

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-1141

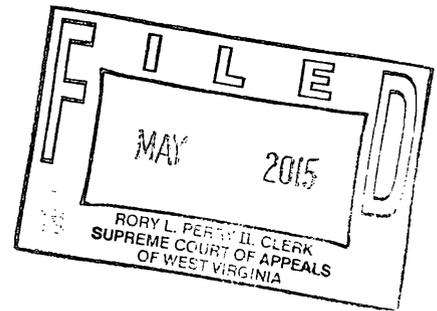
STATE OF WEST VIRGINIA,

*Plaintiff Below,  
Respondent,*

v.

CHRIS WADE FLEMING,

*Defendant Below,  
Petitioner.*



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RESPONDENT'S BRIEF

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## STATEMENT OF THE CASE

Pursuant to Rule 10(d) of the West Virginia Revised Rules of Appellate Procedure, the State of West Virginia (hereinafter, “Respondent”), does not dispute the Statement of the Case as set forth in the brief filed by Chris Wade Fleming (hereinafter, “Petitioner”). As such, Respondent only chooses to supplement and/or correct information from Petitioner’s underlying criminal case.

Respondent would add that Petitioner recalled much more than simply arguing with his wife when Petitioner gave a voluntary statement to law enforcement as to what happened on the evening in question. App. Vol. III at 127-31. Respondent would additionally add that Dr. Thomas Adamski was not initially provided with documentation that Petitioner was awarded the Combat Infantry Badge, and further that Dr. Adamski testified that finding out later that Petitioner was awarded the Combat Infantry Badge did not change his opinion. (App. Vol. III at 136, 178, 180, 187.) Respondent would also add that Gregory Trainor expressly testified that he did not conclude that Petitioner was insane due to post-traumatic stress disorder at the time the offenses were committed. (App. Vol. III at 77, 84.) Respondent would finally add that at the hearing on July 9, 2013, no plea agreement was tendered to the court, no terms of a finalized plea agreement were discussed, and no motion or request was made to the court to consider a proposed plea. (App. Vol. I at 123-29.)

## SUMMARY OF THE ARGUMENT

Petitioner advances ten assignments of error on appeal. First Petitioner argues that the trial court engaged in impermissible participation in the plea bargaining process by failing to make a definitive ruling on Petitioner's plea and ordering Petitioner to undergo an additional evaluation for competency and criminal responsibility. This claim must be rejected as the circuit court was never presented with a finalized plea, and by the time Petitioner had presented a plea proposal to the court, the State had withdrawn its offer. Furthermore, the trial court properly exercised its statutory and discretionary authority to order such an evaluation at any stage of the proceedings. For these reasons, the circuit court also properly denied Petitioner's Motion for a Rule 11 Hearing.

Petitioner also claims that the trial court should have declared a mistrial on multiple occasions. As explained below, the trial court did not abuse its discretion in denying Petitioner's motions as Petitioner fails to demonstrate that there existed a manifest necessity to discharge the jury before rendering its verdict. Petitioner also claims that the State failed to meet its burden of proof in multiple instances including failing to prove that Petitioner was sane at the time he committed the offenses and failing to prove that Petitioner acted with malice, premeditation or deliberation. Viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of Petitioner's crimes beyond a reasonable doubt. Moreover, Petitioner failed to shift the burden to the State to prove sanity beyond a reasonable doubt as Petitioner's own experts failed to overcome the presumption that Petitioner was sane at the time the offenses were committed. Even if it can be said, however, that Petitioner did overcome the presumption, the State met its burden to prove that Petitioner was indeed sane at the time he committed the offenses. The evidence adduced at trial also demonstrates that the

State proved beyond a reasonable doubt that Petitioner committed the offense of attempted murder.

Lastly, the circuit court did not err when it denied Petitioner's Motion for New Trial and Petitioner's Motions for Judgment of Acquittal, and Petitioner's sentence does not violate Petitioner's constitutional protections. The circuit court properly sentenced Petitioner considering both Petitioner's history, including his service record in the military, and the crimes in which the jury found Petitioner guilty.

## **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is not necessary in this case as the dispositive issues have been decided. The briefs and records on appeal adequately present the facts and legal arguments. Oral argument would not significantly aid the decisional process, and a memorandum decision would be appropriate.

## ARGUMENT

### I. The Trial Court Did Not Impermissibly Participate in the Plea Bargaining Process When It *Sua Sponte* Ordered Petitioner to Undergo an Additional Evaluation for Criminal Responsibility.

Petitioner first argues that the circuit court committed reversible error by actively participating in the plea bargaining process when it *sua sponte* ordered Petitioner to undergo an additional evaluation for competency and criminal responsibility. (Pet'r's Br. at 12.) Petitioner reasons that in this case, once the circuit made no definitive ruling regarding his plea at the July 9th hearing and further ordered him to undergo another psychological examination, the trial court directly interfered in the plea bargain process in violation of Rule 11 of the West Virginia Rules of Criminal Procedure. (*Id.* at 18.) Rule 11(e)(1) of the West Virginia Rules of Criminal Procedure provides that a trial court shall not participate in any plea discussions. *State v. Sugg*, 193 W. Va. 388, 406, 456 S.E.2d 469, 487 (1995) ("Rule 11 of the West Virginia Rules of Criminal Procedure erects an absolute bar to a trial judge's participation in plea bargaining.") The circuit court below concluded that Rule 11 was not violated because "the plea was not tendered and the terms of a finalized plea agreement were not addressed prior to or at the July 9th hearing." (App. Vol. IV at 61.) Petitioner utterly fails to refute this finding on appeal, and thus his claim must be rejected.

The record reveals that at a July 1, 2013, hearing, discussions occurred regarding a possible plea. (App. Vol. I at 113-21.) Both the State and Petitioner represented to the court that at this time, however, there was no agreement as to how many counts to which Petitioner would plead guilty. (*Id.* at 115-16.) The trial court subsequently continued the matter until July 9, 2013, for consideration of a plea. (*Id.* at 119-20; App. Vol. IV at 38.) At the outset of the July 9, 2013, hearing, the trial court stated that after reviewing the file and everything else occurring in the case including the charges against Petitioner, the court was going to order another evaluation

to be performed by Dr. Thomas Adamski. (App. Vol. I at 124.) At this juncture, Petitioner's counsel represented to the court that he was familiar with Dr. Adamski and that Dr. Adamski was a very excellent psychiatrist as he had used him as a witness in the past. (*Id.* at 125.)

