IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Docket No. 23-13

STATE OF WEST VIRGINIA,

Respondent,

v.

BRIAN ALLEN MERCHANT JONES,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the December 9, 2022, Order
Circuit Court of Marion County
Case No. 21-F-138

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INTRODUCTION

Respondent State of West Virginia responds to Brian Jones' ("Petitioner") Brief filed in the above-styled appeal. Petitioner, who pled guilty to shooting and killing his best friend with a handgun he illegally possessed, then went to trial and was convicted of conspiracy to deliver methamphetamine and use and presentation of a firearm in the commission of a felony by a jury. Petitioner's argument that the court allowed inadmissible hearsay is baseless, as the statements were admissible under several provisions of the Rules of Evidence. Likewise, Petitioner was not entitled to a mistrial as the flight evidence complained of arose from rebuttal of Petitioner's arguments in his closing. Petitioner was not entitled to a new trial or judgment of acquittal as the evidence was sufficient to sustain his convictions, and because the evidence of marijuana sales was intrinsic. As Petitioner has failed to demonstrate the existence of reversible error, the circuit court's order should be affirmed.

ASSIGNMENTS OF ERROR

Petitioner argues four assignments of error:

1. The circuit court erred in allowing inadmissible hearsay evidence at trial.
2. The circuit court erred by not granting Petitioner's requests for a mistrial due to the State's introduction of inadmissible flight evidence during its closing arguments.
3. The circuit court erred by not granting Petitioner's motion for a new trial.
4. The circuit court erred by not granting Petitioner's motions for judgment of acquittal due to insufficient evidence presented by the State at trial.

Pet'r's Br. 1.

STATEMENT OF THE CASE

After shooting and killing his lifelong friend while the two planned their next methamphetamine delivery, Petitioner was indicted on four counts: one count of conspiracy to commit a felony controlled substances with Zackerie Howser wherein Petitioner and Howser conspired to deliver methamphetamine; one count of use of a firearm in the commission of a felony, alleging Petitioner used or presented a .22 handgun in the commission of conspiracy to commit felony controlled substances; possession of a firearm by a prohibited person based on his prior unlawful assault conviction; and involuntary manslaughter based on the shooting death of Howser. App. 13-15.

Trial began on April 6, 2022. App. 48. After voir dire, Petitioner pled guilty to possession of a firearm by a prohibited person and involuntary manslaughter. App. 17-18, 93. The court completed the plea colloquy with Petitioner and accepted his guilty plea. App. 94-106. Petitioner went to trial on the other two charges.

Detective Zachary Buck testified that he and Detective Moran were first on the scene when Howser was shot. App. 126. Howser was found with a gunshot wound to his head and was breathing but unresponsive. App. 128. A cell phone was found by Howser's feet plugged into a charging cord. App. 132, 135.

Howser's mother Chrissy Riffle testified that Howser was 21 at the time of his death, and that he lived with her. App. 139. On the morning of September 15, 2020, Riffle was awakened by Howser's movement in the home and got up to speak with him. App. 140-41. She witnessed him FaceTiming Shauna Wine, his girlfriend. App. 141-42. Riffle witnessed Howser sending

Facebook[1] messages and he then mentioned "a thousand dollars" which she initially thought referred to a marijuana sale, but Howser informed her it was for "ice." App. 145. Riffle could see that the messages were from someone named Amber and grew concerned about Amber's discussion with Howser based on the high price. App. 147. Riffle admitted that she knew her son used drugs and alcohol. App. 148. She also knew that he was selling marijuana and had been for several years. App. 148-49. Riffle testified of her concern when she realized Howser was selling drugs other than marijuana. App. 151. Riffle witnessed the price negotiation between Howser and Amber. App. 151.

Riffle tried to talk Howser into staying home that evening because of her concern, but Howser assured her he would be safe with his "boy" Taz, which is Petitioner's nickname. App. 152. Riffle knew Petitioner because he and Howser had gone to school together since they were approximately eight years old. App. 150.

Riffle was awoken by a loud bang, and when she went into the hallway she was met by Petitioner who told her, "[t]his nigga done shot himself." App. 153. She went into the bedroom and found Howser unresponsive but breathing, and was in a seated position. App. 154. Riffle called 911 and EMS arrived. App. 154-55.

Roy "Todd" Riffle, Howser's stepfather, testified that he has known Petitioner since Petitioner was very young. App. 162. Todd knew Howser and Petitioner had "sold a little bit of weed together" but did not know if they were selling other drugs. App. 163. On the night in question, after his wife woke him to tell him Howser was injured he heard Petitioner screaming that Howser had shot himself. App. 164.

