IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0219

STATE OF WEST VIRGINIA,

Respondent,

v.

SHANE ERIC HAGERMAN,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the March 5, 2022, Order
Circuit Court of McDowell County
Case No. 19-F-11

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I. INTRODUCTION

Respondent State of West Virginia, by counsel, Andrea Nease Proper, Assistant Attorney General, responds to Shane Hagerman's ("Petitioner") Brief filed in the above-styled appeal. Petitioner cannot show that the circuit court erred or violated any statutory provisions, nor can he show prejudice, in removing jurors from the final venire prior to jury selection because they would have been otherwise disqualified, and any error was harmless beyond a reasonable doubt. Likewise, Petitioner cannot show error in the jury instruction regarding voluntary manslaughter, as it is clear from the verdict that the jury found malice sufficient for its Second Degree Murder conviction, and because the jury instructions, taken as a whole, were correct statements of law and not misleading to the jury. As Petitioner has failed to demonstrate the existence of reversible error, the circuit court's sentencing order should be affirmed and Petitioner's conviction for the Second Degree Murder of McKinley Addair should stand.

II. ASSIGNMENTS OF ERROR

Petitioner asserts two assignments of error:

A. The trial court erred in denying Petitioner's Motion for a Judgment of Acquittal and in the Alternative a New Trial based on the trial court disqualifying then excluding prior to trial and deliberately concealing from Petitioner six Bradshaw, McDowell County residents that were on the jury panel based solely on their geographic location in violation of the Sixth Amendment to the United States Constitution; Article 3, 14 (sic) of the West Virginia Constitutional (sic) and West Virginia Code § 52-1-1 et seq.

B. The trial court erred in instructing the jury it could not convict Petitioner of voluntary manslaughter as a lesser included offense without proof of gross provocation and heat of passion.

Pet'r Br. 1.

III. STATEMENT OF THE CASE

This case arises from the shooting death of McKinley Addair at the hands of Petitioner, who admitted the shooting. Supplemental Appendix ("S.A.") 727. Addair, at one time, was married

to Petitioner's sister, and Petitioner was friends with Addair. S.A. 180. Petitioner was indicted by a McDowell County grand jury on one count of first degree murder. A.R. 41. Petitioner proceeded to trial by jury on November 15, 2021. S.A. 1.

Petitioner's girlfriend, Hannah Muncy, testified that she, Petitioner, Addair, and Lee Tessner were at Petitioner's and Muncy's home. S.A. 203, 208. Eventually Petitioner and Addair got into an argument, and Petitioner threw a punch at Addair. S.A. 216. Muncy testified that Petitioner beat up Addair throughout the night, even going so far as breaking a beer bottle and holding the broken pieces to Addair's neck. S.A. 231-33. Petitioner at one point was on top of Addair, holding a knife to Addair's throat. S.A. 240. In Muncy's prior statement, she noted that Petitioner kept throwing knives at Addair trying to get him to react and Addair did not. S.A. 233-35. In fact, Muncy testified that Addair never fought back. S.A. 263.

Later, Petitioner grabbed a pistol and went back to the bedroom where Addair had gone, and then Petitioner held the pistol to his own head; thereafter, Tessner hid the gun from Petitioner. S.A. 237-40. Eventually, Addair grabbed one of the knives and swiped at Petitioner, but did not make contact. S.A. 240. Petitioner pushed Addair out the door of the trailer with a shotgun, and Addair was wearing only a pair of pants; it was 35 degrees outside at the time. S.A. 245; 498. Petitioner used the shotgun to shoot toward the door but the gun malfunctioned. S.A. 247. Muncy testified that Petitioner would not allow her to call 911 that evening. S.A. 243. Just prior to the shooting, Petitioner exited the back door of the home, went around the home to the front porch where Addair was standing, and later shot and killed Addair. S.A. 266.

Tessner testified that he was good friends with Petitioner, and that everyone was drinking on the evening in question. S.A. 362, 364. Petitioner was so drunk at one point he was dancing around naked. S.A. 408. Tessner noted that at one point, Addair tried to leave the home but

Petitioner would not allow him to leave. S.A. 370. Tessner testified to the ongoing fight between Petitioner and Addair, noting that Petitioner tried to get Addair to use a knife against him, and that Petitioner was beating up Addair in a back bedroom at one point. S.A. 371-72. Tessner was so concerned about the situation that he hid a gun from Petitioner. S.A. 372. Tessner also attempted to break up the fight, telling Petitioner "that's enough" and qualified the ongoing battle as "completely a one-sided fight." S.A. 373, 377. Tessner later noted that he "didn't see [Addair] ever on the upper end of that fight." S.A. 405. Tessner confirmed Muncy's story about the broken beer bottle threat, and about Petitioner throwing knives at Addair trying to get Addair to use the knives against him. S.A. 375-77. Addair picked up a knife eventually but Tessner stated that Addair never landed a stab on Petitioner. S.A. 376-77, 397. Tessner also confirmed that Petitioner chased Addair outside with a shotgun and threatened to kill Petitioner. S.A. 378-79.

A video of the incident showed Tessner asking Petitioner not to kill Addair, and Tessner testified that Addair was trying to hold the door closed so that Petitioner could not exit the home. S.A. 383. The video shows Addair holding the door closed. S.A. 558. Petitioner had been shooting toward the front door with the shotgun but the gun was not working correctly. S.A. 400. Tessner testified that he said "Shane, do not kill him" as Petitioner exited the back of the trailer. S.A. 384-85. When Addair tried to stab Petitioner, Tessner opined that "I think that, I mean, he was just trying to fight for his life...." S.A. 396.

