IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**Docket No. 22-822**

**STATE OF WEST VIRGINIA,**

*Respondent,*

v.

**DAVID HUNTER LEWIS,**

*Petitioner.*

# RESPONDENT'S BRIEF

Appeal from the October 11, 2022 Order
Circuit Court of Marion County
Case No. 21-F-132

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## I. INTRODUCTION

Petitioner, David Lewis, appeals the Marion County Circuit Court's October 11, 2022, Order in Case No. 21-F-132. Petitioner has failed to demonstrate that either the testimonial evidence or the prosecutor's comments made during opening statements and closing arguments prejudiced him. Moreover, Petitioner waived his right to challenge the prosecutor's statements by failing to make a contemporaneous objection at trial. Nevertheless, the nature of the prosecutor's conduct in eliciting such testimony and making the statements do not rise to the level of prosecutorial misconduct. Petitioner has not demonstrated that any of the prosecutor's comments and solicitation of witness testimony prejudiced him in a manner requiring reversal. Any error that may have been committed is harmless.

Moreover, law enforcement properly advised Petitioner of his *Miranda* warnings prior to taking statements from him at the scene of his arrest and at the police department. There was an interval of at least 30 minutes between the two statements during which time Petitioner was transported to the police department. Petitioner cannot establish that during this interval of time law enforcement engaged in any act designed to wear down his resistance. His second statement was thus admissible. This Court should affirm the circuit court's decision.

## II. ASSIGNMENTS OF ERROR

Petitioner, by counsel, advances four assignments of error:

1. The Circuit Court erred by repeatedly overruling the objections of the Petitioner to irrelevant testimony concerning the decedent's character by State's witnesses.

2. Plain error is evident from the record in the form of the repeated, varied, blatant, and prejudicial prosecutorial misconduct of the Prosecuting Attorney during both opening and closing argument, as well as by his deliberately soliciting irrelevant and prejudicial testimony from witnesses.

3. The Circuit Court erred by ruling the Petitioner's second statement admissible after he previously invoked his right to remain silent during an earlier custodial interview half an hour before the second one.

4. The Circuit Court erred cumulatively to the Petitioner's prejudice.

(Pet'r Br. 1.)

## III. STATEMENT OF THE CASE

### A. Shooting, Indictment, and Pretrial Motions Hearing

Late one night mid-December 2020, Petitioner fatally shot Dylan Harr in the chest with a handgun. (App. 144.) In June 2021, a Marion County grand jury indicted Petitioner for Murder in the First Degree and Use of a Firearm in the Commission of a Felony. (App. 10–11.) The State filed its notice of intent to use evidence of Petitioner's flight "to show his intent to escape from and avoid prosecution, thereby indicating his guilty conscience and knowledge." (App. 17.) The State explained that in searching for Petitioner, officers located certain items belonging to Petitioner and subsequently located and arrested Petitioner at a Sheetz convenience store in Fairmont. (App. 17.)

The State also sought to determine the admissibility of Petitioner's statements made in the interview room at the Fairmont Police Department. (App. 19.) In turn, Petitioner moved to suppress his statements made upon his arrest prior to the issuance of his *Miranda* warnings, at the scene of his arrest, and at the Fairmont Police Department later that day. (App. 21.) Petitioner asserted that immediately upon being identified at Sheetz, he was placed under arrest on December 16, 2020. (App. 21.) Once Petitioner was in custody, and before he was given his *Miranda* warnings, Officer Hudson asked him certain questions and Petitioner answered. (App. 21.) Petitioner contended these pre-*Mirandized* statements should be suppressed. (App. 21.) Subsequently Petitioner was advised of his *Miranda* warnings outside of Sheetz and Petitioner

invoked his right to remain silent. (App. 21.) Thirty minutes later, he was transported to the Fairmont Police Department and was again advised of his *Miranda* warnings. This time Petitioner waived those rights and agreed to answer questions. (App. 21.) Later on during this second interview, Petitioner invoked his right to counsel and the interview ended. (App. 22.) Petitioner contends that all statements made after his initial invocation of his right to remain silent outside of Sheetz and at the police department should have been suppressed. (App. 22.)

A hearing on Petitioner's motion to suppress statements and the State's notice of intent to use Petitioner's flight was held in July 2022. (App. 212–45.) Patrolman Samuel Murphy of the Fairmont Police Department testified that on December 15, 2020, he responded to a shots fired call. (App. 218.) Murphy was assigned to generally search the area for a suspect described as a taller, skinnier white male with long green hair that was shaved on the sides. (App. 218, 220.) Upon arriving at the Sheetz on Fairmont Avenue, Murphy observed Petitioner and he fit the description so he placed Petitioner in handcuffs and escorted him outside. (App. 220.)

