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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

# STATE OF WEST VIRGINIA
# SUPREME COURT OF APPEALS

**Demerise A. Smith,**
**Petitioner Below, Petitioner**

**vs.) No. 21-0535** (Raleigh County No. 16-C-407)

**J.D. Sallaz, Lakin**
**Correctional Center,**
**Respondent Below, Respondent**

## MEMORANDUM DECISION

Petitioner Demerise A. Smith, by counsel Robert P. Dunlap II, appeals the Circuit Court of Raleigh County's June 4, 2021, order summarily dismissing her petition for a writ of habeas corpus. Respondent J.D. Sallaz, Superintendent, Lakin Correctional Center, by counsel Patrick Morrisey and Scott E. Johnson, filed a response. Petitioner filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

## I. FACTS AND PROCEDURAL HISTORY

In 1989, Jackie Dale Smith's body was found in Lake Stephens in Raleigh County, West Virginia. The subsequent investigation revealed that petitioner, the decedent's wife, had offered her brother, Harry Jarrell, money to kill the decedent. Mr. Jarrell thereafter recruited Matt Strogen to assist in the killing. On the night of the murder, the decedent and petitioner met Mr. Jarrell and Mr. Strogen out on the lake for nighttime fishing, and Mr. Jarrell and Mr. Strogen proceeded to drown the decedent.

After the murder, Mr. Strogen left Raleigh County and traveled to Texas, where he was later incarcerated for drug offenses. When he was paroled, two members of the Raleigh County Sheriff's Department were waiting to return Mr. Strogen to West Virginia to face felony charges related to copper theft. According to the officers, Mr. Strogen confessed to the decedent's murder while being transported from the prison to the airport. Petitioner, Mr. Strogen, and Mr. Jarrell were indicted for the decedent's murder.

Following separate jury trials, petitioner and Mr. Jarrell were each convicted of first-degree murder, and the jury made no recommendation of mercy for either petitioner or Mr. Jarrell. Petitioner's direct appeal was refused by this Court in September of 1992. *State ex rel. Strogen v. Trent*, 196 W. Va. 148, 150, 469 S.E.2d 7, 9 (1996).

Mr. Strogen pled guilty to first-degree murder, with mercy. *Id.* at 152, 469 S.E.2d at 11. This Court set aside Mr. Strogen's plea and sentence, however, finding that his counsel was ineffective for failing to investigate the circumstances leading to his statement to the police to determine whether it could be challenged, as Mr. Strogen's statement was the "primary link" connecting him to the decedent's murder. *Id.* at 154, 469 S.E.2d at 13. Mr. Strogen then pled guilty to second-degree murder.

Mr. Jarrell's conviction was also reversed by this Court in *State v. Jarrell*, 191 W. Va. 1, 442 S.E.2d 223 (1994). The Court found that Mr. Jarrell's Sixth Amendment right to confront witnesses against him was violated when the trial court permitted the State to read a witness's grand jury testimony and prior trial testimony into evidence instead of allowing her to testify in person. *Id.* at 6, 442 S.E.2d at 228. The Court also stated that petitioner's tape-recorded statements to law enforcement were not properly admitted under the hearsay exception for statements made "during the course and in furtherance of the conspiracy" because "[t]heir relevance is questionable, and [petitioner's] statements to the police quite clearly were not made 'during the course and in furtherance of the conspiracy.'" *Id.* at 7, 442 S.E.2d at 229. Subsequent to this reversal, like Mr. Strogen, Mr. Jarrell pled guilty to second-degree murder. Mr. Strogen and Mr. Jarrell have been released from prison.

In June of 2016, petitioner, while self-represented, filed a petition for a writ of habeas corpus. Petitioner was appointed counsel, and, with the assistance of counsel, she filed an amended petition asserting seventeen grounds for relief.

