IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No.: 19-1102
Circuit Court No.: 19-F-08
Ohio County, West Virginia

GERALD WAYNE JAKO, JR.,

Petitioner.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. The circuit court violated Petitioner's Sixth Amendment right to confrontation by admitting a codefendant's recorded statement even though she did not testify. This violation was predicated on an erroneous finding that Petitioner caused his codefendant's unavailability by wrongdoing.

2. The circuit court violated Petitioner's Sixth Amendment right to conflict-free counsel by not disqualifying Petitioner's counsel who was good friends with the financial victim of the robbery.

3. The circuit court gave the jury a confusing and nonresponsive answer when they asked whether they could convict Petitioner of first degree robbery if they believed the crime was staged. As a matter of plain error, the circuit court should have instructed the jury that a staged crime cannot constitute first degree robbery.

STATEMENT OF THE CASE

Petitioner did not receive a fair trial. The Ohio County circuit court violated his Sixth Amendment rights to confront his accusers and to conflict-free counsel. The circuit court further undermined the proceedings with a nonresponsive and confusing answer to a jury question. These errors led the jury to convict Petitioner of first degree robbery while acquitting him of using a firearm during the commission of a felony.[1] The circuit court then sentenced Petitioner to 100 years.[2]

[1] A.R. 1372-73.
[2] A.R. 1400.

1. Petitioner robbed a gambling parlor.

Petitioner, his girlfriend ("England"), and another individual (Dunn), decided to rob a gambling parlor.[3] An employee of the gambling parlor helped facilitate the robbery but was not present during the crime.[4] For security reasons, all patrons of the gambling parlor had to ring a bell and wait until an employee buzzed them in.[5] England entered first and briefly played the machines.[6] England then exited the business but forgot her purse. As she was leaving, she let Petitioner and Dunn in.[7] The men wore latex gloves, masks, and were armed with a handgun and machete.[8] One of the men held the only employee[9] at gunpoint, zip tied her hands together, and took her cell phone.[10] The other man took over $6,000 from the cash registers and safe.[11]

When the police arrived, they discovered England's purse with Petitioner's identification card inside.[12] Several miles from the business, the police found the employee's cell phone lying next to the road[13] and successfully lifted Petitioner's fingerprint from it.[14]

2. England accepted a plea agreement that required her to testify against Petitioner.

A grand jury charged Petitioner, England, and Dunn with first degree robbery and using a firearm during the commission of a felony.[15] England agreed to plead guilty to first degree robbery and to testify against Petitioner.[16] In exchange, the State agreed to recommend a 40 year

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[3] A.R. 1403.
[4] A.R. 961-63.
[5] A.R. 385.
[6] A.R. 997.
[7] A.R. 1002-03.
[8] A.R. 1003-04, 1006.
[9] This employee is not the victim that Petitioner's counsel was friends with.
[10] A.R. 1007, 1024.
[11] A.R. 1006-07.
[12] A.R. 467.
[13] A.R. 480.
[14] A.R. 669.
[15] A.R. 1303-04.
[16] A.R. 52, 54, 1348.

sentence and to dismiss the remaining charge.[17] England also participated in a recorded debriefing during which she gave a full account of the robbery that inculpated Petitioner.[18]

3. England subsequently withdrew from the plea agreement.

The State incarcerated Petitioner and England in different jails.[19] Petitioner became aware of England's plea agreement and arranged to speak with her over the phone.[20] On numerous occasions, Petitioner and England called a third party at prearranged times and the third party merged their calls.[21] During these calls, Petitioner professed his love for England but also told her that their relationship would end if she was not loyal.[22]

On the day England was scheduled to plead guilty, she withdrew from the plea agreement. The circuit court found that her decision to not plead guilty was made "knowingly, intelligently, and without threat of coercion, force, or duress."[23] After the hearing, the State spoke with England in the presence of her attorney. The State asked England if she was afraid of Petitioner and England responded "absolutely."[24] England did not say that her fear of Petitioner caused her to withdraw from the plea agreement.[25]

