IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0764

STATE OF WEST VIRGINIA,

Respondent,

v.

AARON GLEN HOARD,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the August 27, 2021, Order
Circuit Court of Preston County
Case No. 20-F-92

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I. INTRODUCTION

Respondent, State of West Virginia, by counsel, Lara K. Bissett, Assistant Attorney General, responds to Aaron Glenn Hoard's ("Petitioner") brief filed in the above-styled appeal. Petitioner has failed to demonstrate the existence of reversible error and, therefore, this Court should affirm his conviction and sentence.

II. ASSIGNMENTS OF ERROR

Petitioner advances seven assignments of error in his brief: error in (1) denying motions for mistrial, (2) refusing proposed instructions on self-defense, (3) giving instructions on intent-based crimes, (4) giving two instructions regarding malice, (5) denying a change of venue or a change-of-venue survey, (6) denying motions to strike jurors for cause, and (7) denying motions for judgment of acquittal or new trial. Pet'r Br. 1.

III. STATEMENT OF THE CASE

A. Indictment and underlying crime.

Petitioner was indicted on a single count of first degree murder in Preston County case number 20-F-92 on June 23, 2020. App. 8. The indictment was predicated on the November 3, 2019, murder of Grant Felton, Jr., at Shorthorns Saloon. *Id.*

B. Motion for change of venue.

Petitioner filed a motion for a change of venue or, in the alternative, for permission to conduct a survey to gauge the climate in Preston County surrounding Petitioner's trial, attaching to the motion a memorandum prepared by Orion Strategies. App. 9-20. The memorandum cited 29,461 "media and social media actions such as Comments, Likes, Shares, and Retweets." App. 13. The memorandum noted, however, that the "Designated Market Area" included

Pittsburgh, Pennsylvania; Clarksburg, Weston, Charleston, Huntington, and Wheeling, West Virginia; and Steubenville, Ohio. App. 14-15.

The motion was argued on January 7, 2021. App. 147-189. Petitioner acknowledged that "just being publicized or people knowing about the case certainly, as the Supreme Court has indicated, is not sufficient for this Court to determine that there's a change of venue or good cause for change of venue. There has to be a showing of prejudice." App. 151. To that end, Petitioner asked permission to develop a questionnaire to determine whether there was a "hostile sentiment" against Petitioner. App. 151-52, 154-55. The State pointed out that Petitioner had failed to demonstrate that the social media posts he cited as support for his motion were even made by citizens of Preston County. App. 169. The State also pointed out that the names on some of the posts were redacted, so it was impossible to tell whether they were unique posts or whether certain individuals made multiple posts. App. 169-70. The State further noted that certain of the news stories cited by Orion Strategies were aired on television stations that Prestonians wouldn't even see. App. 170. Nonetheless, the State did not object to the survey. App. 170-71.

Petitioner acknowledged that he was not required to seek the court's permission to conduct a survey, noting that "we have, you know, every right to collect evidence to try to sustain this burden of proof under the code and the rules of criminal procedure and prior case law." App. 158, 175.

In an order entered January 15, 2021, the circuit court denied the motion for a survey but continued to hold the motion for a change of venue in abeyance until the court could first try to seat a jury in Preston County. App. 26. The circuit court found that "at least some of the social media mentions" cited by Orion Strategies were generated by family and friends of the victim,

who would not be eligible to serve on the jury in any case. App. 29. The circuit court expressed its concern "that a telephone survey will taint the jury pool." App. 33. The court noted,

> In this social media and internet age, if Preston County residents hear the names of the individuals involved in this case and that it is a murder, information about the case is a mere click of the computer or smart phone away . . . . Thus, this [c]ourt believes that even if the survey is well-written to avoid providing any information beyond identifying information to survey respondents, individuals who answer the survey call (even if they do not complete it) will likely begin to independently research the case and possibly form opinions or hostility.

App. 34. Citing former Justice Frank D. Cleckley's *Handbook on West Virginia Criminal Procedure*, the circuit court concluded that it should attempt to impanel a jury before making its final determination on the motion for change of venue. App. 34. The circuit court explained that it would take great care to conduct an effective *voir dire* of the jury panel as contemplated in *State v. Walker*, 188 W. Va. 661, 425 S.E.2d 616 (1992).[1] App. 35.

C. Jury selection.

The first substantive question the circuit court asked in *voir dire* was whether any of the prospective jurors had personal knowledge about the case through discussions, reading or hearing media coverage, or social media interactions. App. 260. Each of the prospective jurors who said that they had such knowledge was then individually questioned.[2] App. 261. About half-way through the second day of individual *voir dire*, the State pointed out that there were still 30 potential jurors left to individually *voir dire*. App. 996. Petitioner's counsel then asked, "Do we have to go through them all?" *Id.* When the circuit court responded that all the potential jurors

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[1] Petitioner renewed his motion for change of venue at the end of the first day of *voir dire*. App. 725. The court, again, held the motion in abeyance until *voir dire* was complete. App. 725-26.

[2] For the sake of brevity, Respondent will only detail the individual *voir dire* of the four jurors specifically mentioned in Petitioner's argument.

needed to be questioned, Petitioner's counsel asked, "Can we get to a stopping point and go out and ask the rest of questions and then if we have enough then we don't bring others back in for individual [*voir dire*]?" *Id.* Petitioner's counsel pointed out that "[w]e have enough [potential jurors]." App. 997. Accordingly, once the panel of screened potential jurors reached 38 in number, the circuit court agreed to dismiss the remaining potential jurors without questioning them further. App. 1122-23.

The first 20 jurors in the pool included Jurors 1, 24, 21, and 34, who are specifically mentioned in Petitioner's brief before this Court. App. 1123-25; Pet'r Br. 35-36. None of those four jurors, however, were empaneled on the jury of 12 and six alternates. App. 1176.

1. Juror 1

Juror 1 related to the circuit court that she had no personal knowledge of the shooting but stated that she had prayed with Heidi Felton afterward as a part of her church's prayer quilt ministry. App. 293-94. Heidi's sister attended church with Juror 1. App. 294. Juror 1 stated that she "would hope [she] could" render a true and accurate verdict in the case. *Id.* Upon further questioning by Petitioner's counsel, Juror 1 explained that the prayer quilt ministry went to Heidi's house one time to deliver the quilt and to pray with Heidi. App. 295. The same church ministry also delivered a prayer quilt to Grant's family and prayed with them as well. *Id.*

When asked by Petitioner's counsel whether her contacts with the Feltons or with her nephew, who is Shorthorn's owner Jason Peaslee ("Peaslee"), would prevent her from rendering a "fair" verdict, Juror 1 responded that they would not. App. 297-98. Juror 1 expressed that she "would just pray what God's will is" and that she always does "whatever is true and right." App. 296. Petitioner did not move to strike Juror 1 for cause. *See* App. 305.

2. Juror 21

Juror 21 told the circuit court that her daughter and brother are in a band that performed at Shorthorns Saloon a few nights before the shooting. App. 400. She attended that performance. App. 403. Juror 21 further related that she had seen posts on Facebook regarding the shooting but did not "like" or "share" any of the posts. App. 399-402. Juror 21 did not know any of the participants in the shooting and does not have any friends in Terra Alta. App. 402-03. Upon further questioning by Petitioner's counsel, Juror 21 asserted that she had not formed any opinion about the case. App. 404. She also expressed that she would feel no pressure to render a particular verdict and that she "would be able to do what [she] felt was correct." App. 409. Again, Petitioner did not move to strike Juror 21 for cause. *See* App. 409-10.

3. Juror 24

Juror 24 indicated that she had heard about the shooting, but stated that she did not know any details about the incident. App. 439. Juror 24 assured the circuit court that what she read would not interfere with her judgment in the case and that she had not formed an opinion about it. *Id.* Upon further questioning by Petitioner's counsel, Juror 24 indicated that she "knew of" State's witness Mike Felton ("Felton") and his family but was not close with any of them. App. 440-41. Juror 24 told Petitioner's counsel that she would not feel pressured by the community to come to any particular verdict and that she would render a verdict "based solely on what [she] hear[d] in the courtroom." App. 443-44.

Upon further questioning by the court and the State regarding her relationship with Felton, Juror 24 explained that their hometown of Rowlesburg, West Virginia, "is a small town where pretty much everybody knows everybody," but that would not cause her to give his testimony any more weight than anyone else. App. 445, 449. Petitioner's counsel followed up with questions

about Felton's wife, Valerie. App. 448-49. Juror 24 indicated that she and Valerie had played ball together 15 or 20 years ago but stated that they did not socialize. App. 449. Again, Petitioner did not move to strike Juror 24 for cause. *See* App. 451.

