IN THE CIRCUIT COURT OF PRESTON COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff,

v. **//Case No. 20-F-92**
Honorable Steven L. Shaffer

AARON GLENN HOARD,
Defendant.

ORDER DENYING DEFENDANT'S
MOTION FOR A NEW TRIAL AND MOTION FOR JUDGMENT OF ACQUITTAL

This matter came before the Court, Judge Steven L. Shaffer, presiding, on July 15, 2021, for a hearing on the *Defendant's Motion for a New Trial and Motion for Judgment of Acquittal.* The State appeared by its counsel, Prosecuting Attorney, Preston County Assistant Prosecuting Attorney, Megan M. Fields. The Defendant in person in the custody of the West Virginia Department of Corrections and Rehabilitation and by counsel, Belinda A. Haynie. After considering the Defendant's motion, the arguments of the parties, and the pertinent legal authorities, the Court finds and concludes that the Defendant's motion should be denied.

OPINION

On May 17, 2021, after a nine-day jury trial, the Defendant, Aaron Glenn Hoard, was convicted of the felony offense of *Murder in the Second Degree* of Grant Felton under West Virginia Code § 61-2-1. *Verdict*, entered May 17, 2021. The conviction stemmed from the shooting death of Grant W. Felton, Jr. ("Grant Felton") on or about November 3, 2019, outside of the Shorthorns Restaurant. *Indictment*. The Court notes that Shorthorn's Restaurant, which was also referred to as "Shorthorn's Saloon" by witnesses at trial, is located in Terra Alta, Preston County, West Virginia. The shooting occurred following a Halloween party at the

establishment. Despite contradictory testimony among the witnesses, basic facts were established. The Defendant and his girlfriend attended the Halloween Party at Shorthorn's Saloon with friends Nathan Lanham, Khristina Andrews, and Brian Teets. At a point early in the morning, the Defendant and his associates were escorted out of the establishment. They left the vicinity of the Shorthorns Saloon and then returned, at which point an altercation occurred between Brian Teets, the Defendant, and others who were outside Shorthorns Saloon, including the victim. At a certain point, the victim, Grant Felton, physically placed his hands on the victim, and moved him by force from the parking lot.[1] The Defendant eventually twisted away from Grant Felton. When the Defendant and his friends returned to the vehicle, followed by individuals, and physically placed in the Defendant's pick-up truck, the Defendant retrieved his firearm, a Springfield pistol, from inside the vehicle, and fired four warning shots in the air.[2] The depending on which witnesses the jury believed, either the victim stayed on the ground or Defendant was then tackled by the victim.[3] Additional shots followed. The key disputed facts were whether the Defendant intentionally fired his firearm at the Defendant; who, if anyone, had control of the firearm; and whether the firearm could have accidentally been discharged. Surveillance video from the exterior of Shorthorns Saloon captured the goings-on outside of the establishment, including the shooting.

On May 26, 2021, nine days after the verdict was returned, the Defendant timely filed a *Defendant's Motion for a New Trial and Motion for Judgment of Acquittal.* The Defendant

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[1] The Defendant testified that Grant Felton grabbed him by the neck. Other witnesses stated that Grant Felton grabbed the Defendant by his inner shoulders. Kenneth McCrobie, witness for the State, testified that Grant Felton grabbed the Defendant by his throat. Samuel Sisler testified that Grant Felton took the Defendant by the shoulders.
[2] The moment at which the Defendant retrieved his firearm shortly followed his girlfriend's exit from the pick-up truck. Depending on the witness testimony, his girlfriend, Machaela Jeffries, leapt out of the truck at Grant Felton and tackled him or fell to the ground, or she was pulled out of the truck by Grant Felton and then fell on him.
[3] Different witnesses presented contradictory testimony. Neither the State's witnesses nor the Defendant's witnesses were not always consistent with one another regarding whether the victim, Grant W. Felton, Jr., tackled the Defendant.

makes eight arguments in his post-trial motion. The Court will discuss each argument separately.

I. Motion for a New Trial

Rule 33 of the West Virginia Rules of Criminal Procedure states, in pertinent part, that "[t]he court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." W. Va. R. Crim. P. 33. "The main function of a motion for a new trial is to give the trial court an opportunity to correct errors in the proceedings before it without subjecting the parties to the expense and the inconvenience of prosecuting a proceeding in review." *State v. Cruikshank*, 138 W. Va. 332, 337, 76 S.E.2d 744, 748 (1953) (overruled on other grounds by *State v. Bragg*, 140 W. Va. 585, 87 S.E.2d 689 (1955)).

The Defendant contends in his "Motion for Judgment of Acquittal or, in the Alternative, a New Trial" that this Court committed errors of law and that the verdict was against the weight of the evidence. The Defendant contends that this Court made the following errors:

(1) Denial of the Defendant's motion to conduct a change of venue survey, violating the Defendant's Fourteenth Amendment Right under the United States Constitution and West Virginia Constitution to the effective assistance of counsel;

(2) Denial of the Defendant's motion for a change of venue, violating the Defendant's constitutional right to a fair trial and due process;

(3) Denial of the Defendant's motion to challenge jurors for cause, violating the Defendant's constitutional rights to a fair trial and due process;

(4) Denial of the Defendant's motion for a mistrial following an objection to the Preston County Assistant Prosecuting Attorney's comments on the Defendant's failure to speak with law enforcement;

(5) Court's refusal to give the Defendant's submitted jury instructions on self-defense, specifically Defendant's Proposed Instructions Nos. 22, 23, 24, 25, and 31, violating the Defendant's constitutional rights to a fair trial and due process.

(6) Court's provision of the legal definition of "malice" twice during the charge to the jury, violating the Defendant's constitutional rights to a fair trial and due process;

(7) Court's provision of instructions on certain lesser-included offenses of *First Degree Murder,* specifically *Second Degree Murder* and *Voluntary Manslaughter*, which contain the element of "intent," when the Defendant asserted no evidence of intent was presented during the trial, violating the Defendant's constitutional rights to a fair trial and due process;

(8) Court's denial of the Defendant's motion *in limine* to suppress evidence of the discovery of alleged psilocybin in the Defendant's vehicle where the alleged psilocybin had not been submitted to the forensic laboratory for examination; and

(9) Court's cumulative errors, as listed above, denied the Defendant his constitutional right to a fair trial.