After it was determined what records needed to be sent to Dr. Adamski and a continuance order was discussed, defense counsel then placed an objection to the additional evaluation just before the conclusion of the hearing. (*Id.* at 129.) The only basis defense counsel gave for the objection was in the event the report would turn out to be unfavorable for Petitioner. (*Id.* at 129.) At no time during the July 9, 2013, hearing was a plea tendered to the court nor was any discussion had regarding a finalized plea or its terms. (*Id.* at 123-30.) Indeed, as the circuit court pointed out in its order denying Petitioner's Motion for a Rule 11 hearing, a plea agreement was not filed with the court until October 16, 2013. (App. Vol. IV at 60-61; App. Vol. I at 3.) Given the foregoing, this is not a case where the circuit court summarily refused to consider the terms of a plea agreement. *See i.e., State v. Sears*, 208 W. Va. 700, 705, 542 S.E.2d 863, 868 (2000). Accordingly, insofar as Petitioner claims that the trial court violated Rule 11 by failing to definitively accept, deny, or defer its ruling on a plea agreement, such claim must be rejected as a finalized plea agreement was not presented to the court. *See Syl. Pt. 8, in part, State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995) ("Rule 11 of the West Virginia Rules of Criminal Procedure requires that a judge explore a plea agreement once disclosed in open court[.]").

Petitioner also takes issue with the circuit court ordering another psychological evaluation, asserting "when the trial court ordered an additional psychological evaluation, it directly interfered in the plea bargain process." (Pet'r's Br. at 18.) Petitioner reasons that this "interference in the plea negotiation process caused an accepted plea offer to be withdrawn." (*Id.*) The circuit court found below that the court properly "exercised [its] statutory and

discretionary authority in ordering a second evaluation of [Petitioner]” pursuant to West Virginia Code § 27-6A-2(a). (App. Vol. IV at 60-61.) W. Va. Code § 27-6A-2(a) provides as follows:

Whenever a court of record has reasonable cause to believe that a defendant in which an indictment has been returned, or a warrant or summons issued, may be incompetent to stand trial it shall, *sua sponte* or upon motion filed by the state or by or on behalf of the defendant, at any stage of the proceedings order a forensic evaluation of the defendant’s competency to stand trial to be conducted by one or more qualified forensic psychiatrists, or one or more qualified forensic psychologists.

W. Va. Code § 27-6A-2(a). The circuit court found that “pursuant to West Virginia Code § 27-6A-2(a), a court may, *sua sponte*, order an evaluation at any stage of the proceedings by one or more qualified forensic psychiatrists, or one or more qualified forensic psychologists.” (App. Vol. IV at 60.) Petitioner advances several different contentions in attempting to demonstrate that the trial court somehow interfered with the plea bargain process by ordering a second evaluation. Petitioner first argues that the circuit court ordered the additional evaluation without any justification citing to this Court’s decision in *State v. Sanders*, 209 W. Va. 367, 549 S.E.2d 40 (2001). (Pet’r’s Br. at 14-16.) This Court held the following in *Sanders*:

Where a criminal defendant has already been afforded a competency hearing pursuant to W. Va. Code §§ 27-6A-1(d) & -2 (1983) and been found mentally competent to stand trial, a trial court need not suspend proceedings for purposes of permitting further psychiatric evaluation or conducting an additional hearing unless it is presented with new evidence casting serious doubt on the validity of the earlier competency finding, or with an intervening change of circumstance that renders the prior determination an unreliable gauge of present mental competency.

Syl. Pt. 4, 209 W. Va. 367, 549 S.E.2d 40 (2001). *Sanders*, however, does not support Petitioner’s claim. *Sanders* did not create a rule that *prohibits* trial courts from ordering a second evaluation, but rather, held that it was an *abuse of discretion* for trial courts to refuse to undertake “further psychiatric evaluation” or to “conduct[] an additional hearing” when “it is presented with new evidence casting serious doubt on the validity of the earlier competency

finding, or with an intervening change of circumstance that renders the prior determination an unreliable gauge of present mental competency.” *Id.* 209 W. Va. at 379-80, 549 S.E.2d at 52-53 (“[W]e conclude that the trial court in this case abused its discretion by failing to undertake further inquiry into the defendant’s mental competency.”). Consequently, *Sanders* does not stand for the proposition that before a circuit court *may* order another evaluation there must be some new evidence casting serious doubt on the earlier competency finding or some change of circumstance that renders the prior determination unreliable. *Sanders*, rather, provides the framework for when the circuit court is *required* to do so, and Petitioner’s assertions to the contrary are without merit.

Furthermore, Petitioner’s argument that the circuit court ordered a second “evaluation without providing any form of justification” is belied by the record. (Pet’r’s Br. at 16.) During the July 1, 2013, hearing, the parties indicated they were in plea negotiations and were considering a plea of not guilty by temporary insanity. (App. Vol. I at 114-15.) Before continuing the matter to July 9, 2013, the trial court expressed to the parties at the July 1, 2013, hearing that it needed to review the law surrounding competency and a plea to temporary insanity. (*Id.* at 114-20.) The circuit court then stated at the outset of the July 9th hearing, “I have been reviewing this file and reviewing everything that has been going on in this case and the charges against the Defendant, and so on, and I have decided that . . . the [c]ourt is going to order another evaluation of him.” (*Id.* at 124.) The court further stated, “Given the nature of what has happened in this case and all these wanton endangerments and attempted murders and everything, I think we need that other examination also.” (*Id.* at 124-25.) It should also be noted, as the circuit court pointed out below, that Gregory Trainor’s evaluation occurred approximately three months prior in April, 2013. (App. Vol. IV at 14, 60.); *Cf. Sanders*, 209 W.

Va. at 379, 549 S.E.2d at 52 (“Of particular importance in this case is the fact that Sanders’ trial did not commence until five months after he was last examined by Dr. Glance.”).