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[17] A.R. 1348.
[18] A.R. 53,1403.
[19] A.R. 1405 (England's jail calls originated from Northern Regional Jail while Petitioner's jail calls originated from North Central Regional Jail).
[20] A.R. 1327, 1328.
[21] A.R. 1405 (disk containing the recorded phone calls); A.R.1326, 1343-1(State motions containing excerpts); A.R. 1344 (circuit court's order listing excerpts considered).
[22] A.R. 1328-30, 1351-53.
[23] A.R. 1348-47.
[24] A.R. 59.
[25] A.R. 64.

4. The circuit court granted the State's motion to play England's recorded debriefing during Petitioner's trial if England refused to testify.

The State moved the circuit court to play England's debriefing during Petitioner's trial if England invoked her right against self incrimination.[26] The State argued that Petitioner's wrongdoing caused England's unavailability as a witness. The evidence of wrongdoing consisted of the phone calls between Petitioner and England, and England's statement that she was afraid of Petitioner.[27]

The circuit court granted the State's motion and allowed the State to play England's debriefing during Petitioner's trial.[28] In finding that Petitioner forfeited his right to confront England, the circuit court held that (1) Petitioner reached out to England because she planned to testify against him; (2) Petitioner did not threaten England during their phone conversations; (3) Petitioner "used manipulation and emotions" during their conversations; and (4) Petitioner used "his knowledge of [England's] feelings" to manipulate and coerce her into withdrawing from the plea agreement.[29]

Petitioner argued his statements were insufficient to demonstrate an attempt to influence England's testimony and that he would suffer prejudice from a denial of his rights under the Confrontation Clause.[30] He further objected to losing his right to cross examine England.[31]

5. Petitioner's counsel was good friends with the owners of the gambling parlor.

Two days before trial began, Petitioner's counsel ("Counsel") discovered a conflict of interest. On the first day of trial, Counsel informed the circuit court that he and the owner of the

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[26] A.R. 1326-31.
[27] A.R. 59, 1405.
[28] The State edited the recorded debriefing to remove prejudicial statements.
[29] A.R. 1356.
[30] A.R. 92.
[31] A.R. 311.

gambling parlor, from whom Petitioner stole over $6,000 during the robbery, were good friends who vacationed together.[32] Counsel also informed the circuit court that he was friends with and worked as legal counsel for the owner of the real estate that housed the gambling parlor.[33] Counsel and the real estate owner attended high school together, they knew each other "quite well," and they also vacationed together.[34] When questioned by the circuit court, Counsel denied the conflicts affected him but indicated that Petitioner thought otherwise.[35] The circuit court then denied the motion for new counsel.[36]

6. During its deliberations, the jury sent a note to the circuit court that indicated confusion regarding the elements of first degree robbery and grand larceny.

Petitioner did not request instruction on the lesser included offense of second degree robbery. However, he successfully argued for instruction on the lesser included offense of grand larceny based on his defense that the robbery was an "inside job."[37] Petitioner argued that the employee who was working at the gambling parlor the night of the crime was part of a conspiracy to steal money from the business.[38] Evidence of the employee's involvement included that she left the safe open, she sent suspicious text messages an hour before the robbery, she called her mother instead of the police, she did not call the police until her mother arrived and prompted her to do so, and another co-worker admitted involvement in the crime.[39]

During its deliberations, the jury sent a note to the circuit court that demonstrated confusion regarding the interplay between the elements of first degree robbery and grand

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[32] A.R. 166.
[33] A.R. 166.
[34] A.R. 166.
[35] A.R. 167.
[36] A.R. 167.
[37] A.R. 1051-57.
[38] A.R. 1051-57.
[39] A.R. 1051-57.

larceny: [i]f there is belief the crime was staged, can we still find the defendant guilty of robbery in the first degree?"[40] The circuit court answered the question as follows: "[t]he court cannot answer this question specifically. You are to be guided solely by the application of the law already given to you to the facts as you find them."[41] Petitioner did not object to the circuit court's answer.