4. Juror 34

Juror 34 indicated that he knew the assistant prosecutor trying the case, Megan Fields. App. 551. He indicated, though, that she was just an acquaintance who he sees out "every now and then." *Id.* Juror 34 stated that his relationship with Ms. Fields would not affect his ability to render a fair verdict. App. 552.

Juror 34 also indicated that he knew Felton but that would not affect his verdict. App. 553-54. Upon further questioning by Petitioner's counsel, Juror 34 indicated that he knew "all the [Rowlesburg] Felton[s]" and had "watched [Mike] grow up." App. 558. He stated, though, that he had not seen Felton in five or six years. App. 559. Juror 34 asserted that Felton was more of an acquaintance and that he would not give his testimony any more weight than anyone else's. App. 559-60. Petitioner did not move to strike Juror 34 for cause. *See* App. 561.

D. Trial.

1. Opening statement of the State.

During its opening statement, the State made the following statement:

> Lieutenant Rodeheaver did a considerable number of interviews along with other law enforcement officers with the sheriff's department to determine what happened on November 3rd of 2019, and the witnesses interviewed will be able to describe it to you in their own words. The one interview we [sic] didn't get was with Aaron Hoard or his girlfriend[.]

App. 1221-22. Petitioner immediately asked to approach the bench and moved for a mistrial. App. 1222. The circuit court denied the motion, finding that the State "did not say that [Petitioner] did not give a statement. She said [Lt. Rodeheaver] was unable to interview [Petitioner]."

App. 1222-23. Petitioner renewed the motion at the end of the State's opening statement to preserve it for the record. App. 1228. Again, the court denied the motion, noting, "like I said, I believe it was in the content [sic] that [Petitioner] had fled the scene. [Lt. Rodeheaver] was not able to take [Petitioner's statement]. That's the reason I'm denying it, okay?" *Id.*

2. The State's case-in-chief.[3]

a. *Petitioner and his friends are asked to leave Shorthorns Saloon for the first time.*

On November 2, 2019,[4] Grant Felton ("Grant" or "the victim") and his wife, Heidi, and their children[5] went to Shorthorns Saloon in Terra Alta, Preston County, West Virginia. App. 1276. Heidi testified that a group of people who were unknown to the Feltons, and which included Petitioner, was dancing and jumping around in front of the Feltons, "encroaching on everybody else's space." App. 1279. Shorthorns Saloon owner, Peaslee, likewise testified that on the night of the shooting, he observed Petitioner causing a disturbance, "dancing out-of-control, knocking into people." App. 1334. Shorthorns bouncer, Shiloh Robertson ("Robertson"), also testified that he noticed Petitioner being disorderly and rowdy and making other patrons uncomfortable. App. 1950.

At some point, Robertson saw Grant get up and walk over to Petitioner, so Robertson followed. App. 1953-54. Robertson heard Grant tell Petitioner to calm down or to leave. App. 1954. Petitioner responded, but Robertson did not hear what he said. App. 1954. Petitioner looked angry, though. App. 1955. Grant walked away, and Robertson looked over to Peaslee,

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[3] Respondent will only summarize the trial testimony that is relevant to the issues presented by Petitioner.

[4] The events underlying the murder of Grant Felton spanned November 2, 2019, into the early morning hours of November 3, 2019. *See* App. 1277.

[5] The Feltons' children were then 22, 20, and 16 years old. *See* App. 1265.

who signaled for Robertson to remove Petitioner from the saloon. App. 1335 (Peaslee), 1955 (Robertson). Petitioner told Robertson that he was fine and did not need to leave and tried to push past Robertson. App. 1956. Robertson insisted that Petitioner needed to leave, and Petitioner "was trying to slouch, like almost like he was trying to put weight down to go down to the floor to stay." App. 1335 (Peaslee), 1957 (Robertson). Robertson held Petitioner up under his arms and began to escort him from the saloon. App. 1957. As he was taking Petitioner out, someone hit Robertson in the back of the head. App. 1957-58. Petitioner's girlfriend, Machaela Jefferies ("Jefferies"), had to pull Petitioner away to get him to leave. App. 1401.

Off-duty Sheriff's Deputy Justin Childers ("Dep. Childers"), who was the sound engineer for the band that night, App. 1661, likewise testified that he became aware of a disturbance on the dance floor, App. 1667. He observed someone pick up a bar chair and try to swing it. App. 1667. That corroborated the testimony of Mike Felton ("Felton"), who stated that after Petitioner was asked to leave the saloon, he saw Petitioner's friend, Brian Teets ("Teets"), grab a chair and "rare back like he was going to swing it" at Robertson, so Felton stepped in and took the chair away from Teets. App. 1516. Teets was "arguing and fighting and pushing and shoving" as Felton and others were trying to get Teets to leave, but Teets eventually left. App. 1517. Dep. Childers got down from his podium and went outside to assess the situation. App. 1668. Once he determined that the situation was under control, he went back inside. *Id.*

b. *Petitioner and Teets return to Shorthorns and are asked to leave for the second time.*

Teets's girlfriend, Khristina Andrews ("Andrews"), testified that as Petitioner's group sat in Petitioner's truck laughing and discussing what happened, Andrews realized she did not have her phone. App. 2150. Teets then realized he was missing his hat and vest. *Id.* Andrews asked Jefferies to pull up in front of Shorthorns on Route 7 so Andrews could retrieve her belongings.

App. 2153. Teets and Petitioner got out and began walking toward the door. App. 2156. Andrews and Jefferies stayed in the truck and were talking to one another. App. 2157.

Heidi reported to Grant and Peaslee that Petitioner was headed back inside and "looked pissed." App. 1283. Peaslee went outside, App. 1338, and heard Petitioner and Teets "making, like, threatening remarks or whatnot and then I went up to [Petitioner] and I told him to – they just needed to leave," App. 1340 (Peaslee); *see also* App. 1444 (Wilt). Grant and Peaslee confronted Petitioner, and Peaslee told Petitioner that he had to leave and could not return that night. *Id.* Petitioner screamed that he would "take you all on" or "take you all out," at which point Grant grabbed Petitioner by the shoulders and began walking him backwards across the street. App. 1284. Petitioner then turned and began walking to his truck, with Grant following behind him. App. 1285.

Similarly, saloon patron Samuel Sisler ("Sisler") testified that he heard Grant tell Petitioner that he had to go because he was already told to leave. App. 1988. Sisler saw Grant put his hands on Petitioner's shoulders and walk him across the road toward Petitioner's truck. *Id.* As they got closer to the truck, Petitioner turned and ran to the passenger side of the truck. App. 1990. Saloon patron Angela Freeland ("Freeland") also testified that when Petitioner returned to the saloon after being asked to leave the first time, Grant told Petitioner that he needed to go. App. 2027. Petitioner stated that he was not going to leave yet, *id.*, and Grant took Petitioner across the road, App. 1341 (Peaslee), 1389-90 (Peaslee), 1448 (Wilt), 2029 (Freeland). Felton and Wilt escorted Teets across the street to the vehicle. App. 1448 (Wilt), 1522 (Felton). Teets's friend, Shawn Moats ("Moats"), followed everyone back to Petitioner's truck. App. 2065.

c. *The murder of Grant Felton.*

Wilt and Felton tried to put Teets in the rear passenger seat of the truck while Grant followed Petitioner to the front passenger seat. App. 1448. Wilt observed a female in the driver seat. *Id.* The vehicle was running. App. 1449 (Wilt), 1523 (Felton). Felton opened the rear passenger door but was unable to get Teets in the truck because Teets began "kicking and thrashing around." App. 1449 (Wilt), 1520 (Felton).

In the meantime, Andrews got out of the truck and saw Petitioner running backward toward the truck. App. 2159. He was "hopping side to side" and then ducked down and spun past Andrews, she presumed to get into the truck (although she did not actually watch him get in truck). *Id.* Andrews stepped in front of Grant and put her hand up to him. *Id.*

Freeland testified that she and Grant went to push the front passenger door shut, and a female jumped across the seat and "blindsided Grant," who had turned to walk away. App. 2031. Grant was knocked to the ground. App. 2032. Wilt, too, testified that he saw a female inside the truck kick the door open and knock Grant to the ground. App. 1450. Grant did not get back to his feet after that. App. 1451. Similarly, Felton testified that Grant was tackled by a female and fell to the ground at Felton's feet. App. 1524. Grant was flat on the ground with the female on top of him, so Felton reached down to pull her off of Grant. App. 1524-25. Saloon patron, Kenneth McCrobie ("McCrobie"), likewise testified that he saw a female emerge through the passenger side of the truck and tackle Grant. App. 1896.

