IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-107

WILLIAM BALLENGER,
Petitioner,

v.

ROBIN MILLER, Superintendent,
Huttonsville Correctional Center
Respondent.

RESPONDENT'S BRIEF

Appeal from the
Circuit Court of Cabell County
Case No. 19-C-92

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INTRODUCTION

Respondent Robin Miller, Superintendent, responds to William Ballenger's (Petitioner's) counseled brief. After a jury trial, Petitioner was convicted of Second Degree Robbery, Battery, and Obstructing an Officer; Petitioner was acquitted of First Degree Robbery. The State then conducted a recidivist trial, and the jury found Petitioner had a prior felony drug conviction in Kentucky. Consequently, the court enhanced Petitioner's robbery sentence under the Habitual Offender statute. Petitioner filed a direct appeal of his convictions to no avail.

In this habeas case, Petitioner argues that his Kentucky conviction cannot be used as a qualifying offense under the Habitual Offender statute. But the court analyzed Petitioner's conduct and found that he possessed cocaine with the intent to deliver it to another person. Petitioner further argues that his indictment and trial on two degrees of Robbery violated Double Jeopardy, but he was acquitted for First Degree Robbery and, thus, has not suffered multiple punishments. Finally, Petitioner argues cumulative trial error justifies reversal, but to the extent there were any errors, Petitioner was not prejudiced thereby.

ASSIGNMENTS OF ERROR

1. A jury found Petitioner was a habitual offender based on a prior felony conviction from the state of Kentucky for possession of cocaine. Unlike West Virginia, Kentucky classifies possession of cocaine as a felony. Trial counsel did not challenge the Kentucky conviction even though it is classified as a misdemeanor in West Virginia. The circuit court abused its discretion in finding trial counsel acted reasonably. It also erred as a matter of law by holding that facts in criminal complaints, not the elements of the crime of conviction, govern classification of out of state felonies in recidivist actions.

2. The State violated double jeopardy by indicting Petitioner on two counts of robbery as both charges involved the same incident, the same victim, and the same unit of prosecution. The circuit court erred in finding trial counsel provided effective assistance despite failing to argue that the two counts of robbery violated double jeopardy.

3. The circuit court abused its discretion by rejecting Petitioner's cumulative error claim and holding that the alleged errors were the result of strategic decisions and "well within the broad range of professionally competent assistance.

Pet'r's Br. 1.

STATEMENT OF THE CASE

A. Criminal trial.

In January 2015, Petitioner was indicted by a Cabell County grand jury for Second Degree Robbery, Malicious Wounding, First Degree Robbery, and Obstructing an Officer. App. 213, 1426-27. At the conclusion of the trial, the jury convicted Petitioner of Second Degree Robbery, Battery (a lesser-included offense for Malicious Wounding), and Obstructing an Officer; Petitioner was found not guilty of First Degree Robbery. App. 213, 1489-94.

The Robbery charges relate to the same victim, but charge two different acts. The Second Degree Robbery charge alleged that Petitioner took $20 from the victim under threat of bodily injury. App. 1149-50. The First Degree Robbery charge alleged that Petitioner struck the victim and took his cell phone. App. 1156-58. Petitioner's trial lasted four days, included the testimony of eleven State witnesses and Petitioner, and 51 exhibits were admitted into evidence. App. 548, 711-713, 1016.

The victim testified at trial and identified Petitioner as the person who approached him and asked for money. App. 744-747. The victim denied having any money, but eventually he threw $20 on the ground and Petitioner said "[a]w, I am going to beat your ass because you ain't got nothing but $20." App. 747. The victim said he tried to walk away from Petitioner, but the next thing he knew, he was on the ground. App. 747. The victim remembered Petitioner going in his pocket and stomping him with big brown boots while he was on the ground. App. 747. The next thing the victim remembered was waking up from a coma in the hospital. App. 751.

Rebecca Noble testified for the State as an eyewitness to the robbery who was familiar with both Petitioner and the victim. App. 565-624. Noble stated that Petitioner approached the victim, asked him for $20, and said, "you better give me the f'n money." App. 575, 583, 602. The victim did not give Petitioner $20, and Petitioner began "hitting and stomping" the victim. App. 612. When the victim did not produce any money, Petitioner hit the victim and kicked him after he fell to the ground, and told the victim he would kill him. App. 575. After the victim was struck and lying on the ground, Noble testified that Petitioner took the victim's phone out of his pocket. App. 577, 612. But Petitioner's counsel pointed out that a phone matching the description of the victim's phone was found at the scene of the crime. App. 615-16. The victim bled profusely after the incident and Noble had to hold a towel on the victim's catheter. App. 611-12. Noble was concerned about the victim's health after the robbery and she called 911; the State played this call for the jury. App. 581.