SUMMARY OF ARGUMENT

The circuit court found that Petitioner engaged in conduct so egregious that it warranted stripping him of his Sixth Amendment right to confrontation and allowing the jury to hear England's debriefing even though she did not testify. The conduct at issue was Petitioner's repeated pulling on the heartstrings of an emotional girl (England) by telling her their relationship would end if she was not loyal. Had Petitioner threatened England, he would have forfeited his right to confrontation. However, any emotional impact attributable to Petitioner's statements was insufficient to deny him basic constitutional protections.

The circuit court again violated Petitioner's rights under the Sixth Amendment by not appointing conflict-free counsel. The circuit court should have disqualified Petitioner's counsel because (1) he was friends with and vacationed with the owner of the gambling parlor/the financial victim of the robbery; and (2) because he was also good friends with the owner of the real estate that housed the gambling parlor. These conflicts affected Counsel and his representation fell far short of zealous advocacy.

Finally, as a matter of plain error, the circuit court failed to properly instruct the jury after it submitted a note expressing confusion over the elements of first degree robbery and grand larceny. The circuit court had a duty to craft an answer explaining that a staged crime cannot

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[40] A.R. 1149, 1151.
[41] A.R. 1151.

constitute first degree robbery. Instead, the circuit court compounded the issue by not answering the question and referring the jury back to the instructions that confused it in the first place.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case presents significant issues of constitutional importance involving the fair administration of justice. Accordingly, Petitioner requests a Rule 20 argument.

ARGUMENT

The Sixth Amendment embodies the right to confront accusers and the right to conflict-free counsel. The circuit court violated both of these rights during Petitioner's trial. Equally important to Petitioner's trial were proper jury instructions. The circuit court's failure to meaningfully answer a jury question permitted Petitioner's conviction for robbery even if the jury believed that the crime was staged. Based on these errors, this Court should reverse Petitioner's conviction and remand for a new trial.

1. The circuit court violated Petitioner's Sixth Amendment right to confront his accusers.

The circuit court violated Petitioner's Sixth Amendment right to confront his accusers when it allowed the jury to hear England's debriefing after she pleaded the 5th.[42] The preponderance of the evidence did not establish that Petitioner intentionally caused England to plead the 5th, let alone by coercion and wrongdoing. England was an unavailable witness because she rejected a plea agreement with no maximum sentence and therefore had to invoked her Fifth Amendment right against self incrimination during Petitioner's trial.[43]

The right of confrontation is a fundamental principal of criminal law that is enshrined in the Sixth Amendment of the United States Constitution, applied to the States by incorporation in

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[42] A.R. 1344.
[43] W. Va. Rules of Evidence, Rule 804(a)(1).

the Fourteenth Amendment, and adopted by the West Virginia Constitution in Section 14 of Article III.[44] Pursuant to *Crawford*, testimonial statements from unavailable witnesses, such as England's debriefing, are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[45] Under the doctrine of forfeiture by wrongdoing, however, if a preponderance of the evidence establishes that a defendant intentionally caused a witness's unavailability, that defendant forfeits his right to confrontation.[46]

The circuit court's factual findings are reviewed for clear error while decisions based on those facts are reviewed for an abuse of discretion.[47] Whether Petitioner forfeited his constitutional right to confrontation is a question of law that is reviewed *de novo*.[48] "Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt."[49]

The preponderance of the evidence weighed in favor of not finding wrongdoing. The circuit court found that England rejected the plea agreement "knowingly, intelligently, and without threat of coercion, force, or duress."[50] Petitioner never asked England to withdraw from the plea agreement or plead the 5th. The circuit court further found that Petitioner did not threaten England during their phone conversations. When asked by her attorney why she was withdrawing from the plea agreement England only said "I cannot do it."[51] She did not say that