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[1] The Facebook messages were entered into evidence but are not part of the appellate record.

Amber Pare testified that she was using drugs in 2020 and was specifically using meth and heroin at that time. App. 167-69. She had purchased methamphetamine from Howser, and on the night he was shot she was supposed to be getting an ounce of meth from him. App. 170-71. She had been messaging him on Facebook that evening and had spoken to him on the phone. App. 171. She did not know where he was getting the meth to sell to her. App. 172.

Pare and Shauna Wine, Howser's girlfriend, were good friends, and just after Howser's death she was with Wine when Petitioner called Wine to discuss where he was hiding. App. 175. Pare did not know Petitioner. App. 177.

Shauna Wine testified that she, too, has been addicted to drugs in the past. App. 182. She knew Howser was selling marijuana but did not know he was selling anything else. App. 184. Wine was asked if she knew Petitioner and Howser were selling marijuana together, to which Petitioner objected since the indictment charged conspiracy to sell meth. App. 186. The objection was overruled because the State was pointing out that Wine did not know about the meth conspiracy between Petitioner and Howser. App. 187. Wine testified that until Howser died she did not know that he was selling meth, and only learned that he was selling meth from Ware. App. 187-88. She did not know if he sold meth with Petitioner. App. 193.

Although Wine did not know about the meth sale, she did know that Howser and Petitioner were going to meet with Pare on the night in question, then come to Wine's house. App. 188. This knowledge came from several telephone calls between Wine and Howser. App. 188-89. After Howser was shot, Wine received a call from Petitioner "freaking out" and apologizing for Howser being shot. App. 190-91.

Detective William Stewart testified about the download obtained from Howser's phone after the shooting. App. 199. The messages from Howser's Facebook were admitted as evidence.

App. 201. The messages with Pare were discovered at that time indicating that she and Howser were involved in drug transactions on the night in question. App. 204-06. Howser noted that he did not have the product but that a friend of his did. App. 206. Call logs on the phone show that Pare messaged Howser asking if his supplier would take $700 for the drugs, and four minutes later Howser called Petitioner, but Petitioner did not answer. App. 211. Howser then told Pare he could not reduce the price. App. 211. During this same time period, Howser was communicating with another man about a drug sale but that sale actually referenced Petitioner's name. App. 213. In the conversation with the other person, C.J. Whitecotton, one message directs Whitecotton to pull into a parking lot and Howser says he will "walk down and get in, me and Taz." App. 225. Another message noted that "[i]t's Taz's shit." App. 227. Det. Stewart testified that there was no evidence that anyone was with Petitioner at the time of Howser's death. App. 228. Further, the investigation showed that in Howser's last call to Pare he indicated the person with the drugs was with him at that time, and the only person with him was Petitioner. App. 229.

At the close of the State's case, the court noted that it was customary for the defense to move for judgment of acquittal and noted he felt that the evidence was sufficient. App. 233. Petitioner moved for judgment of acquittal arguing that the State did not make a prima facie case of an agreement to commit a drug felony or an overt act in connection with that felony. App. 282. As to the gun charge, Petitioner argued that the gun was possessed but never actually used in the conspiracy. App. 282. Petitioner offered no evidence. App. 234. Petitioner was found guilty of both remaining offenses. App. 22, 284.

Petitioner filed post-trial motions seeking acquittal or a new trial, arguing that there was insufficient evidence, that the State introduced inadmissible evidence at trial, and that the court erred in failing to grant a mistrial. App. 26. Petitioner argued there was no evidence at all of the

use or presentation of a firearm during the commission of a felony, as any use or presentation of the gun was not "in furtherance of a felony." App. 27. The inadmissible hearsay claim centered on hearsay accounts and evidence Petitioner claimed was prohibited by Rule 404(b) of an alleged drug conspiracy. App. 27. Petitioner also claims inadmissible evidence of a prior marijuana distribution conspiracy was entered. App. 28. Petitioner alleges introduction of flight evidence by the prosecutor after the evidence was deemed inadmissible, which should have caused a mistrial. App. 28-29.