Two EMTs testified that Petitioner refused transport and services. S.A. 345, 350, 358. He was checked out again at the state police detachment due to his claim that he was stabbed, but Trooper Woods did not see any active bleeding at the detachment. S.A. 433. Trooper Woods did see the wounds on-scene, as Petitioner had his shirt off. S.A. 455.

Trooper Woods testified regarding his investigation, noting that under Addair's body a "cheap steak knife" was found, like one "from the Dollar Store." S.A. 441. The court later noted that the blade was two to two and one-half inches long. S.A. 516. Trooper Woods testified that he had arrested Addair once in the past for what he believed to be a burglary charge. S.A. 447.

Christina Keene, Petitioner's neighbor, testified that on the morning of the shooting, she heard a loud bang, then saw Petitioner running into his house. S.A. 628, 641. Thereafter, Muncy came to her door and asked to use the restroom; when she came back out, Muncy informed Keene that Petitioner shot Addair and "I think he might be dead." S.A. 642. Keene tried to call 911 but the call did not connect until the third try; she subsequently went outside to see if she could see movement. S.A. 643. Tessner then helped Petitioner to Keene's porch, and Keene saw blood coming from Petitioner's armpit and hip. S.A. 643. Petitioner was "flopping" around on the porch but was unresponsive and later rolled off the porch onto the ground. S.A. 644. Petitioner landed on a window that was laying on the ground, busting it, and was "talking nonsense." S.A. 644. Petitioner informed Keene at some point that Addair had stabbed him three times. S.A. 650.

Dr. Tonya Mitchell testified that her toxicology report showed that Addair had alcohol, methamphetamine, suboxone, and norbuprenorphine. S.A. 693, 696-97. Dr. Mitchell testified that this concentration would have had "an enormous sedative-type situation" and that the methamphetamine level was so low that it would have almost no effect. S.A. 698.

Petitioner testified that he, Tessner, Addair, and Muncy were drinking at his home the night before Thanksgiving, 2018. S.A. 708. Petitioner noted that Addair was acting "off" so he pulled him aside and was told that Addair was getting annoyed with Tessner. S.A. 712-13. Addair and Petitioner then began arguing about Addair's children, who are also Petitioner's nieces. S.A. 714. The altercation turned physical. S.A. 714. Petitioner admitted that during the altercation he went

and retrieved a pistol. S.A. 716, 749. Addair somehow obtained a knife and was threatening Petitioner. S.A. 719. Petitioner also testified that Addair, once he left the house, was trying to break back in. S.A. 720. Petitioner admitted that he was telling Addair repeatedly to open the door, but Addair was holding the door closed from the outside. S.A. 740-42.

Petitioner admitted he was trying to shoot the shotgun but it was malfunctioning. S.A. 723-25. Petitioner took the shotgun outside and told Addair to stop trying to get into the home, then grabbed Addair's arm and when Addair turned around, Addair stabbed Petitioner. S.A. 727. Petitioner then "butt-stroked [Addair] in the face" then "backed up and shot him." S.A. 727. Petitioner claimed self-defense. S.A. 730-31. Petitioner did not call 911, even though his girlfriend was asking him to do so. S.A. 743.

Petitioner was convicted of second degree murder, a lesser included offense of first degree murder, following a jury trial. A.R. 94-99. Thereafter, Petitioner moved for judgment of acquittal or, in the alternative, a new trial. A.R. 100-03. Petitioner alleged several errors, but has preserved only one on appeal: that the jury composition was unduly influenced by the court's removal of members of the jury. A.R. 100. The State filed a response in opposition to the motion, arguing that the area in which the murder occurred in the town of Bradshaw was "a rural, tightknit, small community" and that most residents of the area "would have prior knowledge of the facts of the murder, the witnesses, or both." A.R. 104. Further, the court only omitted a "very limited" number of jurors. A.R. 104. The court reasoned that the authority relied upon by Petitioner surrounds protected classes of jurors, and in this case no protected classes were excluded. A.R. 105-06. Because no protected class was involved, the court only need satisfy the "rational basis" test, which was satisfied in this case based on the concern that jurors from this small town would sully the jury pool. A.R. 106. Petitioner filed a reply arguing that the failure to randomly select jurors

violated his right to a fair and unbiased jury. A.R. 112. Specifically, Petitioner argued that he was prejudiced "by not having Bradshaw jurors that may have known of [the victim's] violent behavior and that he had brutally stabbed a man prior to his death." A.R. 112.

At the hearing on Petitioner's motion, Petitioner argued that the jury selection was not random with the removal of the six Bradshaw jurors, and that Petitioner was prejudiced by not having jurors from the Bradshaw area that may have known that the victim stabbed another man months prior. Mot. Hr'g 6-7. The State argued in response that Petitioner did not properly file a challenge to the venire pursuant to West Virginia Code § 52-1-15 prior to the trial. Mot. Hr'g 8. The State further argued that there was a fair cross-section of jurors selected in this matter from citizens of McDowell County, and that no distinctive groups were excluded. Mot. Hr'g 9-11. The State argued that the authorities relied upon by Petitioner all dealt with the exclusion of African-American jurors, unlike this matter. Mot. Hr'g 12. Finally, the State noted that there was a rational basis for the exclusion in this case, which is that the jurors from such a small area would have "knowledge of facts, witnesses or both." Mot. Hr'g 12.

