is the first time anybody else has heard it other than them?" "Right." (*Id.* at 993.) On redirect, trial counsel revisited that issue stating "The police never wanted your side of the story, did they?" and the petitioner answered "No." "They never came to talk to you?" "No." "People came and took pictures of you but they didn't talk to you?" "Right." "Never asked you a question did they?" "No." (*Id.* at 996.)

The jury was instructed on all the standard issues, including the elements of the offenses. With particularity, the jury was instructed that it had to find, as to the robbery charge contained in Count 1, that the petitioner took personal property from Campigotto against his will, with the intent to permanently deprive the owner of the property. (*Id.* at 1019.) The jury was similarly instructed that as to the robbery count in which Gorczyca was a victim, the act had to be done against his will, with the intent to permanently deprive the owner of those items. (*Id.* at 1020.) With regard to Count VI, in which Combs was the victim, the jury was instructed that the act had to be done against his will and property taken with the intent to permanently deprive the owner of those items. (*Id.* at 1021-22.) With regard to the three counts of kidnapping, the jury was

instructed it had to find that the petitioner by force and threat confined the victims for the purpose of receiving a concession or advantage. (*Id.* 1023, 1024, 1025.)

As to the malicious wounding charges, the jury was instructed that the petitioner had to have acted unlawfully, intentionally, and maliciously and wounded Gorczyca and Combs. (*Id.* at 1028, 1029.)

The State pointed out in closing that if it were a staged robbery, there was no need for the violence and beating. (*Id.* at 1041.) Further, if it was all playacting, the victims wouldn't have submitted to the infliction of injuries requiring staples and sutures. (*Id.* at 1046.)

The defense closing harped, again, on the themes of a staged robbery and police incompetence. (*Id.* at 1059.)

Early in deliberations, the jury did ask "If we feel this is a conspiracy, does that negate any of the charges." The judge indicated that was a question he could not answer, because the jury had heard the evidence and the law. (*Id.* at 1069.) The judge viewed the question as one of fact, not law. The jury was instructed that it was the finder of fact, and that the question of conspiracy was one of the ultimate issues in the case, for them to decide. (*Id.* at 1070.) Defense counsel stated that he thought the judge could instruct the jury on the law. The judge viewed the question as being not of law, but of fact. "Sir, this is the ultimate question. This is asking if they feel there is not a conspiracy does it negate any of the charges. I can't tell them. They have to make those findings of fact whether there was a conspiracy." (*Id.* at 1071.)

When defense counsel again stated he thought they could be instructed, the judge noted that both sides had submitted instructions, upon which the jury had to rely, and that he could not instruct further on areas which had not been dealt with. (*Id.* at 1072.) The jury deliberated from around 3:30 or until 7:38, with plenty of stretch breaks and questions. (*Id.* 1073.) The question

regarding conspiracy came approximately an hour or an hour and a half after deliberations began. (*Id.* at 1072.) The jury deliberated another two hours and forty minutes or so, without asking any further questions regarding the factual existence of a conspiracy.

The jury found the petitioner guilty of robbery of Campigotto; kidnapping of Campigotto; robbery of Gorczyca; kidnapping of Gorczyca; robbery of Combs; kidnapping of Combs; unlawful wounding of Gorczyca; and battery of Combs. (*Id.* at 1074-75.) By special interrogatory, the jury found that the petitioner used a firearm in the commission of the offenses. (*Id.* at 1080.)

The jury recommended mercy on each of the three counts of kidnapping. (*Id.* at 1107.) Ultimately the court determined that as to the sentence on the kidnapping of Campigotto, the petitioner should receive thirty-two years in prison. He received life, with mercy, on the two other kidnapping counts; twenty years for each of the three robberies; one to five for malicious wounding, and six months in jail for battery (lesser included offenses of the malicious wounding indictments). (App. vol. I at 98-99.) The sentences were to run consecutively save that the unlawful wounding and battery sentences would run concurrently. The petitioner's effective sentence then is a minimum two life sentences plus ninety two years. (*Id.*)

II.