Another eyewitness to the robbery, Vincent Cheeks, testified at Petitioner's trial. App. 656-90. Cheeks stated he was with his friends Rebecca Noble and the victim on the night in question when Petitioner approached them and asked if they "were looking for anything." App. 663. Cheeks believed this "refers to were we looking for drugs or anything that he could assist us with." App. 663. Cheeks responded they were not looking or interested in anything; and they only had $20, which Cheeks had given to his friend, the victim. App. 664. Cheeks testified he had not actually given the victim $20, but he did not want to be involved in the situation. App. 664. Petitioner insisted on getting the $20 from the victim, and the victim said, "no, we don't want anything and I am not handing you the 20." App. 665. Then Petitioner stated "you are going to give up the 20, or else." App. 665. The victim again refused and asked Petitioner to leave them alone. App. 665. Petitioner then hit the victim with a closed fist, and started beating him and stomping him after he

fell to the ground. App.666. Petitioner eventually stopped beating the victim, and Cheeks did not see Petitioner take anything from the victim. App. 666-67. The victim was beaten badly and required medical attention. App. 667-68.

Several other witnesses testified about the State's investigation of the case. App. 714-1083. In addition to the evidence of Robbery and Battery, the State presented evidence that Petitioner committed the offense of Obstructing an Officer when he gave a false name to a police officer who was investigating the crimes. App. 927, 1579.

B. Recidivist trial.

After Petitioner's trial, the State filed a recidivist information based upon Petitioner's prior felony conviction for First Degree Possession of Controlled Substances in Boyd County, Kentucky. App. 213, 1503-04, 1530-40. In September 2004, Petitioner was arrested in Ashland, Kentucky after he was found in possession of "rock" cocaine. App. 1556. According to the police report and citation, an Ashland police officer was investigating a possible drug transaction in progress when he observed Petitioner in a parking lot walking toward a vehicle occupied by a man who was smoking marijuana. App. 213, 1554-59. When Petitioner noticed the officer, Petitioner dropped a plastic package containing rock cocaine. App. 213-14, 1554. Upon contact with the officer, Petitioner initially denied possession of the package but later admitted that he had purchased the cocaine for the man occupying the vehicle. App. 214, 216, 1554. Both the police report and the citation to which Petitioner pleaded guilty indicate that, factually, Petitioner possessed rock cocaine with the intent to deliver. App. 216, 1554.

In October 2004, Petitioner pleaded guilty by information to First Degree Possession of Controlled Substances in Boyd County, Kentucky Circuit Court. App. 1530-44. The information charged as follows –

> On or about the 14th of September, 2004, in Boyd County, Kentucky, the above-named Defendant unlawfully committed the offense of First Degree Possession in Controlled Substances, KRS 218A.1415, UOR 42203, a class D felony, when he unlawfully possessed a quantity of cocaine, against the peace and dignity of the Commonwealth of Kentucky.

App. 1543. After Petitioner pleaded guilty to this felony, the Boyd County, Kentucky Circuit Court sentenced Petitioner to one year in the Kentucky State Penitentiary, suspended in favor of three years of probation. App. 1503, 1530-40. In 2005, Petitioner admitted to violating his probation in Kentucky and the Boyd County court sentenced him to one year in the custody of the Kentucky Department of Corrections. App. 1503-04, 1506-09.

The State introduced the evidence described above at Petitioner's recidivist trial, and the jury found Petitioner to be the same person convicted in Kentucky of the above-described felony offense. App. 214, 1495. Consequently, the court found Petitioner to be a habitual offender and enhanced the minimum sentence for his Second Degree Robbery conviction by five years. App. 214, 1497-98. The court also sentenced Petitioner to jail for 12 months for Battery, and 5 days for Obstructing an Officer, concurrent with each other and consecutive to his sentence for Second Degree Robbery. App. 1497-98.

C. Omnibus habeas hearing.

In July 2021, Petitioner filed an Amended Petition for Writ of Habeas Corpus and *Losh* list; and in October 2021, Petitioner filed a Supplemental Amended Petition for Writ of Habeas Corpus. App. 32-152. In relevant part, Petitioner argued that his trial attorney, Kerry Nessel, provided ineffective assistance because: 1) he did not challenge whether the State could use Petitioner's prior felony conviction from Kentucky to enhance Petitioner's sentence in a habitual offender proceeding, and 2) he did not argue that the First Degree and Second Degree Robbery charges violated double jeopardy. App. 37-43. Petitioner further argued that the cumulative effect of multiple errors violated Petitioner's right to a fair trial. App. 45-49.