The court explained that the jurors were all selected at random, and the court then asked the jurors from Raysal and Bradshaw be excluded from the initial pool.[1] Mot. Hr'g 15. The court noted, however, that "had we not had a sufficient panel out of the first set [of jurors], then they would have been called in on the second set." Mot. Hr'g 16. Additionally, "the reason they weren't called in initially is because these people lived in the immediate neighborhood of where this took place. And people that either knew the Defendant, good or bad, knew McKinley Addair, good or bad, or heard of this situation" would have to be excluded. Mot. Hr'g 16. The court also noted that

[1] The court noted that the population of McDowell County is 19,000 to 20,000 people, and the population of Bradshaw was 207, with the population of Raysal being even fewer. Mot. Hr'g 15.

each juror not called in the first set of jurors had other disqualifying factors, and gave examples as to how each potential juror had disqualifying factors. Mot. Hr'g 16-19. The court further opined that all six would have some kind of information that would disqualify them from the jury. Mot. Hr'g 19-20. Importantly, the court noted that the very reason Petitioner felt he was prejudiced by the absence of the Bradshaw jurors, which is their knowledge of McKinley Addair's violent past, is an additional reason the jurors would be disqualified. Mot. Hr'g 20. The court noted that the jurors selected were from a cross-section of McDowell County, satisfying the West Virginia Code. Mot. Hr'g 22-25. Notably, no juror was excluded based on race, color, religion, sex, national origin, economic status, or disability. Mot. Hr'g 25-27.

The lower court denied Petitioner's motion via order entered on February 22, 2022. A.R. 115. The court noted that it did not exclude any juror based on any of the protected classes found in West Virginia Code § 52-1-2, and that the jury was selected from a fair cross section of the population of McDowell County in accordance with West Virginia Code § 52-1-1. A.R. 115. The court noted that following the clerk's initial juror selection, the court was advised that six of the potential jurors were from Bradshaw; the court then advised the clerk's office not to call those members for the initial panel. A.R. 116. The court also noted that the six jurors would have been independently disqualified for various reasons, including that one was the father of the prosecuting attorney; one worked for 911 and her supervisor was a witness; one worked for Welch Community Hospital where another employee was subpoenaed to testify; one had appeared in court on behalf of the Department of Health and Human Resources, which is represented by the prosecuting attorney's office; one had a relative involved in a child protective services case which involved the office of the prosecuting attorney; and, one was part of an alleged sexual assault investigation as a victim and the prosecuting attorney's office is a part of that investigation. A.R. 116. Further, each

of the jurors would know the victim or Petitioner and would have been disqualified based on that as well. A.R. 117.

Petitioner's sentencing hearing was held on February 28, 2022, and the sentencing order was entered on March 5, 2022. A.R. 121-22. Petitioner was sentenced to a determinate sentence of thirty years for his second degree murder conviction. A.R. 122. Petitioner appeals from this order.

IV. SUMMARY OF THE ARGUMENT

This Court should affirm Petitioner's conviction for the Second Degree Murder of McKinley Addair. The diversion of six jurors to a second, later jury pool was not in violation of any statutory provision. Further, even if the diversion of said jurors was erroneous, Petitioner cannot succeed under a harmless error review, as the State can show that any error was harmless beyond a reasonable doubt, and Petitioner has failed to show prejudice.

Petitioner's argument regarding the jury instructions in this case must also fail. Under this Court's jurisprudence, heat of passion and gross provocation are merely mitigating factors, and the addition of these qualifiers to the jury instructions does not render the instructions erroneous. Additionally, the jury instructions, when taken as a whole, were not confusing to the jury or a misstatement of the law. Finally, the jury's finding of malice, as evidenced by its verdict, renders Petitioner's argument moot. Petitioner's conviction should stand.

V. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to the West Virginia Rules of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record. Accordingly, this case is appropriate for resolution by memorandum decision.

VI. ARGUMENT

A. Standard of review

The denial of a motion for judgment of acquittal is subject to a *de novo* review; "therefore, this Court, like the trial court, must scrutinize the evidence in the light most compatible with the verdict, resolve all credibility disputes in the verdict's favor, and then reach a judgment about whether a rational jury could find guilt beyond a reasonable doubt." *State v. LaRock*, 196 W. Va. 294, 304, 470 S.E.2d 613, 623 (1996).

"[W]hen an objection to a jury instruction involves the trial court's expression and formulation of the jury charge, this Court will review under an abuse of discretion standard." *State v. Guthrie*, 194 W. Va. 657, 671, 461 S.E.2d 163, 177 (1995). Likewise, in *State v. Lease*, 196 W. Va. 318, 472 S.E.2d 59 (1996), this Court explained that we review a "trial court's failure to give a requested instruction or the giving of a particular instruction under an abuse of discretion standard . . . ." *Id.* at 322, 472 S.E.2d at 63; *see also Guthrie*, 194 W. Va. at 671, 461 S.E.2d at 177.

B. The lower court did not err in denying Petitioner's motion for judgment of acquittal or for a new trial based on the circuit court's actions regarding the Bradford jurors.

Petitioner's first assignment of error is that the trial court erred in denying his motion for judgment of acquittal based on the alleged disqualification of jurors from the jury panel prior to trial. Pet'r's Br. 5. Petitioner argues that the omission of "competent jurors from the town of Bradshaw, McDowell County" violated the Sixth Amendment of the United States Constitution, Article 3 § 14 of the West Virginia Constitution, and West Virginia Code § 52-1-1 *et seq.* Pet'r's Br. 6.

Both the federal and state constitutions guarantee a criminal defendant the right to a fair trial. U.S. Const. Amend. 14; W. Va. Const. Sec. 14, Art III. Implicit in these constitutional

provisions is the right to an unbiased jury. *See State v. Sutherland*, 231 W. Va. 410, 416, 745 S.E.2d 448, 454 (2013). Petitioner cannot show error in this case, and, even if there was error, it was harmless beyond a reasonable doubt.