SUMMARY OF THE ARGUMENT

The petitioner asserts that the jury's question regarding "conspiracy" indicates it was hopelessly muddled on the issue of intent, and that the judge committed reversible error by failing to reinstruct the jury to clear up the confusion. Petitioner's trial counsel expressly withdrew any instruction as to conspiracy. The jury was fully instructed as to the elements of each of the offenses, and did not ask any questions about those elements. Further, as framed, the

question was not one the court could answer. There was no evidence at all, not even from the petitioner, that either Mr. Combs or Mr. Campigotto were involved in a conspiracy, his testimony dealt with Gorczyca alone. Therefore, the existence of a conspiracy did not negate all charges. Petitioner's counsel simply stated he thought the judge could instruct the jury on the law. The judge believed the factual existence of a conspiracy was one of the issues for the jury to decide—and that he could not instruct them as to whether a conspiracy existed. Petitioner's counsel did not proffer what instruction could be given. The judge repeated that he could not tell the jury whether there was a conspiracy so as to negate the charges, but that the jury had to make the findings of fact there was a conspiracy. The jury was correctly instructed on the law as a whole, including the issue of criminal intent. Defense counsel expressly withdrew an instruction as to conspiracy. The judge viewed the question from the jury as being a question of fact and refused to answer the factual inquiry, which was not an abuse of discretion. Further, the jury was not hopelessly muddled about the issue of intent as evidenced by its continuing deliberation without further question.

Comment upon a petitioner's post-arrest silence is forbidden. However, not all comment on silence is taboo. If, pre-arrest, the petitioner had an opportunity to make a statement regarding exculpatory material, and failed to take advantage of such opportunity, comment upon the failure to speak up is fair game. In the instant case, before the petitioner was arrested, as he was leaving the club and preparing to evade police, he chose to make a statement that the police were going to have to kill him. That is not the statement of an innocent man, and was rather an opportunity for the petitioner to say "You know what? This wasn't a real crime, it was all an act." Having rebuffed the opportunity to declare his innocence, questioning about his silence was not error.

Even, however, if regarded as error, it was not reversible error. No objection was made to the brief inquiry by the prosecutor, and in fact, petitioner's trial counsel asked even more questions on that subject on re-direct. Frankly, the failure of the police to request an interview played into part of the petitioner's theory of the case which is that the police did a terrible job of investigating the case, including failing to even try to interview the petitioner after the police viewed the videotape.

Since no objection was made, this must be reviewed as plain error (if error at all). Under the plain error standard the petitioner's conviction was not a miscarriage of justice stemming from the use of constitutionally tainted evidence. Taking out those two questions from the prosecutor—and the even more questions from defense counsel—it is clear that those questions did not contribute to the verdict, and were harmless beyond all doubt. The evidence against the petitioner was overwhelming and the prosecutor's questions did not contribute to the verdict.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The respondent respectfully disagrees with the statement that oral argument is necessary, or desirable in the instant matter. The dispositive issues have heretofore been authoritatively decided; the only question is whether the judge erred in the application of the settled law to the facts of the matter. The respondent asserts that he did not. Further, 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.

As the respondent does not believe there was reversible error or a substantial question in procedure, a memorandum decision is appropriate.

IV.

ARGUMENT

A. The circuit court did not err in how it handled the jury question.

This was a chatty jury. It sent out questions regarding whether they could call their families, whether they could get help with the computer, and one question regarding the actual substance of the case. The jury did not deliberate for a long time in this matter, particularly considering the voluminous number of exhibits and witnesses. The entire deliberative process seems to have lasted about four hours. As to the question, "If we feel this is a conspiracy, does that negate any of the charges?", the judge concluded that the jury was asking a question of fact, which he could not answer. While trial counsel objected for the record, saying he believed the judge could instruct on the law, he did not propound any suggested instruction, and in fact, had withdrawn a proposed jury instruction on conspiracy. (App. vol. II at 861, 1069, 1070, 1071.)

The respondent agrees with the judge that the jury was actually asking a question of fact regarding the ultimate issue in the case, as opposed to asking a question evincing confusion over the elements of the offenses, and that the judge did not abuse his discretion in refusing to answer the jury's question.

Additionally, even if the judge could have answered the question posed by the jury, the answer is not a simple one, and probably not one the petitioner really wanted answered.

The petitioner was not charged with the legal offense of conspiracy. The petitioner's defense was that it wasn't really a robbery, or kidnapping, or malicious wounding because the whole thing was staged. And the whole thing was staged for the video tape.