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[44] U.S. Con. Amend. 6; U.S. Con. Amend. 14; W. Va. Cons. Art. III Sec.14.
[45] *Crawford v. Washington*, 541 U.S. 36, 59, 68 (2004); See also Syl. Pt. 6, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006).
[46] *Giles v. California*, 554 U.S. 353, 361-66 (2008); *Crawford v. Washington*, 541 U.S. 36, 62 (2004); *Davis v. Washington*, 547 U.S. 813, 832–34 (2006); Syl. Pt. 11, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006); W. Va. Rules of Evidence, Rule 804(b)(6).
[47] *State v. Arbaugh*, 215 W. Va. 132, 135, 595 S.E.2d 289, 292 (2004).
[48] *State v. Arbaugh*, 215 W. Va. 132, 135, 595 S.E.2d 289, 292 (2004).
[49] Syl. Pt. 2, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006).
[50] A.R. 1348-49.
[51] A.R.64.

Petitioner threatened her.[52] Even if Petitioner had threatened England, he was incapable of acting on any threats as they were both incarcerated in different jails. Furthermore, to establish initial contact with Petitioner, England had to call an unfamiliar number and hope Petitioner also called in.[53] England thereafter proactively engaged in communication with Petitioner by calling a third party at prearranged times. England could have ended all communication without reprisal as they were both incarcerated and would remain so for a long time—yet, she chose not to. Her decision to continue the phone calls from the safety of the Northern Regional Jail belies coercion. Simply put, the preponderance of the evidence established that Petitioner did not engage in wrongdoing or coerce England to withdraw from her plea agreement.

The evidence of wrongdoing relied upon by the circuit court consisted primarily of recorded phone calls between Petitioner and England while they were both incarcerated in different jails.[54] During these calls, Petitioner expressed his love for England, informed her that they could not be together if she was not honest and loyal, and Petitioner expressed frustration over England "running her mouth."[55] The content of the conversations cannot be labeled "wrongdoing" and the circuit court's interpretation of the phone conversations—that Petitioner was intentionally coercing England to not testify against him—was an abuse of discretion. Petitioner never asked England to withdraw from her plea agreement or to plead the 5th during his trial. The circuit court even found that Petitioner did not threaten England over the phone. In an effort to find wrongdoing, however, the circuit court confused the reality codefendants face

[52] A.R. 64.
[53] A.R. 1353 at paragraph (J).
[54] A.R. 1405 (England's jail calls originated from Northern Regional Jail while Petitioner's jail calls originated from North Central Regional Jail).
[55] A.R. 1351-53, 1405.

with coercion: testifying against an accomplice will inevitably result in the deterioration of that relationship.

The circuit court also considered testimony that England was afraid of Petitioner.[56] However, it was an abuse of the circuit court's discretion to attribute England's fear of Petitioner to her decision to withdraw from the plea agreement.[57] Viewed in context, her fear was an abstraction unassociated with her decision to not plead guilty. England and Petitioner were both incarcerated in separate facilities. Petitioner was incapable of physically harming England. There was no evidence of prior domestic violence between Petitioner and England. As the least culpable codefendant, England could only negotiate a nonbinding 40 year sentence recommendation. She would know that Petitioner, the most culpable codefendant, faced—and he ultimately received—a significantly larger sentence that would ensure her continued safety. England also chose to stay in contact with Petitioner by calling a third party at prearranged times. Finally, England never said she withdrew from the plea agreement because she was afraid of Petitioner.[58] As such, it was an abuse of discretion to find England's fear of Petitioner caused her withdraw from the plea agreement.