At the motions hearing, Petitioner argued a lack of evidence to support the conviction on the use of a firearm charge, and that the use and presentation of a firearm during the commission of a felony does not apply to co-conspirators who may have been in the process of conspiring. App. 291-92. Petitioner argued the gun must be presented during the active commission of a felony in furtherance of the conspiracy. App. 292, 298. Petitioner admitted he had no authority for this argument. App. 292. Petitioner also complained about certain evidentiary rulings, including the admission of "inadmissible hearsay evidence" and the use of flight evidence. App. 293. The State responded in opposition to Petitioner's motions. App. 294-97. The court denied the motions for the reasons enunciated by the State, and noted that the evidence was not prejudicial. App. 300. The post-trial motions were denied by order entered on September 23, 2022. App. 32-33.

A recidivist information was filed against Petitioner in June 2022 based on his prior felony. App. 35. Petitioner pled guilty to this Information. App. 37, 305-21. Petitioner was sentenced on all of his criminal convictions in December 2022 as follows: fifteen years of incarceration for conspiracy to commit felony controlled substances offenses[2]; ten years of incarceration for use of a firearm in the commission of a felony, to run consecutively to the first sentence; five years of

[2] This provision was enhanced by Petitioner's recidivist conviction. App. 38, 44.

incarceration for possession of a firearm by a prohibited person, to run concurrently to the second sentence; and, one year in jail for the manslaughter misdemeanor conviction, to be served consecutively to all other counts. App. 38. Petitioner now appeals.

SUMMARY OF THE ARGUMENT

The lower court did not abuse its discretion in denying the motions for mistrial, judgment of acquittal, and new trial. The statements of Howser that Petitioner qualified as inadmissible hearsay were admissible under several provisions of the Rules of Evidence. The evidence of prior marijuana sales was admissible as intrinsic evidence.

Likewise, Petitioner was not entitled to a mistrial as the flight evidence complained of arose from rebuttal of Petitioner's arguments in his closing. Petitioner was not entitled to a new trial or judgment of acquittal as the evidence was sufficient to sustain his convictions and Petitioner's interpretation of West Virginia Code § 61-7-15A tries to create standards which do not exist in the statute or any interpretation thereof.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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.

ARGUMENT

A. Standard of review

Petitioner makes several arguments requiring differing standards of review. As to his evidentiary claims, "an interpretation of the West Virginia Rules of Evidence presents a question of law subject to de novo review." *State v. Sutphin,* 195 W. Va. 551, 560, 466 S.E.2d 402, 411 (1995). As to testimony, a ruling of the trial court "is reviewed for an abuse of discretion, 'but to the extent the [circuit] court's ruling turns on an interpretation of a [West Virginia] Rule of

Evidence our review is plenary.'" *Id.* (citations and quotations omitted). Further, "[r]ulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." Syl. Pt. 1, *State v. Kaufman*, 227 W. Va. 537, 711 S.E.2d 607 (2011) (internal citations omitted).

Petitioner also claims error in the refusal to grant a mistrial. "The decision to grant or deny a motion for mistrial is reviewed under an abuse of discretion standard." *State v. Sheffield*, 247 W. Va. 183, 875 S.E.2d 321, 326 (2022) (citation omitted). Finally, Petitioner alleges error in the denial of a motion for a new trial or judgment of acquittal. "A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion." *State v. Vance*, 207 W. Va. 640, 643, 535 S.E.2d 484, 487 (2000) (quotation omitted). Furthermore, "[t]he Court applies a de novo standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence." *State v. Juntilla*, 227 W. Va. 492, 497, 711 S.E.2d 562, 567 (2011) (citing *State v. LaRock*, 196 W. Va. 294, 304, 470 S.E.2d 613, 623 (1996)). Also, the lower court's ruling regarding a new trial "is entitled to great respect and weight" and will only be reversed "when it is clear that the trial court has acted under some misapprehension of the law or the evidence." Syl. Pt. 1, in part, *Vance*, 207 W. Va. 640, 535 S.E.2d 484.

B. The statements made by Howser to his mother were not inadmissible hearsay.

Petitioner first asserts error in the admission of "inadmissible hearsay" regarding Howser's sale of methamphetamine. Pet'r's Br. 6-7. Petitioner further alleges that the evidence was used to prove the drug conspiracy. Pet'r's Br. 7. The evidence regarding Howser's sale of methamphetamine were not inadmissible, as they are specifically admissible under several provisions of the Rules of Evidence.

"Hearsay is defined as 'a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' W.Va.R.Evid. 801(c)." *State v. Phillips*, 187 W. Va. 205, 208, 417 S.E.2d 124, 127 (1992). When Riffle testified regarding her conversation with her now-deceased son, Petitioner objected citing "the rule against hearsay." App. 145. The court found that the testimony was not being offered for the truth of the matter asserted. App. 145. Further, the court noted that no objections to this testimony were made pretrial despite Petitioner knowing the information was going to be elicited through testimony. App. 146.