However, the petitioner's trial testimony did not implicate either Mr. Combs or Mr. Campigotto as actors in the phony robbery. No other testimony implicated them as thespians on

the evening in question either. The statement of Eldredge, which should not have been admitted, simply posited that the petitioner had been in the club several times and was familiar with all three victims, and they with him.

The petitioner's testimony was that Gorczyca came up with the idea to rob the bar. (*Id.* at 971.) The petitioner did not discuss the plan with either of the other two victims, according to his testimony. Therefore, as to the issue of conspiracy, there was no evidence at all that either Combs or Campigotto were involved.

If there was a conspiracy—and there wasn't—only the petitioner and Gorczyca were involved, according to the petitioner's own self-serving testimony. Therefore, the existence of that conspiracy, even if proven, would not have negated the offenses of robbery and kidnapping as to Combs and Campigotto. So, factually, how could the judge have answered the conspiracy question without, essentially directing the jury to find the petitioner guilty of the offenses in which Combs and Campigotto were victims.

Would the petitioner have wanted the question to be answered: 'You have heard some evidence from the petitioner that he might have been engaged in a conspiracy with Gorczyca. The existence of the conspiracy, if proved to your satisfaction, does not negate the charges, particularly as to Mr. Combs and Mr. Campigotto." Because, legally, a conspiracy involving Gorczyca and the petitioner (if proven, which it wasn't) merely means that the two men were victimized by both the petitioner and Gorczyca.

The petitioner's defense was that the robbery was staged, gussied up to look good, and that the police stopped investigating once they saw the videotape. (One might assume that catching the petitioner red-handed running out also had something to do with the conviction.) However, there was no evidence that there was a conspiracy involving all three victims, and

scant evidence there was a conspiracy involving Mr. Gorczyca, evidence the jury was free to reject.

When the instructions are taken as a whole, as they must be, the jury was correctly instructed as to all the elements of the crime, including the requisite criminal intent which the jury had to find in order to convict the petitioner of each of the charged offenses, or lesser included offenses; and further instructed on reasonable doubt, and the necessity of finding the petitioner not guilty if there was reasonable doubt as to any of the elements of any of the offenses. As stated above, defense counsel withdrew a proposed instruction on conspiracy, and when asked to articulate the conspiracy, mentioned Gorczyca and "possibly" all four. But, there was not a shred of evidence from any source indicating that Combs and Campigotto participated in a stage show, and no credible evidence that Gorczyca conspired.

As stated above,

> A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not mislead by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

Syllabus Point 4, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

No complaint is made of the instructions as a whole. The sole issue is whether the judge abused his discretion in the way he handled the jury's query. The petitioner states that the jury was hopelessly confused on intent, and therefore, it was incumbent upon the judge to reinstruct the jury, and reversible error for him to fail to do so. (*See*, among many other cases, "It has been observed that '[w]hen the jury requests more instructions upon a particular phase of the case, the

trial court is under a duty to instruct them in a plain, clear manner so as to enlighten rather than confuse them.'" *State v. Davis*, 220 W. Va. 590, 595, 648 S.E.2d 354, 359 (2007)).

But in this case, the jury did not request more instructions on a particular phase of the case. The jury had not been instructed on conspiracy, and that was at the petitioner's direct request. Moreover, the question as posed by the jury was one regarding clarification on a factual issue, and not a request to be reinstructed, or a request that could even be reasonably construed as asking for further instruction.

The judge's response to the jury question was that he could not answer that question because "I cannot answer that for you, that is you are the finders of fact, you must decide based on the evidence. . . . That is ultimately one of the ultimate questions in this case, and that is your role to decide that." (App. vol. II at 1070.)

As noted, the rather perfunctory objection by trial counsel was that he thought the court could instruct them (the jury) on the law. (*Id.* at 1071.) The judge replied again, that he couldn't tell the jury whether a conspiracy negated the charges, because "They have to make those findings of fact whether there was a conspiracy." (*Id.*) Trial counsel did not proffer what instructions, if any, he thought the court should give, rather than a general assertion that the judge could instruct the jury on the law.