1) and 2) Denial of Change of Venue Survey and Denial of Motion for Change of Venue

On or about January 7, 2021, Defendant Hoard, by his counsel, filed *Defendant's Motion for Change of Venue or, in the Alternative, Granting Permission for Defendant to Conduct Survey.* In the motion, Defendant Hoard argued that good cause exists for a change

of venue, based upon a memorandum from Graham Godwin, a senior researcher, for Orion Strategies, regarding pretrial publicity of the case. Alternatively, the Defendant requested that if the Court did not grant a change of venue, Defendant Hoard requested that this Court authorize a survey to be conducted via telephone and internet. This Court heard this motion at the January 7, 2021. Following the hearing, this Court entered *Order Regarding Defendant's Motion for Change of Venue,* on January 15, 2021, detailing its specific findings of fact regarding the Defendant's requests, its concerns that a survey could taint the jury pool given the small population size of Preston County, and the anticipated mechanics of the survey. In its order, the Court denied the Defendant's request to conduct the survey and deferred ruling on the request to change venue until jury selection at trial to determine if a jury could be impaneled and whether a present hostile sentiment existed against the Defendant, citing Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure I-847* (2nd ed. 1993), *State v. Walker*, 188 W. Va. 661, 425 S.E.2d 616 (1992), *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994), and *State v. Lassiter*, 177 W. Va. 499, 354 S.E.2d 595 (1987).

Due to novel coronavirus (COVID-19) precautions, this Court conducted *voir dire* differently from its usual procedures. Jury selection and *voir dire* took place across three days, Wednesday, May 5, 2021; Thursday, May 6, 2021; and Friday, May 7, 2021. Each day consisted of multiple sessions with different sets of jurors, with a set number of jurors reporting for a morning session and another set of jurors reporting for an afternoon session, in order to abide by social distancing requirements. For each *voir dire* session, the Court began the initial voir dire with preliminary questions, such as age and residency, in the Courtroom. Then the Court conducted individual *voir dire* of each potential juror in

chambers on the record in the presence of counsel for the State, the Defendant, and counsel for the Defendant.

Ninety-eight (98) jurors were summoned to appear for jury selection, most of whom appeared for jury selection.[4] Upon information and belief, the Court and counsel conducted individual voir dire of most of the potential jurors, ending individual examination on juror number eighty (80), once it became clear that there were sufficient potential jurors to form a qualified panel. Although many of the potential jurors stated they had heard about the case, the Court and counsel questioned nearly every juror in a detailed fashion regarding how they had heard about the case, whether they knew any individuals or witnesses involved, whether the juror had determined the Defendant's guilt or innocence, or whether they harbored any hostile sentiment toward the Defendant or the State.[5] Ultimately, twelve (12) jurors were selected, as well as six (6) alternates. *Order Whereby Jury was Selected*, entered May 7, 2021. Based upon the impaneling of the jury, the Court denied the Defendant's motion for a change of venue.

During the July 15, 2021, hearing, counsel for the Defendant argued that the denial of a change of venue survey, as well as a change of venue, denied the Defendant his right to effective assistance of counsel under the Fourteenth Amendment of the United States Constitution and West Virginia Constitution. Counsel for the Defendant admitted that she could not cite a case en pointe where a trial was found to be tainted by a failure to have a survey. However, she cited the following cases: *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct.

[4] Per the Court's recollection and notes, eight potential jurors did not appear for jury selection, nearly all of whom the Court had excused for various reasons.

[5] On a few occasions, a juror would indicate that they had formed a fixed opinion in the matter or felt that they would be unable to sit as a juror due to another reason and thus those jurors were not always extensively questioned, which resulted in the juror being excused from further service.

1087 (1985) found the trial court erred in failing to allow the defendant access to a psychiatric examination to explore a possible insanity defense, and the case of *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550 (1975), where the trial court erred in denying the defendant an opportunity for final summation in a criminal bench trial. Counsel for the Defendant argued that these cases went toward her contention that this Court should have allowed additional resources or argument. However, the Court does not find this argument persuasive. It is clear that the Defendant was able to conduct research on the potential jurors prior to jury selection with the assistance of his counsel and a private investigator, counsel for the Defendant had the opportunity and extensively examined the potential jurors *in camera*. This situation is unlike that where a defendant is seeking an insanity defense. In that situation, an expert's assistance is necessary to explore the possibility of an insanity defense because it is beyond the realm of a layperson or the average lawyer. However, here, the Defendant, with assistance, conducted research on potential jurors, extensively questioned potential jurors *in camera* over the course of multiple days, which resulted in the excusal of multiple jurors who demonstrated a fixed opinion regarding the Defendant's guilt or innocence, a connection to the Defendant, victim, or law enforcement. Thus, the Defendant was not denied a fair or effective *voir dire*. Similarly, unlike *Herring v. New York*, supra, where the Defendant was denied the opportunity to conduct a final summation, the Defendant here participated in extensive *voir dire* over the course of three days.

The Defendant next argued that because many jurors had heard about the case and ultimately because many jurors were excused, that the Court should have granted a change of venue. Nevertheless, the change of venue standard is not based upon whether people have heard or have some knowledge of the case. As discussed in this Court's January 15, 2021,

Order Regarding Defendant's Motion for Change of Venue, the standard for a chance of venue is that the Defendant must show good cause exists for a change of venue, which may include "[a] present hostile sentiment against an accused, extending throughout the entire county in which he is brought to trial [. . .]" Syl. Pt. 2, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994). It is clear from the ability to impanel a jury, with six alternates, as well as additional potential jurors remaining, that it was not error to deny the Defendant a change of venue survey or a change of venue.

3) Denial of Defendant's Motion to Challenge Jurors for Cause

In his *Motion for a New Trial*, the Defendant argues that his state and federal constitutional rights to a fair trial and due process were violated as a result of the denial of the Defendant's motion to challenge jurors for cause. During the July 15, 2021, hearing, counsel for the Defendant specifically stated that she was citing the failure of the Court to strike Jurors Nos. 1, 21, 24, and 34 for cause.[6] Counsel for the Defendant argued at the hearing that these jurors should have been excused for cause because they had either heard of the case, knew the victim's family, or knew the Peaslee family (who owned and operated the Shorthorns Saloon at the time of the shooting). Per the *Jury Strike List*, filed on May 7, 2021, the Defendant used some of its peremptory strikes to excuse Juror No. 1, 21, 24, and 34.

The case of *State v. Newcomb* gives guidance on the procedure and approach a court must take with reference to *voir dire*:

[6] At the July 15, 2021, hearing, counsel for the both the State and the Defense noted that they were using the jury numbers as contained in the *Jury Strike List*. On the *Jury Strike List*, filed on May 7, 2021, Juror No. 1. is identified as D.S.; Juror No. 21 is identified as M.D.; Juror No. 24 is identified as P.L.; and Juror No. 34 is identified as D.B. This Court is using the jurors' initials for their own privacy.

> "When a prospective juror makes a clear statement of bias during *voir dire*, the prospective juror is automatically disqualified and must be removed from the jury panel for cause. However, when a juror makes an inconclusive or vague statement that only indicates the possibility of bias or prejudice, the prospective juror must be questioned further by the trial court and/or counsel to determine if actual bias or prejudice exists. Likewise, an initial response by a prospective juror to a broad or general question during *voir dire* will not, in and of itself, be sufficient to determine whether a bias or prejudice exists. In such a situation, further inquiry by the trial court is required. Nonetheless, the trial court should exercise caution that such further *voir dire* questions to a prospective juror should be couched in neutral language intended to elicit the prospective juror's true feelings, beliefs, and thoughts-and not in language that suggests a specific response, or otherwise seeks to rehabilitate the juror. Thereafter, the totality of the circumstances must be considered, and where there is a probability of bias the prospective juror must be removed from the panel by the trial court for cause." Syllabus Point 8, *Newcomb*, 223 W. Va. 843, 679 S.E.2d 675.