Andrews observed Petitioner on the floor board of the truck with his head near the console. App. 2164. Andrews saw him roll over and get something out of a black bag. *Id.* She testified that Grant was not in the door of the truck at that point. App. 2165. Andrews then realized Jefferies was not in the truck, but the truck was still running. App. 2166.

Multiple witnesses testified that gunfire then erupted. Wilt testified that he heard four gunshots at first, followed by more shots. App. 1452, 1454. Felton "heard four pops that sounded like firecrackers." App. 1525. Shorthorns bartender, Brian Reckart ("Reckart") heard a couple of shots and looked up to see a muzzle flash that was pointed upward. App. 1587. He observed that the gun was then lowered in a downward angle, and he saw three more shots fired. *Id.* Sisler saw muzzle flashes in the air and saw Petitioner standing on the running board of the truck. App. 1990-91. Freeland, too, heard a gunshot and saw Petitioner standing on the running board of the truck. App. 2032-33. Moats heard gunshots and looked up and saw a flash. App. 2069. Andrews saw Petitioner raise a gun into the air and fire it. App. 2168.

Multiple witnesses also testified that neither Grant nor anyone else was near Petitioner when those first shots rang out. App. 1454 (Wilt), 1588 (Reckart), 1899 (McCrobie), 2073 (Moats). *After* the initial shots were fired, however, there was a struggle for the gun. App. 1454 (Wilt), 1898 (McCrobie), 1991 (Sisler). Felton, a former Terra Alta police chief, saw the muzzle flash and "went for the gun." App. 1525-26. Grant "went to either tackle [Petitioner] or try to subdue him to get the gun." App. 1991.

Felton testified that he repeatedly tried to push Petitioner's wrist upward, but Petitioner, who was standing on the running board of the truck, was trying to push the gun downward. App. 1526-27, 1555-56, 1561. Andrews saw another person's hand on the barrel of the gun, and Jefferies grabbed Petitioner's wrist. App. 2180. After Wilt became aware that Grant had been shot, Wilt jumped over Felton's back and twisted the gun from Petitioner's hand, grabbing the gun by the barrel. App. 1455 (Wilt), 1589 (Reckart). Petitioner was standing on the running board of the truck when he fired. App. 1455. One final shot was fired at that point. *Id.* Wilt believed that shot hit the windshield of the truck. App. 1456. Reckart saw Wilt grab the gun after Grant was

shot. App. 1589. Wilt later handed Reckart the gun, which Reckart gave to off-duty Dep. Childers. App. 1590.

Jefferies then jumped back into the driver's seat as Petitioner told her to drive. App. 2183. As the truck drove off, Wilt tripped over Grant's feet and was hit by the back door of the truck. App. 1456-57. Wilt pulled Petitioner's shoe off as he fell to the ground. *Id.* Wilt noted several times that there was nothing stopping the truck from leaving before the shooting. App. 1452, 1455, 1457, 1458.

d. *Grant Felton's fatal wounds.*

Medical Examiner Dr. Elizabeth Rouse testified that she observed a gunshot wound to the back of Grant's head, slightly to the left of midline. App. 1622. That wound was an entrance wound, traveling through Grant's brain, nasopharynx, and pallet before exiting below his mandible on the right side of his neck. App. 1624-25. That is, the path of the bullet was "downward, it's going left to right and slightly back to front." App. 1629. Dr. Rouse described the wound as "incapacitating and lethal." App. 1627. There was no soot or stippling associated with that wound, App. 1624, indicating that the gun was not fired in close proximity to that wound, App. 1626.

A second gunshot wound was observed to the front right side of Grant's chest. App. 1630. It exited through Grant's back. *Id.* Again, the path of the bullet was downward and slightly from left to right. App. 1631, 1634. The wound was not fatal but did fracture a rib and cause internal bleeding. App. 1631-32. There was no soot or stippling associated with the chest wound. App. 1632.

Dr. Rouse found a third gunshot wound on Grant's upper right arm. App. 1633. It was a through-and-through wound that did not impact any bones or neurovascular structures. *Id.* Again, there was not soot or stippling. *Id.*

Finally, Dr. Rouse observed a grazing wound to Grant's head, going from front to back. App. 1635-36, 1645. Dr. Rouse noted soot and stippling with that wound that indicated the gun was fired close to Grant's head. App. 1636. Dr. Rouse described the gunshot as "intermediate to close range." App. 1636.

e. *The initial investigation of Grant Felton's murder and Petitioner's arrest.*

Lt. Rodeheaver of the Preston County Sheriff's Department testified that he was called out to the scene of the shooting. App. 2214. He received information that Petitioner was the shooter and began trying to locate him. App. 2221. He then went to the hospital where he found Grant dead. App. 2224. While at the hospital, Lt. Rodeheaver interviewed Felton and Teets. App. 2225, 2229. Lt. Rodeheaver then obtained an arrest warrant for Petitioner alleging first degree murder because the witness statements of Felton, Sisler, and McCrobie indicated that Petitioner intentionally lowered his weapon prior to any struggle or the gun. App. 2230, 2266-68.

The following day, the Monongalia County Sheriff's Office was asked to conduct surveillance on Petitioner's residence, and Lt. Rodeheaver attempted to "ping" Petitioner's phone. App. 2231. He discovered that both Petitioner's and Jefferies's phones had been turned off. App. 2232-33. Likewise, both Petitioner and Jefferies disconnected their Facebook accounts while Lt. Rodeheaver was scanning them for information. App. 2234-35. Nonetheless, the Monongalia County Sheriff's Office was able to track down Petitioner on Monday, November 4, 2019. App. 2236. Before they could pick up Petitioner, Petitioner turned himself in to the Monongalia County Sheriff's Office. *Id.*

3. The defense's case.

Jefferies and Petitioner testified that on the night of the shooting, Petitioner had four or five drinks. App. 2524 (Jefferies), 2664 (Petitioner). Petitioner was also taking Adderall, which

contains amphetamines. App. 2663-64. Teets testified that he (Teets) had already consumed "at least five shots" of alcohol before the party arrived at Shorthorns on the night of the murder. App. 2347. At the bar, Teets had an "Irish Trash Can," which he estimated "probably has five [shots] in it by itself," and a Crown and Coke. App. 2355. Nonetheless, he declined to describe himself as intoxicated. *Id.* Instead, Teets described himself as feeling "nice." *Id.* He agreed, though, that "there could be these things that happened that evening that [he didn't] get exactly right" due to the amount of alcohol he consumed. App. 2356. Teets testified that Petitioner, too, had consumed an "Irish Trash Can" at the saloon. App. 2389.

Petitioner testified that prior to being escorted from the saloon, he "[did] not recall" anyone telling him that he needed to settle down. App. 2627. Teets likewise testified that he was unaware of any trouble until he saw Robertson escort Petitioner from the saloon. App. 2351. Petitioner testified that once he was outside, he "was just trying to talk and just see like what was the reason." App. 2629. He denied being aggressive, but did admit he "was coming forward a little bit." *Id.* On cross-examination, however, he acknowledged that Jefferies and Lanham were trying to pull him away as he continued to "push forward" into the saloon. App. 2666. He further admitted that he did not need an explanation as to why he was asked to leaved but said it was just his "nature" to not leave "if there wasn't a good reason." App. 2668.

Petitioner and his friends went back to Petitioner's truck and began discussing what had happened. App. 2632. Petitioner testified, "[B]ut it was like whatever because we're leaving anyways. You know, the band was over." *Id.* Teets and Andrews decided, though, that they wanted to go back to retrieve Teets's vest and hat and Andrews's cell phone. App. 2362-63 (Teets), 2534 (Jefferies). Teets asked Jefferies to stop the vehicle, and he and Petitioner got out and walked back toward the saloon. App. 2364-65. The vehicle was still running, and Jefferies

did not get out because she only intended to be there long enough for Teets to retrieve his and Andrews's belongings. App. 2535. Petitioner acknowledged on cross-examination that Jefferies tried to prevent him from getting out of the truck, pulling him back so hard that his whole body jerked backward. App. 2671. Petitioner followed Teets nonetheless, even though he had no belongings of his own to retrieve and even though he knew he was not allowed back in Shorthorns. App. 2670-71.[6]

Teets asked for his hat and vest (but not Andrews's phone) and someone gave him a hat, but he put it on and realized it wasn't his hat, so he tossed it back at the person. App. 2365-66. Teets acknowledged that Moats offered to get Teets's belongings, but Teets insisted he wanted to get his belongings himself. App. 2366-67. Petitioner testified that he realized the group was focused on Teets, so Petitioner decided to sneak back into the saloon. App. 2635-36. Wilt stopped Petitioner and told him he had to leave. App. 2636.