Of course he could. However, the judge concluded, and that conclusion was not erroneous, that the jury was not asking a question about the instructions, or asking a question that showed the jury did not understand the substantive instructions they had been given regarding intent, reasonable doubt, and the elements of the offenses. He read the question as one of fact regarding the existence of a conspiracy, and the consequences of that. (Again, the consequences question is not so easy to answer because even operating under the unsupported assumption that

the petitioner conspired with one of the victims would not negate any of the offenses involving the other two).

When looking at the roles and responsibilities of the courtroom participants, it is beginner's law that the jury is the finder of fact.

> " 'In the trial of a criminal case the jurors, not the court, are the triers of the facts, and the court should be extremely cautious not to intimate in any manner, by word, tone or demeanor, his opinion upon any fact in issue.' Syl. pt. 7, *State v. Austin,* 93 W.Va. 704, 117 S.E. 607 (1923)." Syl. Pt. 3, *State v. Rogers,* 215 W.Va. 499, 600 S.E.2d 211 (2004).
>
> " 'The trial judge in a criminal trial must consistently be aware that he occupies a unique position in the minds of the jurors and is capable, because of his position, of unduly influencing jurors in the discharge of their duty as triers of the facts. This Court has consistently required trial judges not to intimate an opinion on any fact in issue in any manner. In criminal cases, we have frequently held that conduct of the trial judge which indicates his opinion on any material matter will result in a guilty verdict being set aside and a new trial awarded.' Syl. Pt. 4, *State v. Wotring,* 167 W.Va. 104, 279 S.E.2d 182 (1981)." Syl. Pt. 4, *State v. Rogers,* 215 W.Va. 499, 600 S.E.2d 211 (2004).

Syllabus Points 6 and 7, *State v. Donley*, 216 W. Va. 368, 607 S.E.2d 474 (2004).

As the jury is entrusted with making the factual determination in a case, not by word nor deed should the trial judge hint, intimate, or interfere with the jury's factual findings. The last thing a trial judge should do is instruct the jury that it must or should find the existence of something, anything, including a conspiracy, and then proceed from there.

Yet, that is precisely what the judge deemed the jury asked him, and his decision on that point is not clearly erroneous.

Judges are permitted to answer certain questions, dealing with the law, and rereading instructions or permitting the jury to rehear testimony. Judges are not permitted to answer questions which deal with, or which would interfere with the jury's function as the finder of fact.

The question in this matter is very closely akin to the questions asked by the jury in *State v. Woods*, 2013 WL 2157813, West Virginia Supreme Court of Appeals, Memorandum Decision, May 17, 2013 in No. 12-1409. (The respondent is aware of the hierarchy of decisions regarding signed opinions with a new syllabus point(s); signed opinions quoting syllabus points; and memorandum decisions. However, the fact that a judge should not answer questions of fact propounded by the jury is so basic that the illustrative nature of the above memorandum decision is appropriate citation material in this matter.)

In *Woods,* the jury asked three questions with regard to the offense of grand larceny. "(1) Please define permanently deprive and temporarily deprive, (2) What is the nature of returning the vehicle and what actions are required, and (3) Does the accused have to physically return the car or can the accused assume the vehicle will be returned?" *Woods, supra,* at *3.

The parties agreed that questions one and two should not be answered; the petitioner wanted question 3 answered. The court determined that question 3 could not be answered without answering 1 and 2 and answered none of them. *Id.*

In affirming the court's decision not to answer the question, the court noted that question 3 "is the closest to asking the circuit court to assist the jury in making a finding of fact rather than a pure question of the law." *Woods* at *4. This Honorable Court acknowledged its long standing principle as enunciated in *Davis, supra,* and as cited in *Woods:* "We have held that the trial court has discretion in determining how best to respond to a jury question, and that review of any such response is for an abuse of discretion." *Woods* at *4, citing *State v. Davis*, 220 W. Va. 590, 648 S.E.2d 354 (2007) The court found no abuse of discretion in the court's reference to its legally correct and legally supported grand larceny instruction. *Id.*

The judge regarded the question in the instant case as asking for his help in finding the factual existence of a conspiracy. Such determination was not an abuse of discretion. Additionally, the jury was instructed to decide the case based upon the evidence it had heard and the instructions of the Court as given on each of the verdicts that it had to decide. (App. vol. II at 1070.) Just as in *Woods*, the jury was asking for assistance in deciding a matter of fact, and the court did not abuse its discretion by declining to answer the factual question, and referring the jury to "its legally correct and legally supported" instruction as to each of the substantive offenses. The judge handled the question correctly, and did not abuse his discretion, and this Court should not find that the refusal to answer the jury's query constituted an abuse of discretion and reversible error.