Despite the preponderance of the evidence weighing against wrongdoing, the circuit held that Petitioner forfeited his right to confrontation because he "used manipulation and emotions."[59] "Manipulation and emotions" as presented in this case, do not constitute wrongdoing, and in the absence of threats, are insufficient to abrogate fundamental constitutional protections. Petitioner did not force England to endure emotional manipulation. Instead, she willingly called a third party to stay in contact with Petitioner and she willingly choose a

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[56] A.R. 1355-56.
[57] A.R. 64-63.
[58] A.R. 64.
[59] A.R. 1356.

relationship over pleading to a crime with no maximum sentence. Furthermore, the circuit court's "manipulation and emotions" justification for finding wrongdoing was predicated on an antiquated and sexist argument that women are weak, emotional creatures in need of greater protection. This argument further posits that because women are more susceptible to their emotions, "greater flexibility in the use of testimonial evidence" is required.[60] Justice Scalia rejected this argument in *Davis v. Washington*.[61]

Defendants only forfeit their right to confront witnesses through intentional wrongdoing designed to secure a witness's unavailability.[62] No such wrongdoing was present in this case and consequently, the circuit court violated Petitioner's Sixth Amendment right to confront his accusers. This error requires reversal of Petitioner's conviction as playing England's debriefing to the jury was not harmless beyond a reasonable doubt.[63] Rather, it was the strongest evidence of his guilt.

2. Counsel labored under an actual conflict of interest that precluded his representation of Petitioner under the Sixth Amendment.

Counsel's close personal and business relationships with the two men who owned the real estate and the gambling parlor Petitioner robbed created an actual conflict that affected his representation of Petitioner. Counsel also failed to timely inform Petitioner of this conflict and the circuit court did not conduct the requisite inquiry to determine if Petitioner required new counsel. These errors require reversal and a new trial.

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[60] *Davis v. Washington*, 547 U.S. 813, 832–34 (2006).
[61] *Davis v. Washington*, 547 U.S. 813, 832–34 (2006).
[62] *Davis v. Washington*, 547 U.S. 813, 832–34 (2006).
[63] Syl. Pt. 2, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006).

The United States Constitution and West Virginia Constitution protect the right to conflict-free representation.[64] In limited circumstances, a defendant need only establish the existence of a conflict to trigger automatic reversal.[65] Typically, though, "[i]n order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance."[66] Once this test is met, a defendant "need not demonstrate prejudice."[67]

Furthermore, this Court requires disclosure of conflicts to defendants "at the earliest opportunity, so that the accused can make an intelligent decision whether to waive his right to assistance of counsel free from potential conflict, or to demand or retain different counsel."[68] Once a trial court is notified of a conflict, it must "initiate an inquiry" and "balance individual constitutional protections, public policy and public interest in the administration of justice and basic concepts of fundamental fairness."[69] A trial court may disqualify defense counsel when "the conflict is such as clearly to call in question the fair or efficient administration of justice."[70]

Whether the circuit court violated Petitioner's constitutional right to conflict-free counsel is a question of law that this Court reviews *de novo*. "Failure to observe a constitutional right

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[64] U.S. Con. Amend. VI; W.Va. Const. Art. III, § 14; *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978); *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980); Syl. Pt. 2, *Cole v. White*, 180 W. Va. 393, 376 S.E.2d 599 (1988).

[65] *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978); *Mickens v. Taylor*, 535 U.S. 162, 168 (2002).

[66] *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). Syl. Pt. 3, *Cole v. White*, 180 W. Va. 393, 376 S.E.2d 599 (1988).

[67] *Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980); Syl. Pt. 4, *Cole v. White*, 180 W. Va. 393, 376 S.E.2d 599 (1988) (discussing conflicts arising during joint representation of codefendants).

[68] Syl. Pt. 3, *State v. Reedy*, 177 W. Va. 406, 352 S.E.2d 158 (1986); *Cole v. White*, 180 W. Va. 393, 396, 376 S.E.2d 599, 602 (1988) citing *Reedy,* 177 W.Va. at 411, 352 S.E.2d at 163.

[69] *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980); *State ex rel. Youngblood v. Sanders*, 212 W. Va. 885, 892, 575 S.E.2d 864, 871 (2002) citing *United States v. Agosto*, 675 F.2d 965, 970 (8th Cir. 1982), *abrogated on other grounds by Flanagan v. United States*, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984).