1. **The court did not err in requesting the jurors from Bradshaw and Raysal be diverted to a second, later pool, as the jurors were not removed entirely from the panel, and the panel was randomly selected in the first instance.**

Petitioner complains that the court removed six jurors from the venire prior to voir dire, thus violating West Virginia Code § 52-1-1 *et seq*. Pet'r's Br. 8. A review of the record, however, shows that neither of these contentions are true. First, the court did not remove the jurors entirely from the panel; rather, the clerk randomly selected a cross-section of McDowell County residents, then the court asked that the jurors from Raysal and Bradshaw, six in total, be excluded from the first set of jurors called for potential service. Mot. Hr'g. 15. The judge specifically indicated that "had we not had a sufficient panel out of the first set [of jurors], then they would have been called in on the second set." Mot. Hr'g. 16. Thus, the six jurors were not removed from the panel and were still subject to being called had there not been enough jurors deemed eligible to empanel a fair jury from the initial set called. Petitioner's Sixth Amendment right was simply not violated.

Second, West Virginia Code § 52-1-1 was not violated in this case. The selection of jurors was, in fact, random and was a cross-section of eligible McDowell County residents. Mot. Hr'g. 22-25. Petitioner relies on *State ex rel. Stanley v. Sine*, 215 W. Va. 100, 594 S.E.2d 314 (2004), in support of his argument, but the *Stanley* decision is not dispositive of the issue at hand and actually supports the lower court's actions in this matter. *Stanley,* which was presented to this Court as a narrow writ of prohibition, dealt with the initial selection of the jury pool, which was done alphabetically in violation of West Virginia Code §§ 52-1-5 through 7a. *Id.* at 102-03, 106, 594 S.E. 2d at 316-17, 320. This selection process was deemed improper, as it disallowed a random

selection to each jury panel. *Id.* at 107, 594 S.E.2d 321. Unlike *Stanley*, the selection in this matter was random; further, the six jurors in question remained on the same panel they were chosen for, but were simply moved to the second half of the panel to be called, and with valid reason which will be discussed in greater detail below.

More importantly, *Stanley* discussed how circuit judges have the ability, pursuant to West Virginia Code § 52-1-7(a), to formulate their own rules for jury selection; although, those rules "must comply with the public policy and stated requirements of the statutory jury selection procedures set forth in W. Va. Code § 52–1–1, et seq." Syl. Pt. 4, *Stanley*, 215 W. Va. 100, 594 S.E.2d 314. Nothing in the lower court's actions violates this provision. As noted, Petitioner takes no issue with the actual selection process of the jurors, and does not argue that it was improper pursuant to West Virginia Code § 52-1-1 *et seq*. The randomness of the jury was still maintained, and the six jurors remained in the larger pool to be called; they simply were reserved for empanelment in the event that the original venire did not allow for a fair jury.

Furthermore, the diversion of the jurors to the second venire does not violate public policy as prohibited by Syllabus Point 4 of *Stanley*. Unlike the cases cited by Petitioner, there is no allegation of any type of illegal bias in the selection process at issue. *See Taylor v. Louisiana*, 419 U.S. 522 (1975) (addressing selection based on gender; *Toothman v. Brescoach*, 195 W. Va. 409, 413, 465 S.E.2d 866, 870 (1995) (addressing selection based on gender). The circuit court specifically noted that no juror was excluded on the basis of race, color, religion, sex, national origin, economic status, or being a qualified individual with a disability as prohibited by West Virginia Code § 52-1-2. A.R. 115. Indeed, as discussed below, the diversion of these jurors to a later pool was in the interest of public policy, as these jurors had independent biases which would

have disqualified them, and the movement to a later pool allowed greater judicial economy in the jury selection process in this case.

Finally, Petitioner cannot succeed in challenging the particular jury selection in this case under the test enunciated in Syllabus Point 2 of *State v. Hobbs*, 168 W. Va. 13, 282 S.E.2d 258 (1981). In *Hobbs*, this Court set forth a test for determining "whether a particular method of jury selection comports with the Sixth Amendment guarantee of a fair cross-section of the community." *Id.* at 25, 282 S.E.2d at 266, citing *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

> (T)he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at Syl. Pt. 2, in part. "Once the defendant has made out a prima facie case, the burden shifts to the State to rebut the showing of impermissible exclusion." *Hobbs,* 168 W. Va. at 25, 282 S.E.2d at 266. Petitioner cannot meet any of the factors of this conjuctive test; and his claim fails.

As to the first factor, the distinctive group must be "cognizable" with a "definite composition" and cannot be a group whose "membership shifts from day to day or whose members can be arbitrarily selected." *Id.* at 27, 282 S.E.2d at 267 (citation omitted). Also, "the group must have a community of interest which cannot be adequately protected by the rest of the populace." *Id.* Importantly, "the lack of cognizability is dispositive." *Id.* at 28, 282 S.E.2d at 268. Put simply, there is no cognizable, distinctive group here. Clearly the membership of a grouping merely by geography can, and does, shift day to day. Further, the Bradshaw jurors do not have some special community of interest that cannot be adequately protected by the other randomly selected jurors from a cross-section of McDowell County. As Petitioner cannot meet his burden on the first prong, the Court's analysis ends here. Petitioner, however, cannot meet either of the other two prongs.

Under the second prong, "the defendant must initially demonstrate the percentage of the community population which is composed of the group allegedly underrepresented." *Id.* at 28, 282 S.E.2d at 268. There is no allegation that the 207 people of Bradshaw are somehow underrepresented, or are not adequately represented by their neighbors throughout McDowell County. Thus, this argument, too, must fail.

The final prong also cannot be met. There is no systematic exclusion in this case, as the six jurors were diverted only to a later portion of the pool, and were not excluded from the pool, systematically or otherwise. Petitioner's claim must fail, and his conviction should thereby be affirmed.