Petitioner walked back outside and found Teets still arguing with the group. App. 2637. Petitioner testified that he was talking with Grant about whether Grant could help retrieve Teets's belongings. App. 2639. Petitioner testified that he had no "independent recollection of cussing or screaming or saying anything foul" to Grant. App. 2641. Petitioner stated that he was then "attacked," with Grant putting his hands on Petitioner's throat and shoulder and pushing him across the road. *Id.* A "commotion" ensued, and Teets was also escorted back to the truck. App. 2366. Teets testified that when he was escorted from Shorthorns the second time, a "mob" followed, and he believed he was going to be beaten up by them. App. 2370-71. He did not note any threat to Petitioner. *Id.*

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[6] Pages 2436 and 2437 of Petitioner's testimony are missing from the transcript.

Jefferies observed Petitioner being "shoved across the street" before "stumble[ing] and step[ping] backwards." App. 2535. Jefferies's friend, Nathan Lanham ("Lanham"), also testified that he saw Petitioner being "pushed across the street" toward the passenger side of the truck. App. 2440. Jefferies testified that as Petitioner started climbing back into the truck, Grant came up behind Petitioner, wrapped his hands around Petitioner's throat with his thumbs pressing into his trachea, and pinned Petitioner down to the seat face-first. App. 2539. Lanham saw "a bearded gentleman" pinning Petitioner to the passenger seat with his hands around Petitioner's throat. App. 2441. Lanham, though, observed Petitioner to be face up, with his back toward the center console. *Id.* For his part, Petitioner testified that as he reached the truck, we was grabbed from behind and pushed to the seat by his throat. App. 2642.

Jefferies stated that Grant then grabbed her by the face and the arm and pulled her out of the truck, lifted her high into the air, and threw her to the pavement. App. 2540. Lanham testified that he saw Grant "violently" rip Jefferies out of the truck. App. 2443. Petitioner testified that he looked over and saw Jefferies missing from the truck and had "this overwhelming feeling that she had gotten pulled out of the vehicle" so he unzipped his bag, pulled out his gun, chambered a bullet, stepped onto the running board, raised his hand above the roof of the truck, and fired into the air. App. 2643-47.

Jefferies heard gunshots and then someone reached down, picked her up, and tossed her back into the truck. App. 2541, 2546. Lanham exited the truck when he heard gunshots and took cover. App. 2445, 2477. At the same time, Teets was engaged with Felton before hearing a gunshot. App. 2368. Teets looked up and saw muzzle flashes in an upward direction. *Id.*

Petitioner was then tackled "from underneath." App. 2647. Petitioner testified that he was knocked to the floorboard of the truck with "a man directly over top of [him]." *Id.* Petitioner

described a struggle for the gun, stating that "those bullets are going everywhere." App. 2648. Jefferies similarly described a struggle for the gun between Petitioner and several hands and arms, including her own. App. 2547-48. Petitioner testified that he did not shoot Grant in self-defense; rather, it was an accident. App. 2679. Petitioner acknowledged, though, that he did not accidentally shoot Felton, Wilt, Teets, Sisler, Moats, Jefferies, Andrews, or any of the other people on the scene. App. 2679-80. The gun was eventually taken from Petitioner. App. 2548 (Jefferies), 2649 (Petitioner). When the shooting stopped, Teets saw Grant fall to the ground. App. 2371. Petitioner then told Jefferies "go, like drive, get out [of] here." App. 2548 (Jefferies); *see also* App. 2649 (Petitioner). Petitioner and Jefferies drove to Teets's house. App. 2550-51.[7] Petitioner, Jefferies, and Lanham then drove back to Petitioner's house in Morgantown, West Virginia. App. 2455, 2552.

Petitioner slept for a few hours in his home before getting up, showering, and changing his clothes. App. 2654-55. He then drove to his mother's house. App. 2655. He went there because "[his] mother has worked for an attorney for like 20 years, so, obviously, I'm going to go to her and tell her what happened." App. 2656. Petitioner admitted that he removed the camper top—which contained unmistakable identifying marks on it, App. 2633—from his truck and left it in some bushes at his mother's house. App. 2657-58. He then drove his truck to a friend's house six miles away. App. 2658. Petitioner turned himself in the following Monday. App. 2657.

E. Petitioner's second motion for mistrial.

During its cross-examination of Petitioner, the State had this exchange with Petitioner:

A: It was a complete and total accident. I never murdered that man.

Q: You didn't murder him?

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[7] Pages 2416 and 2417 of Petitioner's testimony are missing from the transcript.

A: I did not murder that man.

Q: But you never told the police that, did you?

App. 2682. Petitioner asked to approach the bench and moved for a mistrial. App. 2682-83. The circuit court denied the motion, ruling that because Petitioner was testifying, the State is "allowed to ask him what he did." App. 2683. Petitioner asserted that he exercised his right to remain silent on advice of counsel, but the State pointed out that he could testify to that to the jury. *Id.* The circuit court pointed out that prior testimony in the trial established that Petitioner had taken certain actions on advice of counsel. *Id.* Still, the court noted Petitioner's objection. *Id.*

F. Motions for judgment of acquittal.

Following the State's case, Petitioner moved for acquittal, arguing that the State had failed to prove premeditation, deliberation, intent, or malice and that Petitioner acted in self-defense. App. 2319-22. The State opposed the motion, pointing out that intent had been proven because the victim did not attack Petitioner in a deadly manner and that intent can be inferred given that the victim is the one who took Petitioner across the road and was the only person who was shot. App. 2323-24. The State further argued that deliberation and premeditation had been demonstrated by the fact that Petitioner and his friends returned to Shorthorns Saloon after some time, that Petitioner had to get in a black bag to retrieve the gun in the first place, that the gun was fired with a downward trajectory, and that the gun had two safety mechanisms. App. 2324-26. The State likewise pointed out that malice could be inferred from the fact that the victim was shot four times, including in the head and chest. App. 2325.

The circuit court noted that it spent its lunch hour reviewing his four notebooks full of notes from the State's case and that he "listened very intently to all the testimony." App. 2327. The court also noted that it reviewed the pertinent legal standards. App. 2329. The court found

that "there is a substantial likelihood that the jury could find [Petitioner] guilty, and, so, it denied Petitioner's motion for judgment of acquittal. *Id.* The court noted, however, that it would keep open the question of reducing the charges presented to the jury, pending the remainder of the evidence. *Id.*

Petitioner renewed his motion at the close of evidence. App. 2700. Again, the circuit court denied the motion, finding that the State had presented "substantial evidence upon which a jury might justify [a guilty verdict]." App. 2704.

G. Jury instructions.

Following the close of the defense's case, the parties and the court began to go through the proposed jury instructions. App. 2710. The State objected to several of Petitioner's proposed instructions. App. 2711-21. Petitioner objected to the State's proposed instruction 16, arguing that this was not a "heat of passion" case. App. 2722. It would seem that over the weekend, Petitioner sent an e-mail to the circuit court regarding an instruction on malice being given twice in the jury charge. App. 2724. It is unclear whether Petitioner *objected* to that part of the charge or whether he merely questioned if it was a mistake. *Id.* What is clear is that when the jury charge conference resumed on the record that Monday, Petitioner did not make a formal objection to the instructions. *See* App. 2724-2734. Otherwise, Petitioner offered only this objection:

> And, Your Honor, just so I'm making a record for appeal, I just want to say that I'm – any instruction or verdict form that I previously submitted that's not given, I would preserve that objection, *and I don't know specifically what they are right now*, but, I mean, I think generally the [c]ourt has given, you know, sort of the instructions – *I mean, honestly, right now I can't think of anything*. I mean, I know that I gave some self-defense instructions that probably, like, came from, like, the 1930s the way they were written. So I just want to preserve that for appeal in case.

App. 2735 (emphasis added).

H. Verdict, post-trial motions, and sentence.

The jury deliberated for just under six hours before returning a verdict of guilty of murder in the second degree. App. 2847. Petitioner subsequently moved for a new trial and for judgment of acquittal, alleging eight grounds for relief.[8] App. 109-10. The circuit court denied that motion on August 23, 2021. App. 141-42. Petitioner was sentenced to 40 years in prison. App. 144.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary, and this case is suitable for disposition by memorandum decision because the record is fully developed and the arguments of both parties are adequately presented in the briefs. W. Va. R. App. P. 18(a)(3) and (4).

V. SUMMARY OF THE ARGUMENT

Petitioner's arguments are wholly meritless, and this Court should affirm his conviction of second degree murder. The circuit court did not abuse its discretion in denying Petitioner's motions for mistrial regarding the State's passing comments about his pre-trial silence. Even if the comments constituted a *Doyle* violation, any error is harmless as the evidence of Petitioner's guilt is overwhelming.