To that end, this Court has stated that

> "Generally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules." Syllabus Point 1, *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990).

Syl. Pt. 3, *State v. Morris*, 227 W. Va. 76, 705 S.E.2d 583 (2010). "The hearsay rule excludes hearsay evidence only when offered 'as evidence of the truth of the matter asserted'; and does not operate against such testimony offered for the mere purpose of explaining previous conduct." *Id.* at Syl. Pt. 4 (citation omitted).

Petitioner can show no error in the admission of the limited testimony regarding what Howser said to his mother. First, Riffle testified extensively as to messages she actually saw between her son and Amber Pare. App. 145-47, 151, 159. This is not hearsay; this was a first-hand account of messages Riffle viewed at the time as said messages were being exchanged.

Second, this testimony was admissible pursuant to Rule 803(3), which states that "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan)" is an

exception to the hearsay rule. The testimony regarding Howser's intent and plan to sell methamphetamine clearly falls within this exception.

Third, Howser was clearly unavailable as a witness due to his death at the hands of Petitioner. Thus, his statements to his mother were admissible pursuant to Rule 804(b)(3), as a statement against interest. This rule states as follows:

> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
>
> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

W. Va. R. Evid. 804(b)(3). By telling his mother that he was about to sell methamphetamine to someone else, Howser was exposing himself to criminal liability. Further, the messages submitted as evidence corroborate the statements made.

While the circuit court did not actually rely on Rules 803 or 804 of the West Virginia Rules of Evidence, it is firmly established that "[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 1, *State ex rel. Gordon v. McBride*, 218 W. Va. 745, 630 S.E.2d 55 (2006)(citation omitted); *see also Weirton Ice & Coal Co. v. Weirton Shopping Plaza, Inc.*, 175 W. Va. 473, 476 n.1, 334 S.E.2d 611, 614 n.1 (1985) ("Although it did not furnish the basis for the lower court's judgment, we may affirm the decision of that court when it appears that such judgment is correct on any ground disclosed by the record regardless of the reason assigned by the trial court for its judgment.").

Petitioner relies on *Phillips*, but that case supports admission of this evidence, even noting that "[e]ven if classified as hearsay, the statements could nonetheless have been introduced if the declarant had truly been "unavailable" as alleged by the prosecution." 187 W. Va. at 208–09, 417 S.E.2d at 127–28. There is no question Howser was unavailable as a witness. While Petitioner fails to argue a Confrontation Clause violation in this matter, the State posits that none exists under *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006), holding modified on other grounds by *State v. Jako*, 245 W. Va. 625, 862 S.E.2d 474 (2021). *Mechling* "bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness." *Id.* at Syl. Pt. 6. *Mechling* states that "a testimonial statement is, generally, a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at Syl. Pt. 8. The statements made by Howser to his mother were obviously not testimonial in nature; thus, there is no bar to his testimony under the Confrontation Clause. Accordingly, as the evidence was not inadmissible, this Court should affirm the circuit court's sentencing order.

C. The lower court properly denied Petitioner's motion for mistrial based on comments made in the State's rebuttal closing.

Petitioner next argues that the circuit court erred in failing to grant a mistrial based on "the prosecution's references to flight in its closing argument which were not admitted at trial." Pet'r's Br. 8. While the decision to declare a mistrial is "within the sound discretion of the trial court," Syllabus Point 8, *State v. Davis*, 182 W.Va. 482, 388 S.E.2d 508 (1989), "[a] trial court is empowered to exercise this discretion only when there is a 'manifest necessity' for discharging the jury before it has rendered its verdict." *State v. Corey*, 233 W. Va. 297, 308, 758 S.E.2d 117, 128

(2014) (quotation omitted). Petitioner cannot show an abuse of discretion in this case because he cannot show manifest necessity for a mistrial.

Petitioner's complaints center on statements made in closing. In Petitioner's closing, he stated as follows: "Mr. Jones has done the right thing. He stood up in this courtroom and pled guilty to that. He took responsibility for what he's done. He stood up there and said that's what happened." App. 264. In response, the State opined:

> And did he take responsibility? Really? Really? He tells Chrissy your dumb son just shot himself in the head with my gun, twice. "That nigga done shot himself in the head with my gun." He says, "That nigga done shot himself in the head with my gun.". . . So no he didn't take responsibility for it. He told that mother that her son had done it to himself. And ran, like a coward, for months and months . . . Five months later he turns himself in. That's not taking responsibility.