The habeas court found that Petitioner's prior conviction in Kentucky for possession of cocaine is a felony, and court documents from the Kentucky case reflect that Petitioner told the arresting officer that he intended to deliver the cocaine to another person. App. 214-18. Thus, the habeas court held that the most appropriate analogue for this offense under West Virginia law is also a felony, i.e., Possession with Intent to Deliver a Controlled Substance. App. 216. Petitioner did not raise this issue on direct appeal. *State v. Ballenger*, No. 16-0986, 2017 WL 5632824 (W. Va. Supreme Court, Nov. 22, 2017) (memorandum decision).

With regard to Petitioner's double jeopardy argument, the habeas court held that the First Degree Robbery and Second Degree Robbery charges are separate and distinct offenses because they are supported by separate acts committed by Petitioner. App. 219. The factual basis for the First Degree Robbery charge is an act of violence, in which Petitioner struck the victim several times and took his cell phone. *Id.* In contrast, the factual basis for the Second Degree Robbery charge is a threat of violence, where Petitioner threatened the victim and demanded money prior to striking him and taking his cell phone. *Id.* Further, Petitioner did not suffer multiple punishments because he was acquitted for First Degree Robbery. App. 1489-94. Thus, the State properly prosecuted Petitioner for both offenses, and Nessel was not ineffective as alleged. App. 218-20.

The habeas court also rejected Petitioner's cumulative error claim, finding no errors to support this claim. App. 221-224. The court held Nessel made an objectively reasonable strategic decision not to object during the State's opening and closing statements. App. 222. And Nessel was not ineffective when he failed to object to the admission of Noble's and Cheeks' statements at trial, because the court would have overruled any hearsay objection that Nessel may have offered. *Id.* The court further held Nessel's impeachment and cross-examination of the victim was reasonable, even though he would approach them differently now because "[h]indsight … is

20/20." App. 223. Petitioner presented no evidence that Nessel's failure to object to a photo array was unreasonable. App. 223-24. Rejecting the cumulative error claim, the court reasoned that even if "any of these objections or arguments should have been made, Petitioner nevertheless received a fair trial when considering the evidence" presented and the trial as a whole. App. 224.

SUMMARY OF ARGUMENT

First, the court properly found Petitioner to be a habitual offender because he had a prior felony conviction for in the Commonwealth of Kentucky. Petitioner waived his challenge to the habitual offender issue because he did not present it on direct appeal. And considering the facts underlying this crime, the proper classification in West Virginia for this prior felony is Possession of Cocaine with Intent to Deliver. Petitioner's attorney was not ineffective for failing to argue otherwise. Second, Petitioner has not suffered a double jeopardy violation because of his indictment for First Degree Robbery and Second Degree Robbery, because the jury found him not guilty of First Degree Robbery. Third, Petitioner's cumulative constitutional error argument fails because, to the extent there may be errors, Petitioner was not prejudiced thereby.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule 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

I. Petitioner was properly convicted as a habitual offender, and his attorney was not ineffective.

A. Standards of review.

Review of a habeas corpus action is three-pronged. A circuit court's final order and ultimate disposition is reviewed for an abuse of discretion, factual findings are reviewed for clear

error, and questions of law are reviewed *de novo*. Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

"For purposes of a recidivist proceeding, whether a conviction for a certain crime qualifies as a crime punishable by confinement in a penitentiary is a question of law for the court." Syl. Pt. 5, *State v. Costello*, 245 W. Va. 19, 857 S.E.2d 51 (2021).

B. Petitioner waived any argument regarding his habitual offender enhancement because he did not raise it on direct appeal.

Petitioner argues the habeas court erred when it denied his challenge to a habitual offender sentence enhancement based on his felony conviction in Kentucky. Pet'r's Br. 9-18. Any ground that a habeas petitioner could have raised on direct appeal, but did not, is presumed waived. Syl. Pt. 1, *Ford v. Coiner*, 156 W. Va. 362, 196 S.E.2d 91 (1972). "[T]he burden of proof rests on petitioner to rebut the presumption" that he waived this ground for habeas relief. Syl. Pt. 2, *Id.* The alleged deficiency in Petitioner's habitual offender enhancement was apparent when the verdict was returned, and Petitioner could have raised this issue on direct appeal, but he did not. *State v. Ballenger*, No. 16-0986, 2017 WL 5632824 (W. Va. Supreme Court, Nov. 22, 2017) (memorandum decision). Thus, this Court should find there is a rebuttable presumption that Petitioner knowingly and intelligently waived this issue and he could have advanced it on direct appeal. Syl. Pt. 2, *Ford.* Petitioner has not rebutted this presumption and, consequently, this Court should deny review on this issue.