Since *Newcomb*, in *State v. Sutherland*, 231 W.Va. 410, 745 S.E.2d 448 (2013) the West Virginia Supreme Court of Appeals has revisited the issue of what occurs when a defendant uses a peremptory strike to remove a juror that should have been removed for cause. In *Sutherland*, the defendant argued that his state and federal constitutional rights were violated when the trial court denied the motion to remove a juror from the panel for cause during a murder trial and used a peremptory strike to remove the juror due to the juror's statements regarding murder penalties and that he agreed with the phrase "an eye for an eye and a tooth for a tooth." *Id* at 413-414, 451-452. The Supreme Court found that the failure to remove a biased juror from a jury panel does not violate the defendant's right to a trial by an impartial juror if the defendant removes the juror with a peremptory strike. The Supreme Court further ruled that if a defendant seeks a new trial on the basis of utilizing a peremptory strike to remove a biased juror, the defendant must show prejudice. *Id* at 420, 458.

Juror No. 1 stated during her individual *voir dire* in chambers that she had heard about the case but that she did not remember much about what she had heard and thus did not think what she had heard would affect her. Although she stated that she was related to the Peaslee family and had provided a prayer quilt to the victim's family in conjunction with her church's prayer quilt ministry, she stated she hoped that this would not interfere with her judgment in the case. This juror never made a clear statement indicating a disqualifying prejudice.

Juror No. 24 reported that while she had heard about the shooting soon after it had occurred, she had not formed an opinion. She stated that when she lived in Rowlesburg that she knew Michael Felton (a witness for the State) and his wife, Valerie Felton, an employee of Shorthorns Saloon. However, she did not report any recent or continued contact with him. Juror No. 24, upon questioning by the Court and counsel, stated that she could be an impartial juror.

Juror No. 34 stated that he had heard about the incident in the paper and had no family or friends in Terra Alta, where the shooting occurred. He stated that he knew of Megan M. Fields, the Assistant Prosecuting Attorney, Michael Felton, a witness for the State, as well as the Felton family based in Rowlesburg[7], Preston County Sheriff's Deputy Tichnell, and Officer Dallas Wolfe. However, Juror No. 34 did not make any clear statements indicating a disqualifying prejudice and stated that he had not formed an opinion in the case.

As previously stated, counsel for the State and the Defendant had ample opportunity to question the jurors during the individual *voir dire* conducted in chambers. None of the Defendants made any clear statements of disqualification that would require the Court to remove them for cause from the jury panel. Thus, there this Court cannot find that Jurors No. 1,

[7] The Court notes that the victim was Grant Felton, Jr., who lived in the Terra Alta area, and that the proffers prior to trial and testimony at trial established that the victim was not related to State's witness Michael Felton. The Felton family to which Grant Felton, Jr. belonged was located in Terra Alta, where the Felton family to which Michael Felton belonged was located in Rowlesburg, two geographically distinct areas in Preston County.

21, 24, and 34 were biased and should have been removed from the jury panel. Furthermore, the Defendant has not met his burden established in the *State v. Sutherland*, *supra*, that the failure to remove these jurors caused the Defendant any prejudice at trial. Because none of the potential jurors made clear statements of disqualification, the Defendant cannot meet his burden to prove they were biased nor can the Defendant meet the burden of proving that prejudice resulted at trial for the failure to remove these jurors for cause. Thus, the Court cannot grant the Defendant's motion on this argument. The Court notes that that Jurors No. 1, 21, 24, and 34, were stricken by the Defendant with peremptory strikes.

4) Denial of Defendant's Motion for a Mistrial

In his motion, the Defendant argues that his state and federal constitutional rights to a fair trial and due process were violated when the Court denied the Defendant's motion for a mistrial following objections to counsel for the State's comments on the Defendant's failure to speak to law enforcement. Prior to trial, counsel for the Defendant and State agreed to the admission of evidence of the Defendant's flight following the November 3, 2019, incident.[8] Both sets of counsel stated that they believed that evidence of the Defendant's actions following the shooting were necessary to each side's presentment of evidence and argument. At trial, witnesses for the State and the Defendant testified that following the shooting that resulted in the death of Grant W. Felton, Jr., that the Defendant left the scene prior to the arrival of law enforcement or emergency services.[9]

[8] The testimony at trial was undisputed that following the shooting, the Defendant and his girlfriend, Machaela Jeffries, left the scene in the Defendant's vehicle and drove to Monongalia County. Later, the Defendant turned himself in to law enforcement but did not provide a statement.

[9] Naturally, witnesses differed on most other details of the incident and what occurred thereafter.

However, the Defendant argues that comments and questions made by the Assistant Prosecuting Attorney impermissibly constituted comment on the Defendant's right to remain silent and refrain from giving statements to law enforcement. Counsel for the State argues that when the Defendant took the stand at trial, she questioned him regarding his actions following the shooting, which included questions about leaving the scene of the incident prior to the arrival of law enforcement and emergency services personnel. Counsel for the State argues that even if the comments were in error, that the comments would not have affected the outcome of the trial given the weight of the evidence.

The first statement made by the Assistant Prosecuting Attorney objected to by the Defendant on these grounds occurred during counsel for the State's opening statement. During the State's opening, the Assistant Prosecuting Attorney provided a summary of the State's investigation and the anticipated trial testimony of witnesses, including from Lt. Rodeheaver with the Preston County Sheriff's Office, the lead investigating officer on the case. In her opening, counsel for the State commented that that Lt. Rodeheaver did not obtain a statement from either the Defendant or his girlfriend, Machaela Jefferies. Immediately following this comment, counsel for the Defendant moved for a mistrial, which the Court denied. The second motion for a mistrial from Defense counsel occurred after the Assistant Prosecuting Attorney elicited the statement from the Defendant during cross-examination, while he was testifying on the stand under oath, that "never told police" that he "didn't murder that man." On both occasions, the Defendant timely objected and moved for a mistrial, arguing that counsel for the State improperly commented and cross-examined the Defendant on his right to remain silent. Previously, on direct examination, the Defendant testified regarding the shooting incident, stating that he had fired warning shots from the running board of his pick-up truck, which he

believed would disperse the individuals around his vehicle, before he was tackled by an individual (later identified as the victim) and additional gun shots were fired. The Defendant described the additional shots as occurred during struggle for control of the firearm he had used to fire the warning shots. On cross-examination, the Defendant specified that he obtained the gun, which he intended to use in self-defense and that he then shot the victim by accident. Immediately thereafter, the Defendant commented that he never told police that he "didn't murder that man."