Petitioner did not properly preserve his objections regarding the jury instructions and, so, his claims must be evaluated for plain error. Such an analysis falls short, however. There was no error in the circuit court's denial of certain of Petitioner's proposed instructions on self-defense because those instructions unnecessarily duplicated the principles already expounded in the circuit court's instruction, which was identical to Petitioner's proposed instruction 31. Likewise, there was no error in instructing the jury on the intent-based crimes with which Petitioner was charged. Taken in a light most favorable to the State, the evidence supported a finding of intent. Finally,

[8] Petitioner did not include a copy of his motion in the Appendix.

the circuit court did not err in twice reading instructions on malice as malice is an essential element of both first degree and second degree murder and is the distinguishing element between second degree murder and voluntary manslaughter.

Petitioner's arguments that the court erred in denying his motion for change of venue or a change-of-venue survey are also meritless. The circuit court was quite comfortably able to seat a fair and impartial jury, thus negating the need for a change of venue.

Petitioner's argument that the circuit court erred in denying his motions to strike certain jurors for cause should be wholly disregarded because the record bears out that he never made such motions.

Finally, because there were no individual errors in this case, there can be no cumulative error.

VI. ARGUMENT

A. The State's isolated remarks regarding Petitioner's failure to speak with law enforcement following the murder of Grant Felton amounted to harmless error.

a. Standard of review.

"The decision to grant or deny a motion for mistrial is reviewed under an abuse of discretion standard." *State v. Lowery*, 222 W. Va. 284, 288, 664 S.E.2d 169, 173 (2008).

b. Harmless error.

Petitioner argues that he was deprived of his Fifth Amendment right to remain silent when the State commented during its opening statement and its cross-examination of him that Petitioner did not speak to police following his murder of Grant Felton. Pet'r Br. 12. The comments were brief and isolated and constituted harmless error. Accordingly, Petitioner's argument fails.

Respondent does not dispute that the use of a defendant's silence at the time of arrest and after receiving *Miranda* warnings for the purposes of impeaching his or her testimony is a violation

of the Due Process Clause of the Fourteenth Amendment pursuant to *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). In considering *Doyle*, this Court has noted that

> [t]he basis for the rule prohibiting the use of the defendant's silence against him is that it runs counter to the presumption of innocence that follows the defendant throughout the trial. It is this presumption of innocence which blocks any attempt of the State to infer from the silence of the defendant that such silence is motivated by guilt rather than the innocence which the law presumes.

State v. Boyd, 160 W. Va. 234, 240, 233 S.E.2d 710, 716 (1977). To that end,

> where, as here, there are substantial areas of relevant facts about which the defendant did not make pre-trial statements, the trial court must be careful to insure that the State does not in its impeachment efforts compel the defendant to acknowledge or justify his pre-trial silence in those areas. Impeachment cannot cross into constitutionally prohibited territory.

Id. *Doyle* and subsequent cases, however, leave room for a harmless error analysis when such missteps are made by the State. *Doyle*, 426 U.S. at 619-20 ("The State has not claimed that such use in the circumstances of this case might have been harmless error. Accordingly, petitioners' convictions are reversed and their causes remanded to the state courts for further proceedings not inconsistent with this opinion."); *see also Brecht v. Abrahamson*, 507 U.S. 619 (1993) ("[W]e think *Doyle* error fits squarely into the category of constitutional violations which we have characterized as '"trial error."' Trial error 'occur[s] during the presentation of the case to the jury,' and is amenable to harmless-error analysis because it 'may ... be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial].'" (citations omitted)).

"Harmless error analysis in the appeal of a criminal case asks 'not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered . . . was surely unattributable to the error.' *Sullivan v. Louisiana,* 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182, 189 (1993)." *Marple*, 197 W. Va. at 53,

475 S.E.2d at 53. In *Marple*, this Court affirmed the petitioner's conviction where the investigating officer in the case commented on the defendant's post-*Miranda* silence. The Court noted, "The State did not dwell on the issue beyond the one question to Officer Cecil nor did Officer Cecil go beyond the few remarks quoted [in the opinion]. The State did not address the issue of the defendant's post-*Miranda* silence during its closing argument." *Id.* at 53, 475 S.E.2d at 53. The Court, pointing to the 28 witnesses in the case, the petitioner's own statements to certain of those witnesses, and the forensic evidence, concluded, "In view of all the admissible evidence introduced by the State, we believe the jury would have reached the same verdict absent the post-*Miranda* silence testimony, and we are in no way persuaded that the assigned error contributed to the conviction." *Id.* at 54, 475 S.E.2d at 54. This case presents the same scenario as *Marple*, and as the *Marple* Court did, this Court should affirm Petitioner's conviction.

The State's passing comment regarding Petitioner's pre-trial silence made in its opening statement did not even reference Petitioner's post-*Miranda* silence. During its opening statement, the State made the following statement:

> Lieutenant Rodeheaver did a considerable number of interviews along with other law enforcement officers with the sheriff's department to determine what happened on November 3rd of 2019, and the witnesses interviewed will be able to describe it to you in their own words. The one interview we [sic] didn't get was with Aaron Hoard or his girlfriend[.]

App. 1221-22. Petitioner immediately moved for a mistrial. App. 1222. The circuit court properly denied the motion. App. App. 1222-23, 1228.

First, Lt. Rodeheaver's testimony demonstrates that most of his interviews were conducted November 3, 2019, and the days immediately following. App. 2225, 2229, 2240. Petitioner was not apprised of his *Miranda* rights (by the magistrate) until November 7, 2019. App. 2995. Second, the circuit court's denial of Petitioner's motion for a mistrial was based on its reasoning

that the State's remark was made in the context of showing not that Petitioner refused to speak to investigators but that he fled the scene and then went on the lam for two days and was not available to be interviewed. Thus, the court's ruling was not an abuse of discretion.

The State's comment on Petitioner's silence during its cross-examination of him was equally innocuous. App. 2682. In moving, again, for a mistrial, Petitioner asserted that he exercised his pre-trial right to remain silent on advice of counsel, but the State pointed out that he could testify to that fact to the jury if he so wished. App. 2683. The circuit court pointed out that, in fact, prior testimony in the trial established that Petitioner had taken certain actions on advice of counsel. *Id.* Again, the circuit court did not abuse its discretion in denying Petitioner's motion for a mistrial.

Even if one assumes, *arguendo*, that the State's comments were a *Doyle* violation, any resulting error was certainly harmless. Just as in *Marple,* the other evidence against Petitioner was overwhelming. Twenty-seven witnesses testified in this case, *see* App. 2503-2504, which stretched over nine days, App. 108. Furthermore, there was no question that Petitioner killed the victim. Petitioner never denied that he fired the gun that killed Grant Felton. *See e.g.,* App. 1240-42. Consequently, Petitioner's argument that the State made these errant comments "as substantive evidence of guilt," Pet'r Br. 14, is a red herring. The eyewitness testimony of most of those 27 witnesses, including Petitioner himself, was substantive evidence of Petitioner's guilt. That is, the jury would have reached the same verdict absent the post-*Miranda* silence testimony. *Marple*, 197 W. Va. at 53, 475 S.E.2d at 53.

Likewise, Petitioner's suggestion that the State's passing comments so undermined his theory of self-defense as to prejudice his defense, Pet'r Br. 18, is a fallacy. Petitioner ultimately abandoned his claim of self-defense on cross-examination, expressly repudiating the claim and

relying on a defense of accident instead. App. 2679, 2682. So, if ever there was a case for harmless error in the context of an alleged *Doyle* violation, this is it. This Court should affirm.

B. Petitioner did not properly preserve his objections to the jury instructions below; thus, his argument must be reviewed under the plain error doctrine. Petitioner cannot demonstrate plain error, and his conviction should be affirmed.

a. Standard of review.

"As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is de novo." Syl. Pt. 1, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996).

> Whether facts are sufficient to justify the delivery of a particular instruction is reviewed by this Court under an abuse of discretion standard. In criminal cases where a conviction results, the evidence and any reasonable inferences are considered in the light most favorable to the prosecution.

Syl. Pt. 12, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994).

b. Failure to preserve objection.

At trial, Petitioner made only a single, generalized objection to the circuit court's refusal to give any of his instructions:

> And, Your Honor, just so I'm making a record for appeal, I just want to say that I'm – any instruction or verdict form that I previously submitted that's not given, I would preserve that objection, *and I don't know specifically that they are right now*, but, I mean, I think generally the [c]ourt has given, you know, sort of the instructions – *I mean, honestly, right now I can't think of anything.* I mean, I know that I gave some self-defense instructions that probably, like, came from, like, the 1930s the way they were written. So I just want to preserve that for appeal in case.