[70] Syl. Pt. 3, *State ex rel. Michael A.P. v. Miller*, 207 W. Va. 114, 116, 529 S.E.2d 354, 356 (2000) citing Syl. Pt. 1, *Garlow v. Zakaib,* 186 W.Va. 457, 413 S.E.2d 112 (1991), Syl. Pt. 2, *Musick v. Musick,* 192 W.Va. 527, 453 S.E.2d 361 (1994).

constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt."[71]

a. Counsel's actual conflict of interest negatively affected his representation of Petitioner.

In addition to the employee who was present when the robbery occurred, there were two other victims. The owner of the real estate where the robbery took place and the financial victim/owner of the gambling parlor from whom Petitioner stole over $6,000. Counsel labored under an actual conflict because he knew both men "quite well" and would go on vacation with them.[72] Counsel also "represented [the owner of the real estate] in a legal capacity on a number of occasions."[73]

Unsurprisingly, Counsel's conflict of interest adversely affected his performance causing it to fall short of zealous advocacy. Counsel introduced evidence that a person can leave fingerprints on cell phones even if they wear latex gloves like the robbers did.[74] A simple Google search would have avoided this catastrophe and not eliminated the closing argument that Petitioner was not inside the gambling parlor and only touched the phone after the robbery occurred. His motion for judgment of acquittal was perfunctory at best: he failed to address Count II of the indictment which carried a 2-10 year sentence; and while he mentioned the robbery charge, Counsel did not actually argue for an acquittal and instead pointed out the weaknesses in his own case. The circuit court's denial of Counsel's motion illustrated the arguments Counsel should have made. Counsel did not request a jury instruction on the lesser included offense of second degree robbery—an offense that carried a punishment significantly

[71]Syl. Pt. 3, *State v. Sheppard*, 172 W. Va. 656, 310 S.E.2d 173 (1983) citations and quotations omitted.
[72] A.R. 166.
[73] A.R. 166.
[74] A.R. 991.

less than first degree robbery.[75] Regarding the jury question, Counsel contributed to Petitioner's conviction for first degree robbery instead of grand larceny by not arguing for the circuit court to instruct the jury that a staged crime cannot constitute first degree robbery. Instead, Counsel acquiesced to the circuit court's vague and nonresponsive answer.[76] He failed to reply to the State's response to his motion for a new trial and waived argument on the motion.[77] Finally, Counsel's argument at sentencing lacked advocacy, mitigation, and it failed to argue for any particular sentence. Instead, Counsel told the circuit court that Petitioner began using illicit substances at age 12 and that the circuit court "should be concerned with" Petitioner's "substantial criminal history."[78] Addressing bad facts head on is an effective strategy—but only if it includes mitigation and a plan to correct those issues going forward.

b. Counsel did not give Petitioner sufficient time to request new counsel.

Counsel also failed to timely inform Petitioner of his friendship with the two victims. Counsel received discovery from the State on January 18, 2019.[79] But he did not find time to read "every little line in [the discovery]" until August 18, 2019—seven months after receiving discovery and two days before trial began.[80] In *Reedy*, this Court reversed a conviction because trial counsel did not inform the defendant that he was friends with, and related to the victim prior to trial.[81] Specifically, this court found "that the potential conflict of interest in the family relationship, together with the lack of timely disclosure to the appellant, constituted a violation of the appellant's right to effective assistance of counsel."[82]

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[75] Counsel successfully argued for instruction on grand larceny.
[76] A.R. 1151.
[77] A.R. 1280-81.
[78] A.R. 1288.
[79] A.R. 3.
[80] A.R. 167.
[81] *State v. Reedy*, 177 W. Va. 406, 352 S.E.2d 158 (1986) at fn. 1; *Id.* at Syl. Pt. 3.
[82] *State v. Reedy*, 177 W. Va. 406, 409, 352 S.E.2d 158, 161–62 (1986).

Counsel's disclosure was similarly late. There is no practical difference between post trial disclosure and the pretrial disclosure here. Petitioner's first opportunity to request conflict-free counsel occurred after the jury panel was waiting in the court room and the judge was already upset with last minute issues that cropped up.[83] The circuit court's denial of new counsel at that stage in the proceedings was a foregone conclusion.[84]

c. The circuit court failed to properly consider Counsel's conflict of interest.