Detective Reed Moran of the Fairmont Police Department arrived at the Sheetz after Petitioner had been arrested and was awaiting a pat down. (App. 226.) Moran initially verbally advised Petitioner of his *Miranda* rights, which warnings were captured on Officer Hudson's bodycam. (App. 226–27.) Petitioner essentially denied his involvement in the incident and subsequently invoked his right to remain silent. (App. 228–29.) He was, therefore, transported to the police department. (App. 227.)

Upon arrival at the police department approximately 30 minutes after his arrest, Detective Moses Elmer Perry advised Petitioner again of his *Miranda* warnings, both orally and in writing. (App. 230–32, 236.) Petitioner signed and initialed the *Miranda* form acknowledging his rights and agreeing to respond to questions in the interview room. (App. 233–34.)

Following the hearing, the trial court took the matter under advisement (App. 182) and issued its ruling on the first day of trial (App. 300–01.) Regarding Petitioner's statements at Sheetz subsequent to his arrest, the trial court excluded all statements following Petitioner's invocation of his right to remain silent. (App. 300–01.) As to Petitioner's statements at the police department, the trial court found that Petitioner signed a waiver of his Miranda rights and, consequently, waived his right to remain silent at the police department. (App. 301.) The trial court reasoned that in the absence of a request for counsel, Petitioner "changed his position, waived his right, and that statement is admissible." (App. 301.) After hearing additional testimony, the trial court also allowed the State to present evidence of Petitioner's flight. (App. 325–26.)

**B. Trial and Post-Trial Motions**

Following a three-day jury trial, Petitioner was convicted of the lesser included offense of Murder in the Second Degree and Use of a Firearm in the Commission of a Felony. (App. 179, 181, 185) Following the guilty verdicts, Petitioner moved for a new trial based on the premise that the weight of the evidence was against the verdict. (App. 188.) Petitioner argued that the witnesses to the murder initially gave limited statements on the day of the incident but presented trial testimony with significantly more detail and specificity. (App. 188.) Petitioner contends that this discrepancy reflected the lack of credibility and, therefore, the witnesses' testimony should have been given no weight by the jury. (App. 188.) Petitioner also argued that the State repeatedly characterized the victim in a favorable light, which was not only irrelevant evidence but "irredeemably tainted the jury's consideration of both the witnesses testifying" and "the totality of the evidence upon which their verdict should have been based." (App. 189.)

Petitioner also moved for post-trial judgment of acquittal, arguing that the evidence was insufficient to support the verdict. (App. 189.) Specifically, he argued that the evidence did not establish that Petitioner caused the victim's death "with malice and intent." (App. 189.)

By Order entered September 21, 2022, the trial court denied Petitioner's post-trial motions, finding that "the totality of the evidence presented in this matter does indeed support the verdicts returned by the jury." (App. 191.) The trial court further found that "the evidence presented to the jury at the trial of this matter is clearly sufficient to sustain convictions of the offenses of which the jury unanimously found [Petitioner] guilty." (App. 191.)

**C. Sentencing**

The trial court sentenced Petitioner to a determinate term of imprisonment of 40 years for the Second Degree Murder conviction and to a concurrent, determinate term of ten years for the Use of a Firearm in Commission of a Felony conviction. (App. 193–94.)

Petitioner appealed.

## IV. SUMMARY OF THE ARGUMENT

Each of Petitioner's assignments of error are without merit. First, Petitioner has failed to demonstrate that the testimonial evidence as to the victim's character was improperly admitted by the trial court. Petitioner initially challenges only two instances of testimonial evidence to which he objected at trial. This evidence was limited in scope and the prosecutor did not dwell upon it during direct examination. Pursuant to the holding in *State v. Wade*, 200 W.Va. 637, 400 S.E.2d 724 (1997), any error in eliciting testimony about the victim's son was harmless. The State presented eyewitness testimony that Petitioner shot and killed Dylan and further presented evidence of Petitioner's flight that was probative of his guilt. Moreover, Petitioner presented a defense of accident at trial, thereby conceding that he shot Dylan. This evidence demonstrates that

the jury would have reached the same verdict of Second Degree Murder in the absence of the character evidence.

Petitioner's challenges to the prosecutor's opening statements and closing arguments should not be reviewed by this Court because Petitioner failed to assert a contemporaneous objection at trial. *See* Syl. Pt. 3, *State v. Robert Scott R., Jr.*, 233 W.Va. 12, 20, 754 S.E.2d 588, 596 (2014). Notwithstanding Petitioner's waiver of this claim, his contention is without merit because the complained-of instances of when the prosecutor mentioned the victim's character were minimal and did not prejudice Petitioner. The trial court did not abuse its discretion in admitting the testimonial evidence or the prosecutor's statements.