App. 276-77. After the jury was excused, Petitioner moved for a mistrial arguing that the State mentioned evidence of flight. App. 279. The State noted that the argument was made in response to Petitioner's statement that he accepted responsibility. App. 279. The court noted that while the comments were not optimal, the jury was instructed that what the attorneys say is not evidence and denied the motion for a mistrial. App. 280.

Regarding mistrials, this Court has explained that:

> The decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is a matter within the sound discretion of the trial court. A trial court is empowered to exercise this discretion only when there is a 'manifest necessity' for discharging the jury before it has rendered its verdict. This power of the trial court must be exercised wisely; absent the existence of manifest necessity, a trial court's discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy.

State v. Smith, 225 W. Va. 706, 709, 696 S.E.2d 8, 11 (2010)(quoting *State v. Williams,* 172 W.Va. 295, 304, 305 S.E.2d 251, 260 (1983)). Petitioner's contentions herein do not support a mistrial, and the circuit court did not err in failing to grant the requested mistrial.

In this instance, any potential mistrial would have been based on the prosecutor's statements. The prosecutorial misconduct standard is as follows:

> In determining whether a statement made or evidence introduced by the prosecution represents an instance of misconduct, we first look at the statement or evidence in isolation and decide if it is improper. If it is, we then evaluate whether the improper statement or evidence rendered the trial unfair. Several factors are relevant to this evaluation, among them are: (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. *See* generally *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995).

State v. Guthrie, 194 W. Va. 657, 677 n.25, 461 S.E.2d 163, 183 n.25 (1995). Moreover, this Court has stated that

> 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.

Syl. Pt. 6, *Sugg*, 193 W. Va. 388, 456 S.E.2d 469. None of the statements complained of by Petitioner rise to the level required to reverse Petitioner's conviction.

All of the statements Petitioner asserts were improper occurred during closing arguments. "[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. Critzer*, 167 W. Va. 655, 658–59, 280 S.E.2d 288, 291 (1981) (collecting cases and first citing Syl. Pt. 2, *State v. Brewster*, 164 W. Va. 173, 261 S.E.2d 77 (1979)) (subsequent citations omitted). Petitioner herein has failed to show such prejudice or manifest injustice.

Petitioner fails under both the *Guthrie* and the *Sugg* standards. Importantly, under the second *Guthrie* factor, the Court must examine whether the statement was "invited by the defense." 194 W.Va. at 677 n. 25, 461 S.E.2d at 183 n. 25. In this case, the State was specifically responding to what Petitioner argued in his closing. App. 279. Petitioner emphasized that he had taken full responsibility for his actions that night, and the State was entitled to, and did, rebut that idea. As this Court has noted, "[a]n appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case." Syl. Pt. 3, *State v. Crabtree*, 198 W. Va. 620, 482 S.E.2d 605 (1996).

Petitioner's argument also fails under many of the other *Guthrie* factors. The statement was isolated to less than a paragraph of the State's rebuttal closing, which spans eight transcript pages. App. 270-77. There was no jury instruction on flight because the State withdrew it. App. 176. There is no evidence the statement was deliberately placed before the jury for any reason other than to rebut Petitioner's claim of taking responsibility. Petitioner chose to take a risk by making the statement that he took responsibility for his actions, knowing that he attempted to pass blame for the shooting and avoided capture for months. Finally, the evidence was sufficient to sustain Petitioner's conviction without this one statement.

Petitioner's arguments also fail under the *Sugg* factors. The prosecutor's remarks did not mislead the jury, as they were in direct rebuttal to Petitioner's claims of responsibility. Petitioner was not prejudiced as he had admitted to shooting and killing Howser and the jury knew that, and likely chalked any flight up to his guilt for shooting his friend. The remarks were isolated and made only in rebuttal, one paragraph of an eight-page rebuttal transcript. The remarks did not go to the guilt of the accused, and the remarks did not distract from the issues at hand—whether Petitioner was guilty of the two charges that were the subject of the trial.

As this Court has found,

> Prosecutorial misconduct does not always warrant the granting of a mistrial or a new trial. The rule in West Virginia since time immemorial has been that a conviction will not be set aside because of improper remarks and conduct of the prosecution in the presence of a jury which do not clearly prejudice a defendant or result in manifest injustice. *State v. Beckett*, 172 W.Va. 817, 310 S.E.2d 883 (1983); *State v. Buck*, 170 W.Va. 428, 294 S.E.2d 281 (1982).