B. The prosecuting attorney did not comment impermissibly upon the petitioner's pre-arrest silence. As the comments were not only not objected to, but amplified in redirect, under the plain error standard, there was no reversible error. Further, in view of the petitioner's theory of the case and the overwhelming evidence against the petitioner, the questions were harmless beyond any doubt.

Although comment upon criminal defendant's silence is never given a gold star in criminal law practice, comment upon pre-arrest silence may not always constitute error. In *State ex rel. Boso v. Hedrick,* 182 W. Va. 701, 391 S.E.2d 614 (1990), among the asserted errors of trial counsel was ineffective assistance for failing to object to cross-examination questions regarding his pretrial silence. *Boso* at 705, 391 S.E.2d at 617. Both the appellant and his mother were asked why neither had come forward before trial with the exculpatory information that the appellant was home when the crime occurred. *Id.* at 706, 391 S.E. 2d at 619. However, there is no constitutional prohibition against exploring the "failure to speak" when the government did not induce the silence. If a failure to speak occurs before a person is taken into custody and

Mirandized there is no fundamental unfairness, and impeachment by prearrest silence does not violate the Fourteenth Amendment. *Id.*, *citing Jenkins v. Anderson*, 447 U.S. 231 (1980).

In *Boso* the appellant turned himself in the day after the crime was committed, was not asked to give a statement, and not given any Miranda warnings. Therefore, comment on his pre-arrest silence was found to be fair game for impeachment.

That rationale has been upheld not only in habeas, but on direct appeal. *State v. Ramsey*, 209 W. Va. 248, 545 S.E.2d 853 (2000), dealt with the issue of questioning an individual at trial about his prearrest silence. The appellant was cross examined about what he said, or rather did not say, when he encountered a police officer near a marijuana patch. The appellant was asked if he had volunteered information to an officer, and the petitioner said he had said nothing because he had no opportunity to speak. The court found that the petitioner's failure to speak occurred prearrest, and only after other officers arrived was the appellant placed under arrest and Mirandized. *Ramsey* at 256, 545 S.E.2d at 861. As the failure to speak was prearrest, that failure was fair game for cross-examination.

The petitioner's brief reads as if the use of silence, prearrest, can occur only in those situations where there has been some kind of formal interview or interrogation. In *Boso*, there was no questioning before the appellant's arrest, and cross examination was afforded on the issue of failure to speak. In the instant case, when the petitioner left the scene of what he claimed to be a staged robbery—and therefore, not a crime at all—rather than stating to the first officers he saw "I didn't commit any crime, those guys were in it with me", the petitioner stated, voluntarily and before arrest, "You're going to have to kill me" (or that same sentence with the addition of an expletive) and ran away. That statement was heard by at least three officers. Given that the petitioner encountered the police immediately as he was leaving the club, and had the

opportunity to give his exculpatory information before he was arrested and Miranda warning given, and rather than giving the exculpatory information ran, after making the statement you're going to have to kill me, his failure to speak was fair game for cross examination, and not an impermissible comment on his pretrial silence.

However, assuming for argument purposes only that this Court does not regard the petitioner's failure to volunteer his exculpatory excuse when he had the opportunity to do so, as in fact a legitimate failure to speak, the questions propounded by the prosecutor are still not reversible error.

No objection was made to the two questions asked by the prosecutor. In fact, after she asked her questions, trial counsel popped up and asked even more questions about the failure of the petitioner to offer his exculpatory excuse before trial.

"So this story that you are telling me today, wouldn't you agree that this is the first time you have told this story to anyone other than your lawyers?" and the petitioner answered "Well, nobody ever asked for it. I mean, I didn't get an interview from a detective." "But this is the first time anybody else has heard it other than them?" "Right." (App. vol. II at 993.) On redirect, trial counsel, revisited that issue stating "The police never wanted your side of the story, did they?" and the petitioner answered "No." "They never came to talk to you?" "No." "People came and took pictures of you but they didn't talk to you?" "Right." "Never asked you a question did they?" "No." (*Id.* at 995-96.)