A prosecutor may not comment on the defendant's failure to testify at trial. *See State v. Murray*, 220 W.Va. 735, 649 S.E.2d 509 (2007); *State v. Keesecker*, 222 W.Va. 139, 663 S.E.2d 593 (2008). Similarly, if a defendant asserts his right to silence during an investigation into the crime, the State is precluded from cross-examining the defendant on his silence or commenting on the silence at trial. *State v. Walker*, 207 W.Va. 415, 419-420, 533 S.E.2d 48, 52-53 (quoting *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

However, though a comment by a prosecutor may be improper, an improper comment alone will not necessarily result in an automatic mistrial. A trial court must conduct a balancing test to determine whether the improper remark is the basis for granting a mistrial, using the following four factors:

> (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Syl. Pt. 4, *State v. Walker, supra.*

Here, counsel for the State clearly commented on the Defendant's failure to provide a statement to law enforcement regarding the shooting incident. This statement was not inaccurate because there is no dispute that the Defendant did not provide a statement to law enforcement or that he was subject to any interview by the leading investigating officer or any other officer. Thus, the comment did not mislead the jury or unduly prejudice the Defendant. At the point the comment was made, it was clearly an isolated comment made in the context of Assistant Prosecuting Attorney summarizing the State's investigation and the anticipated testimony of the witnesses, specifically the investigation and anticipated testimony of Lt. Rodeheaver. Beyond the remark, the State presented the testimony of eyewitnesses who witnessed or who otherwise were directly involved in the shooting incident, such as Michael Felton, Kenneth McCrobie, Shawn Moats, D.J. Wilt, Brandi Lock, Angela Freeland, Samuel Sisler, and Brian Reckart. The Defense presented the eyewitness testimony of Brian Teets, Nathan Lanham, Machaela Jeffries, and the Defendant. In addition, the State presented the expert testimony of Calissa Carper, a forensic scientist with the West Virginia State Police Forensic Laboratory, specializing in firearm/toolmark identification. Importantly, both counsel for the State and the Defendant played video from the shooting incident (identified as the first three video clips on State's Exhibit 7A) numerous times throughout the trial, often multiple times with many witnesses, in order for each witness to provide commentary on their position during the incident and what happened. Due to the eyewitness testimony, expert testimony, and the review of the video from the shooting incident, the State produced strong competent evidence to establish the guilt of the Defendant. Lastly, the comment by counsel for the State did not appear to be designed to divert the jury's attention from the relevant evidence. At the time the comment was made, counsel for the State was giving its opening statement after the Court had instructed the jury that nothing

the attorneys said in their opening statements was to be considered evidence. Particularly because the comment was isolated and did not appear to be designed to divert the jury, this Court cannot find that the comment necessitated a mistrial.

Regarding the second comment, which was given by the Defendant during his cross-examination, this Court must make similar findings. It did not appear that counsel for the State intended to elicit this particular remark from the Defendant, mislead the jury, or prejudice the Defendant, as counsel cross-examined the Defendant on whether the Defendant was claiming self-defense, an intentional shooting, or an accidental shooting, an unintentional shooting. A crux of the State's argument at trial became that the Defendant was claiming inconsistent theories, with the Defendant claiming that his use of the firearm began an intentional self-defense action but then became accidental after he was tackled by the victim and struggled for possession of the firearm. At that point, the Defendant's comment that he never told police he "didn't murder that man" appeared to essentially state that he did not deny that shots from his gun struck the victim, eventually resulting in the victim's death, though he also testified that he was not sure if he pulled the trigger and that he was not aware that anyone had actually been shot. At the time that the assistant prosecuting attorney questioned the Defendant on this subject, she did not appear to be attempting to mislead the jury or prejudice the Defendant, as she was seeking clarification on the Defendant's legal defenses.

As previously stated above, the State presented strong competent evidence of the Defendant's guilt absent this remark. Lastly, the comment by counsel for the State did not appear to be designed to divert the jury's attention from the relevant evidence and counsel for the State did not then cross-examine the Defendant's about his failure to provide a statement to

or be interviewed by law enforcement. Based on these findings, this Court cannot find that the comment necessitated a mistrial.

5) Denial of Defendant's Proposed Jury Instructions on Self-Defense

The Defendant next argues that the refusal of the Court to incorporate Defendant's Proposed Instructions Nos. 22, 23, 24, 25, and 31 violated the Defendant's constitutional rights to a fair trial and due process.

Beginning on page twenty-four (24) of the *Judge's Charge to the Jury*, this Court instructed the jury on the argument of self-defense as follows:

> The Defense has presented evidence of two defenses to these crimes: (1) Self-Defense; and (2) Accidental Killing.
>
> Thus, one of the questions to be determined by you in this case is whether or not the Defendant acted in self-defense as to justify his acts. A person can claim self-defense for the protection of themself or others. Under the laws of this State, if the Defendant was not the aggressor, and had reasonable grounds to believe and actually did believe that he was in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force against his assailant, then he had the right to employ deadly force in order to defend himself. Deadly force is considered force which is likely to cause death or serious bodily harm.
>
> In order for the Defendant to have been justified in the use of deadly force in self-defense, he must not have provoked the assault on him or have been the aggressor. Mere words, without more, do not constitute provocation or aggression.
>
> The circumstances under which he acted must have been such as to produce in the mind of a reasonable prudent person, similarly situated, the reasonable belief that the other person was then about to kill him or to do him serious bodily harm. In addition, the Defendant must have actually believed that he was in imminent danger of death or serious bodily harm and that deadly force must be used to repel it.
>
> If evidence of self-defense is present, the State must prove beyond a reasonable doubt that the Defendant did not act in self-defense. If you find that the State has failed to prove beyond a reasonable doubt that the Defendant did not act in self-defense, you must find the Defendant not guilty. In other words, if you have a reasonable doubt as to whether or not the Defendant acted in self-defense, your verdict must be not guilty.

Defendant's Proposed Instruction No. 22 reads as follows:

The Court instructs the jury that it is not essential to the right of self-defense that the danger should in fact exist. If, to the defendant, it reasonably appeared that the danger in fact existed, he had the right to defend against it to the same extent and under the same rules that would apply in case the danger had been real.

In passing upon the danger, if any, to which the accused was exposed, you will consider the circumstances as they reasonably appeared to him and draw such conclusions from these circumstances as he could reasonably have drawn, situated as he was at the time. In other words, the Court instructs you that the accused is entitled to be tried and judged by facts and circumstances as they reasonably appeared to him and not by any intention that may or may not have existed in the mind of the deceased.[10]

Defendant's Proposed Instruction No. 23 reads as follows:

The Court instructs the jury that as to the imminency of the danger which threatened the defendant, and the necessity of action in the first instant, the defendant is the judge; and that the jury must pass upon the defendant's action in the circumstances presented, viewing said action from the defendant's standpoint at the time of his action; and if the jury believe from all the facts and circumstances in the case, viewed from the standpoint of the defendant at the time of the action, that the defendant had reasonable ground to believe, and did believe, the danger imminent, and that the action was necessary to preserve his own life, or to protect him from great bodily harm, he was excusable for using a deadly weapon in his defense and the jury should find the defendant not guilty.[11]

Defendant's Proposed Instruction No. 24 reads as follows:

The Court instructs the jury that where a man is threatened with danger, the law authorizes him to determine from appearances and the actual state of things surrounding him as to the necessity of resorting to force, and if he acts from reasonable and honest conviction, he will not be held criminally responsible for a mistake as to the actual danger. Where other and more judicious men would have been mistaken: for when one man attempts to injure another, it gives the injured the right to make use of such means to prevent injury as his behavior and the situation necessitates.[12]

Defendant's Proposed Instruction No. 25 reads as follows:

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[10] Defendant's Proposed Jury Instruction No. 22 cites the following case: State v. Gibson, 413 S.E.2d 120 (W. Va. 1991).