Moreover, it should be pointed out that Mr. Trainor’s evaluation, the only evaluation that was conducted at that point, did not conclude that Petitioner was in fact temporarily insane at the time Petitioner committed the crimes on the night in question. As the circuit court pointed out below, Trainor concluded that Petitioner “had a moderate to severe inability to comprehend the nature or quality of his criminal behavior, his capacity was moderately to severely diminished to appreciate the wrongfulness of his behavior and to control his reactions on the night in question, and his capacity was diminished to premeditate and formulate intent.” (App. Vol. IV at 58; *id.* at 36.) This reading of Trainor’s report is supported by Trainor’s testimony at trial. Trainor testified, “One would be, you know, a complete or nearly complete inability, which would fit the standard for, you know, not guilty by reason of insanity, and I did not feel that [Petitioner] reached that level of disability, that he was just completely not responsible for himself.” (App. Vol. III at 77.) When asked if it was his opinion, to a reasonable degree of psychological certainty, that Petitioner did not rise to the level of insanity, Trainor responded, “Correct.” (*Id.* at 84.) Trainor testified that he thought Petitioner may have some diminished capacity but that Petitioner was not insane. (*Id.*) Given the foregoing, Petitioner’s claim that the circuit court did not have any justification for ordering another evaluation is without merit.

Petitioner further points to this Court’s decisions in *W. Virginia Judicial Inquiry Comm’n v. Dostert*, 165 W. Va. 233, 233, 271 S.E.2d 427, 428 (1980), and *State ex rel. Hamstead v. Dostert*, 173 W. Va. 133, 313 S.E.2d 409 (1984), asserting that the trial court’s decision to order an additional evaluation “violates the bright line that the trial court holds as an impartial arbitrator.” (Pet’r’s Br. at 17.) As Petitioner correctly recognizes these are “extreme cases of a

circuit court judge trying to act as prosecutor.” (Pet’r’s Br. at 17.) Such are not the facts of this case. As opposed to assuming the role of prosecutor, the circuit court in this case properly exercised the discretion the legislature expressly gave to circuit courts pursuant to W. Va. Code § 27-6A-2(a). The circuit court correctly found below that the judge “properly exercised his statutory and discretionary authority to order such an evaluation at any stage of the proceedings.” (App. Vol. IV at 61.)

Finally, in attempting to demonstrate that the circuit court somehow directly interfered with the plea bargain process by ordering another evaluation, Petitioner argues that such “interference in the plea negotiation process resulted in the State withdrawing its plea offer, and Petitioner’s case proceeding to trial.” (Pet’r’s Br. at 18.) Petitioner continues that “[b]ut for the trial court’s interference in the plea negotiations, Petitioner [] would have entered a plea of not guilty by reason of temporary insanity to seven counts of the indictment and been committed to a mental health facility.” (*Id.* at 19.) Again, Petitioner fails to demonstrate how the circuit court’s ordering of another evaluation directly interfered in the plea bargain process. The circuit court was not presented with a plea agreement nor was it presented with any finalized terms of an agreement. The circuit court did not suggest or encourage a particular plea bargain and did not participate in plea discussions. At most, the circuit court expressed that it needed to review the law in regard to a plea to temporary insanity. (App. Vol. I at 114-20.) Furthermore, as Petitioner asserts “Rule 11 . . . leaves the acceptance or rejection of a plea agreement within the sound discretion of the circuit court.” (Pet’r’s Br. at 12) (citing Syl. Pt. 2 *Myers v. Frazier*, 173 W. Va. 658, 319 S.E.2d 782 (1984), Syl. Pt. 5, *State v. Guthrie*, 173 W. Va. 290, 315 S.E.2d 397 (1984)). Thus even assuming *arguendo* that the circuit court was presented with a plea agreement, the circuit court was under no obligation to accept the agreement, especially whereas

here the proposed plea was a plea of not guilty by temporary insanity based on a report that did not contain such a conclusion. Accordingly, Petitioner's claim in this regard must be rejected and the circuit court affirmed.

## **II. The Circuit Court Properly Denied Petitioner's Motion for a Rule 11 Hearing.**

Petitioner claims in his second assignment of error that the trial court erred when it denied Petitioner's Motion for a Rule 11 Hearing. (Pet'r's Br. at 19-21.) Petitioner argues that the trial court erred when it failed to consider the plea agreement on July 9, 2013, and again erred when it failed to consider the plea agreement on October 16, 2013. (Pet'r's Br. at 20.) As explained below, Petitioner's claims in this regard must be rejected.

Quoting Rule 11(e)(2) of the West Virginia Rules of Criminal Procedure, the circuit court below stated, "If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement . . . the court may accept or reject the agreement, or may defer its decision . . . ." (App. Vol. IV at 60.) The circuit court found, however, that the court "did not violate Rule 11 of the Rules of Criminal Procedure because the plea was not tendered and the terms of a finalized plea agreement were not addressed prior to or at the July 9th hearing." (App. vol. IV at 61.) Petitioner fails to refute the circuit court's finding in this regard.

Petitioner quotes from this Court's decision in *State v. Sears* stating "[w]hen a criminal defendant and the prosecution reach a plea agreement, it is an abuse of discretion for the circuit court to summarily refuse to consider the substantive terms of the agreement solely because of the timing of the presentation of the agreement to the court." (Pet'r's Br. at 20) (quoting Syl. Pt. 5, *Sears*, 208 W. Va. 700, 542 S.E.2d 863). The only basis to which Petitioner points in support of his claim that the circuit court failed to consider his plea agreement on July 9, 2013, is the circuit court's order entered on July 1, 2013, which stated that the matter was continued to July 9, 2013, for consideration of a plea. (*Id.* at 38; Pet'r's Br. at 20.) Petitioner fails to address,

however, the fact that the circuit court was never advised of an accepted plea agreement either on or before July 9, 2013, as was the case in *Sears*. 208 W. Va. at 703, 542 S.E.2d at 866 (“Defense counsel advised the court that his client had accepted the plea offer made by the prosecutor . . . .”). Accordingly, the circuit court did not fail to consider a plea in violation of Rule 11, and Petitioner’s claim in this regard must be rejected.

In regard to Petitioner’s assertions that the court failed to consider the plea on October 16, 2013, the circuit court found that the State properly withdrew its plea offer because Petitioner “ha[d] not yet pled guilty and because the plea offer was not approved by the [c]ourt. The [c]ourt further found that the State may withdraw its plea offer because of the new evidence, specifically Dr. Adamski’s evaluation . . . which the [c]ourt finds to be a fair and just reason for allowing the State to withdraw its plea offer.” (App. Vol. IV at 63.) Petitioner argues that the court erred in this finding because Dr. Adamski’s evaluation was “the product of impermissible judicial interference in the plea bargain process[]” as explained in Petitioner’s first assignment of error. (Pet’r’s Br. at 20.) As demonstrated by Respondent in the preceding section, the circuit court did not interfere in the plea bargain process, and thus Petitioner’s claim in this regard must also be denied.