On June 4, 2021, the habeas court entered an order summarily dismissing the amended petition. The court noted that petitioner filed a direct appeal, and it found that all but three of the grounds raised in her habeas petition could have been pursued on direct appeal.[1] Consequently, the habeas court found that only three of petitioner's asserted grounds were reviewable in habeas: newly discovered evidence, ineffective assistance of counsel, and disparate sentence. The habeas court found that petitioner's failure to pursue the remainder of her seventeen grounds for relief on direct appeal resulted in her waiver of those grounds in this habeas proceeding, but it, nevertheless, analyzed the remaining grounds in the event that "it be determined on review that any of the remaining issues was not waived." Petitioner now appeals from the court's summary dismissal order, which we describe more fully below.

## II. STANDARD OF REVIEW

[1] In petitioner's direct appeal, she claimed error on only three grounds: (1) the State referenced petitioner's statements when she exercised her right not to testify, (2) the State attacked its own witnesses in closing argument, and (3) the State argued for a no mercy verdict.

> In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.

Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

## III. DISCUSSION

Petitioner raises eleven assignments of error on appeal, challenging the habeas court's ruling on nearly every ground asserted in her amended habeas petition.[2]

### A. Claims the Habeas Court Found Were Reviewable in Habeas

As stated above, the habeas court found that only three of petitioner's asserted grounds for habeas relief had not been waived, and her challenge to the court's conclusions on those three grounds correspond to her first three assignments of error, which assert, respectively, that she was denied due process based on newly discovered evidence, that she was denied due process and equal protection of the law "due to the disproportionate sentencing" of petitioner and her codefendants, and that she was denied due process based on ineffective assistance of trial counsel.

1. Newly Discovered Evidence

In May of 2008, Mr. Jarrell executed a notarized statement asserting that he drove "Matthew Strogen to the lake the night Jackie Dale Smith was killed. [Petitioner] had no knowledge of this." He further averred that

> Matthew Strogen stated to me that Jackie Dale Smith molested him when he was younger and that he, Matthew Strogen, would take care of business when the time came. He made that statement to me when we were putting a basketball goal up in Jackie Smith's yard. . . . That same night, he pushed Jackie in the water and did make a statement that it wasn't the first time and he would kill again if he had to.

In addition, during Mr. Strogen's habeas proceeding, he purportedly testified that he was coerced into confessing and testifying. In pointing to where this claimed testimony can be found within the appendix record, petitioner states, "A__ [See Exhibit 6 attached hereto.]." Clearly, no page within the appendix is identified, and there is no "Exhibit 6" appended to her brief. Nevertheless, petitioner asserts that both Mr. Jarrell's notarized statement and Mr. Strogen's claimed testimony constitute newly discovered evidence warranting a new trial.

This Court has held that

[2] The habeas court's discussion of the grounds petitioner has abandoned on appeal has been omitted here.

> [a] new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.

Syl., *State v. Frazier*, 162 W. Va. 935, 253 S.E.2d 534 (1979) (citation omitted). "[A]ll five elements must be satisfied" before a new trial will be granted. *Id.* at 941, 253 S.E.2d at 537.

The habeas court found that Mr. Jarrell was not a new witness who was "discovered" after trial, and any efforts to secure him as a witness were not disclosed by petitioner; the information stated by Mr. Jarrell, if true, would have been known to him at the time of petitioner's trial and, upon diligent inquiry, to petitioner; the information is cumulative in that it addresses the same points as Mr. Strogen's testimony; there is "minimal likelihood" Mr. Jarrell's testimony would be found by a jury to have more weight and credibility than Mr. Strogen's testimony, so it cannot be said that the evidence would produce an opposite result at a second trial; and Mr. Jarrell's affidavit serves only to impeach Mr. Strogen's testimony on Mr. Strogen's actions, motive, and petitioner's involvement. In sum, the habeas court found that Mr. Jarrell's notarized statement failed to satisfy any of the *Frazier* factors.

As for Mr. Strogen's purported testimony, petitioner presented the circuit court with a newspaper clipping detailing Mr. Strogen's habeas hearing and petition for appeal from the court's denial of his habeas petition. The habeas court declined to consider the newspaper clipping in lieu of the actual testimony, noting that the newspaper clipping did not constitute an affidavit or other sworn testimony; accordingly, the habeas court found that the newspaper clipping did not constitute newly discovered evidence and, thus, declined to apply the *Frazier* factors. The court further undertook a review of Mr. Strogen's petition for appeal and found that he did not claim that he testified falsely in petitioner's trial.