C. Petitioner was properly convicted as a habitual offender based on a prior felony conviction in Kentucky, and Petitioner's attorney did not provide ineffective assistance of counsel for failing to argue otherwise.

Even if this Court addresses the habitual offender issue on the merits, it will find Petitioner is a habitual offender because his prior felony conviction in Kentucky would have been classified as a felony had it occurred in West Virginia. "[T]he primary purpose of the [recidivist] statute is

to deter felony offenders ... from committing subsequent felony offenses." *State v. McMannis*, 161 W. Va. 437, 441, 242 S.E.2d 571, 574-75 (1978). "Whether the conviction of a crime outside of West Virginia may be the basis for application of the West Virginia Habitual Criminal Statute ... depends upon the classification of that crime in this State." Syl. Pt. 3, *Justice v. Hedrick*, 177 W. Va. 53, 350 S.E.2d 565 (1986).

In this case, the recidivist jury found Petitioner was convicted of First Degree Possession of Controlled Substances in Kentucky in October 2004. App. 1495-98. This crime is a felony punishable by incarceration in a penitentiary. The Kentucky statute under which Petitioner was convicted reads as follows –

> (1) A person is guilty of possession of a controlled substance in the first degree when he knowingly and unlawfully possesses: a controlled substance ... that is classified in Schedules I or II which is a narcotic drug....
>
> (2) Possession of a controlled substance in the first degree is:
>
> (a) For a first offense a Class D felony.
>
> (b) For a second or subsequent offense a Class C felony.

K.R.S. § 218A.1415 (2002). When Petitioner was convicted of this offense in 2004, the penalty for a Class D felony in Kentucky was 1-5 years in prison. K.R.S. § 534.060(2)(d) (1998).

Based upon Petitioner's admissions in the citation and police report, the habeas court found that he possessed cocaine with the intent to deliver it to another person. App. 213-216. Thus, the court concluded, "that Petitioner's Kentucky conviction may be the basis for application of the West Virginia Habitual Criminal Statute because it would be classified as a felony – Possession with Intent to Deliver a Controlled Substance – under West Virginia law." App. 216.

Petitioner argues that the habeas court improperly relied upon the facts alleged in the Kentucky criminal citation and police report when determining how the Kentucky crime is classified in West Virginia. Pet'r's Br. 15-18. Rather than analyzing the facts of the case, Petitioner

submits that the court's classification determination should be limited to a comparison of elements of the Kentucky statute and West Virginia statute. Thus, Petitioner concludes that the court erred because Petitioner was charged with possession of cocaine in Kentucky, and possession of cocaine is a misdemeanor in West Virginia. Pet'r's Br. 10-12. Petitioner further argues that Nessel provided ineffective assistance because he did not challenge the court's determination that his Kentucky conviction could be used for sentence enhancement under the Habitual Offender Act. Pet'r's Br. 12-15.

Petitioner is incorrect, because the version of the Habitual Offender Act in effect at the time of Petitioner's 2016 recidivist trial does not prevent a court from reviewing the facts underlying the out-of-state criminal conviction. W. Va. Code § 61-11-18(a) (2000). In relevant part, this statute reads "[w]hen any person is convicted of an offense and is subject to confinement in a state correctional facility therefor, and it is determined ... that such person had been before convicted in the United States of a crime punishable by confinement in a penitentiary, the court shall" enhance the person's sentence. W. Va. Code § 61-11-18(a) (2000). It is without question that Petitioner's Kentucky conviction is punishable by confinement in a penitentiary. K.R.S. §§ 218A.1415 (2002), 534.060 (1998). And, in fact, Petitioner was sentenced to one year in the custody of the Kentucky Department of Corrections after the Boyd County court found he violated his probation. App. 1503-12. West Virginia's recidivist statute does not require a purely elemental comparison of the Kentucky and West Virginia statutes; and it does not prevent the West Virginia court from reviewing the facts underlying the Kentucky conviction. *See* W. Va. Code § 61-11-18(a) (2000).

Petitioner complains that the habeas court's factual analysis of Petitioner's Kentucky conviction erroneously added the "intent to deliver cocaine" to his crime of conviction. Pet'r's Br.