Guthrie, 194 W. Va. at 684, 461 S.E.2d at 190. "The test is whether the remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Sugg*, 193 W. Va. at 405, 456 S.E.2d at 486 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). These limited remarks did not infect the trial with unfairness, did not deny Petitioner due process, and did not rise to the level of manifest necessity sufficient to cause a mistrial to be granted. Accordingly, Petitioner's sentencing order should be affirmed.

D. Petitioner was not entitled to a new trial because the evidence of an alleged marijuana conspiracy was intrinsic.

With regard to the denial of a motion for new trial, Petitioner argues that he was entitled to a mistrial or a new trial based on the entry of improper 404(b) evidence relating to a marijuana delivery conspiracy between Petitioner and Howser. Pet'r's Br. 10. Petitioner further argued that the notice required of 404(b) evidence was absent, and that the use of this evidence was prejudicial to Petitioner. *Id.* As the evidence in question was intrinsic, it was outside the parameters of Rule 404(b) and, thus, there was no error here.

It is well-established that "[r]ulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983) (quoting *State v. Louk,* W.Va., 301 S.E.2d 596, 599 (1983)). Thus, a circuit court's decision that evidence is intrinsic to a crime is reviewed only for an abuse of discretion. Here, Petitioner has not and cannot

demonstrate the circuit court abused its discretion in denying the motion for a new trial or mistrial relating to the use of evidence regarding the marijuana delivery.

Rule 404(b) of the West Virginia Rules of Evidence generally bars "prior bad act" evidence. But, as this Court recognized in *State v. Harris*, evidence related to such acts is admissible where that evidence is intrinsic to the crimes charged. 230 W. Va. 717, 742 S.E.2d 133 (2013); *see also State v. McDaniel*, 238 W. Va. 61, 69, 792 S.E.2d 72, 80 (2016) (quoting Vol. 1, Louis J. Palmer, Justice Robin Jean Davis, Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, § 404.04[5][a] (6th ed. 2015) ("'Rule 404(b) only applies to limit the admissibility of evidence of extrinsic acts. Intrinsic evidence, on the other hand, is generally admissible so that the jury may evaluate all the circumstances under which the defendant acted. That is, intrinsic evidence of a crime is admissible without analysis pursuant to Rule 404(b).'")). Evidence is "'intrinsic' when the evidence of the other act and evidence of the charged crimes are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged." *Harris*, 230 W. Va. at 721, 742 S.E.2d at 137 (quoting *LaRock*, 196 W. Va. at 312 n.29, 470 S.E.2d at 631, n.29 (quoting *United States v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990))). In other words, evidence is admissible as intrinsic evidence if it "furnishes part of the context of the crime," is necessary for a "full presentation of the case," or is "so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its 'environment'" that it is necessary "to complete the story of the crime on trial by proving its immediate context[.]" *Harris*, 230 W. Va. at 721-22, 742 S.E.2d at 137-38 (further noting that evidence is intrinsic and admissible where the "uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . . .").

After the State's closing, Petitioner objected during a sidebar that the State had "decided to use that 404(b) evidence without any notice of this prior marijuana delivery conspiracy." App. 259. The State argued it did not introduce evidence of a marijuana deal and if it was referenced it was "no more than a mere reference." App. 260. The court overruled the objection. App. 260. In the post-trial motions hearing, the State argued that the marijuana sales of Petitioner and Howser were "intrinsic evidence of the ongoing drug conspiracy between [Howser] and [Petitioner]." App. 295. The State further noted that "[t]hey had been actively involved in drug trafficking for a period of time" and "the fact that they had made previous drug transactions certainly is intrinsic to their continuing intent to distribute not just marijuana, but now additional controlled substances." App. 295-96. The court denied Petitioner's motion based on "the reasons expressed by" the State. App. 300.