Petitioner wholly ignores this Court's precedent in *Hobbs* in favor of an 1886 case out of New York. *See* Pet'r's Br. 13-14. This case is not applicable to the instant action. In a situation wholly inapposite to the instant case, the New York court found that the applicable statute actually prevented the very juror removal the judge undertook: "[t]he court added a disqualification, not only not found in the statute, but which the statute declares shall not constitute a disqualification." *Hildreth v. City of Troy*, 101 N.Y. 234, 238, 4 N.E. 559 (1886). This is not the case at bar and should be disregarded by this Court, as it has no level of authority or persuasion here.

Inasmuch as Petitioner claims that he could not avail himself of the challenge procedure found in West Virginia Code § 52-1-15(c), as he did not know about the movement of the six jurors prior to trial, this argument, too, should fail. As noted above, Petitioner complied with the relevant statutes and law, and, thus, any challenge filed under West Virginia Code § 52-1-15 would have failed. Furthermore, the statute notes that absent fraud, the provisions of § 52-1-15 are the exclusive means in which to challenge jury selection procedures; it is undisputed that Petitioner failed to comply. Petitioner contends that this code provision requires a "substantial failure to

comply with article 1, chapter 52, of the Code" and, if proven, no showing of prejudice is required. Pet'r's Br. 13. Petitioner, however, cannot show a substantial failure, as the jurors were drawn randomly as required by statute, the jurors represented a cross-section of county residents, and the six jurors in question were not actually removed from the pool. Accordingly, he must show prejudice.

Importantly, Petitioner did not prove that the circuit court acted fraudulently. "The onus probandi is on him who alleges fraud, and, if the fraud is not strictly and clearly proved as it is alleged, relief cannot be granted." Syl. Pt. 3, *Allegheny Dev. Corp. v. Barati*, 166 W. Va. 218, 273 S.E.2d 384 (1980). Further, "[t]he law does not presume fraud, and he who alleges it must clearly and distinctly prove it." *Divel v. Divel*, 178 W. Va. 558, 559, 363 S.E.2d 243, 244 (1987). Petitioner's failure to prove fraud in this case is another basis for this Court to affirm the lower court's order.

2. Even if the court erred, it was harmless in this case.

Even if this Court finds that the movement of the six Bradshaw jurors to a later jury pool is erroneous, the error should be found harmless. The doctrine of harmless error is "firmly established by statute, court rule and decisions as salutary aspects of the criminal law of this State." Syl. Pt. 4, *State v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975). Even a constitutional error can be found harmless if the error is shown as harmless beyond a reasonable doubt. *Id.* at Syl. Pt. 5. In this case, the Bradshaw jurors would have been stricken from the venire based on their actual or presumed biases; accordingly, any error in their movement to the later portion of the jury pool was harmless beyond a reasonable doubt.

As this Court has noted, "the trial court has broad discretion in determining whether to strike jurors for cause, and we will reverse only where actual prejudice is demonstrated." *State v.*

Miller, 197 W. Va. 588, 605, 476 S.E.2d 535, 552 (1996) (citation omitted). "Actual bias can be shown either by a juror's own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed." *Id.* at Syllabus point 5. A juror who cannot act as a fair or impartial fact-finder should be excused from service, Syl. Pt. 4, *State v. Newcomb*, 223 W. Va. 843, 679 S.E.2d 675 (2009), and any doubts on whether a juror can be fair and impartial should be resolved "in favor of excusing the juror." Syl. Pt. 2, in part, *State v. Cowley*, 223 W. Va. 183, 672 S.E.2d 319 (2008) (internal quotation and citation omitted). All of the jurors at issue would fall under these exclusions.

As noted by the circuit court, the six jurors diverted to a later panel were all from a tiny, tightknit community comprised of only 207 people, and likely all would have had familiarity with the parties in this case and the incident in question. Mot. Hr'g 15. Individually, the jurors would have been disqualified for other reasons as well. One such juror was the father of the prosecuting attorney. A.R. 116. Two jurors worked for entities that had witnesses subpoenaed to testify in the case, including one whose supervisor would be testifying. A.R. 116. A fourth juror regularly appeared in circuit court for DHHR, and was represented in those cases by the office of the prosecuting attorney. A.R. 116. The fifth juror had a relative involved in a child protective services case and was also familiar to the court. A.R. 116. The final juror was part of an alleged sexual assault investigation as a victim. A.R. 116. All of these potential jurors were either known by the court to be ineligible as jurors or their disqualification could be gleaned from a review of their juror questionnaires.

Petitioner notes that the "traditional means" for showing that a jury is composed of those with no interest in the case and no bias or prejudice is voir dire. Pet'r's Br. 9-10, citing *State v. Ashcroft*, 172 W.Va. 640, 646, 309 S.E.2d 600, 606 (1983). In this case, though, the court chose

to move biased jurors, or jurors who had intimate knowledge of the parties in the case, to a later pool rather than chancing the fact that they could share said knowledge with the rest of the jury pool during voir dire.

Further, Petitioner claims prejudice in this case because the excluded jurors would have possibly known of Addair's allegedly violent past, and, with their absence from the jury, this information was not known. A.R. 112. First, as recognized by the lower court, had jurors been intimately familiar with Addair's mannerisms to the point that they were aware of past violent incidents, those jurors would be clearly biased and would be eliminated from the venire for cause. Second, Petitioner elicited evidence of Addair's alleged past at trial; thus, he cannot show prejudice on this point. S.A. 630-41. This Court has stated that without a showing that a defendant was injured by the method in which the jury was drawn, there is no prejudice. *State v. Hankish*, 147 W. Va. 123, 127, 126 S.E.2d 42, 45 (1962). Therefore, even if there was error in this case, Petitioner cannot show prejudice, and the error is harmless beyond a reasonable doubt.