**III. The State’s Evidence Proved Beyond a Reasonable Doubt that Petitioner was Sane at the Time the Criminal Conduct Occurred.**

Petitioner argues in his third assignment of error that the circuit court erred when it allowed Petitioner’s convictions to stand because the State failed to prove beyond a reasonable doubt that Petitioner was sane at the time the criminal conduct occurred. (Pet’r’s Br. at 21.)

When a defendant in a criminal case raises the issue of insanity, the test of his responsibility for his act is whether, at the time of the commission of the act, it was the result of a mental disease or defect causing the accused to lack the capacity either to appreciate the wrongfulness of his act or to conform his act to the requirements of the law, and it is error for the trial court to give an instruction

on the issue of insanity which imposes a different test or which is not governed by the evidence presented in the case.

Syl. Pt. 2, *State v. Myers*, 159 W. Va. 353, 354, 222 S.E.2d 300, 302 (1976) *overruled on other grounds by State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). Furthermore, “[t]here exists in the trial of an accused a presumption of sanity. However, should the accused offer evidence that he was insane, the presumption of sanity disappears and the burden of proof is on the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time of the offense.” Syl. Pt. 6, *State v. McWilliams*, 177 W. Va. 369, 372, 352 S.E.2d 120, 123 (1986) (quoting Syl. pt. 2, *State v. Milam*, 163 W.Va. 752, 260 S.E.2d 295 (1979)). “The defendant who raises the issue of his insanity at the time of the commission of the act carries the burden of proving that defense by a preponderance of the evidence[.]” Syl. Pt. 3, *Myers*, 159 W. Va. 353, 222 S.E.2d 300.

Petitioner first asserts in a conclusory manner that the defense properly established its insanity defense of PTSD through the expert testimony of two psychological experts, and thus that the burden fell on the State to prove beyond a reasonable doubt that Petitioner was sane at the time the criminal conduct occurred. (Pet’r’s Br. at 22.) An examination of the two defense experts’ testimony, however, reveals that Petitioner failed to overcome the presumption of sanity. Furthermore, even if it can be said that Petitioner did present sufficient evidence to overcome the presumption of sanity, the State proved beyond a reasonable doubt that Petitioner was sane at the time the criminal conduct occurred as Dr. Thomas Adamski’s testimony sufficiently rebutted the testimony of Petitioner’s two experts. While it is undisputed that Petitioner was previously diagnosed with PTSD, the question at trial was whether he was suffering from PTSD at the time of the commission of the crime such that it caused Petitioner to

lack the capacity either to appreciate the wrongfulness of his act or to conform his act to the requirements of the law.

Petitioner first called Gregory Trainor. On direct examination Trainor was asked if he had “an opinion, with a reasonable degree of psychological certainty, regarding whether or not [Petitioner’s] capacity to appreciate the difference between right and wrong was severely diminished or impaired due to the post-traumatic stress disorder coupled with alcohol consumption[.]” (App. Vol. III at 76-77.) Trainor testified as follows: “So let me qualify my statement there. One would be, you know, a complete or nearly complete inability, which would fit the standard for, you know, not guilty by reason of insanity, and I did not feel that Petitioner reached that level of disability, that he was just completely not responsible for himself.” (*Id.* at 77.) Furthermore, on cross-examination Trainor testified that to a reasonable degree of psychological certainty that Petitioner did not rise to the level of insanity but that he may have some diminished capacity. (*Id.* at 84.) Accordingly, Trainor’s testimony fails to overcome the presumption that Petitioner was sane at the time the criminal acts occurred.

Petitioner then called Dr. Barnet Feingold. (*Id.* at 85.) Dr. Feingold testified on direct examination that it was clear to him “that [Petitioner’s] actions were shaped by his post-traumatic stress disorder and more broadly by his experiences in Iraq.” (*Id.* at 119.) When asked if it was his opinion that he was not criminally responsible on the night in question Dr. Feingold testified,

To the best of my understanding of criminal responsibility, yes, it’s my opinion that, again, his PTSD and drinking came together to cause him to lose an accurate, you know, to distort his sense of reality such that what he was doing and what he thought he was doing were two . . . different things.

(*Id.* at 118.) On cross-examination Feingold was asked in reference to Gregory Trainor’s opinion if he knew the difference between insanity and diminished capacity. (*Id.* at 132.)

Feingold testified that he did not. (*Id.* at 133.) Dr. Feingold was then asked if he knew the difference between specific intent crimes and general intent crimes. (*Id.*) Feingold testified that he did not. (*Id.*) Feingold testified that he had never testified as an expert before a court due to his being employed by the Department of Veteran’s Affairs. (*Id.* at 87.) While Dr. Feingold was familiar with PTSD, it was demonstrated on cross-examination that Dr. Feingold was not familiar with the legal standards at play in his determination of criminal responsibility.

The State called Dr. Thomas Adamski in rebuttal who testified that at the time the offenses occurred Petitioner “(1) [] was able to appreciate the wrongfulness of his behavior; and (2) [] could have conformed his conduct to the requirements of the law.” (*Id.* at 164.) Dr. Adamski testified that he did not dispute that Petitioner had PTSD. (*Id.* at 166.) However, at the time of the offenses Dr. Adamski testified that he “did not identify at any time where [Petitioner] felt that his life was in jeopardy, that his integrity was being threatened, that he was in danger of being harmed, which is an expectation for somebody who engages in a PTSD-like behavior.” (*Id.* at 168.)

Dr. Feingold testified that the protracted argument Petitioner had with his wife after Petitioner said he saw an American flag that was ripped up reminded Petitioner of combat and terrorist attacks and the situations involving Mr. and Mrs. Ludwick and Mr. Slade had some resemblance to checkpoints he encountered. (*Id.* at 111.) Dr. Adamski, however, testified that in regard to having a fight with his wife, Petitioner would need to be asked why he felt that the argument was a threat to Petitioner’s personal safety “because it’s with that cornerstone event that leads an individual to going off.” (*Id.* at 167.) Dr. Adamski further explained that “if you don’t feel like you’re going to die, then that’s not an explanation for . . . PTSD behaviors that immediately follow such a fight.” (*Id.*) As stated above, Dr. Adamski stated that he did not

identify any point in time wherein Petitioner felt that his integrity was threatened or that he was in danger of being harmed.