Petitioner cannot demonstrate that the Circuit Court erred in concluding the evidence was intrinsic, as the other acts were part of the same series of criminal events and, therefore, closely linked both substantively and temporally to the crimes charged. Further, it was necessary evidence to paint a full picture of the crime at trial. The purpose of permitting the introduction of intrinsic evidence at trial is to avoid fragmentizing the case. Both this Court and the United States Supreme Court have recognized that jurors do not want abstract cases; they demand a coherent evidentiary narrative and, without this narrative, may penalize the State—the party with the burden of evidentiary persuasion. *Harris*, 230 W. Va. at 722, 742 S.E.2d at 138 (quoting *Old Chief v. United States,* 519 U.S. 172, 188-89 (1997)). "The jury is entitled to know the 'setting' of a case. It cannot be expected to make its decision in a void without knowledge of the time, place and circumstances of the acts which form the basis of the charge." *Id.* at 721-22, 742 S.E.2d at 137-38 (quoting *United States v. Roberts*, 548 F.2d 665, 667 (6th Cir. 1977)).

The evidence in this case shows that Petitioner and Howser were involved in the sale of marijuana, and, on the night in question, in the sale of methamphetamine. Numerous witnesses testified to this, including Howser's mother and Amber Pare, and Facebook messages extracted from Howser's phone show further evidence of both marijuana and methamphetamine transactions. Thus, the evidence that Petitioner and Howser were engaged in the sale of marijuana was but a precursor to the crimes at issue, making it fall squarely within the definition of intrinsic evidence. Therefore, the lower court did not abuse its discretion in allowing this evidence. There was no manifest necessity requiring a mistrial, nor was there reason to grant a new trial.

E. Petitioner was not entitled to acquittal or a new trial based on the sufficiency of the evidence.

Petitioner next argues that he should have been granted a judgment of acquittal. Pet'r's Br. 12. Petitioner argues that the elements of West Virginia Code § 61-7-15A are incompatible with a conspiracy crime as the predicate felony. Pet'r's Br. 12. Petitioner further argues that the evidence was not sufficient to support conviction of both the charges. Pet'r's Br. 14. Respondent will respond to each in turn.

1. A plain reading of the statute shows that a defendant may be convicted of use or presentation of a firearm during the commission of any felony.

Petitioner first argues that the court erred in denying his motion for judgment of acquittal because there was insufficient evidence that Petitioner was "engaged in the commission of a felony" or "uses or presents a firearm." Pet'r's Br. 12. West Virginia Code § 61-7-15a states as follows:

> As a separate and distinct offense, and in addition to any and all other offenses provided for in this code, any person who, while engaged in the commission of a felony, uses or presents a firearm shall be guilty of a felony and, upon conviction, shall be imprisoned in a state correctional facility for not more than ten years.

Basically, Petitioner argues that one could not violate both West Virginia Code § 61-7-15a and engage in a conspiracy. Petitioner's arguments are unavailing.

A plain reading of the statute belies Petitioner's entire argument. West Virginia Code § 61-7-15a clearly indicates that it applies to "any and all other offenses provided for in this code." This includes conspiracy pursuant to West Virginia Code § 60A-4-414. "Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. Pt. 2, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). This language could not be more clear. Petitioner attempts to inject into the statute that which does not exist, including additional requirements that § 61-7-15a applies only to "'active' felony crime such as robbery, kidnapping, or rape." Pet'r's Br. 13. This wholly disregards the Legislature's statement that the provision applies to any and all other offenses and, thus, this argument should be disregarded. "It is a well known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning." *State ex rel. Johnson v. Robinson*, 162 W. Va. 579, 582, 251 S.E.2d 505, 508 (1979). In sum, any and all truly means any and all other offenses.

Petitioner also argues that it is "unclear how a person 'uses or presents' a firearm during the course of a conspiracy felony." Pet'r's Br. 13. The answer to that is the fact pattern in this very case. While Petitioner and Howser were preparing to deliver methamphetamine to Amber Pare, among other buyers, somehow Petitioner's gun was used or presented, because Howser was shot. App. 153. In fact, Petitioner pled guilty to involuntary manslaughter relating to this shooting, and pled guilty to possessing the firearm in question. App. 17-18, 93. There is no question whose gun was used, and who used it. Likewise, the jury convicted Petitioner of conspiracy to deliver controlled substances from this same scenario. The only logical conclusion is that while

conspiring, Petitioner used or presented a firearm and shot Howser. Further, it is clear that Petitioner was illegally carrying a firearm while committing the several felony offenses. This is sufficient to sustain his conviction.

2. The evidence was sufficient to sustain Petitioner's convictions.

Finally, Petitioner argues that the evidence was insufficient to support either of his convictions. Pet'r's Br. 14. A petitioner who challenges the sufficiency of the evidence underlying his or her conviction faces a heavy burden. Syl. Pt. 3, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163. To prevail, a petitioner must establish that "no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *LaRock*, 196 W. Va. at 303, 470 S.E.2d at 622. While undertaking its review of the record, this Court must "review all the evidence . . . in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution." Syl. Pt. 3, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163.