Second, Petitioner has failed to demonstrate that any of the prosecutor's comments or his solicitation of witness testimony constituted prosecutorial misconduct. Neither the testimonial evidence nor the comments significantly prejudiced Petitioner. Moreover, the weight of the evidence, in the absence of such comments, was strong and consisted primarily of competent eyewitness testimony and evidence of Petitioner's flight, combined with Petitioner's defense that he did not shoot the victim. Petitioner's claim of prosecutorial misconduct is without merit.

Third, law enforcement properly advised Petitioner of his *Miranda* warnings prior to taking statements from him at the scene of his arrest and at the police department. The 30-minute interval between statements consisted primarily of Petitioner's transport to the police department and not of any law enforcement acts designed to wear down Petitioner's resistance. Petitioner competently waived his *Miranda* warnings and his statement was properly admitted.

Finally, Petitioner has failed to demonstrate that any error prejudiced him resulting in an unfair trial. His claim of cumulative error, therefore, is without merit. Petitioner's conviction and sentence should be affirmed.

## V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent disagrees with Petitioner that oral argument is necessary and asserts that 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).

## VI. ARGUMENT

### A. The trial court did not abuse its discretion in admitting testimony evidence related to the victim or allowing the prosecutor's statements regarding the victim's son. To the extent that the testimony and statements are construed as error, such error is harmless as the jury would have reached the same verdict in the absence of such evidence and statements.

#### 1. The trial court did not abuse its discretion in admitting testimony related to the victim.

It is well-established in this Court that "[a] trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." *State v. Combs*, 247 W.Va. 1, 875 S.E.2d 139, 145 (2022) (citing Syl. Pt. 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998)). The "legal analysis underlying a trial court's decision" is reviewed *de novo*. *State v. Guthrie*, 194 W.Va. 657, 680, 461 S.E.2d 163, 186 (1995).

Petitioner argues that the trial court's admission of the victim's character evidence was irrelevant, prejudicial, and intended to inflame the jury. (Pet'r Br. 17–22.) In support of his argument, Petitioner, relies on *State v. Wade* for the proposition that evidence of a victim's family members, if not relevant to any issue in the case, is inadmissible "for the sole purpose of gaining sympathy from the jury." 200 W.Va. 637, 400 S.E.2d 724 (1997).

In *Wade*, the State admitted testimony "that the victim had a twelve-year-old son, a fact which bore absolutely no relation to the issues involved in th[e] case." *Id.* at 652, 400 S.E.2d at 739. The Court found that because the evidence was "not relevant to any fact of consequence to

this case," the evidence was admitted in error. *Id.* "Evidence that a homicide victim was survived by a spouse or children is generally considered inadmissible in a homicide prosecution where it is irrelevant to any issue in the case and is presented for the sole purpose of gaining sympathy from the jury." Syl. Pt. 10, *Wade* (quoting Syl. pt. 5, in part, *State v. Wheeler,* 187 W.Va. 379, 419 S.E.2d 447 (1992)).

Despite the State's improper references to the victim's twelve-year-old son, the *Wade* Court applied a harmless error analysis: "A judgment will not be reversed because of the admission of improper or irrelevant evidence when it is clear that the verdict of the jury could not have been affected thereby." 200 W.Va. at 652, 400 S.E.2d at 739 (citations omitted); *see also Wheeler*, 187 W.Va. at 389, 419 S.E.2d at 457 (discussing standards for relevance and prejudice).

The *Wade* Court acknowledged that the State elicited the improper testimony but "did not dwell on that testimony" and the witness simply stated the victim had a child. *Wade*, 200 W.Va. at 652, 400 S.E.2d at 739. Finding that substantial evidence of eyewitness testimony was presented at trial, the Court concluded the jury would have reached the same verdict in the absence of the testimony and, therefore, any error was harmless. *Id.* "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)." *State v. Marple*, 197 W.Va. 47, 53, 475 S.E.2d 47, 53 (1996); *see also People v. Martinez*, 734 P.2d 650, 652 (Colo. App. 1986) (finding error in permitting references to murder victim's pregnancy was harmless where the "references . . . were brief, [] no attempt was made by the prosecution to emphasize this evidence," "there was overwhelming evidence" of "defendant's guilt," and "*the jury found that defendant was guilty of second degree murder, not of*

*first degree murder, the original charge*") (emphasis added); *Eckels v. State*, 153 Tex. Crim. 402, 220 S.W.2d 175 (1949) (finding no reversible error where challenged testimony about homicide victim having children went unchallenged elsewhere in the proceedings).