We find no error in the habeas court's dismissal of petitioner's claim of newly discovered evidence and, therefore, no merit to petitioner's first assignment of error. With respect to Mr. Strogen, petitioner has simply failed to put forth any newly discovered evidence. She has not pointed this court to where Mr. Strogen testified as petitioner claims he did, and below she provided only a newspaper clipping—not an "affidavit of [a] new witness." Plus, the habeas court found that Mr. Strogen did not claim to have testified falsely at petitioner's trial. There was no "newly discovered evidence" from Mr. Strogen for the habeas court to analyze under *Frazier*.

Regarding Mr. Jarrell, petitioner, at a minimum, has failed to explain how she was diligent in ascertaining and securing his statement, which, if true, she would have known at the time of trial. As all five *Frazier* factors must be satisfied to justify a new trial, her claim fails for that

reason alone. We note further, though, that petitioner offers only her conclusory assertions that the notarized statement "certainly would affect the outcome of the trial" and "will clearly produce an opposite result" in a second trial. She offers no analysis or explanation of how this would be the case in view of the evidence presented at trial, so she has not demonstrated error in the habeas court's dismissal of this claim.

2. Disparate/Disproportionate Sentence

In petitioner's second assignment of error, she argues that "the end result of sentences for [Mr.] Strogen and [Mr.] Jarrell shock the conscious [sic] when compared to [petitioner's] sentence for life without parole" because Mr. Strogen and Mr. Jarrell physically carried out the murder, not her. Petitioner argues that "the disproportionality analysis should be involved based on the disparate sentences of her co[]defendants."

The habeas court interpreted petitioner's claim as alleging only disparate sentences. The court found that the State's "decision to negotiate pleas to second[-]degree murder rather than proceed to a second trial of either was well within the discretion of the prosecution." Petitioner's sentence for first-degree murder is statutorily mandated, and her codefendants' sentences were likewise in accordance with the penalty set by statute for second-degree murder. The habeas court found that, as the sentences were mandated by the legislature, and absent a finding of disproportionality, "the imposition of the three sentences was required by law."

We find, first, that petitioner, having been convicted of first-degree murder while her codefendants stand convicted of second-degree murder, is not similarly situated to her codefendants, so she can find no relief in claiming that her sentence is disparate. *See State v. Watkins*, 214 W. Va. 477, 481, 590 S.E.2d 670, 674 (2003) ("We believe that the appellant's claim of disparate sentencing is untenable given the guilty pleas and subsequent convictions to two separate and distinct offenses by the appellant and the codefendant; it is clear that the appellant and the codefendant were not similarly situated; therefore, we find no merit to this assignment of error.").

Petitioner, however, claims further that her sentence is disproportionate. In support, she cites to *State ex rel. Ballard v. Painter*, where we stated that "disparate sentences of co-defendants that are similarly situated may be considered in evaluating whether a sentence is so grossly disproportionate to an offense that it violates our constitution." 213 W. Va. 290, 294, 582 S.E.2d 737, 741 (2003) (citation omitted). But the crime at issue in *Ballard*, first-degree robbery, has no fixed maximum. *See id.* at 292, 582 S.E.2d at 739; W. Va. Code § 61-2-12(a)(1) (setting forth the penalty for first-degree robbery as imprisonment "not less than ten years"). Petitioner was convicted of first-degree murder, though, and the statutory penalty is life incarceration. W. Va. Code § 61-2-2. Petitioner could have received no other term of incarceration than the one imposed, and we have previously held that "[l]ife imprisonment without possibility of parole is not cruel and unusual punishment for first-degree murder." Syl. Pt. 5, in part, *State v. Shafer*, 237 W. Va. 616, 789 S.E.2d 153 (2015) (citations omitted). There was no merit to this claim, and the habeas court did not err in dismissing it.