Dr. Adamski also testified that he listened to the interview between Petitioner and Captain Eckerson wherein Petitioner was able to recall many things that happened during the evening in question, supporting Dr. Adamski's conclusion that Petitioner was not insane at the time of the offense. (*Id.*) Petitioner recalled being in an argument with his wife and remembers going home with his wife. (*Id.*) Petitioner also recalled continuing the argument with his wife and subsequently taking off in his jeep. (*Id.* at 128.) Petitioner did not recall cutting through Mr. Ludwick's yard. (*Id.* at 129.) Dr. Feingold testified, however, that he did not know whether cutting through the yard was attributable to a PTSD-induced flashback, and additionally testified that "it might be attributable to just kind of a generally impaired memory due to drinking." (*Id.*) Petitioner also recalled driving down the road and subsequently getting into an argument with an individual and remembered that individual leaving. (*Id.*) Petitioner also recalled being on Rubenstein Road and that there was a car behind him with its high beams on. (*Id.* at 130.) Petitioner also recalled seeing blue lights and knew the blue lights were police officers. (*Id.* at 130-31.) Petitioner said during the interview that he could take the officers back to Rubenstein Road to show them where the ammunition was. (*Id.* at 131.) Petitioner also stated the following in the course of the interview: "I was trying to cool off. I probably shouldn't have done what I did. I didn't have the right to do that." (*Id.* at 131.)

Petitioner attempts to discredit Dr. Adamski by attempting to demonstrate Dr. Adamski's bias. (Pet'r's Br. at 22-24.) It should first be noted that "[t]he term 'credibility' includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness' character." Syl. Pt. 1, in part, *State v. Barnett*, 226 W. Va. 422, 424, 701

S.E.2d 460, 462 (2010) (quoting Syllabus Point 4, *State v. Richey*, 171 W.Va. 342, 298 S.E.2d 879 (1982)). Importantly, “[c]redibility determinations are for a jury and not an appellate court.” Syl. Pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). Petitioner was able to cross-examine Dr. Adamski as to all of the instances to which Petitioner claims proves that Dr. Adamski was biased, and the jury ultimately decided the credibility question in favor of Dr. Adamski. (*Id.* at 176-87, 188-89.) Furthermore, Petitioner’s assertions that Dr. Adamski was improperly biased are without merit. Petitioner asserts that Dr. Adamski called the prosecutor to tell him that that he was going to find Petitioner criminally responsible. (Pet’r’s Br. at 22.) However, Dr. Adamski testified that “[he] wouldn’t have done that without sending a report. That’s a misuse of somebody’s spoken words, and they are not mine.” (App. Vol. III at 184.) Petitioner also cross-examined Dr. Adamski as to his initial evaluation wherein Petitioner did not have the documentation to show Dr. Adamski that Petitioner was awarded a Combat Infantry Badge. (*Id.* at 180-81, 184-87.) Ultimately, Dr. Adamski testified that he did later find out that Petitioner was awarded the Combat Infantry Badge and that it did not change his opinion. (*Id.* at 187.) Petitioner also asserts that Dr. Adamski almost said during cross-examination that he was working for the State. (Pet’r’s Br. at 24.) The only evidence that Petitioner gives in support of this claim is his own counsel trying to spur an answer he desires by interrupting Dr. Adamski’s testimony, stating, “He’s the one-say it, keep on, come on. Say what you’re thinking. He’s the one that you’re working for.” At no point did Dr. Adamski testify that he was working for the State. Petitioner’s claim in this regard must also be denied.

**IV. The Evidence Admitted at Trial Was Sufficient to Support Petitioner’s Conviction for Attempted Murder.**

Petitioner asserts in his fourth assignment of error that trial court committed plain error when it allowed the jury’s guilty verdict on Petitioner’s attempted murder charge to stand.

(Pet'r's Br. at 26.) "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, 7, 459 S.E.2d 114, 118 (1995). "To be 'plain,' the error must be 'clear' or 'obvious.'" Syl. Pt. 8, in part, *id.* Petitioner's plain error claim must be rejected as the circuit court did not commit an error that was plain when it allowed the jury's guilty verdict on Petitioner's attempted murder charge to stand.

Petitioner challenges the sufficiency of the evidence with regard to his attempted murder conviction asserting that he sufficiently rebutted the inference of malice, willfulness, and deliberation through the testimony of his defense expert, and that the State failed to present any evidence that Petitioner's actions were premeditated and deliberate. (Pet'r's Br. at 26-27.)

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

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, *id.*

Petitioner was convicted of the attempted murder of Brian Slade. (App. Vol. III at 275.) Brian Slade testified that he encountered Petitioner when he was trying to get the license plate number on the jeep Petitioner was driving. (App. Vol. II at 183-84.) Slade testified that he followed Petitioner when Petitioner turned into Buffalo Gap. (*Id.* at 183.) Slade testified when Petitioner stopped, he stopped. (*Id.* at 187.) Slade then testified that he saw a weapon come out and that Petitioner just started shooting. (*Id.* at 184.) Slade ducked down, put his vehicle on reverse and headed back to his house. (*Id.*) Slade testified that he could hear cracks from the rifle and bullets hitting his car. (*Id.*) Slade demonstrated for the jury the manner in which Petitioner was shooting at him and additionally testifying that it was “[f]rom the hip.” (*Id.* at 186-87.) Slade also testified as to the damage found on his car as a result of Petitioner’s gunfire. Slade testified that one of the bullets creased the top of his car and would have gone through the middle of his head had it been six inches lower. (*Id.* at 186.) Slade testified that another bullet penetrated the rear passenger side of his car. (*Id.*) Slade found a total of five instances where a bullet struck his car. (*Id.*) This Court previously has expressed that

[m]ethods for proving malice cannot be definitely prescribed because it is a subjective attitude, *State v. Gunter*, 123 W.Va. 569, 17 S.E.2d 46 (1941); however, (malice) may be inferred from the intentional use of a deadly weapon, *State v. Brant*, [162 W.Va. 762] 252 S.E.2d 901 (1979).” *State v. Ferguson*, [165 W.Va. 529] 270 S.E.2d 166, 170 (1980)[, *overruled on other grounds*, *State v. Kopa*, 173 W.Va. 43, 311 S.E.2d 412 (1983) ].