In the instant case, Petitioner contends that the trial court erred "by *repeatedly* overruling the objections of the Petitioner to irrelevant testimony" regarding the victim's character by the State's witnesses. (Pet'r Br. 16) (emphasis added). Despite his claim of "repeated" objections, Petitioner challenges only *two* objections to a *small* portion of testimony by two State witnesses: Gage Starr's testimony that Dylan always took care of his son and included his friends when playing with his son (App. 349) and Russell Critchfield's testimony that Dylan was "a brother from another mother" and that he was Dylan's son's godfather (App. 613). Similar to *Wade*, the State here did not dwell on this witness testimony regarding Dylan or Dylan's son. Indeed, Gage's statement comprised no more than four lines of a 20-page direct examination transcript. (*See generally*, App 346–365.) Likewise, Russell's challenged testimony was no more than four lines in a 27-page direct examination transcript. (*See generally*, App. 587–613.) The grand total of material subject to Petitioner's "repeated" objections, then, occupied—at the very most—eight lines in 47 pages of direct examination transcripts.

Notwithstanding the relevancy of this testimonial evidence, any such error in admitting the testimony is harmless. As in *Wade*, the State presented competent eyewitness testimony at trial from Gage Starr (App. 354–55) and Evan McElroy (App. 639). Evan testified that he watched "Dylan walk up to [Petitioner] and try to talk to him, and he put his arm around him. And then [Petitioner] turned and, like, shot him through his coat pocket." (App. 639.) Similarly, Gage testified that he saw Dylan with "his arm around [Petitioner]. And it all happened so fast. I just seen [sic] him turn and then I hear pow." (App. 355.) Moreover, the State presented evidence of

Petitioner's flight from the scene of the shooting that was probative of his guilt. (App. 476–87.) Petitioner, therefore, did not deny shooting Dylan. Rather, he maintained that the shooting was an accident. (App. 702–03.) This evidence demonstrates that the jury would have reached the same verdict of Second Degree Murder in the absence of the testimony referencing Dylan and his son. Any error committed by the State was thus harmless.

**2. Petitioner has waived his right to challenge the prosecutor's opening statements due to his failure to make a contemporaneous objection to the statements at trial. Notwithstanding Petitioner's waiver, Petitioner is not entitled to relief as any error the prosecutor may have committed in discussing Dylan or Dylan's son during opening statements was harmless error.**

Petitioner contends that the prosecutor willfully introduced highly prejudicial and inflammatory statements regarding Dylan and Dylan's son during opening statements and closing arguments. (Pet'r Br. 19, 23.) Petitioner, however, focuses only on the prosecutor's opening statements and does not identify any specific statements in the prosecutor's closing arguments that were made in error. This Court has long held that "[f]ailure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court." Syl. Pt. 3, *State v. Robert Scott R., Jr.*, 233 W.Va. 12, 20, 754 S.E.2d 588, 596 (2014) (citation omitted); *see also State v. Preston*, No. 15-0210, 2015 WL 7628816, at *4 (W.Va. Supreme Court, Nov. 23, 2015) (memorandum decision) (declining to address the petitioner's claim that the prosecutor improperly referenced extrinsic evidence during closing arguments because the petitioner failed to object to the statements during trial). Petitioner argues that the State made improper comments as to the character of the victim during opening statements. (Pet'r Br. 17–22.) Petitioner, however, failed to make a contemporaneous objection to the prosecutor's statements at trial. Consequently, Petitioner has waived his right to raise the issue on direct appeal.

Even if Petitioner had properly preserved the issue for appeal, he is not entitled to the relief he requests. The State's references to Dylan and Dylan's son, as cited by Petitioner (Pet'r Br. 19–20), were limited and were not mentioned extensively throughout the opening statements. *See Wade*, 200 W.Va. at 652, 400 S.E.2d at 739. Petitioner challenges only two paragraphs of the State's opening statement, wherein the prosecutor briefly referenced Dylan's son. (App. 335–37.) These two paragraphs represented only a small portion of the State's opening statement which consisted of seven pages of the transcript, and certainly were not the last thoughts left with the jury. (App. 333–39.)

Assuming the prosecutor's statements were improper, any error in allowing the statements was harmless. As discussed above, the eyewitness testimony combined with the evidence of Petitioner's flight and his admission to the shooting but as an accident, all overwhelmingly support Petitioner's guilt. Any error committed by the State was thus harmless.