3. Ineffective Assistance of Counsel

Petitioner's ineffective assistance of counsel claim was predicated on four asserted deficiencies, each of which is viewed in light of the following test:

> In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Further, "[i]n deciding ineffective of assistance claims, a court need not address both prongs of the conjunctive standard of *Strickland v. Washington* . . . and *State v. Miller*, . . . but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test." Syl Pt. 5, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995).

a. Inexperience/Motion to Withdraw

Petitioner first claims that trial counsel was ineffective due to his inadequate experience in criminal law cases and his "limited time to investigate the circumstances and allegations, interview [p]etitioner, co[]defendants, and witnesses and negotiate with the State." Trial counsel filed a motion to withdraw, claiming an "irreconcilable conflict" that has "destroyed or tended to destroy the confidence in the attorney," but the trial court denied the motion, and trial counsel proceeded to trial.

The habeas court observed that trial counsel's motion "was not grounded on the existence of a disqualifying factor that required the withdrawal of counsel," and it "cited no grounds that required examination by the trial court in consideration of due process and the right to counsel guaranteed by the Sixth Amendment." Because petitioner did "not articulate a theory on which [trial counsel] could have persuaded the court to grant a motion . . . to withdraw or that her counsel's continued participation in the matter was to her detriment," the habeas court found neither deficient representation nor prejudice to petitioner. Petitioner asserts only that the habeas court "erred in making this determination and abused its discretion in denying [p]etitioner's request for habeas corpus relief"; she does not explain how the habeas court's reasoned conclusion is wrong.

This Court has held that "[i]nexperience alone does not constitute ineffective assistance of counsel." Syl. Pt. 4, *State v. Glover*, 177 W. Va. 650, 355 S.E.2d 631 (1987). "Every lawyer who handles criminal matters has once handled his first criminal matter. Not every lawyer would be guilty of rendering ineffective assistance the first few times he appeared in court." *Id.* at 657, 355 S.E.2d at 638 (citation omitted). Without more from petitioner—namely, how trial counsel was ineffective and how, but for ineffective assistance, the result of her trial would have been different—she has not demonstrated entitlement to habeas relief on this ground or error in the habeas court's conclusion. "[A] 'skeletal' argument that is unsupported by legal analysis and pertinent authorities[,] . . . really nothing more than an assertion, does not preserve a claim." *State v. Benny W.*, 242 W. Va. 618, 633, 837 S.E.2d 679, 694 (2019) (citation omitted)

Likewise, petitioner offers no analysis regarding trial counsel's alleged insufficient time to investigate, nor does she describe what additional evidence could have been obtained from her, her codefendants, or other witnesses or how that evidence would have affected the outcome of her trial. So, again, without more from petitioner, she has not demonstrated entitlement to relief on this ground or error in the habeas court's conclusion. *See id.*

b. Failure to Adequately Inform Petitioner of Her Right to Testify

Second, petitioner alleged that trial counsel failed to adequately inform her of her right to testify and that the decision to testify belonged solely to her. In finding no merit to this claim, the habeas court noted that the trial record reflected that petitioner was advised, by both the trial court and her trial counsel, of her right to testify on three separate occasions and that she had decided not to testify. As such, the habeas court found that she could establish neither deficient representation nor prejudice. Petitioner does not dispute that the trial record contradicts this claim, so we find that her claim is baseless and that she has failed to demonstrate error in the claim's dismissal.

c. Jury Sequestration

Petitioner alleges that trial counsel was ineffective for failing to request that the jury be sequestered during trial, and she appended newspaper articles to her habeas petition that purportedly demonstrated "extensive" pretrial publicity. In dispensing with this claim, the habeas court noted that "[t]he purpose of an order of sequestration is to shield the selected trial jury from anticipated future media publicity or other influences while the trial is in progress." But during voir dire, "only three members of the jury panel recalled media coverage before the trial, [and] there existed little reason for trial counsel to believe that media attention would increase during trial to a degree that supported a motion for jury sequestration," so counsel's decision not to move for sequestration "was supported by the information available at that time." The court found further that petitioner failed to articulate a ground upon which jury sequestration may have been granted and that she failed to show either deficient representation or that any alleged deficiency affected the result of the trial.