*State v. Horn*, 232 W. Va. 32, 40, 750 S.E.2d 248, 256 (2013) (quoting *State v. Slonaker*, 167 W.Va. 97, 101, 280 S.E.2d 212, 215 (1981)). “If the jury believes, however, there was legal justification, excuse, or provocation, the inference of malice does not arise and malice must be established beyond a reasonable doubt independently without the aid of the inference.” Syl. Pt. 7, in part, *State v. Miller*, 197 W. Va. 588, 593, 476 S.E.2d 535, 540 (1996). Petitioner first asserts that he successfully rebutted the inference of malice through the use of Dr. Feingold’s

testimony that established that Petitioner was unaware of what was transpiring due to his suffering from PTSD. (Pet'r's Br. at 26.) As pointed out above, Dr. Adamski found, as well as the jury, that Petitioner was not suffering from PTSD at the time the offense occurred. Accordingly, a reasonable jury could properly find Petitioner acted maliciously when Petitioner fired his assault rifle at Brian Slade multiple times, hitting Slade's car and coming within inches of hitting Slade's head.

Petitioner also asserts that the State failed to present any evidence that Petitioner's actions were premeditated and deliberate. (Pet'r's Br. at 27.)

Although premeditation and deliberation are not measured by any particular period of time, there must be some period between the formation of the intent to kill and the actual killing, which indicates the killing is by prior calculation and design. This means there must be an opportunity for some reflection on the intention to kill after it is formed.

Syl. Pt. 5, *State v. Guthrie*, 194 W. Va. 657, 664, 461 S.E.2d 163, 170 (1995).

[t]he duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, ... is sufficient to support a conviction for first degree murder.

Syl. Pt. 6, in part, *id.*

In this case, viewing the evidence in the light most favorable to the prosecution, a reasonable person could find that Petitioner acted deliberately and with premeditation. When Slade pulled in behind Petitioner, Petitioner stopped his car, retrieved his weapon, opened his car door and stepped out of his car pointing his weapon toward Slade. Petitioner then opened fire striking Slade's car and coming within inches of shooting Slade in the head. When Petitioner stopped his car, he formed the intent to kill the person who was following him and executed that

intent by exiting his car and using his assault rifle to attempt to shoot Brian Slade. Accordingly, Petitioner's claim in this regard must also be rejected.

**V. The Trial Court Did Not Abuse Its Discretion as It Properly Denied Petitioner's Motions for Mistrial.**

Petitioner asserts in his fifth assignment of error that the trial court erred when it failed to declare a mistrial following the State's examinations of Heather Ludwick, Dr. Adamski, and Dr. Feingold. "It has been established that '[t]he decision to declare a mistrial, discharge the jury, and order a new trial in a criminal case is a matter within the sound discretion of the trial court.'" *State v. Corey*, 233 W. Va. 297, 308, 758 S.E.2d 117, 128 (2014) (quoting Syl. pt. 8, *State v. Davis*, 182 W.Va. 482, 388 S.E.2d 508 (1989)). "As we explained in *State v. Williams*, 172 W.Va. 295, 304, 305 S.E.2d 251, 260 (1983), '[a] trial court is empowered to exercise this discretion only when there is a 'manifest necessity' for discharging the jury before it has rendered its verdict.'" *Id.*

In regard to Heather Ludwick, Petitioner argues that the circuit court should have declared a mistrial when the State asked Mrs. Ludwick if Petitioner was speaking Arabic or issuing military commands and when the State asked her if Petitioner was talking about aliens or spaceships. (Pet'r's Br. at 28-29.) In support of his claim, Petitioner quotes a footnote stating "[t]rial courts should preclude questions for which the questioner cannot show a factual and good faith basis." (Pet'r's Br. at 29) (quoting *State v. Guthrie*, 194 W. Va. 657, 686 n.47, 461 S.E.2d 163, 192 n.47 (1995) (citing *State v. Banjoman*, 178 W.Va. 311, 359 S.E.2d 331 (1987))). Petitioner's claim is without merit.

First, there is nothing inflammatory in regard to asking Heather Ludwick if Petitioner was speaking Arabic or issuing military commands during her encounter with Petitioner. As the State correctly pointed out below, the issue in this case was whether Petitioner was suffering

from PTSD at the time of the offenses. (App. Vol. II at 179.) Petitioner's own expert testified that Petitioner had started using commands he would use in Iraq and that Petitioner had started speaking in Arabic to an individual in a store instructing him to get away. (App. Vol. III at 78.) The only basis Petitioner gives in support of his assertion that such questions were improper is that the prosecutor knew that Petitioner did not say these things to Mrs. Ludwick. Petitioner asserts that the only logical basis for those questions "was to undermine Petitioner's insanity defense by improperly putting those questions before the jury." Pet'r's Br. at 29. The fact that testimony undermines a defense of Petitioner does not make such testimony improper. Furthermore, the fact that Petitioner did not speak Arabic or issue military commands to Mrs. Ludwick is a fact the jury should be allowed to consider in making its determination of whether Petitioner was suffering from PTSD at the time of the offenses. Moreover, as soon as Petitioner's counsel objected to the line of questioning the prosecutor stated that there was "not going to be any further questions with that." (App. Vol. II at 175.) Given the foregoing, the trial court did not abuse its discretion in denying Petitioner's motion for new trial in this regard.

Petitioner also states that upon completion of Dr. Adamski's testimony, the trial court should have declared a mistrial and erred when it failed to do so. (Pet'r's Br. at 29-30.) This claim must be rejected, however, because Petitioner failed to make a motion for a mistrial in regard to Dr. Adamski's testimony. *Corey*, 233 W. Va. at 310, 758 S.E.2d at 130 (2014) ("Thus, a defendant who fails to make a timely motion for mistrial ... waives the right to assert on appeal that the court erred in not declaring a mistrial[.]") (citation omitted.)

Petitioner also asserts that the trial court should have declared a mistrial when the State asked Dr. Feingold if he was aware of possible ethical violations for rendering an expert opinion without first interviewing Petitioner. (Pet'r's Br. at 31.) Petitioner agrees that the State's

assessment of the ethical rules governing psychologists was accurate. (*Id.*) The circuit court denied Petitioner's motion for a new trial finding that the State's questioning regarding ethical responsibilities was simply voir dire cross-examination of Dr. Feingold. (App. Vol. III at 142.) Moreover, when Dr. Feingold was asked by the State on cross-examination if he was aware it was considered unethical to render an opinion about someone without going to interview them, Petitioner's trial counsel asserted that he did not mind Dr. Feingold answering the question. (*Id.* at 121.) Defense counsel further asserted, however, that the State was opening the door to criticism of Adamski. (*Id.*) In denying Petitioner's motion the circuit court reasoned that the State's questions did not rise to the level of a mistrial since Dr. Feingold was able to answer the questions and defense counsel was then given latitude to then go into Dr. Feingold's criticisms of Dr. Adamski's report. (*Id.* at 142, 135-36.) The circuit further stated that Petitioner was also going to have the chance to cross-examine Dr. Adamski. (*Id.* at 142.) Given the foregoing, the circuit court did not abuse its discretion when it denied Petitioner's motion for a mistrial, and Petitioner's claim in this regard must be rejected.