App. 2735 (emphasis added). West Virginia Rule of Criminal Procedure 30 provides, in pertinent part, "[n]o party may assign as error the giving or the refusal to give an instruction . . . unless that party objects thereto before the arguments to the jury are begun, *stating distinctly the matter to which that party objects and the grounds of the objection*[.]" (emphasis added). Thus, "[t]he

general rule is that a party may not assign as error the giving of an instruction unless he objects, stating distinctly the matters to which he objects and the grounds of his objection." Syl. Pt. 3, *State v. Gangwer*, 169 W. Va. 177, 286 S.E.2d 389 (1982). Because trial counsel offered only an overall and general just-in-case objection to the jury charge at trial, he forfeited his claim. Should this Court should review the matter, it must do so under the plain error doctrine.

"The 'plain error' doctrine grants appellate courts, in the interest of justice, the authority to notice error to which no objection has been made." *State v. Miller*, 194 W. Va. 3, 18, 459 S.E.2d 114, 129 (1995). Plain error is "one that is clear and uncontroverted at the time of appeal." Syl. Pt. 2, *State v. Marple*, 197 W. Va. 47, 48, 475 S.E.2d 47, 48 (1996). "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. Plain error warrants reversal "solely in those circumstances in which a miscarriage of justice would otherwise result." *Id.* at 18, 459 S.E.2d at 129 (citing *United States v. Frady*, 456 U.S. 152, 163 n. 14 (1982)). The Petitioner has "'the burden of establishing entitlement to relief for plain error.'" *Greer v. United States*, 141 S. Ct. 2090, 2097 (2021) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004)). "Satisfying all four prongs of the plain-error test 'is difficult.'" *Id.* (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)). In short, while appellate courts may review forfeited objections for plain error "such error is rarely found." 9 James Wm. Moore et al., *Moore's Federal Practice* ¶ 46.02[2] (3d ed. 2002). As will be demonstrated below, Petitioner cannot show a miscarriage of justice, and his conviction should be affirmed.

c. Self-defense.

Petitioner argues that the circuit court erred in declining to give his five proposed jury instructions regarding self-defense and, instead, giving its own instruction. Pet'r Br. 19. First, the circuit court's instruction was a correct statement of the law and clearly instructed the jury regarding the law. Second, the instruction it gave was nearly identical to Petitioner's proposed instruction 31. Third, on cross-examination, Petitioner abandoned his claim of self-defense; thus, vitiating his right to a self-defense instruction in the first instance. Petitioner's argument is, therefore, meritless.

The Court has observed that

> [t]he purpose of instructions is to clearly instruct the jury regarding the law to be applied in the case. *See United States v. Ribaste,* 905 F.2d 1140, 1143 (8th Cir.1990) ("[t]he purpose of instructing the jury is to focus its attention on the essential issues in the case and inform it of the permissible ways in which these issues may be resolved." (Citation omitted)); *United States v. Assi,* 748 F.2d 62, 65 (2d Cir.1984) ("[t]he purpose of jury instructions is to inform the jury clearly and succinctly of the role it is to play and the decisions it must make"). Without instructions as to the law, the jury becomes mired in a factual morass, unable to draw the appropriate legal conclusions based on the facts.

Miller, 194 W. Va. at 16 n.20, 459 S.E.2d at 127 n.20 (1995). With that said, the Court has held:

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

State v. Guthrie, 194 W. Va. 657, 663-64, 461 S.E.2d 163, 169–70 (1995).

> A trial court's refusal to give a requested instruction is reversible only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial

> so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense.

Syl. Pt. 11, *Derr*, 192 W. Va. 165, 451 S.E.2d 731.

In the instant case, the circuit court gave the defense's proposed instruction 31, which is a comprehensive and exhaustive instruction on self-defense. App. 2764-65; Pet'r Br. 20-21. The court did decline to give proposed instructions 22, 23, 24, and 25, but they were duplicative of the instruction the court did deliver to the jury and, so, there was no error in refusing to give them. Syl. Pt. 11, *Derr*, 192 W. Va. 165, 451 S.E.2d 731. Indeed, while Petitioner points to *State v. Gibson* to support his argument that his proposed instructions 22 and 24 were "taken directly from instructions approved by this Court," the *Gibson* Court—which also approved an instruction nearly identical to Petitioner's proposed instruction 23—held that it is *not* error for a lower court to *refuse* to give otherwise correct instructions if they are "cumulative and unnecessary in light of the other instructions actually given on the theory of self-defense." 186 W. Va. 465, 472, 413 S.E.2d 120, 127 (1991). As the *Gibson* Court pointed out, this Court has held:

> " 'It is not error to refuse to give an instruction to the jury, though it states a correct and applicable principle of law, if the principle stated in the instruction refused is adequately covered by another instruction or other instructions given.' Syl. [P]t. 2, *Jennings v. Smith,* 165 W. Va. 791, 272 S.E.2d 229 (1980), *quoting,* [S]yl. [P]t. 3, *Morgan v. Price,* 151 W. Va. 158, 150 S.E.2d 897 (1966). Syl. [P]t. 2, *McAllister v. Weirton Hospital Co.,* 173 W. Va. 75, 312 S.E.2d 738 (1983)." Syllabus Point 4, *Jenrett v. Smith,* 173 W. Va. 325, 315 S.E.2d 583 (1983).

Syl. Pt. 9, *State v. Deskins*, 181 W. Va. 112, 380 S.E.2d 676 (1989). Indeed, the rejected defense instructions are not only duplicative of the self-defense instruction the circuit court did give, but also of one another. *See* Pet'r Br. 20. Petitioner cannot meet the second prong of *Derr*'s three-prong test and, therefore, it was not reversible error for the lower court to refuse to give Petitioner's proposed instructions 22, 23, 24, and 25.

Moreover, Petitioner expressly abandoned his claim of self-defense on cross-examination by the State and, so, was not entitled to a self-defense instruction at all. App. 2679. Petitioner testified on cross-examination that he did not shoot Grant in self-defense; rather, it was an accident.

> Q: Okay. So you're claiming that Grant Felton – you're claiming that this was an accident?
>
> A: Yes, ma'am.
>
> Q: And you are not claiming that you shot Grant Felton in self-defense, correct?
>
> A: No, ma'am, I'm not.

App. 2679. He was adamant about that point when the State pressed him further.

> Q: So just happened to be that the person that took you across the road that you say did a choke-out on you or choked you out –
>
> A: Yes, ma'am.
>
> Q: – was the only one that took these four bullets?
>
> A: Yes, ma'am.
>
> Q: And that was an accident?
>
> A: It was a complete and total accident. I never murdered that man.

App. 2682. Petitioner acknowledged, though, that he did not accidentally shoot Felton, Wilt, Teets, Sisler, Moats, Jefferies, Andrews, or any of the other people he claimed to be surrounded by that night, App. 2679-80, so even Petitioner's "accident" claim is dubious at best. In any instance, because self-defense was abandoned by Petitioner in his testimony, Petitioner cannot meet the third prong of the *Derr* test either. Thus, there was no plain error in the circuit court's refusal to give Petitioner's requested instructions regarding self-defense.

d. Intent.

Petitioner next argues that the circuit court erred in instructing the jury on offenses containing the element of intent, asserting that there was no evidence to support such claims. Pet'r Br. 23. Petitioner's jaundiced assessment of the evidence does not correctly portray the State's case. The instructions were proper, and Petitioner's argument, again, fails.

"'Instructions must be based upon the evidence and an instruction which is not supported by evidence should not be given.' Syllabus Point 4, *State v. Collins,* 154 W. Va. 771, 180 S.E.2d 54 (1971)." Syl. Pt. 5, *State v. Brooks*, 214 W. Va. 562, 591 S.E.2d 120 (2003). Furthermore, "'[j]ury instructions on possible guilty verdicts must only include those crimes for which substantial evidence has been presented upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.' Syl. [P]t. 5, *State v. Demastus*, 165 W. Va. 572, 270 S.E.2d 649 (1980)." Syl. Pt. 1, *State v. Leonard*, 217 W. Va. 603, 619 S.E.2d 116 (2005). Of course, as mentioned previously, the question of "[w]hether facts are sufficient to justify the delivery of a particular instruction is reviewed by this Court under an abuse of discretion standard. In criminal cases where a conviction results, the evidence and any reasonable inferences are considered *in the light most favorable to the prosecution.*" Syl. Pt. 12, *Derr*, 192 W. Va. 165, 451 S.E.2d 731 (emphasis added).