15-18. Whether an out-of-state felony conviction is a qualifying offense under West Virginia's Habitual Offender Act "depend[s] upon the circumstances of the prior felony," because the Habitual Offender Act "enhances punishment based on the earlier conduct." *State v. Ward,* 245 W. Va. 157, 162, 858 S.E.2d 207, 212 (2021). In this case, the court properly considered the circumstances of the prior felony and the allegation in the Kentucky court records regarding Petitioner's intention to deliver cocaine. App. 214, 216, 1554. Thus, the habeas court had a duty to analyze the facts underlying Petitioner's Kentucky conviction. And it was proper for the habeas court to use a holistic approach, including facts gleaned from Petitioner's criminal citation in Kentucky, when determining the classification of the Kentucky crime under West Virginia law. App. 214-18.

Petitioner liberally cites *Justice v. Hedrick* and *State v. Lawson*, which interpret the habitual offender statute. But these cases do not support Petitioner's argument that it was improper for the habeas court to factually analyze Petitioner's Kentucky felony conviction when determining it should be classified as a felony in West Virginia. 177 W. Va. 53, 350 S.E.2d 565 (1986); 125 W. Va. 1, 22 S.E.2d 643 (1942).

Because the court did not err when it classified Petitioner's prior felony conviction in Kentucky as a qualifying offense under the Habitual Offender Act, this Court may dispose of this claim without analyzing whether Petitioner was prejudiced. *See* Syl. Pt. 5, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995) (holding that this Court may dispose of an ineffective assistance of counsel claim "based solely on a petitioner's failure to meet either prong of the test."). In sum, Nessel's failure to challenge this issue was objectively reasonable and the court properly found Petitioner to be a habitual offender.

II. Petitioner's indictment for First Degree Robbery and Second Degree Robbery did not violate his right against multiple punishments for the same offense, thus Petitioner's counsel was not ineffective for failing to object to the indictment on Double Jeopardy grounds.

A. Standard of review.

This Court's review of "a double jeopardy claim [is] *de novo*." Syl. Pt. 1, in part, *State v. Sears*, 196 W. Va. 71, 468 S.E.2d 324 (1996).

B. Petitioner did not suffer multiple punishments because of his indictment for First Degree Robbery and Second Degree Robbery.

Petitioner argues that the First Degree Robbery and Second Degree Robbery charges in the indictment violate the Double Jeopardy prohibition of multiple punishments for the same offense. Pet'r's Br. 18-21. But the mere fact that Petitioner was tried for both First Degree Robbery and Second Degree Robbery does not constitute a double jeopardy violation, because the jury acquitted him of First Degree Robbery. App. 1489.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution protect against multiple punishments for the same offense. *Missouri v. Hunter*, 459 U.S. 359 (1983); Syl. Pts. 1 and 2, *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253 (1992). In the context of multiple punishments, "the interest protected by the Double Jeopardy Clause is limited to ensuring that the total punishment did not exceed that authorized by the legislature." *United States v. Martin*, 523 F.3d 281, 290 (4th Cir. 2008) (quoting *Jones v. Thomas*, 491 U.S. 376, 381 (1989) (internal quotations omitted). "The signal danger in multiplicitous indictments is that the defendant may be given multiple sentences for the same offense." *United States v. Burns*, 990 F.2d 1426, 1438 (4th Cir. 1993). Second Degree Robbery is a lesser-included offense of First Degree Robbery, thus they are not separate offenses for the purposes of Double Jeopardy. *State v. Massey*, 178 W. Va. 427, 432 359 S.E.2d 865, 870 (1987).

The State "has … broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case." *Ball v. United States*, 470 U.S. 856, 859 (1985) (holding that a simultaneous prosecution of overlapping crimes is permissible, but the defendant can only be convicted and sentenced for one of the crimes). This discretion includes the authority to charge Petitioner with two types of Robbery. In this case, the State pursued two alternate theories of Robbery. For the First Degree Robbery charge, the State attempted to prove that Petitioner struck the victim and took his cell phone. App. 973-74, 1157-59. And the Second Degree Robbery charge alleged that the victim gave Petitioner $20 under threat of bodily injury. App. 973-74, 1149-50. The jury was properly instructed on both charges. App. 1149-50, 1157-59. Even if Petitioner's counsel filed a motion to require the State to elect a single theory of Robbery, this motion would have failed because "an election will not be compelled when the several counts of the indictment have been inserted in good faith for the purpose of meeting the evidence as it may transpire…." *United States v. Montes*, Criminal Action 5:12CR29, 2013 WL 1411136 (N. D. W. Va. Jan. 15, 2013) at *2 (quoting *Terry v. United States*, 120 F. 483, 484 (4th Cir. 1903)). Given the State's discretion to prosecute criminal cases, pursuing two alternate Robbery charges was permissible, even though Petitioner could not in the end stand convicted of both offenses. Petitioner was acquitted of First Degree Robbery, but convicted of Second Degree Robbery. Thus, Petitioner was not convicted or punished twice for the same offense.