"When sequestration is requested by motion, counsel should provide the trial court with an adequate basis to support a finding that there is a reasonable probability that, absent sequestration, the jury will be exposed to outside influences which could improperly taint their verdict." Syl. Pt. 5, in part, *State v. Young*, 173 W. Va. 1, 311 S.E.2d 118 (1983). Petitioner again points to newspaper articles, and she states that the victim was "a well-known and well-liked figure within the community." She fails to explain how the victim's status within the community would have supported a finding that, absent sequestration, the jury would be exposed to outside influences, so she has not demonstrated that trial counsel was ineffective for failing to move for sequestration on that ground. Moreover, it is clear that the articles did not evidence that the jury would be exposed to outside influences because only three members of the jury panel recalled media coverage prior to trial. Plus, the habeas court noted that the jury was instructed not to watch television or read newspapers during the trial, and there is no evidence that the jury failed to obey this directive. Accordingly, petitioner has failed to demonstrate error in the habeas court's conclusion regarding this ground.

d. Failure to Strike a Certain Juror

In her fourth claim of ineffective assistance, petitioner argues that counsel should have moved to strike a juror who, after sworn, remembered that she had previously worked with petitioner. The juror informed the court that, after the first day of trial, "it dawned on [her] that [she] briefly knew the [petitioner]." Although the juror and the trial court cut one another off in discussing this relationship, it appears that the juror worked in a different area or department from petitioner and that the juror did not believe her prior work relationship would affect her ability to listen to the evidence. Petitioner, nevertheless, asserts that the prior association gives rise to "a well-grounded suspicion" that the juror could not be fair and impartial. Petitioner also claims that she and this juror "once had a conflict regarding a situation at work," but she neither provides details of that supposed conflict nor indicates that she made trial counsel aware of the supposed conflict.

The habeas court reviewed the trial transcript and noted that the juror "did not disclose any impressions or opinions that would have supported counsel's motion to remove her from the jury and replace her with an alternate," and it highlighted that petitioner made no indication that trial counsel was aware of any conflict petitioner had with the juror, so petitioner had failed to establish either deficient representation or prejudice.

"A juror is considered to be biased where 'the juror had such a fixed opinion that he or she could not judge impartially the guilt of the defendant.'" *State ex rel. Parker v. Keadle*, 235 w. Va. 631, 638, 776 S.E.2d 133, 140 (2015). Additionally, "[a]ctual bias can be shown either by a juror's own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed." Syl. Pt. 5, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996). The trial court questioned the juror regarding the negligible familiarity she had with petitioner, and the juror disclaimed any notion that the prior limited association with petitioner would affect her ability to serve. In other words, the juror harbored no bias. Consequently, we find no error in the habeas court's determination that counsel was not ineffective for failing to baselessly move to strike this juror.

## B. Claims the Habeas Court Found Were Waived

In petitioning for habeas corpus relief, "there is a rebuttable presumption that petitioner intelligently and knowingly waived any contention or ground in fact or law relied on in support of his petition for habeas corpus which he could have advanced on direct appeal but which he failed to so advance." Syl. Pt. 1, in part, *Ford v. Coiner*, 156 W. Va. 362, 196 S.E.2d 91 (1972). Further, it is the habeas petitioner's burden "to rebut the presumption that he intelligently and knowingly waived any contention or ground for relief which theretofore he could have advanced on direct appeal." *Id.* at 362, 196 S.E.2d at 92, Syl. Pt. 2, in part. But, in bearing this burden, "when the petitioner makes a prima facie case that he was denied a fair trial or his constitutional rights, the circuit court is obligated at some point to afford him an opportunity to offer proof to meet the burden." *Losh v. McKenzie*, 166 W. Va. 762, 765, 277 S.E.2d 606, 609 (1981). Finally, "[o]n an appeal to this Court the appellant bears the burden of showing that there was error in the proceedings below resulting in the judgment of which he complains, all presumptions being in

favor of the correctness of the proceedings and judgment in and of the trial court." Syl. Pt. 2, *Perdue v. Coiner*, 156 W. Va. 467, 194 S.E.2d 657 (1973).