This Court has ruled that it may accept any adequate evidence, including circumstantial evidence, as support for a conviction. *State v. Spinks*, 239 W. Va. 588, 611, 803 S.E.2d 558, 581 (2017) (citing *Guthrie*, 194 W. Va. at 668, 461 S.E.2d at 174). As the Court explained in *Guthrie*, it will not overturn a verdict unless "reasonable minds could not have reached the same conclusion." 194 W. Va. at 669, 461 S.E.2d at 175. Finally, "[t]he evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt." *Id.* at Syl. Pt. 3. Instead, a verdict "should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *Id.* "This standard is a strict one; a defendant must meet a heavy burden to

gain reversal because a jury verdict will not be overturned lightly." *Id.* at 667–68, 461 S.E.2d at 173–74. This Court likewise has stated:

> A convicted defendant who presses a claim of evidentiary insufficiency faces an uphill climb. The defendant fails if the evidence presented, taken in the light most agreeable to the prosecution, is adequate to permit a rational jury to find the essential elements of the offense of conviction beyond a reasonable doubt. Phrased another way, as long as the aggregate evidence justifies a judgment of conviction, other hypotheses more congenial to a finding of innocence need not be ruled out. We reverse only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

LaRock, 196 W. Va. at 303, 470 S.E.2d at 622. "To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. Pt. 4, *State v. Etchell*, 147 W. Va. 338, 127 S.E.2d 609 (1962) (quoting Syl. Pt. 1, *State v. Bowles*, 117 W. Va. 217, 185 S.E. 205 (1936)). Petitioner cannot sustain his heavy burden on this assignment of error.

The evidence supporting Petitioner's conviction pursuant to West Virginia Code § 61-7-15a is discussed in subsection 1, supra. As to Petitioner's conspiracy conviction, the evidence of such was abundant. The jury was instructed, without objection, on the elements of the conspiracy conviction as follows:

> Conspiracy to commit felony controlled substance offenses is committed when a person willfully and feloniously conspires with one or more persons to commit delivery of a controlled substance and/or possession with intent to deliver a controlled substance, both felony offenses, and one or more of such persons commits an overt act to effect the object of the conspiracy, which conspiracy has not terminated.
>
> ***
>
> It is not necessary to show that the parties met and actually agreed to undertake the performance of an unlawful act. Nor is it necessary that they previously arranged a detailed plan for execution, or that the parties entered into a formal or express agreement, but rather an agreement can be shown by a tacit understanding between conspirators to accomplish an unlawful act, which may be inferred from the development and collocation of the circumstances.

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...an agreement to commit a crime may be inferred from the words or actions of the conspirators, or other circumstantial evidence, and the state is not required to show the formalities of the agreement.

App. 240-42. The jury, having reviewed all of the evidence, could logically have found Petitioner guilty. Chrissy Riffle testified that she saw messages indicating Howser was selling methamphetamine on the night in question. App. 145-51. She then testified that later that night, Petitioner was at her house. App. 153. Further, Riffle indicated that Howser told her he would be safe delivering the meth because Petitioner would be with him. App. 152. This evidence shows the drug transactions and Petitioner's involvement and knowledge.

Amber Pare testified that she was to be the recipient of the meth Petitioner was selling, and Facebook messages reflected this. App. 170-72. This evidence also shows the drug transactions. Facebook messages supported the sales to not only Pare, but to others, and even named Petitioner as the supplier. App. 225, 227, 249. This shows Petitioner's involvement in the drug transactions. At the time the sale was to take place and Howser was about to leave his home with Petitioner to deliver to Pare, he was shot by Petitioner's gun. App. 170-72, 258. This shows that Petitioner, while preparing for delivery of the methamphetamine, possessed a gun and used or presented it. All of these links lead the jury to the inevitable conclusion that Petitioner was guilty on both counts. As Petitioner cannot overcome the heavy burden set forth by this Court's sufficiency of the evidence standard, this assignment of error should be rejected and Petitioner's convictions affirmed.

CONCLUSION

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

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-13

STATE OF WEST VIRGINIA,

Respondent,

v.

BRIAN ALLEN MERCHANT JONES

Petitioner.

CERTIFICATE OF SERVICE

I, Andrea Nease Proper, do hereby certify that on the 14th day of July, 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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