**B. The prosecutor did not engage in misconduct by eliciting certain testimony and in making opening statements and closing arguments related to the victim.**

Next, Petitioner maintains that the State committed prosecutorial misconduct by offering certain comments in opening statements, making other statements in closing arguments, and in eliciting testimony irrelevant and prejudicial testimony from witnesses. (Pet'r Br. 23–30.) Many of these arguments concern the same kinds of evidence and comments to which Petitioner objects in his first assignment of error.

"[A]llegations of prosecutorial misconduct are based on notions of due process." *State v. Guthrie*, 194 W.Va. 657, 677 n.25, 461 S.E.2d 163, 183 n.25 (1995). "In determining whether a statement made or evidence introduced by the prosecution represents an instance of misconduct, [this Court] first look[s] at the statement or evidence in isolation and decide[s] if it is improper." *Bowers v. Ames*, No. 20-0625, 2022 WL 123507, at *15 (W. Va. Jan. 12, 2022) (memorandum

decision) (quoting *Guthrie*, 194 W.Va. at 677 n.25, 461 S.E.2d at 183 n.25). If the statement is improper, then the Court determines whether the statement or evidence rendered the trial unfair. *Id.* In performing this evaluation, several factors are considered:

> (1) The nature and seriousness of the misconduct; (2) the extent to which the statement or evidence was invited by the defense; (3) whether the statement or evidence was isolated or extensive; (4) the extent to which any prejudice was ameliorated by jury instructions; (5) the defense's opportunity to counter the prejudice; (6) whether the statement or evidence was deliberately placed before the jury to divert attention to irrelevant and improper matters; and (7) the sufficiency of the evidence supporting the conviction.

*Id.*; *see also* Syl. Pt. 6, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995) ("Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.").

**1. The prosecutor appropriately introduced evidence of the victim's character under Rule 404(a)(2)(C) to rebut Petitioner's argument that the victim was the initial aggressor.**

Petitioner first contends that the State presented inadmissible and irrelevant character evidence of the victim from certain witnesses to describe the relationships between Dylan and his friends (App. 347–49, 394–96, 596, 612–13). (Pet'r Br. 23–30.) In particular, Gage, Dylan's best friend, testified that he viewed Dylan as a big brother, a jokester, and a caring person always ensuring everyone was all right. (App. 347–48.) McKenzie McCullough, another of Dylan's friends, testified that Dylan was her family and she considered him as one of her brothers. (App. 394.) Similarly, Russell, who was McKenzie's roommate and Dylan's friend, testified that Dylan was "a pretty cool dude and he was chill and wouldn't hurt a fly unless he absolutely had to."

(App. 596.) Russell further testified that Dylan "was a brother from another mother" and that they "were tight as could be, to the point to where he literally told [him] to call his mom "mom." (App. 613.)

Many of the State's comments regarding Dylan's family and friends was admissible under Rule 404(a)(2)(C) of the West Virginia Rules of Evidence. While evidence of a person's character or trait "to prove that on a particular occasion the person acted in accordance with the character or trait" is inadmissible, *see* W.Va. R. Evid. 404(a)(1), Rule 404(a)(2)(C) provides an exception in a homicide case and allows the State to "offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor." W.Va. R. Evid. 404(a)(2)(C). Petitioner correctly points out that he presented a defense of accident at trial. Counsel asserted during opening statements and closing arguments that the shooting of Dylan was an accident. (App. 702–05.) During opening statements, counsel asserted that eyewitness testimony would reveal that Dylan approached Petitioner, "put his arm around [Petitioner's] shoulder, spun him around, and they heard a gunshot. [Petitioner] left the area." (App. 342.) In closing argument, counsel argued that the State failed to prove beyond a reasonable doubt that "this could not have been Dylan laying hands on [Petitioner], [Petitioner] being surprised, turning around, and a shot occurring because of the way Dylan was going after David." (App. 702–03.) In fact, counsel asserted "Dylan's death was unintentional. It was unplanned." (App. 704.) Thus, although Petitioner maintained that the shooting of Dylan was an accident, counsel argued that Dylan was the one who first placed hands on Petitioner prior to him shooting Dylan.

This Court, in Syllabus Point 2 of *State v. Neuman*, held: "It is improper for the prosecution to offer evidence of the victim's peacefulness until after the defense has offered evidence which either attacks a pertinent character trait of the victim or tends to show that the victim was the first

aggressor." 179 W.Va. 580, 371 S.E.2d 77 (1988). The State thus introduced evidence of Dylan's character in response to Petitioner affirmatively placing Dylan's character for peacefulness in issue. Although Petitioner contends that he did not place Dylan's character for peacefulness in issue via a defense of self-defense or a defense of provocation, he directly placed such character at issue by arguing that Dylan was the initial aggressor. The State, therefore, was entitled, under Rule 404(a)(2)(C), to admit evidence of the victim's character to rebut counsel's argument that Dylan was the initial aggressor.