Here, we find that the habeas court properly denied petitioner's remaining claims—and we correspondingly find no merit to the remainder of petitioner's assignments of error—because she could have, but did not, advance the claims on direct appeal, and she has not made a prima facie case that she was denied a fair trial or her constitutional rights.[3] *See also id.* at 467, 194 S.E.2d at 658, Syl. Pt. 1 ("A court having jurisdiction over habeas corpus proceedings may deny a petition for a writ of habeas corpus without a hearing and without appointing counsel for the petitioner if the petition, exhibits, affidavits or other documentary evidence filed therewith show to such court's satisfaction that the petitioner is entitled to no relief.").

1. Evidentiary Rulings

In petitioner's fourth assignment of error, she claims that testimony was improperly admitted in violation of Rule 404(b) of the West Virginia Rules of Evidence, and in her fifth assignment of error, she claims that hearsay was improperly admitted. In her eighth assignment of error, she likewise challenges the trial court's admission of certain evidence. The challenged evidence included an officer's testimony of one of petitioner's statements to the police. That statement was recorded, but the officer inadvertently taped over the recording. Petitioner argues that the officer should not have been permitted to testify about her statement where the recording could not be produced. Petitioner also challenged the introduction of another one of her statements to the police where the recording of that statement was edited to redact references to her willingness to take a polygraph examination. Petitioner claims that her willingness to sit for a polygraph examination was exculpatory and should not have been deleted from the recording.

Unquestionably, "[o]nly matters of constitutional magnitude will be remedied through habeas corpus relief." *State ex rel. Crupe v. Yardley*, 213 W. Va. 335, 338, 582 S.E.2d 782, 785 (2003). Claims of "ordinary trial error not involving constitutional violations will not be reviewed." Syl. Pt. 4, in part, *State ex rel. McMannis v. Mohn*, 163 W. Va. 129, 245 S.E.2d 805 (1979). In *Johnson v. Mutter*, we "dispense[d]" with the habeas petitioner's claims involving evidentiary rulings, including Rule 404(b) and hearsay claims, because the claims were not cognizable in habeas. No. 19-0788, 2020 WL 6624970, *3 (W. Va. Nov. 4, 2020)(memorandum decision). And "[a]bsent 'circumstances impugning fundamental fairness or infringing specific constitutional protections,' admissibility of evidence does not present a state or federal constitutional question." *Hatcher v. McBride*, 221 W. Va. 5, 11, 650 S.E.2d 104, 110 (2006) (citation omitted).

Because these three claims assert ordinary trial error, they are not cognizable in habeas, and the habeas court did not err in dismissing them. Furthermore, the habeas court noted that petitioner failed to object to the introduction of the claimed Rule 404(b) evidence, and she failed to raise a hearsay objection to the evidence now claimed to be improperly admitted hearsay. "It is

[3] We also observe that, in any event, as petitioner's habeas petition and attached exhibits totaled nearly 550 pages—all of which the habeas court considered—it cannot be said that petitioner lacked ample opportunity to demonstrate entitlement to habeas relief.

a fundamental proposition of law that an appellate court generally will not entertain an alleged trial error unless it has been properly preserved at trial." *State v. Marple*, 197 W. Va. 47, 51, 475 S.E.2d 47, 51 (1996); *see also id.* (citing *Meadows v. Holland*, 831 F.2d 493, 498 (4th Cir. 1987) ("West Virginia has always treated a failure to object to trial errors as a default of any right to assert these errors on direct appeal *or in habeas review*." (emphasis added)). And with respect to the challenged evidence regarding her statements to the police, we observe that petitioner provided no legal analysis in her amended habeas petition to support her assertion that the officer could not testify to her statement to him or her assertion that the jury should have heard information regarding her willingness to take a polygraph examination. *See Benny W.*, 242 W. Va. at 633, 837 S.E.2d at 694 (noting that "skeletal" arguments do not preserve claims). For all of these reasons, it is clear that these claims would not support a finding that petitioner was denied a fair trial or her constitutional rights, so the habeas court did not err in dismissing them.