So, not only was no objection interposed to the prosecutor's questions, petitioner's lawyer asked even more questions. Why, one might ask, did the petitioner's lawyer both fail to object and then expound upon the issue? Because it fit perfectly with the defense theory of the case. The defense theory of the case, which was vigorously argued, and developed both in cross-

examination of the state's witnesses and in direct examination of the petitioner, was that this was all a staged and planned event and the police were too stupid, too lazy, too haphazard and too slipshod to follow up on the obvious staging, even to the point where they didn't confiscate cell phones, take formal statements from at least one of the victims, fingerprint the evidence, or even attempt to talk to the petitioner.

In the absence of an objection, and even more clearly since the petitioner himself amplified on the assertedly impermissible question, this can be reviewed only under the standard of plain error.

This Honorable Court cogently noted in *State v. Miller,* 194 W. Va. 3, 17, 459 S.E.2d 114, 128 (1995), that "the failure of a litigant to assert a right in the trial court likely will result in the imposition of a procedural bar to an appeal of that issue." The *Miller* Court, in accord with the United States Supreme Court, distinguished "waiver" and "forfeiture." Waiver is the intentional relinquishment of a known right, and when there is a knowing waiver, there is no error. However, forfeiture of a right--the failure to assert such right in a timely fashion--does not extinguish the error. Plain error may be corrected in circumstances where a miscarriage of justice would otherwise result. The error must indeed be plain, which means obvious. If there is "plain" error, to which no timely objection was raised, a determination must be made as to whether that error actually affected substantial rights of the defendant. That means that the error must have been prejudicial and affected the outcome of the proceedings. Further, the defendant bears the burden of persuasion with respect to prejudice. *Miller*, 194 W. Va. at 18, 459 S.E.2d at 129.

The Court noted in Syl. Pt. 4 of *State v. England,* 180 W. Va. 342, 376 S.E.2d 548 (1988), that the plain error doctrine

> It enables this Court to take notice of error . . . occurring during the proceedings, even though such error was not brought to the attention of the trial court. However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would other wise result.

Additionally, this Court stated in Syl. Pt. 7 of *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996):

> 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.

In short, under the plain error analysis, an error must have occurred, it must be an obvious error, affecting substantial rights, and be an error which seriously affects the fairness, integrity or public reputation of the proceedings.

The respondent does not concede that the prosecutor's questioning was error at all, and certainly not plain error. Further, trial counsel for the petitioner emphasized in redirect the failure of the police to question his client as just part and parcel of the shoddy investigation. The petitioner bears the burden of showing that the allegedly impermissible line of questioning was improper, and that the error affected the fairness and integrity of the proceedings.

Quite simply, those two questions and the respondent's answers are not the type of plain error which should result in the reversal of this conviction. The questioning did not affect substantial rights of the petitioner, causing him prejudice, and did not affect the integrity of the proceedings.

Without reiterating in huge detail the mountains of evidence against the petitioner, the following was before the jury: When Kenneth King reentered the bar after closing, he was told by the owner "We are being robbed." (App. vol. II at 299.) A 911 call was made to which

several officers responded, including a SWAT team. The officers could hear arguing from inside the bar, and could view through glass a black male and three white males, each of whom had their hands raised. (*Id.* at 317, 320.)

After some passage of time a black male (the petitioner) left the bar, dropped a gun and money, told the police they would have to kill him, and ran. (*Id.* at 333, 354, 356, 360, 777, 787.) The doctors who treated two of the victims testified: Dr. Yung testified Kenneth Combs had a black eye and a possible subdural hematoma. (*Id.* 376-77.). The injuries occurred from being hit in the face with a gun. (*Id.* at 375.) Each of the victims testified. Each denied being part of a conspiracy, or even having met the petitioner before. Each described the petitioner pulling out a gun, yelling, demanding money, hitting Eric in the head, throwing him to the floor, stomping him, threatening to kill them. (*Id.* at 443, 444, 447, 452, 493 494, 652, 658, 714-15, 724.) Each described being restrained by the DVR cords. (*Id.* at 487, 489, 661, 738, 749.) Gorczyca suffered a nasal fracture and lacerations requiring both sutures and staples. (*Id.* at 619, 620.) And much of the incident, including the petitioner holding the men at gunpoint, and apparently screaming demanding money (although the surveillance footage was not transcribed into the appendix) was caught by the surveillance cameras. Also, the petitioner essentially admitted every single particular of the offenses, save that he denied hitting Mr. Combs. He testified that although he had physically committed the acts, he was engaged in a staged robbery with Gorczyca.