Naturally, Petitioner and Respondent do not agree on the sufficiency of the State's evidence to support instructions on any crimes requiring an element of intent.[9] Respondent would represent to the Court, however, that the evidence adduced at trial—taken in the light most favorable to the State—was more than sufficient to support both the circuit court's instructions and the verdict. Mike Felton testified that he repeatedly tried to push Petitioner's wrist upward, but Petitioner, who

[9] Petitioner does not question the legal correctness of the circuit court's instructions themselves.

was standing on the running board of the truck as he fired, was trying to push the gun downward. App. 1526-27, 1555-56, 1561. Shorthorns bartender, Brian Reckart, heard a shot and looked up to see a muzzle flash that was pointed upward before the gun was then lowered in a downward angle before being fired three more times. App. 1587. The Medical Examiner testified to the victim's wounds, which included an "incapacitating and lethal" gunshot wound to the back of Grant's head that followed a downward path from back to front and a gunshot wound to the Grant's chest that also followed a downward path. App. 1622, 1624-25, 1629-31. The paths of those wounds seem to corroborate the eyewitness accounts of Felton and Reckart, who testified that Petitioner pointed the gun downward; and that would imply that Petitioner intended to shoot the victim. Even more damning, though, was Petitioner's own acknowledgment that, though he was claiming Grant's shooting was an accident, Petitioner did not accidentally shoot Felton, D.J. Wilt, Brian Teets, Sam Sisler, Shawn Moats, Machaela Jefferies, Khristina Andrews, or any of the other people on the scene. App. 2679-80. He shot only the man with whom he had exchanged words and had physical contact immediately prior to the shooting. *See* App. 1284-85, 1341, 1389-90, 1448, 1954, 1991, 2027, 2029, 2441, 2539, and 2641-42.

In consideration of Petitioner's motions for judgment of acquittal, the circuit court noted that it reviewed its four notebooks full of notes from the State's case and "listened very intently to all the testimony," App. 2327, and reviewed the pertinent legal standards before finding that "there is a substantial likelihood that the jury could find [Petitioner] guilty [of the intent-based crimes alleged against him], App. 2329; *see also* App. 2704 (finding that the State had presented "substantial evidence upon which a jury might justify [a guilty verdict]."). The circuit court did not commit error in those rulings, *infra*, and, likewise, it did not commit plain error in giving instructions on the intent-based crimes charged against Petitioner.

e. Malice.

Petitioner's final jury instruction argument is that the circuit court erred in giving "repetitious" instructions regarding malice. Pet'r Br. 25. Petitioner's argument is without merit. The instructions given by the circuit court were not repetitious in the first instance, and they represented a correct statement of the law as well as a holistic definition of both first degree and second degree murder.

Again, "[t]he purpose of instructions is to clearly instruct the jury regarding the law to be applied in the case." *Miller*, 194 W. Va. 3, 16 n.20, 459 S.E.2d 114, 127 n.20. "Without instructions as to the law, the jury becomes mired in a factual morass, unable to draw the appropriate legal conclusions based on the facts." *Id.*

> A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, *and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.*

Guthrie, 194 W. Va. 657, 663-64, 461 S.E.2d 163, 169–70 (emphasis added).

Petitioner protests that he was prejudiced when the circuit court instructed the jury on malice as an element of first degree murder and then again as an element of second degree murder. Pet'r Br. 27. Indeed, he argues that the circuit court's reasoning, citing *State v. McGuire*, 200 W. Va. 823, 832, 490 S.E.2d 912, 921 (1997), "that the 'better approach' is for a 'trial court to affirmatively state the elements of each crime'" misunderstands the Court's decision in *McGuire*. Pet'r Br. 27, n.5. This Court's ruling in Syllabus Point 2 of *State v. Davis*, however, supports the circuit court's interpretation of *McGuire* and suggests that Petitioner would have been prejudiced if the circuit *had not* repeated the malice instruction:

> "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." Syllabus, *State v. Miller,* 184 W. Va. 367, 400 S.E.2d 611 (1990).

220 W. Va. 590, 648 S.E.2d 354 (2007). Malice is an essential element of both first degree murder and second degree murder; therefore, the circuit had to instruct on malice twice. *See Gibson*, 186 W. Va. at 471, 413 S.E.2d at 126 (finding that the lower court's instruction that "murder in first degree is when one person kills another unlawfully, maliciously, deliberately, and premeditatedly . . ." adequately informed the jury of all the elements of first degree murder); Syl. Pt. 2, in part, *State v. Drakes*, 243 W. Va. 339, 844 S.E.2d 110 (2020) ("Murder in the second degree is the unlawful, intentional killing of another person *with malice*, but without deliberation and premeditation." (emphasis added)). Moreover, malice is the distinguishing factor between second degree murder and voluntary manslaughter.

> "Gross provocation and heat of passion are not essential elements of voluntary manslaughter, and, therefore, they need not be proven by evidence beyond a reasonable doubt. It is intent *without malice*, not heat of passion, which is the distinguishing feature of voluntary manslaughter." Syl. Pt. 3, *State v. McGuire*, 200 W. Va. 823, 490 S.E.2d 912 (1997).

Syl. Pt. 3, *Drakes*, 243 W. Va. 339, 844 S.E.2d 110 (emphasis added).

Petitioner asserts that "[t]he circuit court gave prejudicial credence to [the State's] theory [of the case] when it twice instructed the jury [on malice]." Pet'r Br. 27. He points to the State's closing argument in which, he says, "[t]he State focused heavily on the concept of malice." *Id.* That argument is another red herring, though, as (1) the court's instructions were decided and given prior to the State making its closing argument and (2) by Petitioner's own account, the State only used the terms "malice" or "malicious" 12 times spread across only six pages of its 19-page closing argument. Pet'r Br. 27; App. 2771, 2773, 2776-77, 2783-784. Petitioner's own closing argument

contained the terms "malice" or "malicious" 15 times. App. 2791-93, 2823. If the "gave prejudicial credence" to the State's theory of malice then, Petitioner did as well.

Likewise, Petitioner's argument that the jury was "confused about malice" does not hold water. Pet'r Br. 27. While Petitioner points to the jury's request for "more definition of the word malice," Pet'r Br. 27 (citing App. 2845), the malice instruction given by the circuit court for first degree murder and then again for second degree murder was identical. App. 93-94, 97-98. It simply defies reason to assume that a single definition of malice (read twice) could somehow confuse the jury. Again, there was not plain error in the circuit court's instructions to the jury.

C. Petitioner failed to meet his burden for a change of venue. Moreover, the jury was carefully vetted with the input and approval of both the State and Petitioner and represented a fair and impartial panel.

1. Standard of review.

"Whether a change of venue is warranted rests in the sound discretion of the trial court, and its ruling thereon will not be disturbed, unless it clearly appears that such discretion has been abused." Syl. Pt. 2, *Gangwer*, 169 W. Va. 177, 286 S.E.2d 389.

2. Change of venue.

Petitioner argues that he was denied his right to a fair and impartial jury when the circuit court denied both his motion to conduct a change-of-venue survey and his motion for change of venue. Pet'r Br. 28. The record demonstrates, however, that the circuit court had no trouble empaneling a jury which could impartially judge Petitioner's guilt or innocence. Accordingly, Petitioner's argument is meritless.

This Court has considered the denial of a motion for a change of venue many times but has infrequently reversed a conviction therefor, even in the age of social media and 24-hour news cycles. *See e.g., State v. Zuccaro*, 239 W. Va. 128, 799 S.E.2d 559 (2017) (affirming conviction

upon finding that lower court did not abuse its discretion in denying motion for change of venue); *State v. Payne*, 239 W. Va. 247, 800 S.E.2d 833 (2016) (same); *State v. Skeens*, 233 W. Va. 232, 757 S.E.2d 762 (2014) (same); *State v. Blevins*, 231 W. Va. 135, 744 S.E.2d 245 (2013) (same); *State v. Black*, 227 W. Va. 297, 708 S.E.2d 491 (2010) (same); *State v. Horton*, 203 W. Va. 9, 506 S.E.2d 46 (1998) (same); *Derr*, 192 W. Va. 165, 451 S.E.2d 731 (same); *Gangwer*, 169 W. Va. 177, 286 S.E.2d 389 (same); *State v. Wooldridge*, 129 W. Va. 448, 40 S.E.2d 899 (1946) (reversing conviction on other grounds, but finding no abuse of discretion in denying motion for change of venue); *but see State v. Sette*, 161 W. Va. 384, 242 S.E.2d 464 (1978) (reversing conviction based on failure to grant change of venue).

The Court's test for a change of venue has remained substantially the same all this time:

> """To warrant a change of venue in a criminal case, there must be a showing of good cause therefor, the burden of which rests on the defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused." Point 2, Syllabus, *State v. Wooldridge*, 129 W. Va. 448, 40 S.E.2d 899 (1946).' Syllabus Point 1, *State v. Sette*, 161 W. Va. 384, 242 S.E.2d 464 (1978)." Syl. Pt. 1, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994).