2. Change of Venue and Disqualified Juror

In petitioner's sixth assignment of error, she claims that the trial court erred in failing to grant a change of venue due to pretrial publicity, and in her seventh, she claims that the trial court should have removed the juror who was previously acquainted with petitioner through work. As explained in addressing petitioner's ineffective assistance of counsel claims predicated on the alleged errors in failing to move for jury sequestration and to remove the coworker juror, there was no basis for a change of venue on the ground of pretrial publicity or to remove the juror. These claims were properly dismissed for the same reason her ineffective assistance of counsel claims were properly dismissed. Her claim regarding the challenged juror was likewise properly dismissed as it is not cognizable in habeas. *See also State ex rel. Wimmer v. Trent*, 199 W. Va. 644, 648, 487 S.E.2d 302, 306 (1997) ("This Court has looked at the trial error alleged by the appellant to have been committed by the trial court, and, in particular, this Court has looked at the appellant's claims that the trial court erred in allowing certain jurors to remain on the panel . . . . The Court does not believe that those errors even if supported by the record would implicate the appellant's constitutional rights in such a manner as to be reviewable on habeas corpus or that they establish manifest injustice.").

3. Prosecutorial Misconduct

Petitioner's ninth assignment of error raises prosecutorial misconduct, and within this claim, she raises a number of instances of alleged misconduct. Each claimed instance of misconduct lacked merit on its face, so as explained below, the habeas court did not err in dismissing the claim in its entirety.

a. Deals with Mr. Strogen

Petitioner claims, first, that the State made "deals and promises" with Mr. Strogen and that the prosecuting attorney's secretary developed a relationship with him through which the prosecutor improperly communicated with Mr. Strogen.

The habeas court determined that, even if petitioner could prove that deals were made with Mr. Strogen, she had not shown how the prosecutor's actions in that regard were outside the bounds

of the law. And, although the habeas court noted that a personal relationship developed between Mr. Strogen and a member of the prosecuting attorney's office, petitioner had not alleged that it developed or existed prior to or during her trial, and the subsequent development of that relationship led to the prosecuting attorney's office's voluntary recusal from Mr. Strogen's prosecution when his plea was set aside in 1996.

It is clear that petitioner's amended petition did not provide a prima facie case that she was denied a fair trial or her constitutional rights on this basis, and on appeal, petitioner likewise only conclusorily claims error in the habeas court "determining the actions of the prosecution did not rise to an inappropriate level and that [it] abused its discretion in summarily denying" the claim. Petitioner has cited to no law to support this claim, and her bare assertion that the habeas court erred does not satisfy her burden of proving error. *See Benny W.*, 242 W. Va. at 633, 837 S.E.2d at 694 (noting that skeletal arguments do not preserve claims).

b. Vested Interest

Petitioner claims further that the prosecutor improperly communicated with the media, thereby violating her right to a fair trial, and that the prosecutor had an interest in the outcome of the case. Petitioner supported this claim with, again, newspaper clippings, which, as the habeas court noted, either did not pertain to the case and did not identify the prosecutor as a source; included public records, such as petitioner's indictment, and did not list the prosecutor as a source; or were recitations of the underlying criminal proceedings that included references only to the prosecutor's arguments made during open hearings.

Before this Court, petitioner maintains that the clippings constituted evidence that the prosecutor "had an interest in the outcome of this case that went beyond the ordinary dedication to duty to see that justice was done," but she does not explain how the clippings demonstrate that, nor does she contend, let alone establish, that the court erred in determining that the clippings reveal no such improper interest in the outcome of petitioner's trial. Accordingly, we find no error in the habeas court's dismissal of this ground.

c. Witness obstruction

Next, petitioner claims prosecutorial misconduct because the prosecutor prevented petitioner's investigators from questioning the State's witnesses. Petitioner provided affidavits from those witnesses in support of this claim. The habeas court reviewed the affidavits and found that "[n]one of the affiants said he or she was 'instructed' by the Prosecuting Attorney to refuse to be interviewed, and each affidavit supports the conclusion that each decision was of the affiant's 'own volition.'"