Finally, when the circuit court was informed of Counsel's conflict, it compounded the issue by failing to conduct the proper inquiry and "balance individual constitutional protections, public policy and public interest in the administration of justice, and basic concepts of fundamental fairness."[85] Instead, the only inquiry conducted by the court was to ask Counsel if he "believed" he was ethically prohibited from representing Petitioner.[86] Counsel answered in the negative and Petitioner was forced into a trial with conflicted counsel.[87] The circuit court's cursory inquiry was legally insufficient but unsurprising given Counsel's late disclosure of the conflict.[88]

As in *Reedy*, this Court should reverse Petitioner's conviction because he was not timely informed of Counsel's conflicts of interest. The circuit court's failure to conduct the required analysis further argues in favor of a new trial.

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[83] A.R. 163.
[84] A.R. 167.
[85] *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980); *State ex rel. Youngblood v. Sanders*, 212 W. Va. 885, 892, 575 S.E.2d 864, 871 (2002) citing *United States v. Agosto*, 675 F.2d 965, 970 (8th Cir. 1982), *abrogated on other grounds by Flanagan v. United States*, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984).
[86] A.R. 167.
[87] A.R. 167.
[88] A.R. 167.

3. The circuit court committed plain error by providing a nonresponsive answer to a jury question expressing confusion regarding the elements of first degree robbery.

During their deliberations, the jury sent a note asking "[i]f there is belief the crime was staged, can we still find the defendant guilty of robbery in the first degree."[89] The circuit court, without objection, responded that "[t]he court cannot answer this question specifically. You are to be guided solely by the application of the law already given to you to the facts as you find them."[90] The circuit court's answer was nonresponsive to the jury's question and failed to resolve their confusion regarding the elements of first degree robbery. Reversal is necessary as a matter of plain error.

"The trial court must instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error."[91] "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."[92] This Court reviews a circuit court's response to jury question for abuse of discretion.[93]

a. The circuit court committed error.

Here, as in *Davis*, the jury's question reflected a fundamental misunderstanding regarding the elements of first degree robbery and the lesser included offense of grand larceny.[94] The

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[89] A.R. 1149.
[90] A.R. 1151.
[91] Syl. Pt. 2, *State v. Davis*, 220 W. Va. 590, 648 S.E.2d 354 (2007) citing Syl. Pt. 1, *State v. Miller,* 184 W.Va. 367, 400 S.E.2d 611 (1990).
[92] Syl. Pt. 1, *State v. Davis*, 220 W. Va. 590, 648 S.E.2d 354 (2007) citing Syl. Pt. 7, *State v. Miller,* 194 W.Va. 3, 459 S.E.2d 114 (1995).
[93] *State v. Davis*, 220 W. Va. 590, 593, 648 S.E.2d 354, 357 (2007) citing *People v. Sanders,* 368 Ill.App.3d 533, 306 Ill.Dec. 549, 857 N.E.2d 948, 952 (2006).
[94] *State v. Davis*, 220 W. Va. 590, 595, 648 S.E.2d 354, 359 (2007).

circuit court instructed the jury on grand larceny because there was sufficient evidence for the jury to find that the robbery was staged.[95] If the jury thought the crime was staged, the only crime that could have occurred was grand larceny.

This Court requires lower courts to answer jury questions "in a plain, clear manner so as to enlighten rather than confuse them."[96] Contrary to this edict, the circuit court's answer was nonresponsive and only added to the confusion. The jury's question went to the heart of the case and the circuit court was obligated to provide the jury with a clear answer: if you believe the crime was staged, you cannot convict the defendant of first degree robbery. However, the circuit court sowed further confusion by instructing the jury to refer back to the instructions that confused them in the first place. It did nothing to enlighten the jury or aid them in their truth finding mission. By failing to provide the jury with any guidance, let alone "adequate guidance," the circuit court committed error.[97]

b. The error was plain.