In the face of this overwhelming evidence, the two questions propounded by the prosecutor were not plain error, particularly in view of the fact that not only was no objection raised, but the defense amplified on the failure of the police to question the petitioner as being part and parcel of its theory of the case.

Error, even error of constitutional dimension does not automatically lead to the reversal of a criminal conviction.

> When the alleged error involves the infringement of a petitioner's constitutional rights, the burden is on the State to show that the error is harmless beyond a reasonable doubt:
>
> We have stated that the "[f]ailure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syllabus Point 5, *State ex rel. Grob v. Blair,* 158 W.Va. 647, 214 S.E.2d 330 (1975). *In accord,* Syllabus Point 14, *State v. Salmons,* 203 W.Va. 561, 509 S.E.2d 842 (1998). "An error in admitting plainly relevant evidence which possibly influenced the jury [or a trial judge] adversely to a litigant cannot ... be conceived of as harmless." *Chapman v. California,* 386 U.S. 18, 23–24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). " 'Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction.' " *State v. Jenkins,* 195 W.Va. 620, 629, 466 S.E.2d 471, 480 (1995) (*quoting,* Syllabus Point 20, *State v. Thomas,* 157 W.Va. 640, 203 S.E.2d 445 (1974)). Moreover, once an error of constitutional dimensions is shown, the burden is upon "the beneficiary of a constitutional error"—usually the State—"to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman,* 386 U.S. at 24, 87 S.Ct. 824.

State v. Bowling, 232 W. Va. 529, 542-43, 753 S.E.2d 27, 40-41 (2013) *cert. denied,* 134 S. Ct. 1772, 188 L. Ed. 2d 603 (2014).

Again, even if this was error of constitutional dimension, and reviewable under the plain error standard, it is clear that the error, if error at all, did not contribute to the verdict obtained, and was error, harmless beyond any doubt. There was a mountain of evidence, referenced above briefly in the plain error argument section and more fully described in the statement of the case. In the face of that evidence, two questions propounded by the prosecutor, which, in fact supported the defendant's theory of the case, can only be described as harmless beyond any doubt, and as factors that did not contribute to the verdict.

V.

CONCLUSION

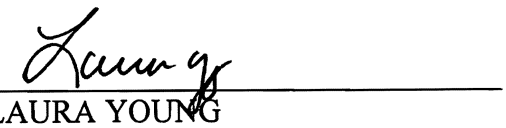
Based upon the foregoing recitations of fact and arguments of law, the respondent respectfully requests this Honorable Court to affirm the verdicts returned by the jury in Cabell County determining that the petitioner was guilty beyond a reasonable doubt of three counts of kidnapping, three counts of robbery, one count of unlawful wounding, and one count of battery, and further affirm the sentence imposed by the Circuit Court of Cabell County.

Respectfully submitted,

STATE OF WEST VIRGINIA
Plaintiff Below, Respondent

By counsel

PATRICK MORRISEY
ATTORNEY GENERAL



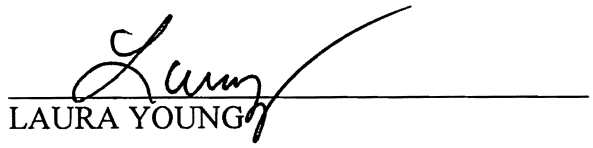
LAURA YOUNG
DEPUTY ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
Telephone: (304) 558-5830
State Bar No. 4173
Email: Laura.Young@wvago.gov

Counsel for Respondent

CERTIFICATE OF SERVICE

I, LAURA YOUNG, Deputy Attorney General and counsel for the respondent, do hereby verify that I have served a true copy of the *BRIEF ON BEHALF OF THE RESPONDENT* upon counsel for the petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 10th day of April, 2015, addressed as follows:

Crystal L. Walden, Esquire
Public Defender Services
Appellate Advocacy Division
One Players Club Drive, Suite 301
Charleston, WV 25311



LAURA YOUNG