**VI. Petitioner Waived His Claim That the Trial Court Violated Rule 404(b) of the West Virginia Rules of Evidence.**

Petitioner claims that the trial court violated Rule 404(b) of the West Virginia Rules of Evidence when it allowed the prosecuting attorney to ask Lois Fleming about Petitioner's exit from the Charlotte-Mecklenburg Police Department, a prior divorce, and about a prior domestic incident. (Pet'r's Br. at 33.) Petitioner raises this claim for the first time on appeal, and therefore this claim must be considered waived.

Our cases consistently have demonstrated that, in general, the law ministers to the vigilant, not to those who sleep on their rights. Recently, we stated in *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 216, 470 S.E.2d 162, 170 (1996): "The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace." (Citation omitted). When a litigant deems himself or herself aggrieved by

what he or she considers to be an important occurrence in the course of a trial or an erroneous ruling by a trial court, he or she ordinarily must object then and there or forfeit any right to complain at a later time. The pedigree for this rule is of ancient vintage, and it is premised on the notion that calling an error to the trial court's attention affords an opportunity to correct the problem before irreparable harm occurs. There is also an equally salutary justification for the raise or waive rule: It prevents a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error (or even worse, planting an error and nurturing the seed as a guarantee against a bad result). In the end, the contemporaneous objection requirement serves an important purpose in promoting the balanced and orderly functioning of our adversarial system of justice.

*State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996). “Elaborating on this principal, we have explained that an objection to evidence must be timely and specific in order to give the trial court an opportunity to address the issue at a time when corrective action may be taken.” *Coleman v. Sopher*, 201 W. Va. 588, 601, 499 S.E.2d 592, 605 (1997).

At no time during the proceedings below did Petitioner make an objection under Rule 404(b) of the West Virginia Rules of Evidence. Petitioner’s objection in regard to this assignment of error never expressly raised Rule 404(b) nor presented the court below with any hint that its objection concerned Rule 404(b). (App. Vol. III at 14-16.) Accordingly, the circuit court never had the opportunity to address the issue Petitioner now raises on appeal. Petitioner has failed to preserve this issue for appeal and therefore has waived this issue.

Even if this court were to consider this claim on appeal, Petitioner’s claim cannot survive harmless error analysis.

“Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.” Syl. Pt. 2, *State v. Atkins*, 163 W.Va. 502, 261 S.E.2d 55 (1979).

Syl. Pt. 2, *State v. Sharp*, 226 W. Va. 271, 272, 700 S.E.2d 331, 332 (2010). First, when the alleged inadmissible evidence is removed from the State's case, the remaining evidence is undoubtedly sufficient to support Petitioner's convictions. Lois Fleming was not an essential witness for the State. The testimony of the multiple victims, including law enforcement officials, and the State's expert was sufficient to support all of Petitioner's convictions. Furthermore, any prejudicial effect the evidence had on the jury was minimal. The record reveals that Lois Fleming testified on cross-examination that she did not know the basis or reasons that were cited for the divorce; that her understanding of why Petitioner left the police department was that Petitioner was moving to Maryland; that while she was aware that Petitioner's brother called law enforcement in regard to a domestic dispute, she was unaware if it involved alcohol; and that she was not aware of any incident involving Petitioner in a bar. (App. Vol. III at 13-18.) On redirect, defense counsel then asked additional questions regarding Petitioner's reasons for resigning from the police department including reading directly from the report entitled "Criminal Justice Education and Training Standards Commission, Report of Separation, Law Enforcement Officer." (*Id.* at 19-22.) Given the foregoing, Petitioner's claims in this regard must be rejected.

**VII. Petitioner Fails to Prove that the Prosecuting Attorney Engaged in Misconduct and Fails to Show that the Alleged Misconduct Deprived Petitioner of His Right To a Fair Trial.**

Petitioner next asserts that the prosecuting attorney's misconduct deprived Petitioner of his right to a fair trial. Petitioner then cites to the following from *State v. Guthrie*:

The inquiry focuses on the fairness of the trial and not the culpability of the prosecutor because allegations of prosecutorial misconduct are based on notions of due process. In determining whether a statement made or evidence introduced by the prosecution represents an instance of misconduct, we first look at the statement or evidence in isolation and decide if it is improper. If it is, we then evaluate whether the improper statement or evidence rendered the trial unfair.

Several factors are relevant to this evaluation, among them are: (1) The nature and seriousness of the misconduct; (2) the extent to which the statement or evidence was invited by the defense; (3) whether the statement or evidence was isolated or extensive; (4) the extent to which any prejudice was ameliorated by jury instructions; (5) the defense's opportunity to counter the prejudice; (6) whether the statement or evidence was deliberately placed before the jury to divert attention to irrelevant and improper matters; and (7) the sufficiency of the evidence supporting the conviction.

*State v. Guthrie*, 194 W. Va. 657, 677 n.25, 461 S.E.2d 163, 183 n.25 (1995) (citing *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995)).

Petitioner then, in support of his prosecutorial misconduct claim, simply realleges the grounds previously asserted as assignments of errors including that the prosecutor asked Heather Ludwick, Dr. Feingold, Lois Fleming, and Dr. Adamski improper questions; and that Dr. Adamski essentially admitted he was working for the prosecutor. (*Id.* at 39.) As Respondent demonstrated in the preceding sections, Petitioner's assertions in this regard are without merit and must be rejected. Accordingly, Petitioner's claim that the prosecutor engaged in prosecutorial misconduct to deprive Petitioner of a fair trial must also be rejected.