An error is plain if the "error is predicated upon legal principles that the litigants and trial court knew or should have known at the time of the prosecution."[98] Here, both the circuit court and the parties knew that as a matter of law, a staged robbery cannot serve as the basis for a first degree robbery conviction. If the "victim" is an accomplice who is complicit in the stealing of money, robbery's element of a taking by force or fear is nonexistent.[99] This knowledge was demonstrated during argument regarding the instruction and in the circuit court's decision to

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[95] A.R. 1051-57.
[96] *State v. Davis*, 220 W. Va. 590, 595, 648 S.E.2d 354, 359 (2007) citing *Smith v. State,* 265 Ga.App. 756, 596 S.E.2d 13, 15 (2004).
[97] *State v. Davis*, 220 W. Va. 590, 595, 648 S.E.2d 354, 359 (2007) citing *People v. Curet,* 256 A.D.2d 1017, 683 N.Y.S.2d 602, 603 (1998).
[98] *State v. Davis*, 220 W. Va. 590, 596, 648 S.E.2d 354, 360 (2007) citing Syl. pt. 6, *State v. Myers,* 204 W. Va. 449, 513 S.E.2d 676 (1998).
[99] W. Va. Code 61-2-12; Syl. Pt. 3, *State v. Henson,* 239 W. Va. 898, 806 S.E.2d 822 (2017).

instruct on grand larceny as a lesser included offense.[100] Therefore, the circuit court's failure to adequately answer the jury's question "was plain error under . . . existing law."[101]

c. The error affected substantial rights.

An error that affected substantial rights requires a showing of prejudice.[102] '[T]he defendant need not establish that in a trial without the error a reasonable jury would have acquitted; rather, the defendant need only demonstrate the jury verdict in his or her case was actually affected by the assigned but unobjected to error."

Here, the circuit court's nonresponsive and confusing answer to the jury's question affected the verdict. By refusing to properly explain the law to the jury, the circuit court allowed conviction even if members of the jury thought the robbery was staged. Evidence that some members of the jury actually believed the robbery was staged is found in the question itself. Further evidence is found in the jury's inability to reach a unanimous verdict and the circuit court's giving of an *Allen* instruction approximately 20 minutes before the jury submitted the question at issue.[103] As such, the circuit court prejudiced Petitioner with its answer to the jury question.

d. The error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

This Court will reverse for plain error if "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings."[104] Here, the circuit court's failure to resolve the jury's confusion affected the fairness and integrity of the trial. It was clear that at least some

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[100] A.R. 1051-57.
[101] *State v. Davis*, 220 W. Va. 590, 597, 648 S.E.2d 354, 361 (2007).
[102] *State v. Davis*, 220 W. Va. 590, 597, 648 S.E.2d 354, 361 (2007).
[103] A.R. 1149 (court finishes Allen instruction at approximately 3:25 p.m. and receives question at issue at 3:44 p.m.)
[104] *State v. Davis*, 220 W. Va. 590, 597, 648 S.E.2d 354, 361 (2007).

jurors thought the robbery was staged. By failing to explain that a staged robbery constitutes grand larceny, the circuit court permitted conviction based on impermissible factors and a misapprehension of the law. Allowing such convictions to stand also erodes the public's perception of the judiciary. Accordingly, this Court should notice plain error and reverse Petitioner's conviction because the circuit court failed to properly instruct the jury.

CONCLUSION

The circuit court violated Petitioner's substantial rights afforded under the United States Constitution and this Court's precedent. Accordingly, this Court should reverse Petitioner's conviction and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Justin M. Collin, counsel for Petitioner Gerald Wayne Jako, Jr., do hereby certify that I have caused to be served upon the counsel of record in this matter a true and correct copy of the accompanying *"Petitioner's Brief"* and *"Appendix Record"* to the following:

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by depositing the same in the United States mail in a properly addressed, postage paid, envelope on the 16th Day of March, 2020.

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