[11] At the bottom of the Proposed Jury Instruction No. 23, the Defendant cited the following cases: "*State v. Donahue*, 79 W. Va. 260, 265, 90 S.E. 834 (1916); *State v. Cain*, 20 W. Va. 679, 707 (1882); *State v. Clark*, 51 W. Va. 457, 468, 41 S.E. 204 (1902); see *State v. DeBoard*, 119 W. Va. 396, 407, 194 S.E. 349 (1937)."

[12] Defendant's Proposed Jury Instruction No. 24 cites the following case: "*State v. Gibson*, 413 S.E.2d 120 (W. Va. 1991)."

> The Court instructs the jury that a person has a right to repel force by force in the defense of his person, his family or his habitation, and if in so doing he may use only so much force as the necessity, or apparent necessity, of the case requires, he is not guilty of any offense, though he kills or injures his assailant in so doing.[13]

Defendant's Proposed Instruction No. 31 reads as follows:

> If the defendant was not the aggressor, and had reasonable grounds to believe and actually did believe that he or she was in imminent danger of death or serious bodily harm from which he or she could save him or herself only by using deadly force against his or her assailant, he or she had the right to employ deadly force in order to defend him or herself. By "deadly force" is meant force which is likely to cause death or serious bodily harm.
> In order for the defendant to have been justified in the use of deadly force in self-defense, he or she must not have provoked the assault on him or her or have been the aggressor. Mere words, without more, do not constitute provocation or aggression.
> The circumstances under which he acted must have been such as to produce in the mind of a reasonably prudent person, similarly situated, the reasonable belief that the other person was then about to kill him or her or to do him or her serious bodily harm. In addition, the defendant must have actually believed that he or she was in imminent danger of death or serious bodily harm and that deadly force must be used to repel it.
> If evidence of self-defense is present, the State of West Virginia must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find that the State has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty. In other words, if you have a reasonable doubt whether or not the defendant acted in self-defense, your verdict must be not guilty.[14]

In comparing the *Judge's Charge to the Jury* and the Defendant's proposed instructions, it is clear that although the exact phrasing from the Defendant's proposed instructions was not used, the substance of the legal concepts is essentially the same. The concepts that are enumerated in Defendant's Proposed Instructions Nos. 22, 23, 24, 25, and 31, are the

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[13] Defendant's Proposed Jury Instruction No. 25 cites the following cases: "*State v. Manns*, 48 W. Va. 480, 486, 37 S.E. 613 (1900); *State v. Hamrick*, 74 W. Va. 145, 148, 81 S.E. 703 (1914); see, also, *State v. Banks*, 99 W. Va. 711, 715, 129 S.E. 715 (1925)."

[14] Defendant Proposed Instruction No. 31 cites the following authority: "E. Devitt and C. Blackmar, Federal Jury Practice and Instructions § 41.19 (3rd ed. 1977). Set forth in footnote 8, *State v. Kirtley*, 162 W. Va. 249, 252 S.E.2d 374 (1978). Noted with approval in *State v. Duncan*, 168 W. Va. 225, 283 S.E.2d 855 (1981). See Syl. pt. 1, *State v. Knotts*, 187 W. Va. 795, 421 S.E.2d 917 (1992); *State v. Beegle*, 188 W. Va. 681, 425 S.E.2d 823 (1992); *State v. Headley*, 210 W. Va. 524, 558 S.E.2d 324 (2001)."

appearance of danger to the defendant under the circumstances as they reasonably appeared to him; threat of imminent danger; reasonable and honest conviction that self-defense is necessary; the availability of self-defense for the protection of oneself or others; and the use of deadly force for a person who was not the aggressor. These concepts are also present in the *Judge's Charge to the Jury.* The Defendant does not argue that the legal concepts explained in the *Judge's Charge to the Jury* are incorrect. Accordingly, this Court cannot find error in the failure to give the precise instructions suggested by the Defendant when the same legal principles in those propose instructions are contained within the *Judge's Charge to the Jury.*

6) Jury Instructions regarding "Malice"

In the *Judge's Charge to the Jury*, containing the instructions read to the jury, the Court defined the legal term "malice" when giving instructions for both the offense of *First Degree Murder* and *Second Degree Murder*. There was no dispute at trial that the "malice" is an element of each of these crimes under the relevant statutes. However, counsel for the Defendant argued that defining "malice" each time the Court instructed the jury of the elements of *First Degree Murder*, *Second Degree Murder*, and *Voluntary Manslaughter* was error because it would cause the jury to focus on the element of "malice" above the other elements of the crimes. The Defendant cited the jury's question to the Court regarding malice in support of her argument that the jury unduly focused on the "malice" element. In its question, the jury requested that the Court give a further explanation of "malice." In its response, the Court advised the jury that "malice" had been fully explained and defined in the *Judge's Charge to the Jury.*

This Court notes that its duty to inform the jury regarding the relevant and accurate law includes its duty to define each element of the offenses it must consider. In this case, the Court

instructed the jury on offense of *First Degree Murder* as charged in the *Indictment*, as well as its lesser-included offenses of *Second Degree Murder, Voluntary Manslaughter, and Involuntary Manslaughter*. There is no dispute that "malice" is an element of *First Degree Murder*, *Second Degree Murder*, and *Voluntary Manslaughter* and that it is not an element of *Involuntary Manslaughter*. The Court further notes that failure to define elements of each offense could constitute error and that the West Virginia Supreme Court of Appeals frowned on a proposed instruction that attempted to shortcut the recitation of elements of the offenses of *Second Degree Murder, Voluntary Manslaughter,* and *Involuntary Manslaughter* by not affirmatively stating the elements of each crime. *See State v. McGuire*, 200 W.Va. 823, 831-832, 490 S.E.2d 912, 920-921 (1997). The Supreme Court commented that the "better approach" is for a "trial court to affirmatively state the elements of each crime." *Id* at 832, 921. This is precisely the careful approach taken by this Court so that the jury is aware of each element of each crime instructed, a matter that is of utmost important when the jury is considering four separate offenses, as well as the defenses of self-defense and accident. Although the jury clearly considered the element of "malice," this is unsurprising given that the element of "malice" distinguishes *Second Degree Murder* from *Voluntary Manslaughter* and *Involuntary Manslaughter*, which do not require the existence of malice. Given that the "malice" element was necessary for the jury to consider in its deliberations and the guidance of the West Virginia Supreme Court of Appeals that the better approach to instructing a jury is for the Court to affirmatively state each element of the crime, this Court cannot find error in multiple definitions of the element of "malice."