Even if Petitioner had been convicted of both counts of Robbery, the proper remedy would be to vacate one of the convictions. *Ball v. United* States, 470 U.S. at 861-64 (1985); *Burns* at 1438; *see, e.g. State v. Tuttle*, 177 So.3d 1246, 1250-51 (Fla. 2015) (holding that in the context of multiple punishments, Double Jeopardy concerns only "arise once guilty verdicts on overlapping crimes are returned."); *People v. Miller*, 869 N.W.2d 204, 208-13 (Mich. 2015) (holding that

convictions for OWI and OWI-injury violate the multiple punishments prong and ordering that the OWI conviction be vacated by the trial court); *Solis v. State*, 315 P.3d 622 (Wyo. 2013) (holding that two convictions under disjunctive provisions of Third Degree Sexual Assault statute violated double jeopardy, remanding for entry of new judgment and sentence convicting defendant of one count); *State v. Moos*, 758 N.W.2d 674, 682-83 (N. D. 2008) (holding that multiple convictions and punishments for a falsified invoice violated double jeopardy, remanding for defendant to be sentenced on only one conviction)

Because the factual situation presented in this case does not implicate multiple punishments, Petitioner's counsel was not ineffective for failing to object to the indictment on Double Jeopardy grounds. Thus, this Court may dispose of Petitioner's claim without analyzing whether Petitioner was prejudiced. *See* Syl. Pt. 5, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995) (holding that this Court may dispose of an ineffective assistance of counsel claim "based solely on a petitioner's failure to meet either prong of the test."). But even if this Court reviews for prejudice, Petitioner's argument fails.

Petitioner argues he was prejudiced by his trial for both First Degree Robbery and Second Degree Robbery because both charges potentially induced the jury to convict on one of the Robbery charges, rather than continuing to debate Petitioner's innocence on both charges. Pet'r's Br. 22 (quoting *Price v. Georgia*, 398 U.S. 323, 331 (1970)). But this is mere speculation based on a misreading of *Price*. *Price* stands for the proposition that where a defendant is convicted of a lesser-included offense and faces retrial after appeal, the defendant can only be retried on the lesser-included offense. *Price*, 398 U.S. at 326-27. As stated *supra*, the State has broad discretion to conduct criminal prosecutions to account for the facts that may develop at trial. This discretion includes the ability to charge alternate versions of Robbery. Ultimately, Petitioner did not suffer

multiple punishments because he was found not guilty of First Degree Robbery. App. 1489. And, in the instant case, the Double Jeopardy bar of multiple punishments only applies if Petitioner had been convicted of both counts of Robbery. Thus, this Court should affirm the ruling of the habeas court that Petitioner's counsel was not ineffective.

III. Petitioner's other alleged instances of ineffectiveness are not errors and do not constitute cumulative constitutional error.

Petitioner argues that cumulative error resulted from trial counsel's failure to make various objections. "Cumulative error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors." *State v. Knuckles*, 196 W. Va. 416, 426, 473 S.E.2d 131, 141 (1996). "Insignificant or inconsequential" errors do not justify reversal under the cumulative error doctrine; rather, this doctrine only applies when numerous errors exist and they are so substantial that they "denied the Petitioner a fair trial." *State v. Tyler G.*, 236 W. Va. 152, 165, 778 S.E.2d 601, 614 (2015).

A. Petitioner waived the evidentiary issues submitted in his cumulative error claim because they are not constitutional in nature and could have been raised on direct appeal.

Petitioner argues that the following alleged evidentiary errors constitute cumulative error that justifies reversal of his convictions: 1) prejudicial remarks by the prosecutor during opening and closing statements (Pet'r's Br. 25-26); 2) failure to object to hearsay and witness bolstering (Pet'r's Br. 26-27); 3) failure to object to leading questions (Pet'r's Br. 27-28); 4) failure to object to photos published to the jury prior to their admission into evidence (Pet'r's Br. 28). These issues could have been raised on direct appeal, but were not. Pet'r's Br. 24-28; *State v. Ballenger*, No. 16-0986, 2017 WL 5632824 (W. Va. Supreme Court, Nov. 22, 2017) (memorandum decision). Petitioner did not present these issues in his direct appeal, thus there is a rebuttable presumption

they are waived and should not be considered by this Court. Syl. Pt. 2, *Ford v. Coiner*, 156 W. Va. 362, 196 S.E.2d 91 (1972).