C. The jury instruction for voluntary manslaughter, which was not objected to below, is not erroneous and does not necessitate reversal.

Petitioner's second assignment of error argues that the trial court erred in instructing the jury that it could not convict Petitioner of voluntary manslaughter without proof of gross provocation and heat of passion. Pet'r Br. 14. Petitioner admits that counsel did not object to the instruction, and, in fact, counsel stated, when asked if there were objections, "I have no objections, Your Honor." S.A. 771. Moreover, Petitioner cannot show reversible error when examining the jury instructions as a whole and, accordingly, this assignment of error must fail.

As stated in Syllabus Point 4 of *Guthrie*, broad discretion and deference are given to the trial court in formulating instructions and the "precise extent and character of any specific instruction will be reviewed only for an abuse of discretion." Syl. Pt. 4, in part, *Guthrie*, 194 W.Va.

657, 461 S.E.2d 163. Moreover, "[a] verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties." Syl. Pt. 6, *Tennant v. Marion Health Care Found.*, 194 W.Va. 97, 459 S.E.2d 374 (1995). When there is a criminal conviction, "the evidence and any reasonable inferences are considered in the light most favorable to the prosecution." Syl. Pt. 12, in part, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994).

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[.]" 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). Since counsel below admittedly did not object, this Court must review this matter under the plain error doctrine. Petitioner, however, also affirmatively waived any objections to the instruction by stating that she had no objections. S.A. 771. The plain error doctrine is not a "do-over," however.

> A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined.

Syl. Pt. 8, in part, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. That is, if a defendant waives his objection at trial, he cannot undo that waiver by turning to this Court and pleading "plain error."

Here, Petitioner not only failed to affirmatively object to the instructions given by the trial court but in fact stated that there were no objections. That is nearly identical to the situation in *Miller*, wherein trial counsel "explicitly stated" to the trial court that he was satisfied with the proposed jury charge and had no objection to it. *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128. In

that case, this Court held that "the defendant [therein] waived any issues she might have had regarding an improper or insufficient jury charge." *Id.* at 19, 459 S.E.2d at 130: *See also State v. Julius*, 185 W. Va. 422, 434 n. 18, 408 S.E.2d 1, 13 n. 18 (1991)("Because trial counsel failed to object to any of the State's instructions, we find that he waived this alleged error on appeal."). It should do the same in this case and affirm Petitioner's conviction.

Even under the plain error standard, though, Petitioner's contentions fail. The Petitioner does not raise such a rare case as to invoke plain error and the Court should affirm his conviction.

1. Petitioner cannot succeed under the plain error doctrine

The 'plain error' doctrine grants appellate courts the authority to notice error that would otherwise be procedurally barred because a litigant failed to object in the trial court. *State v. Miller*, 194 W. Va. 3, 7, 459 S.E.2d 114, 118 (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 "bears the burden of persuasion on each of the four prongs of the plain error standard." *Lowery v. United States*, 3 A.3d 1169, 1173 (D.C. 2010). *See also United States v. Hall*, 625 F.3d 673, 684 (10th Cir. 2010) ("The defendant has the burden of establishing all four elements of plain error."); *United States v. Epstein*, 426 F.3d 431, 443 (1st Cir. 2005) ("The test for plain error contains four prongs, which the defendant bears the burden of proving."); *United States v. Clarke*, 767 F. Supp. 2d 12, 24 (D.D.C. 2011) ("The defendant bears the burden of proving

each element of the plain error standard."). And "[s]atisfying all four prongs of the plain-error test is difficult[.]" *United States v. Williamson,* 706 F.3d 405, 413 (4th Cir. 2013). 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).

The *Miller* Court noted that "[h]istorically, the 'plain error' doctrine 'authorizes [an appellate court] to correct only 'particularly egregious errors' . . . that 'seriously affect the fairness, integrity or public reputation of judicial proceedings [.]' " *Miller,* 194 W. Va. at 18, 459 S.E.2d at 129, citing *United States v. Young*, 470 U.S. 1, 15, (1985). Moreover, "'[p]lain error warrants reversal "solely in those circumstances in which a miscarriage of justice would otherwise result."' *United States v. Frady*, 456 U.S. 152, 163 n. 14, (1982)." *Miller*, 194 W. Va. at 18, 459 S.E.2d at 129. Justice Cleckley expanded on this proposition, stating as follows:

> Assuming that an error is "plain," the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.

Syl. Pt. 9, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. Petitioner certainly cannot sustain his burden in proving plain error regarding this jury instruction.

The instruction Petitioner complains of states as follows:

> **Voluntary Manslaughter** is the unlawful felonious, intentionally, willful killing of another person without deliberation, premeditation or malice.
>
> To prove Voluntary Manslaughter in this case, the State must prove beyond a reasonable doubt that the defendant intentionally, willfully and unlawfully feloniously killed the victim.
>
> The distinguishing difference between Second Degree Murder and Voluntary Manslaughter, therefore, involves the existence or absence of malice. Voluntary Manslaughter does require a specific intent to kill. It is the element of malice that forms the critical distinction between Murder and Voluntary Manslaughter. Voluntary Manslaughter involves a sudden intentional killing upon gross

> provocation and in the heat of passion. Thus, Voluntary Manslaughter arises from the sudden heat of passion, while Murder is from the wickedness of the heart and mind.
>
> The term "provocation", as it is used to reduce a homicide to Voluntary Manslaughter, consists of certain types of acts and conduct committed against the defendant which would cause a reasonable person to kill. This means that the provocation must be such that it would cause a reasonable person to lose control of himself and act out of the heat of passion to kill, and that the defendant in fact did so in this case.