7) Jury Instructions regarding Lesser-Included Offense of *First Degree Murder*

As discussed above, the Court gave instructions in *Judge's Charge to the Jury* for two lesser-included offenses of *First Degree Murder* that included the element of "intent," specifically, *Second Degree Murder* and *Voluntary Manslaughter*. The Defendant argues that the Court erred in giving these lesser-included instructions because there was no evidence presented at trial regarding intent. Despite the Defendant's assertion that there was no evidence regarding intent at trial, multiple witnesses presented their views on the Defendant's intent or lack of intent.

Counsel for the State presented the testimony of the following witnesses regarding their observations of the Defendant and the incident that led to the shooting: Shiloh Robertson, Kenneth McCrobie, Shawn Moats, D.J. Wilt, Michael Felton, Samuel Sisler, Brian Reckart. The Defendant also presented witnesses: Brian Teets, Nathan Lanham, and Machaela Jeffries. Each of these witnesses The Court will discuss these witnesses' testimony more fully below under the *Defendant's Motion for Judgment of Acquittal*. However, each witness testified regarding their eyewitness observations of the events of November 2, 2019, through November 3, 2019, the Defendant's behavior, as well as the behavior of his associates, and the conclusions they drew from their observations.

Finally, the Defendant took to the witness stand and testified that while he fired warning shots and believed he accidentally fired the shots that injured and ultimately killed the victim. He testified that he had no intent to kill the victim. Based upon the jury's verdict it is clear that they did not accept his rendition of the night's events. Any jury's chief assignment is to determine the credibility of the witnesses. In addition, the jury viewed surveillance video of the incident, which was introduced into evidence as State's Exhibit 7A. From the surveillance video

alone, the jury was able to draw its own conclusions. Thus, there was no error in giving instructions regarding lesser-included offenses that contained the element of "intent."

8) Denial of Defendant's motion *in limine* regarding Purported Psilocybin

Prior to trial, counsel for the Defendant orally moved for a motion *in limine* to preclude the State from introducing evidence regarding the discovery of a small package of suspected psilocybin (appearing to the layperson as mushrooms and also referred to as "mushrooms" at trial) from the Defendant's vehicle.[15] The Defendant's chief argument was that the State failed to send the suspected psilocybin to the State Forensic Laboratory for testing and analysis and thus it was not clear that the package contained psilocybin, resulting in the inadmissibility of evidence pertaining to the package. Counsel for the State confirmed that the package had not been analyzed by experts but argued that the chief investigating officer, Lt. Rodeheaver, should be permitted to testify regarding what he suspected the contents of the package to be given his experience in law enforcement and with illegal substances. At trial, the Court permitted Lt. Rodeheaver to testify regarding the package and what he *believed* the contents of the package to be given his expertise; however, the Court ruled that counsel for the Defendant would be permitted to question Lt. Rodeheaver on whether the package contents were tested by a laboratory to confirm the contents, whether the usual practice is for a laboratory confirmation of suspected controlled substances, and why the contents were not sent for testing.

The Court notes that there was no dispute that the package of suspected psilocybin was found in the Defendant's vehicle and that there were no allegations of chain of custody issues. Further, the Court notes that a witness for the State, Khristina Andrews, provided unsolicited

[15] Prior to and during the trial, there was no argument that the package was found during a legal search of the Defendant's vehicle.

testimony that she left "psychedelic mushrooms" in the front seat of the Defendant's vehicle. Although the testimony of Khristina Andrews does not definitively prove that the package contained psilocybin, it adds further credence to Lt. Rodeheaver's suspicion. Counsel for the Defendant was given an opportunity to cross-examine Lt. Rodeheaver on why he did not have the package analyzed by the State Police Forensic Laboratory and how he could not confirm the contents of the package. A photograph of the suspected psilocybin was introduced into evidence as State's Exhibit No. 90.

Little case law seems to exist on this subject in West Virginia.[16] Thus, this Court must rely on common sense and judgment. Here, counsel did not disagree that the State failed to send the suspected psilocybin for confirmatory testing through the West Virginia State Police Forensic Laboratory or any other laboratory. Thus, the Court did not permit Lt. Rodeheaver to testify that he knew the contents of the package and instead ordered that Lt. Rodeheaver could testify what he *believed* or *suspected*, with the Defense permitted to cross-examine, leaving the jury to draw its own conclusions regarding the substance and the sufficiency of the State's investigation.

9) Cumulative Errors

In his motion, the Defendant argues that the cumulative errors already identified "denied the defendant the right to a fair trial." This Court will match the Defendant's brevity. Due to the reasons identified above that establish why each of the Defendant's arguments numbered one through nine on the Defendant's *Motion for a New Trial* do not meet the burden of establishing

[16] The closest analogy this Court could find was in a footnote in *State v. McDaniel*, 238 W.Va. 61, 792 S.E.2d 72 (2016). There, the Supreme Court found no error where the trial court overruled an objection by permitting a law enforcement officer to refer to a substance found in a vehicle as "baby vomit" where it had not been tested. At trial, the trial court allowed the officer to testify that the substance "appeared" to be baby vomit and allowed the jury to judge for itself based on the testimony and a photograph of the substance admitted as evidence. *Id* at footnote 13.

that the Defendant's constitutional rights were violated, the alleged cumulative errors do not justify the Defendant's request for a new trial.

II. Motion for Judgment of Acquittal

In his motion, the Defendant requests that the verdict be set aside and argues that the evidence at trial failed to show that the Defendant had intent to kill the victim when the firearm discharged. The Defendant specifically cited the trial testimony of Michael Felton and D.J. Wilt and argued that the testimony showed that the Defendant lost control of his firearm when he was tackled and did not intentionally fire toward anyone.

A. Standard of Review

Rule 29 of the West Virginia Rules of Criminal Procedure states, in pertinent part, that

> [i]f the jury returns a verdict of guilty . . . a motion for judgment of acquittal may be made or renewed within ten days after the jury is discharged . . . . If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal.

W. Va. R. Crim. P. 29(c).

A criminal defendant undertaking an insufficiency of the evidence argument carries a heavy burden. This Court, in reviewing the evidence on which Defendant's convictions are based, utilizes the following standard:

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

> the judge must choose the inference that best fits the prosecution's theory of guilt.

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

"This standard is a strict one; a defendant must meet a heavy burden to gain reversal because a jury verdict will not be overturned lightly." *State v. Guthrie*, 194 W. Va. 657, 667-68, 461 S.E.2d 163, 173-74 (1995).