"Habeas corpus serves as a collateral attack upon a conviction under the claim that the conviction was obtained in violation of the state or federal constitution," and this Court maintains that only constitutional error "can be a proper subject of a habeas corpus proceeding." *Edward v. Leverette*, 163 W. Va. 571, 576, 258 S.E.2d 436, 439 (1979). Further, West Virginia's habeas corpus statute provides that "there is a rebuttable presumption that petitioner intelligently and knowingly waived any contention or ground in fact or law relied on in support of his petition for habeas corpus which he could have advanced on direct appeal but which he failed to so advance." Syl. Pt. 1, *Ford*. Further, "the burden of proof rests on petitioner to rebut the presumption that he intelligently and knowingly waived any contention or ground for relief which theretofore he could have advanced on direct appeal." Syl. Pt. 2, *Id.*; *see McBride v. Lavigne*, 230 W. Va. 291, 304, 737 S.E.2d 560, 573 (2012) (holding that Petitioner's cross assignments of error were waived because they were not raised on direct appeal).

None of the four errors listed above are based on a constitutional provision, and Petitioner does not rebut the presumption of waiver for failing to raise these issues on direct appeal. Syl. Pt. 2, *Ford*. Thus, this Court should find that they are waived because they should have been raised in Petitioner's direct appeal. Even if this Court reviews these issues, it will find the Petitioner was not prejudiced.

B. The prosecutor's remarks did not contribute to Petitioner's conviction, and his attorney was not ineffective for failing to object to them.

Petitioner argues that the State made prejudicial statements during its opening and closing arguments. Pet'r's Br. 25-26 (citing App. 551-52, 559, 1173, 1209). Petitioner further complains that the prosecutor "testified" that she was the same height as the victim and asked him to stand

next to her to show the discrepancy in height between the Petitioner and victim. Pet'r's Br. 27-28. When determining whether prosecutorial comments rise to the level of misconduct that requires reversal, this Court analyzes the following factors:

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

Syl. Pt. 6, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995). The record is reviewed as a whole when determining whether the prosecutor's comments, if improper, were harmless. *Id.* at 395, 486. When this Court reviews alleged error not involving the erroneous admission of evidence, it holds that "nonconstitutional error is harmless when it is highly probable the error did not contribute to the judgment." *State v. Guthrie*, 194 W. Va. 657, 684, 461 S.E.2d 163, 190 (1995).

The evidence in this case proves that, on the night in question, Petitioner approached the victim, Rebecca Noble, and Vincent Cheeks and asked the victim for $20. Petitioner threatened "you are going to give up the 20, or else," and "you better give me the f'n money." App. 575, 583, 602, 664. The victim testified that he threw $20 on the ground, but Petitioner was not happy with this, and Petitioner hit the victim, knocked him down, and began "hitting and stomping" him into the ground. App. 612, 664-65, 744-47. Despite the prosecutor's remarks regarding the social ills of Huntington and her comparative height to the victim, the State presented substantial evidence to prove that Petitioner committed the crimes of conviction. Thus, it is highly probable that the prosecutor's comments did not contribute to Petitioner's convictions; and Petitioner's counsel was not ineffective for failing to object to them.

C. Witness bolstering did not occur in this case, and Petitioner's attorney was not ineffective for failing to object.

Petitioner argues his attorney was ineffective because he did not to object to alleged witness bolstering at trial. Pet'r's Br. 26-27. Petitioner submits his attorney should have objected when Noble and Cheeks read from the statements they gave to police, and when State witnesses read parts of police reports to the jury, because this "impermissibly bolstered the State's case." App. 671, 877-79, 925, 929-30, 1064.

Petitioner mischaracterizes the meaning of "bolstering," and none occurred in this case. Witness "bolstering occurs when a party seeks to enhance a witness's credibility before it has been attacked." *State v. Wood*, 194 W. Va. 525, 531, 460 S.E.2d 771, 777 (1995); *see* W. Va. R. Evid. 608(a)(2). In *Wood,* this Court found impermissible bolstering where the State introduced evidence from the victim's teacher that she was a "truthful person." *Id.* A witness's reputation for truthfulness is character evidence that cannot be admitted before the victim's character for truthfulness has been attacked. *Id.* at 532, 778. In the instant case, the State did not call any witnesses to testify to Noble's or Cheeks' reputation for truthfulness. Thus, no bolstering occurred and the Court should deny this claim.

D. To the extent that any hearsay statements were admitted at trial, they were harmless and Petitioner was not prejudiced.