A.R. 84-85 (emphasis supplied); *see also* A.R. 826-27. This Court has recognized, however, that "there is no statutory definition of voluntary manslaughter in West Virginia." *State v. McGuire*, 200 W. Va. 823, 833, 490 S.E.2d 912, 922 (1997). "Intent without malice" is the distinguishing feature of voluntary manslaughter in comparison to murder. Syl. Pt. 3, in part, *State v. Drakes*, 243 W. Va. 339, 844 S.E.2d 110 (2020). The jury was properly instructed in this case as to the distinguishing feature of voluntary manslaughter, as the above instruction clearly notes that voluntary manslaughter requires an intentional killing without malice. A.R. 84-85. The jury's verdict demonstrates that they seized on that distinction and found malice.

Petitioner's reliance on this Court's holdings in *Drakes* is misplaced. *Drakes* was focused almost exclusively on an erroneous instruction for second degree murder wherein the State did not have to prove intent to kill. *Id.* at 348, 844 S.E.2d at 119. As a secondary matter, the Court found that the voluntary manslaughter instruction was erroneous because it "contained elements that were not essential to a conviction for voluntary manslaughter;" but, importantly, the Court also noted that "at the same time the circuit court made it easier for the State to prove second-degree murder, it made it more difficult for the jury to consider voluntary manslaughter by adding the elements of sudden provocation and heat of passion." *Id.* at 349, 844 S.E.2d at 120. Thus, when looking at the instructions as a whole, the Court found error.

Furthermore, *Drakes* relied on this Court's prior opinion in *McGuire*, but the *McGuire* Court did not find an instruction similar to the one in this case erroneous; rather, the *McGuire* Court found that the State did not have a duty to prove gross provocation and/or heat of passion in order to convict a defendant of voluntary manslaughter. *McGuire*, 200 W. Va. at 834, 490 S.E.2d at 923. While "[g]ross provocation and heat of passion are not essential elements of voluntary manslaughter," the distinguishing feature of voluntary manslaughter is "intent without malice." *Id.* at Syl. Pt. 3. The *McGuire* Court recognized that, historically, manslaughter arises from "the sudden heat of passions" while murder "arises from the wickedness of the heart." *Id.* at 833, 490 S.E. 2d at 922 (citing 5 William Blackstone, *Commentaries* *190). Further, as recently as 1992, this Court defined voluntary manslaughter as "a sudden, intentional killing upon gross provocation and in the heat of passion." *Id.*, quoting *State v. Beegle*, 188 W.Va. 681, 685, 425 S.E.2d 823, 827 (1992). The *McGuire* Court then recognized that, rather than the State having to prove heat of passion or gross provocation (also referred to as "sudden quarrel") beyond a reasonable doubt, those terms represent "mitigating factors which are in the nature of a defense, reducing murder to manslaughter." *Id.* at 834, 490 S.E.2d at 923. Instead of indicating that the addition of heat of passion and gross provocation make a jury instruction defective, the *McGuire* Court held only that the State need not prove these mitigating factors beyond a reasonable doubt. *Id.* at 835, 490 S.E.2d at 924.

Keeping the above jurisprudence in mind, Petitioner cannot sustain his burden under the plain error standard. To begin, there is no error. The *McGuire* Court clearly noted that the State need not prove heat of passion or gross provocation, and that those are merely mitigating factors which would reduce murder to manslaughter. *Id.* at 834, 490 S.E.2d at 923. The instruction at issue in this case states the same when it defines "provocation" and states that "the provocation must be

such that it would cause a reasonable person to lose control of himself and act out of the heat of passion to kill, and that the defendant in fact did so in this case." A.R. 85. This portion of the instruction makes it clear that provocation is simply a mitigating factor that would reduce murder to manslaughter.

Petitioner also cannot meet the second prong of the plain error test, as the error is not "plain" when considered under the umbrella of the *McGuire* decision. Again, *McGuire* did not indicate that the addition of heat of passion or gross provocation rendered an instruction erroneous; rather, *McGuire* reduced the State's burden in proving these facts. Likewise, Petitioner cannot meet the final two factors as he cannot show that the instruction affected his substantial rights or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. As noted at length below, and viewing the case in the light most favorable to the State, the entirety of the jury instruction properly instructed the jury. Importantly, the jury found malice which eliminated the possibility of convicting Petitioner for voluntary manslaughter and led them to convict him of Second Degree Murder instead. Accordingly, the lower court's discretion should be respected, and Petitioner's conviction affirmed.

When reviewing the instructions as a whole, Petitioner cannot show error. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. Syl. Pt. 4, in part, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163. The instruction should be reviewed "as a whole and in light of the evidence" to determine if the instructions "mislead the jury or state the law incorrectly to the prejudice of the objecting party." *Id.* at 672, 461 S.E.2d at 178. The instructions in this case were comprehensive and detailed. For example, the jury was instructed on four possible guilty verdicts as follows:

> The Court further instructs the jury that Murder in the First Degree is when one person kills another person unlawfully, willfully, maliciously, deliberately and

> premeditatedly; that Murder in the Second Degree is one person kills another person unlawfully and maliciously, but not deliberately or premeditatedly; that Voluntary Manslaughter is the intentional, unlawful and felonious but not deliberate or malicious taking of human life and under sudden excitement and heat of passion; that one is guilty of Involuntary Manslaughter where there is an accidental causing of death of another person, although unintended, which death of another person, although unintended, which death is the proximate result of negligent—negligence so gross, wanton and culpable as to show a reckless disregard of human life.