Moreover, as established above in relation to his first assignment of error, Petitioner has not established that the testimonial evidence complained of prejudiced him. The testimonial comments were very limited comparatively. The State presented the testimony of sixteen witnesses, including five of Dylan's friends, eight law enforcement officers, two expert witnesses, and Petitioner's former girlfriend, comprising approximately 320 pages of the trial transcript over the course of a three-day trial. (App. 345–665.) Moreover, the strength of the case against Petitioner, independent of the evidence, was quite strong and consisted of competent eyewitness testimony and evidence of Petitioner's flight which was indicative of his guilt. Petitioner does not dispute that the gun was discharged nor does he dispute that he was involved in it. Rather, Petitioner's argument focused along the lines of intent when he asserted the defense of accident. Based on the foregoing, the trial court did not abuse its discretion in admitting the prosecutor's testimonial evidence and Petitioner was not unfairly prejudiced by its admission.

**2. The prosecutor's complained-of statements made during opening and closing arguments do not rise to the level of prosecutorial misconduct.**

Petitioner next contends that the prosecutor improperly made "repeated, varied, blatant, and prejudicial" opening statements and closing arguments. (Pet'r Br. 23–30.) Consistent with Petitioner's previous assignment of error, counsel did not make a contemporaneous objection to

the prosecutor's opening statements and closing arguments. Petitioner has waived his right to review of these claims. Nevertheless, for the sake of argument, the State will consider the merits of Petitioner's claims. *See Robert Scott R., Jr.*, 233 W.Va. at 20, 754 S.E.2d at 596; *Nelson v. Ballard*, No. 11-1487, 2013 WL 513270, at *11 (W.Va. Feb. 11, 2013) ("Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court").

"[P]rosecutors are entitled to great latitude in closing arguments and it is only where improper remarks are clearly prejudicial or result in manifest injustice that reversal is proper." *State v. Hardin*, No. 21-0034, 2022 WL 163888, at *4–5 (W. Va. Jan. 18, 2022) (memorandum decision) (internal quotations and citations omitted). None of the statements complained of by Petitioner rise to the level required to reverse Petitioner's conviction.

Petitioner first alleges that the aforementioned prosecutorial statements during opening statements and closing arguments regarding the one-year-old son Dylan left behind were improper. (Pet'r Br. 25.) During closing arguments, Petitioner alleges that the State likewise improperly focused on Dylan's character and his family and the devastating impact upon them (App. 683–85). (Pet'r Br. 25–26.) As established above, Petitioner has not demonstrated that the prosecutor's comments complained of prejudiced him to an extent that requires reversal. The prosecutor's direct comments were limited in the opening statements and closing arguments. The prosecutor's opening statement spanned seven pages of transcript, with the complained-of statements comprising only one page. (App. 333–39.) Similarly, the prosecutor's closing arguments spanned twenty-two pages, including rebuttal. (App. 683–96, 705–13.)

Moreover, the strength of the case against Petitioner, independent of the evidence, was quite strong and consisted of competent eyewitness testimony. Petitioner does not dispute that the gun was discharged nor does he dispute that he was involved in it. Rather, Petitioner's argument focused along the lines of intent when he asserted the defense of accident. Moreover, there is no indication that the prosecutor's comments were unrelated to the case or intended to divert attention.

Petitioner also argues that the State improperly argued during closing arguments that the jury has "the duty and obligation of pursuing at all costs the truth," (App. 691), that the jury must not let everyone down, and that the jury would "do the right thing" (App. 695). (Pet'r Br. 27.) Moreover, Petitioner avers that the prosecutor told the jury one of the young men who testified "was honest to a fault, and he was so emotional." (Pet'r Br. 27.)

This Court has held that the prosecuting attorney "occupies a quasi-judicial position in the trial of a criminal case" and "is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial." *State v. Hamrick*, 216 W.Va. 477, 481, 607 S.E.2d 806, 810 (2004). Moreover, a prosecutor may not "assert his personal opinion as to the . . . credibility of a witness." Syl. Pt. 3, *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (1981).