In *State v. Guthrie*, *supra*, the Supreme Court of Appeals of West Virginia adopted the federal standard for claims involving insufficiency of the evidence under *Jackson v. Virginia*, 443 U.S. 307 (1979). To that end, the West Virginia Supreme Court stated that "[i]n adopting *Jackson*, we necessarily overturn our long established rule that when the State relies upon circumstantial evidence, in whole or in part, for a court to sustain the verdict all other *reasonable* hypotheses need be excluded by the prosecution save that of guilt." *Guthrie*, 194 W. Va. at 668, 461 S.E.2d at 174. The West Virginia Supreme Court held:

> There should only be one standard of proof in criminal cases and that is proof beyond a reasonable doubt. Once a proper instruction is given advising the jury as to the State's heavy burden under the guilt beyond a reasonable doubt standard, an additional instruction on circumstantial evidence is no longer required even if the State relies wholly on circumstantial evidence.

Syl. pt. 2, *State v. Guthrie*, *supra*.

Thus, this Court concludes that a case built entirely on circumstantial evidence will satisfy the evidentiary standard so long as when the evidence is viewed through a light most favorable to the prosecution, it is enough to satisfy a jury of guilt by proof beyond a reasonable doubt. With this standard in mind, the Court considers the evidence presented during the five-day jury trial.

The Defendant argues in his motion that that the conviction for the felony offense of *Second Degree Murder* should be set aside because the evidence presented at trial did not

establish that essential element of "intent," as required by West Virginia Code § 61-2-1. Instead, the Defendant argues that the evidence at trial established that the Defendant obtained and used his firearm "in self-defense to prevent the other members of his party, including the mother of his child, from being attacked."

B. Findings of Fact

Numerous witnesses testified at trial, often with conflicting testimony. For the sake of this Order, the Court will focus on the eyewitness testimony of witnesses who were present at the Defendant's vehicle at the time of the shooting, as well as the State's firearm expert.

1. D.J. Wilt

D.J. Wilt, who stated his legal name is Larry D. Wilt, testified that he was unofficially helping out at the Halloween party at Shorthorns Saloon and thus became a witness. Regarding the events that occurred at the Defendant's pick-up truck immediately before the shooting, Mr. Wilt testified that he and other had taken the Defendant and his friends to the vehicle to make them leave the area. He stated that he specifically was attempting to place Brian Teets in the rear of the pick-up truck. He recalled seeing a girl (presumably the Defendant's girlfriend, Machaela Jeffries) kicking a door of the vehicle open and taking Grant Felton to the ground. He then remembered hearing gunshots and seeing flashes from a firearm discharge. He stated that he tried to get the firearm and ultimately twisted it out of the Defendant's hands.

2. Michael Felton

Michael Felton testified that he was present at Shorthorns Saloon for the Halloween Party because he went to assist his wife, who was the manager at the establishment. Regarding the events at the Defendant's vehicle immediately before the shots were fired, he stated he assumed that Grant Felton was on the ground because a girl had tackled Grant Felton. When he went to take the girl off of Grant Felton, he testified that he saw muzzle flashes. He then stated he attempted to gain the Defendant's firearm and eventually caught the Defendant's wrist while trying to push the gun up while the Defendant attempted to push the gun down while the gun continued to fire. He stated that he then heard someone yell "Grant was shot."

3. Samuel Sisler

Samuel Sisler testified that he was a patron of Shorthorns Saloon the night of the incident. When a group of individuals followed the Defendant and others to the Defendant's pick-up truck, he stated he followed those individuals to the truck because he was worried about the situation. He stated that when the first shots were fired, the Defendant was on the running board of the truck, with Grant Felton outside of the truck. He stated that it appeared Grant Felton tackled the Defendant in order to take the Defendant's gun, though it was difficult for him to see well due to his position beyond the truck. After Grant Felton and the Defendant went through the doorframe of the vehicle, he stated he did not see any more but heard additional shots.

4. Brian Reckart

Brian Reckart testified that he assisted with bartending at Shorthorns Saloon and was working the night of the incident. He stated that he was inside of the establishment when shots were fired and that he went outside when he heard shots. He stated he saw the Defendant with the firearm, which was lowered at a downward angle and then saw Grant Felton fall to the ground. He stated that D.J. Wilt, Michael Felton, and the Defendant's girlfriend were around the Defendant. He stated that he witnessed D.J. Wilt take the gun from the Defendant and that D.J. Wilt then handed him the firearm, which he put into his waistband. He later provided the firearm to a law enforcement officer. Mr. Reckart testified that he did not believe the shooting was unintentional and speculated that otherwise there was no purpose for using the firearm.

5. Kenneth McCrobie

Kenneth McCrobie testified that he was present at Shorthorns Saloon and assisted the establishment's hired bouncer. He stated that he was among the group of individuals who followed the Defendant to the Defendant's vehicle shortly before the shooting. He stated that a girl came out of the truck and tackled Grant Felton, which took them both to the ground. He stated that someone removed the girl from Grant Felton. The then saw the Defendant, who was inside the front passenger door of the pick-up truck, when the initial shots were fired. Grant Felton then went around and tackled the Defendant when shots were fired. Mr. McCrobie stated that he then felt something on his left shoulder and thought had had been shot. Then he witnessed Grant Felton fall out of the vehicle to the ground, with the vehicle leaving.

6. Shawn Moats

Shawn Moats, testified he was a patron of Shorthorns Saloon the night of the incident, and was friends with Grant Felton, as well as Brian Teets, and had met the Defendant through Brian Teets. He testified that he was right beside of Grant Felton, with his right shoulder and Grant Felton's left shoulder were touching, after the Defendant fired the warning shots. He stated that when he saw flashes from the gunshots and heard the gunshots that no one was attacking the Defendant. Then he testified that he saw arms reach for the Defendant. At this point, he pushed two women to the ground in an attempt to keep them safe from the shooting.

7. Khristina Andrews

Khristina Andrews testified that she is the girlfriend of Brian Teets, who is friends with the Defendant, and that she attended the Halloween party at Shorthorns Saloon in the company of the Defendant, his girlfriend, Machaela Jeffries, Brian Teets, and Nathan Lanham. She testified that immediately before the shooting, she was in the pick-up truck and saw the Defendant on the floorbed of the truck and get something from a black bag. She stated that she saw an arm grab Machaela Jeffries, who was in the drivers seat of the vehicle, and then saw Machalea go across the windshield. Next she described the Defendant going out of the front passenger door, place his arms straight up, and shoot. She also stated that no one was attacking the Defendant when the Defendant obtained the gun from inside his vehicle. She testified that she did not see Machaela Jeffries jump out of the vehicle or jump on Grant Felton. She also stated that she believed that this action would be out of character for Ms. Jeffries.

8. Calissa Carper

The State tendered Calissa Carper, an employee of the West Virginia State Police Forensic Laboratory as an expert in firearm and toolmarks. Ms. Carper testified at trial regarding her examination of the firearm used in the incident, as well as casings, cartridge cases, and bullets. She stated that she examined the firearm and found no defects with the firearm and that the safety mechanism functioned correctly. She testified that an individual shooting the firearm must disengage multiple safety mechanisms and must have a strong grip on the firearm's frame to fire bullets from the pistol.