#### **VIII. The Trial Court Properly Denied Petitioner's Motions for Judgment of Acquittal.**

Petitioner next argues that the circuit court erred when it denied Petitioner's Motion for Judgment of Acquittal at the close of the State's case-in-chief and at the conclusion of the trial. (Pet'r's Br. at 40-41.) Petitioner's principal contention within this assignment of error is that the State failed to prove that acts complained of occurred in Hampshire County, West Virginia. (*Id.*) The circuit court concluded that "[o]bviously, this crime occurred in Hampshire County, West Virginia, from the maps and the exhibits and the testimony that was presented today." (App. Vol. II at 147.) While Petitioner asserts that the prosecutor never elicited direct testimony regarding whether the acts complained of occurred in Hampshire County, West Virginia, "[i]t

has long been established in our law that venue can be established by circumstantial evidence.” *State v. Burton*, 163 W. Va. 40, 58, 254 S.E.2d 129, 140 (1979). Petitioner simply asserts that the court abused its discretion in making this finding, failing to address why the testimony coupled with the use of the maps was insufficient other than asserting Capon Bridge was a border town. (Pet’r’s Br. at 40-41.) Petitioner fails to carry his heavy burden to show that the State’s evidence was insufficient. When the evidence is viewed in the light most favorable to the prosecution including all inferences and credibility assessments, the trial court did not abuse its discretion in finding that the State proved that the offenses occurred in Hampshire County, West Virginia.

Petitioner next states in one sentence that “Petitioner also argued that the State failed to prove that numerous counts of wanton endangerment were anything more than brandishing.” (Pet’r’s Br. at 41.) This Court has reiterated that “casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal.” *State v. Lilly*, 194 W.Va. 595, 605 n. 16, 461 S.E.2d 101, 111 n. 16 (1995) (internal quotations and citation omitted). This Court has also repeated that “a skeletal argument, really nothing more than an assertion, does not preserve a claim.” *State Dep’t v. Robert Morris N.*, 195 W.Va. 759, 765, 466 S.E.2d 827, 833 (1995) (internal quotations and citations omitted). Furthermore, the circuit court properly denied this claim based on the State’s argument below wherein the State explained the State’s evidence in regard to each count. (App. Vol. II at 243-47.) Petitioner’s remaining assertions involve preceding assignments of error including that the State failed to prove beyond a reasonable doubt the elements of premeditation and malice in regard to attempted murder, and that the State failed to prove beyond a reasonable doubt that Petitioner was sane at the time the offenses were

committed. (Pet'r's Br. at 41.) As explained in further detail above, Petitioner's claims in this regard must also be rejected.

**IX. The Circuit Court Properly Denied Petitioner's Motion for New Trial**

Petitioner simply argues in his ninth assignment of error that the circuit court abused its discretion when it denied Petitioner's Motion for New Trial. (Pet'r's Br. at 41.)

In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error 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. 3, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000). Petitioner asserts that many of the grounds Petitioner asserted in his Motion for New Trial are presented throughout Petitioner's Brief, and that for the reasons set forth in Petitioner's Brief and his Motion for New Trial, the trial court abused its discretion in denying the motion. (Pet'r's Br. at 41.) As explained in Respondent's Brief, Petitioner's claims for relief are without merit and thus the circuit court did not abuse its discretion in denying Petitioner's Motion for New Trial.

**X. Petitioner's Sentence Was Not Disproportionate To His Crimes, and Therefore, Does Not Constitute a Constitutional Violation.**

In Petitioner's final assignment of error, he claims that the trial court erred when it sentenced Petitioner to a period of incarceration disproportionate to the underlying criminal conduct. (Pet'r's Br. at 42.) "There are two tests to determine whether a sentence is so disproportionate to a crime that it violates our constitution." *State v. Cooper*, 172 W. Va. 266, 272, 304 S.E.2d 851, 857 (1983). "The first is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further." *Id.* "When it cannot be said that a sentence shocks the conscience, a disproportionality challenge is

guided by the objective test we spelled out in Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981)[.]” *Id.*

In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

Syl. Pt. 5, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 523-24, 276 S.E.2d 205, 207 (1981).

“While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence.” *Id.* 166 W. Va. at 531, 276 S.E.2d at 211.

Petitioner only addresses the first test on appeal arguing that his sentence shocks the conscience. Petitioner’s claim is without merit. Before pronouncing Petitioner’s sentence, the circuit court stated at the outset that it had reviewed Petitioner’s Presentence Investigation Report and LS/CMI which placed Petitioner in the medium-risk category for reoffending. (App. Vol. I at 102.) The circuit court also expressly considered both Petitioner’s military record and Petitioner’s lack of criminal record. (*Id.*) The circuit court also considered the testimony and statements given during the sentencing hearing. (*Id.* at 102-03.) The court took notice that Petitioner was being treated for PTSD, was on medication, and had counselling. (*Id.* at 103.) Taking all of the foregoing in consideration, the circuit court sentenced Petitioner to two years for Count I, wanton endangerment; two years for Count II, wanton endangerment; three years for Count IV, wanton endangerment; three to fifteen years for Count V, attempted murder; three years for Counts VI-XII, wanton endangerment; one to five years for Count XIII, Fleeing in Reckless Indifference for Safety of Others; and five years for Counts XIV-XV, Wanton

Endangerment. (App. Vol. IV at 118-22.) The circuit court further ordered that Counts I, II, and IV to run concurrently with each other. (*Id.* at 122.) The court additionally ordered that Counts V-XII to run concurrently with each other. (*Id.*) The circuit court ordered these two groups to run consecutively to one another. (*Id.*) The court ordered Count XIII to run consecutively to Counts V-XII. (*Id.*) The Court finally ordered that Counts XIV and XV to run concurrently to each other, but consecutive Count XIII. (*Id.*)

Petitioner's argument that his sentence shocks the conscience largely centers on his assertion that he committed the criminal conduct in this case as a result of a PTSD-induced flashback. (Pet'r's Br. at 44.) Petitioner argues that he could not conform his conduct to the laws of West Virginia at the time of the offenses, and therefore, probation is the only appropriate and just sentence. (*Id.*) Petitioner's argument must be rejected. The jury weighed the evidence in the case and determined that Petitioner was not suffering from a PTSD-induced flashback at the time he committed the criminal acts when they convicted Petitioner of the above counts. In pronouncing its sentence, the circuit court properly considered Petitioner's history, including his service record, and additionally properly considered the gravity of the offenses to which Petitioner was ultimately found guilty. Accordingly, the sentence rendered in this case is not so offensive that it cannot pass a societal and judicial sense of justice, and Petitioner's claim in this regard must be denied.

**CONCLUSION**

For the reasons stated above, the judgment of the Circuit Court of Hampshire County must be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,  
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By counsel,

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## CERTIFICATE OF SERVICE

I, Derek A. Knopp, Assistant Attorney General and counsel for the State of West Virginia, hereby verify that I have served a true copy of "Respondent's Brief" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 7th day of May, 2015, addressed as follows:

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