In Syllabus Point 3 of *Kennedy v. State*, we held, in part, that "[a] prosecutor may not instruct prosecuting witnesses not to speak with a defendant or defense counsel, or otherwise unreasonably obstruct access to such witnesses." 176 W. Va. 284, 342 S.E.2d 251 (1986). But, "[a] defendant's right of access is not violated as long as the final decision of the witness not to be interviewed is of his or her own volition." *Id.* Petitioner concedes in her reply brief that "the Prosecuting Attorney may not have explicitly instructed witnesses not to talk to the defense."

Further, because the affidavits do not support any claim of unreasonable obstruction, the habeas court did not err in dismissing this claim.

d. Withheld Evidence

In another claim of prosecutorial misconduct, petitioner asserts that the State withheld exculpatory evidence. She states that a videotape disclosed during the trial proceedings contained footage of an area Mr. Strogen directed the police to examine for items he and his codefendants discarded after the victim's murder. She states further that exculpatory portions of that videotape were deleted from the version produced to her.

In analyzing this claim, the habeas court reviewed the trial transcript and found that the State denied that anything had been deleted from the videotape. The trial court indicated that it would review the videotapes possessed by both the State and petitioner to determine whether any deletions were present on petitioner's copy. Although it does not appear that the trial court drew any conclusion following its viewing, the record revealed that petitioner's trial counsel "did not bring it up again." Therefore, the habeas court found that the issue was abandoned at trial and could not be pursued in habeas.

Petitioner claims on appeal that the habeas court erred in dismissing this claim, but she does not dispute the habeas court's observation that the tapes were asserted to be identical or that the claim was abandoned below. Accordingly, she has demonstrated no error.

4. Prejudicial Statements by the Prosecutor

In her tenth assignment of error, petitioner claims that the habeas court erred in denying her habeas relief on the ground that the prosecutor improperly used the word "murder" or "murdered" with respect to the victim and the word "clan" to refer to petitioner's family. The habeas court found that the instances of the use of the word "murder" or "murdered" followed Mr. Strogen's testimony that he and Mr. Jarrell had decided to murder the victim and that the word "was a 'plausible inference to be drawn from the evidence.'" Regarding the use of the word "clan," the habeas court found that "insofar as it signifies an extended family group that lives in the same locality, it is not intrinsically pejorative." If the word was used to "convey[] a negative connotation that the [p]etitioner's extended family combined their efforts in a shared goal to protect the [p]etitioner from the efforts of law enforcement and the prosecuting attorney to gather information about the suspected murder, such constitutes a 'plausible inference drawn from the evidence.'"

Petitioner has failed to demonstrate error in the habeas court's conclusions. She claims only that "the lower court erred in this determination and abused its discretion in summarily denying [her] request for relief based on this claim." Again, these sorts of conclusory assertions do not demonstrate error, and we have also found such claims to be nothing more than ordinary trial error not cognizable in habeas. *See Wimmer*, 199 W. Va. at 648, 487 S.E.2d at 306 ("This Court has looked at the trial error alleged by the appellant to have been committed by the trial court, and, in particular, this Court has looked at the appellant's claims . . . that the prosecutor engaged in prosecutorial misconduct by making allegedly improper remarks. The court does not believe that

those errors even if supported by the record would implicate the appellant's constitutional rights in such a manner as to be reviewable on habeas corpus or that they establish manifest injustice.").

5. Cumulative Error

Finally, in her eleventh assignment of error, petitioner claims that the numerous errors she has raised entitle her to relief under the cumulative error doctrine. Petitioner, however, failed to identify a single error, and as "[c]umulative error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors," the cumulative error doctrine has no applicability here. *State v. Knuckles*, 196 W. Va. 416, 426, 473 S.E.2d 131, 141 (1996).

## IV. CONCLUSION

For the foregoing reasons, we affirm.

Affirmed.

**ISSUED:** May 26, 2022

**CONCURRED IN BY:**

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice William R. Wooton

**NOT PARTICIPATING:**

Justice C. Haley Bunn