9. Dr. Elizabeth Rouse

The State also presented the expert testimony of Dr. Elizabeth Rouse, a retired medical examiner, who prepared the autopsy report on the victim, Grant W. Felton, Jr. She testified regarding the number of gunshot wounds suffered by Grant Felton, her opinions regarding the proximity of the firearm to the wounds, and the gunshot wound that likely caused Grant Felton's death. She opined that Mr. Felton suffered a grazing wound to the side of the head, with evidence of "soot" or "stippling," that indicated the firearm was in intermediate to close range to Mr. Felton's body[17]. Mr. Felton also suffered a gunshot wound to his chest and through his armpit that exited the back of his arm, which she opined would not immediately cause caue death. She further testified that she believed that the cause of death resulted from the head wound where a bullet entered the victim's head from the back to the front, exiting right below his mandible on the right side of his neck.

[17] She testified on cross-examination that "soot' usually occurs when a firearm is within a foot of the victim, with "stippling" occurring, within an inch. However, she stated this varies by individual firearm, ammunition, and when the firearm was last cleaned.

10. Brian Teets

Brian Teets testified on behalf of the Defense. He stated that he recalled that shortly before the shooting, a crowd followed him, the Defendant, and the others in their group to the Defendant's pick-up truck. He stated he only saw flashes and was not aware of the location of the Defendant or Machaela Jeffries. He then testified that he saw a body go out of the truck before the truck drove away.

11. Brian Lanham

Nathan Lanham also testified on behalf of the Defendant regarding the night's events, as he had accompanied the Defendant to the party. Immediately before the shooting, he stated that the Defendant was "bum-rushed" toward the passenger side of the vehicle and then was pinned by a bearded gentleman, with the Defendant being half-way in and half-way out of the vehicle. Mr. Lanham then stated that Machaela Jeffries was violently ripped out of the vehicle by someone who he believed was Grant Felton. Later, under cross-examination, he described Grant Felton as dragging Machaela Jeffries out of the vehicle by her face. He stated he then heard shots and reacted by taking cover behind the rear passenger tire of the vehicle. After this the truck drove away

12. Machaela Jeffries

Machaela Jeffries, the Defendant's girlfriend, provided extensive testimony at trial. She testified that immediately before the shooting, peopled came "pouring in" toward the pick-up truck where she sat in the driver's seat. She testified that the Defendant had turned his back on the individuals following him to the truck and had one foot on the running board, when Grant

Felton placed his hands on the Defendant's neck and pinned him to the seat of the truck, with Grant Felton's thumbs down on the Defendant's trachea. She stated that Grant Felton grabbed her by the face and left arm and pulled her out of the vehicle. She described curling up in a fetal position while people hit her while she was on the ground, before someone pulled her up. While she was on the ground, she reported that she heard shots fired. She stated when she was able to see what was going on, the Defendant was on the floorboard of the truck, with multiple people leaning into the truck and grabbing for the Defendant and the gun. She stated she went back into the truck, where she placed her hand under the Defendant's hands in order to brace the firearm. Then someone pulled the firearm away, at which point she crawled into the drivers seat and slowly drove the vehicle away.

13. Defendant

The Defendant took to the stand at trial. He that shortly before the shooting, while going to his pick-up truck, Grant Felton grabbed him by the neck from behind. He described being blindsided and believed he momentarily blacked out while Grant Felton was choking him. He stated that he was panicked and confused, especially when he did not see his girlfriend, Machaela Jeffries, in the truck. He believed that Machaela Jeffries had been pulled out of the truck and made a split-second decision to get his firearm from a bag within the truck. He testified that he had no intention to shoot anyone and made sure not to point the gun at anyone. At this point, he stated he chambered the gun, got onto the running board of his pick-up truck, and fired roughly four shots into the air. Immediately he described being tackled by some guy, with the man directly on top of him, with the gun going down his left side, resulting in a struggle for the firearm. He stated that while he had full control of the firearm, all shots were in

the air and that he did not consciously pull the trigger. On cross-examination, he stated that he initially retrieved the gun as an act of self-defense because he thought firing warning shots would disperse the crowd that he believed was trying to hurt himself and his friends. Following the warning shots, he stated that the additional shots were fired by accident. The Court notes the standard of review requires that evidence ben viewed in the light most favorable to the prosecution. Here, the Defendant's testimony was not always credible and a plausible interpretation is a rejection of the Defendant's statements that he had no intention to shoot any individual or Grant Felton.

14. Surveillance Video

As previously noted, throughout the trial, counsel for the State and the Defendant played the surveillance video of the incident, which was introduced as the first three video clips contained on State's Exhibit 7A. The surveillance video shows the area outside of the Shorthorns Saloon where much of the incident took place, although the scene at the Defendant's vehicle is at the top of the video screen and is farthest away from the camera, rendering the scene more difficult to view than the area in immediate proximity of the surveillance camera. However, the video was sufficient for the jury to compare with the witness testimony and draw their own conclusions, especially when the relevant video clip is displayed on a large screen television with a clear picture, as the jury viewed the video at trial.

C. Conclusion

To overturn a jury verdict, a defendant bears a heavy burden, especially with the trial court required to consider the evidence in the light most favorable to the State. In comparing the witness testimony, there are clear contradictions, both between witnesses testifying for the same side, as well as contradictions between witness testimony and the surveillance video. Nevertheless, witnesses for both the State and the Defendant presented testimony regarding their views regarding the incident and the Defendant's intentions. Further evidence was introduced in the form of the surveillance video from the incident. Given the evidence regarding the Defendant's use of the firearm, the testimony of Brian Reckart that the Defendant intentionally lowered the firearm to the victim, the Defendant's testimony that he intended to use the gun to defend himself and others, the testimony of the Defendant that the gun fired after he was tackled by Grant Felton, the State's firearm expert's testimony regarding how the Springfield firearm must be operated in order to fire, among other witnesses, the Court cannot find that in viewing the facts in the light most favorable to the Defendant that the jury verdict was in error. It is the jury's duty to determine the facts of the case, consider evidence, judge the credibility of witnesses, and give the appropriate weight to the evidence. In this case, the jury made its factual determinations and rendered its legal conclusion, through the verdict, that the Defendant committed the offense of *Second Degree Murder*.

III. Conclusion

For the reasons explained in this Order, the Court does hereby **ORDER** that the *Defendant's Motion for a New Trial and Motion for Judgment of Acquittal* is **DENIED.**

All parties are saved their exceptions and objections to the rulings of the Court. It is further

ORDERED that the Clerk of the Court personally deliver or send via first-class mail a certified copy of this Order to the Preston County Prosecuting Attorney; and to Belinda Haynie, counsel for Defendant.

2 Copies
SID
8/23/2

ENTER this 23rd day of August 2021.

Steven L. Shaffer, JUDGE

ENTERED this 23 day of August 2021.

Lisa Leishman, CLERK

by: Sheila Turner, deputy

A TRUE COPY:
ATTEST: S/LISA LEISHMAN
CLERK OF THE CIRCUIT COURT
By: Sheila Turner Deputy