Even assuming that these comments were improper, the comments were nevertheless not so pervasive as to mislead the jury or prejudice Petitioner. Moreover, the comments were somewhat isolated in that they were confined to closing arguments. Most importantly though, absent the prosecutor's comments, the strength of competent proof established Petitioner's guilt. As discussed above, Petitioner essentially admitted to shooting Dylan, which resulted in his death. He argued that the shooting, however, was an accident. The eyewitness testimony established that Petitioner was aggravated when he left the house and that he turned to Dylan before shooting him

through the pocket of Petitioner's sweatshirt/jacket. Such actions support the jury's finding that Petitioner's conduct was not accidental. Moreover, there is no evidence to suggest that the prosecutor deliberately placed the comments "before the jury to divert their attention to extraneous matters." If anything, the prosecutor's comments focused the jury on the witness testimony at trial relative to Petitioner's guilt. When considering all of the comments complained of, Petitioner cannot meet his burden in showing that he was prejudiced to such an extent that requires reversal of his conviction.

**C. The trial court properly denied Petitioner's motion to suppress his second statement.**

In reviewing a trial court's ruling on a motion to suppress, this Court employs a two-tiered standard of review. First, the trial court's findings of fact are reviewed under "the clearly erroneous standard." *State v. Deem*, 243 W.Va. 671, 849 S.E.2d 918 (2020). Second, the trial court's ultimate conclusion as to the constitutionality of the law enforcement action and questions of law are reviewed *de novo*. *Id.*; s*ee also State v. Jones*, 216 W.Va. 392, 395, 607 S.E.2d 498, 501 (2004). A trial court's decision under the clearly erroneous standard "ordinarily will be affirmed unless it is unsupported by substantial evidence; based on an erroneous interpretation of applicable law; or, in light of the entire record, this Court is left with a firm and definitive conviction that a mistake has been made." *State v. Lilly*, 194 W.Va. 595, 600, 461 S.E.2d 101, 106 (1995) (internal citation and footnote omitted). The Court "should construe all facts in the light most favorable to the State" and give "particular deference" to the trial court's findings "because it had the opportunity to observe the witnesses and to hear testimony on the issues." Syl. Pt. 1, in part, *Deem*, 243 W.Va. 671, 849 S.E.2d 918 (quoting Syl. Pt. 1, in part, *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996)).

Petitioner argues that the trial court erred in admitting his second statement after he previously invoked his right to remain silent during an earlier custodial interview 30 minutes before the second interview. (Pet'r Br. 30–33.) Relying on *Michigan v. Mosley*, 423 U.S. 96 (1975), and *State v. Rissler*, 165 W.Va. 640, 270 S.E.2d 778 (1980), Petitioner contends that the passage of 30 minutes did not render void his prior invocation of his right to remain silent. (Pet'r Br. 31–33.)

In *Mosley*, the United States Supreme Court held that *Miranda* does not "create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent." 423 U.S. at 102–03. Rather, "[t]he critical safeguard" set forth in *Miranda* is a person's "option to terminate questioning" through which "he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." *Id.* at 103–04. Consequently, "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" *Id.* at 104 (internal citation omitted). Mosley waived his *Miranda* warnings but later stated he did not want to discuss his crimes of robbery and the interrogation immediately ceased. *Id.* More than two hours later, Mosley was questioned by another law enforcement officer at another location to discuss an unrelated murder. *Id.* In finding Petitioner's statements from the second interview admissible, the Court explained that law enforcement "immediately ceased the [first] interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation." *Id.* at 106.

Petitioner's reliance on *Rissler* is misplaced as the facts of that case, as Petitioner states (Pet'r Br. 33), are not analogous. The focus in *Rissler* was on whether law enforcement "scrupulously" honored the defendant's right to remain silent without any mention of a second interview after any passage of time. Syl. Pt. 3, in part, *State v. Rissler*, 165 W.Va. 640, 270 S.E.2d 778 (1980).

Here, it is undisputed that Petitioner was in custody at the time of both statements. *See State v. Campbell*, 246 W.Va. 230, 237, 868 S.E.2d 444, 451 (2022) ("It is well established that Miranda rights apply only to custodial interrogations"). The issue is whether "the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." *Mosley*, 423 U.S. at 105–06.

A "significant period of time" was defined in *Mosley* as "a function of to what degree the police 'persist[ed] in repeated efforts to wear down [the suspect's] resistance and make him change his mind.'" *Mosley*, 423 U.S. at 105–06. "A significant period of time between interrogations does not require a durational minimum." *Weeks v. Angelone*, 176 F.3d 249 (4th Cir. 1999). After law enforcement acknowledged Petitioner's invocation of his right to remain silent, Petitioner was transported to the police department. Upon arrival, Petitioner was interviewed by a different law enforcement officer approximately 30 minutes after his invoked his right to remain silent. Petitioner was again advised of his *Miranda* warnings and this time, was provided the warnings in writing which he initialed and signed indicating he waived his right to remain silent and to an attorney. Detective Perry testified that he was unaware of Petitioner's prior invocation of his right to remain silent but acknowledged Petitioner's then waiver of such right. *See United States v. Pettiford*, 295 F.Supp.2d 552, 563 (D. Md. 2003) (finding that to be a significant period of time,

"the interval between interrogations need not last a certain period of time" and that an hour interval did not wear down petitioner's resistance).