Syl. Pt. 1, *Zuccaro*, 239 W. Va. 128, 799 S.E.2d 559. It is not enough that potential jurors have heard or read about the case; their knowledge must have hardened their opinion about it.

> "One of the inquiries on a motion for a change of venue should not be whether the community remembered or heard the facts of the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt or innocence of the defendant." Syl. Pt. 3, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994).

Id. at Syl. Pt. 2. Moreover, that bias must creep into every corner of the county.

> "'A present hostile sentiment against an accused, *extending throughout the entire county in which he is brought to trial*, is good cause for removing the case to another county.' Point 2, Syllabus, *State v. Dandy,* 151 W. Va. 547, 153 S.E.2d 507 (1967),

quoting Point 1, Syllabus, *State v. Siers,* 103 W. Va. 30, 136 S.E. 503 (1927)." Syllabus Point 2, *State v. Sette,* 161 W. Va. 384, 242 S.E.2d 464 (1978).

Syl. Pt. 2, *Derr*, 192 W. Va. 165, 451 S.E.2d 731 (emphasis added).

Here, Petitioner presented the circuit court a series of news articles, social media posts, and signage to support its motion for change of venue or, in the alternative, motion to conduct a survey. App. 9-20. As the State pointed out, however, many of the news articles and broadcasts cited ran in markets to which Prestonians would likely never be exposed, including Huntington and Wheeling, West Virginia, and Steubenville, Ohio. App. 14-15, 170. The State further pointed out that Petitioner had failed to demonstrate that the social media posts he cited as support for his motion were even made by citizens of Preston County or were made by unique users (as opposed to a certain individuals making multiple posts). App. 169-70. The circuit court pointed out that at least some of the social media posts cited by Orion Strategies were generated by family and friends of the victim, who would not be eligible to serve on the jury in any case. App. 29.

In the end, the circuit court was concerned Petitioner's requested telephone survey would only further taint the jury pool, noting that it might actually spur people to look into the facts of the case. App. 34. Citing former Justice Frank D. Cleckley's *Handbook on West Virginia Criminal Procedure*, the circuit court held the motion for change of venue in abeyance until it could attempt to impanel a jury. App. 34.

Though he now argues that the circuit court's ruling prevented him from receiving effective assistance of counsel, Pet'r Br. 32, Petitioner acknowledged below that he was not required to seek the court's permission to conduct a survey. App. 158, 175. Had he truly believed that the survey would produce the results he sought to carry his burden, he surely would have conducted the survey *prior* to bringing his motion for a change of venue. In the end, though, the point is moot. The court was able to empanel a fair and impartial jury in Preston County.

3. Jury strikes for cause.

This Court should wholly disregard Petitioner's argument that he was deprived of his right to an impartial jury when the circuit court denied his motions to strike certain jurors for cause. *See* Pet'r Br. 35. The record belies Petitioner's contentions. A review of the transcript of jury *voir dire* clearly shows that Petitioner did not move to strike Juror 1, App. 305, Juror 21, App. 409-10, Juror 24, App. 451, or Juror 34, App. 561, for cause. Petitioner made and was granted other motions to strike potential jurors for cause during *voir dire*, *see e.g.,* App. 1119-1122, but he did not move to strike for cause the four jurors of which he complains now. Indeed, Petitioner points to nothing in the record to support his contention that he moved to strike those four jurors prior to using his peremptory strikes to remove them from the panel. *See* Pet. 35-37. For that reason alone, the Court should disregard the argument. Moreover, the argument is meritless.

In the instant case, the circuit court undertook an extensive and exhaustive two-day *voir dire* process, individually interviewing each of the prospective jurors who indicated they had personal knowledge about the case through discussions, reading or hearing media coverage, or social media interactions. *See* App. 260-61. The circuit court was so methodical and deliberate that about half-way through the second day of individual *voir dire*—with 30 potential jurors left to individually *voir dire*—Petitioner asked, "Do we have to go through them all?" App. 996. When the circuit court responded that all the potential jurors needed to be questioned, Petitioner's counsel asked, "Can we get to a stopping point and go out and ask the rest of questions and then if we have enough then we don't bring others back in for individual [*voir dire*]?" *Id.* Petitioner's counsel pointed out that "[w]e have enough [potential jurors]." App. 997. Accordingly, once the panel of screened potential jurors reached 38 in number, the circuit court agreed to dismiss the remaining potential jurors without questioning them further. App. 1122-23.

The over 850 pages of jury *voir dire* contained in the record demonstrate that the circuit court did all that it was required to do by law to impanel a fair and impartial jury:

> "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 [P]oint 8, *State v. Newcomb,* 223 W. Va. 843, 679 S.E.2d 675 (2009).

Syl. Pt. 2, *State v. Sutherland*, 231 W. Va. 410, 745 S.E.2d 448 (2013). As discussed more fully in Respondent's Statement of Facts, Jurors 1, 21, 24, and 34 did not make clear statements of bias which required their removal from the panel, nor did they indicate a probability of bias that would have necessitated their removal. *Id.* Even assuming *arguendo* that those jurors *were* biased, "[a] trial court's failure to remove a biased juror from a jury panel . . . does not violate a criminal defendant's right to a trial by an impartial jury if the defendant removes the juror with a peremptory strike. In order to obtain a new trial for having used a peremptory strike to remove a biased juror from a jury panel, a criminal defendant must show prejudice." *Id.* at Syl. Pt. 3. Petitioner has failed to meet that burden.

D. The circuit court did not err in denying Petitioner's motions for judgment of acquittal.

1. Standard of review.

> "'Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence.' Syl. [P]t. 4, *Sanders v. Georgia–Pacific Corp.*, 159 W. Va. 621, 225 S.E.2d 218 (1976)." Syl. Pt. 1, *Andrews v. Reynolds Mem'l Hosp., Inc.*, 201 W. Va. 624, 499 S.E.2d 846 (1997).

Syl. Pt. 1, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000). "The Court applies a de novo standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence." *State v. Juntilla,* 227 W. Va. 492, 497, 711 S.E.2d 562, 567 (2011) (citing *State v. LaRock,* 196 W. Va. 294, 304, 470 S.E.2d 613, 623 (1996)).

2. No cumulative error.

While Petitioner's final assignment of error is framed as an appeal of the circuit court's denial of his motion for judgment of acquittal, he does not address the law regarding the denial of such a motion. Rather, Petitioner wholly focuses his argument on the cumulative error doctrine. Pet'r Br. 38-39. Under the cumulative error doctrine,

> [w]here the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.

Syl. Pt. 5, *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972). "[T]he cumulative error doctrine is applicable only when 'numerous' errors have been found." *State v. Tyler G.*, 236 W. Va. 152, 165, 778 S.E.2d 601, 614 (2015). "[T]his Court has recognized that the cumulative error doctrine 'should be used sparingly' and only where the errors are apparent from the record." *State v. Peterson*, 239 W. Va. 21, 35, 799 S.E.2d 98, 112 (2017) (quoting *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 118, 459 S.E.2d 374, 395 (1995)). "Cumulative error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors." *State v. Knuckles*, 196 W. Va. 416, 426, 473 S.E.2d 131, 141 (1996). In other words,

where there is no error at all, the cumulative error doctrine lacks vitality and cannot afford a petitioner a basis for relief. *State v. Hardin*, No. 21-0034, 2022 WL 163888, at *5 (W. Va. Supreme Court, Jan. 18, 2022) ("Because we find that there was no error in this case, the cumulative error doctrine does not apply."); *State v. Bailey*, No. 16-0740, 2018 WL 300588, at *5 (W. Va. Supreme Court, Jan. 5, 2018) (memorandum decision) ("Because we have found no error, the cumulative error doctrine does not apply. Thus, we reject this assignment of error."); *State v. Wilfred H.*, No. 17-0170, 2018 WL 3005947, at *9 (W. Va. Supreme Court, June 15, 2018) (memorandum decision) ("Here, as we find no error, we find no merit in petitioner's argument for the application of the cumulative error doctrine.").

The judgment of the circuit court should be affirmed.

VII. CONCLUSION

For the foregoing reasons, this Court should affirm the August 27, 2021, Order of the Circuit Court of Preston County.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent, by Counsel.

PATRICK MORRISEY
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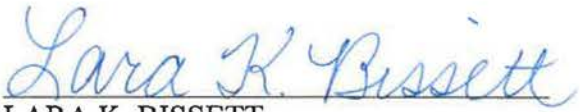

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0764

STATE OF WEST VIRGINIA,

Respondent,

v.

AARON GLEN HOARD,

Petitioner.

CERTIFICATE OF SERVICE

I, Lara K. Bissett, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, March 24, 2021, and addressed as follows:

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