A.R. 820. Moreover, as discussed above, the distinguishing difference between Second Degree Murder and Voluntary Manslaughter is that any murder charge requires malice. *McGuire*, 200 W. Va. at 835, 490 S.E.2d at 924 (citation omitted). To that end, the jury was instructed at great length regarding malice and how to determine if Petitioner acted with malice. For example, the trial court instructed as follows:

> The word "malice," as used in these instructions, is used in a technical sense. It may be either express or implied and it includes not only anger, hatred and revenge, but other unjustifiable motives. It may be inferred or implied by you from all of the evidence in this case if you find such inferences—and such inference is reasonable from facts and circumstances in this case which have been proven to your satisfaction beyond all reasonable doubt. It may be inferred from any deliberate and cruel act done by the Defendant without any reasonable provocation or excuse, how (verbatim) sudden.
>
> Malice is not confined to ill-will toward one or more particular persons, but malice is every evil design in general; and by it is meant that the fact has been attached by such circumstances as are ordinarily symptoms of a wicked, depraved and malignant spirit, and carry with it the plain indications of a heart, regardless of social duty, fatally bent upon mischief. It is not necessary that malice must have existed for any particular length of time and it may first come into existence at the time of the act at any previous time.
>
> The Court instructs you that malice may be inferred by the jury from the Defendant's intentional use of a deadly weapon under circumstances which you do not believe afforded the Defendant excuse, justification or provocation for his or her conduct....
>
> Malice is a necessary element of both Murder in the first Degree and Murder in the Second Degree.

A.R. 822-24.

2. Petitioner's rights were not substantially affected, nor was the integrity and fairness of his trial brought into question because the instructions, as a whole, reflect a correct and complete statement of the law.

The final determination for this Court, then, is whether there was sufficient evidence to convict Petitioner of Second Degree Murder under these instructions. *McGuire,* 200 W. Va. at 835, 490 S.E.2d at 924. When reviewing sufficiency of the evidence to support a criminal conviction, "the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." *Guthrie*, 194 W. Va. at 668, 461 S.E.2d at 174. "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." Syl. Pt. 2, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

The jury in this case convicted Petitioner of Second Degree Murder. A.R. 94-99. "Murder in the second degree is the unlawful, intentional killing of another person with malice, but without deliberation and premeditation." Syl. Pt. 2, in part, *Drakes*, 243 W. Va. 339, 844 S.E.2d 110. Thus, the jury need only find that Petitioner killed Addair with malice, but without premeditation. An examination of the evidence in the light most favorable to the State shows abundantly sufficient evidence on which the jury could base its conviction.

First, the testimony in this case was overwhelming that Petitioner was a constant and repeated aggressor against Addair. For example, both Muncy and Tessner testified that Petitioner threw the first punch of the night at Addair and was the aggressor. S.A. 216, 405. Both also testified that Petitioner broke a beer bottle and used it against Addair in a threatening manner. S.A. 231-33, 375-77. Tessner qualified the ongoing battle as "completely a one-sided fight." S.A. 373, 377.

Both witnesses testified that the only person with a gun was Petitioner, and that Petitioner kept trying to get Addair to fight back, even throwing knives toward him and telling him to use them. S.A. 233-35, 375-77. Neither witness saw Petitioner get stabbed by Addair. S.A. 240, 376-77, 397.

Both witnesses also noted that Addair left the home, and both testified that Petitioner repeatedly attempted to shoot a shotgun at the front door, knowing Petitioner was outside. S.A. 245, 247, 400. The video of the incident showed, and testimony supported, that Addair was actually holding the front door closed in an attempt to keep Petitioner inside his home rather than Addair trying to get into the home. S.A. 383, 558. In fact, Petitioner himself testified that Addair was holding the door shut while Petitioner was trying to get him to open it. S.A. 740-42. Tessner testified that Petitioner was threatening to kill Addair, and Muncy testified that she was not allowed to call 911. S.A. 243, 378-79. Finally, and most significantly, Petitioner by his own testimony exited the home with a gun out the back, walked to the front of the home, and engaged in a fight with Addair at the front of the home before shooting and killing him. S.A. 727.

The evidence above can reasonably be viewed by a jury to reflect malice. Petitioner was the consistent aggressor according to both witnesses, one of whom was Petitioner's girlfriend and the other his friend. Although Addair was outside of Petitioner's home, Petitioner chose to go outside and eventually shot Addair. Since there was sufficient evidence to convict Petitioner of Second Degree Murder under these instructions, this conviction should be affirmed by this Court.

VII. CONCLUSION

For the foregoing reasons, the Respondent respectfully asks this Court to affirm the circuit court's sentencing order.

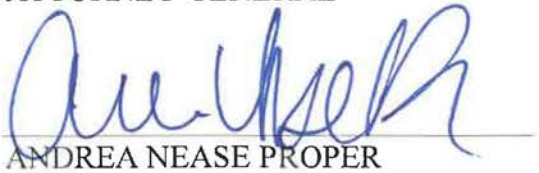
Respectfully Submitted,

STATE OF WEST VIRGINIA,

Respondent,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0219

STATE OF WEST VIRGINIA,

Respondent,

v.

SHANE ERIC HAGERMAN,

Petitioner.

CERTIFICATE OF SERVICE

I, Andrea Nease Proper, 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, August 19, 2022, and addressed as follows:

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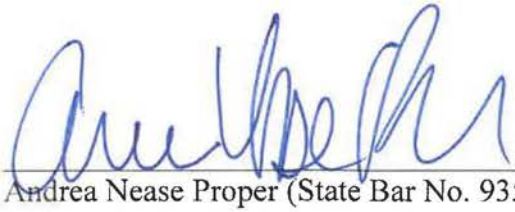

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