There is no credible evidence of record that during the 30-minute interval, law enforcement engaged in any acts designed to wear down Petitioner's resistance. Rather, as in *Mosley*, law enforcement officers here gave full "*Miranda* warnings" to Petitioner at the start of each questioning, both at the scene of his arrest and at the police department (App. 21, 226–29). *See Mosley*, 423 U.S. at 106–07. Petitioner was subjected to only a brief period of initial questioning and questioning was suspended for approximately thirty minutes when he was being transported to the police department (App. 21–22, 230–32, 236). *Id.* Upon arriving at the police department, an officer unaffiliated with the questioning of Petitioner at the scene of his arrest, advised Petitioner of his *Miranda* warnings again, specifically advising him he had the right to remain silent and had the right to counsel—far from anything, even resembling a "failure . . . to give any warnings whatever to the person in their custody before embarking on an intense and prolonged interrogation of him." *Mosley*, 423 U.S. at 107. Despite Petitioner's prior invocation of his right to remain silent, he opted to waive his rights and speak with the officer. Under the totality of the circumstances, Petitioner's second statement was not the result of an involuntary waiver. *See People v. Quezada*, 731 P.2d 730, 735 (Colo. 1987) (finding admissible the petitioner's statements made during a second interrogation following a 45-minute break after the petitioner invoked her right to cut off questioning in the first interrogation regarding the same crime).

**D. Petitioner has not demonstrated the presence of cumulative error.**

Finally, Petitioner argues that he has "identified numerous errors in the preceding argument sections" that constitute cumulative error. (Pet'r Br. 33.) In Syllabus Point 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972), this Court held, "Where 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." (emphasis added). The "cumulative error doctrine is applicable only when 'numerous' errors have been found." *State v. Tyler G.*, 236 W. Va. 152, 165–66, 778 S.E.2d 601, 614–15 (2015) (citing *State v. McKinley,* 234 W.Va. 143, 167 n. 22, 764 S.E.2d 303, 327 n. 22 (2014) ("In order to invoke the cumulative error doctrine, there must be more than one harmless error. Mr. McKinley cannot rely on this doctrine because only one harmless error was found in this case."); *State v. Cook,* 228 W.Va. 563, 572, 723 S.E.2d 388, 397 (2010) ("While the State concedes that one of the four enumerated evidentiary rulings was error, it argues that the other evidentiary rulings relied upon by Appellant were not an abuse of the trial court's discretion. We agree. Accordingly, we do not find cumulative error justifying a reversal of Appellant's conviction.")).

Petitioner has not demonstrated the existence of any error that prevented him from receiving a fair trial, let alone numerous errors constituting cumulative error. As demonstrated above, the State presented competent eyewitness testimony at trial from Gage (App. 354–55) and Evan (App. 639). Evan testified that he watched "Dylan walk up to [Petitioner] and try to talk to him, and he put his arm around him. And then [Petitioner] turned and, like, shot him through his coat pocket." (App. 639.) Similarly, Gage testified that he saw Dylan with "his arm around [Petitioner]. And it all happened so fast. I just seen [sic] him turn and then I hear pow." (App. 355.) Moreover, the State presented evidence of Petitioner's flight from the scene of the shooting that was probative of his guilt. (App. 476–87.) Petitioner did not deny shooting Dylan and maintained that the shooting was an accident. (App. 702–03.) This evidence demonstrates that the jury would

have reached the same verdict of Second Degree Murder in the absence of any errors that may have been committed as alleged by Petitioner. Any error committed by the State was thus harmless.

## VII. CONCLUSION

Based on the foregoing, Respondent respectfully requests that this Court affirm Petitioner's conviction and sentence.

Respectfully Submitted,

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Docket No. 22-822**

**STATE OF WEST VIRGINIA,**

*Respondent*,

v.

**DAVID HUNTER LEWIS,**

*Petitioner*.

## CERTIFICATE OF SERVICE

I, Mary Beth Niday, do hereby certify that on the 3rd day of April, 2023, I served a true and accurate copy of the foregoing **Respondent's Brief** upon the below-listed individuals via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure:

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