Petitioner complains that his attorney did not object to hearsay statements admitted at trial, but he does not argue that they affected the outcome of the trial. Pet'r's Br. 26-27. The alleged hearsay statements include: handwritten statements from Noble and Cheeks, portions of the police report, a "CAD report" of Noble's 911 call, and portions of the victim's medical records. *Id.*

> Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds

> of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.

Syl. Pt. 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979).

Even assuming that the aforesaid evidence was hearsay, the remaining evidence was sufficient for Petitioner to be convicted of Second Degree Robbery, Battery, and Obstructing an Officer. Nobles and Cheeks were eyewitnesses to these crimes, and they testified in vivid detail about the events leading up to Petitioner's robbery of the victim. App. 565-624, 656-90. And the alleged hearsay statements were not so prejudicial that they changed the outcome of the trial. Thus, Petitioner's attorney was not ineffective for failing to object to them; and this court should affirm the trial court's ruling.

E. Petitioner presents no evidence that he was prejudiced by photos shown to the jury.

Petitioner claims the State published photos of the crime scene to the jury prior to their admission, but he does not allege that he was prejudiced thereby. Pet'r's Br. 28 (citing App. 898-99). Claims of ineffective assistance are governed by a two-pronged test established in *Strickland v. Washington,* 466 U.S. 668 (1984). Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). This Court may dispose of an ineffective assistance claim based solely on petitioner's failure to meet either prong of the test. Syl. Pt. 5, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995). On this issue, Petitioner has shown that his attorney did not object when the photos were viewed by the jury, but the photos were admitted into evidence immediately thereafter. App. 898-99. Petitioner has not shown that this issue had any impact on the fairness of his trial, and the habeas court held the same in its final order. App. 223-24. In this

case, Petitioner does not argue that he was prejudiced; thus, this Court should deny relief on this issue and affirm the trial court's ruling.

F. Petitioner presents no evidence that Petitioner was absent during a jury instruction conference, and the Court should dismiss this claim.

Petitioner alleges he was not present during a jury conference in which jury instructions were discussed, but he presents no evidence to support this claim. Pet'r's Br. 28 (citing App. 119, 1130). At the omnibus hearing, attorney Nessel denied that Petitioner was absent during any jury instruction conference. App. 322. The sections of the Appendix cited by Petitioner in support of this argument reflect that the conference in question occurred immediately after the jury left the courtroom when the parties rested their cases. App. 119, 1130-33. The record does not reflect that Petitioner was absent, and Petitioner's attorney testified that he was not. *Id.* Because Petitioner presents no evidence to support this issue, the Court should deny it.

This Court should deny relief on this issue because Petitioner's brief does not comply with the Rules of Appellate Procedure. Rule 10 of the West Virginia Rules of Appellate Procedure requires that all briefs contain a Statement of the Case "[s]upported by appropriate and specific references to the appendix or designated record." W. Va. R. App. P. 10(c)(4). Moreover, the Petitioner's brief "must contain an argument clearly exhibiting the points of fact and law presented, . . . citing the authorities relied on," and must also "contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal." W. Va. R. App. P. 10(c)(7). Although this Court will "liberally construe briefs in determining issues presented for review, issues ... mentioned only in passing but [that] are not supported with pertinent authority, are not considered on appeal.'" *State v. Larry A.H.*, 230 W. Va. 709, 716, 742 S.E.2d 125, 132 (2013) (quoting *State v. LaRock*,

196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996)). "[A] skeletal argument, really nothing more than an assertion, does not preserve a claim. ... Judges are not like pigs, hunting for truffles buried in briefs." *State v. Surber*, 228 W. Va. 621, 633, 723 S.E.2d 851, 863 (2012) (internal quotations and citation omitted). Moreover,"[a]n appellant must carry the burden of showing error in judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment. Syl. Pt. 4, *State v. Myers*, 229 W. Va. 238, 728 S.E.2d 122 (2012) (internal quotations and citations omitted). In this Court's December 10, 2012 Administrative Order, it noted that the Rules of Appellate Procedure "are not mere procedural niceties; they set forth a structured method to permit litigants and this Court to carefully review each case." Administrative Order, *Filings That Do Not Comply with the Rules of Appellate Procedure* (Dec. 10, 2012). In maintaining this exacting approach, this Court has routinely refused to address inadequately supported claims. *See Porter v. Logan Co. Fire Dep't*,, No. 15-0520, 2016 WL 1735243, at *2 n.2 (W. Va. Supreme Court Apr. 29, 2016) (memorandum decision) (disregarding a portion of the petitioner's argument because he failed to cite to the 1,400-page appendix record); *Jones ex rel. Estate of Jones v. Underwriters at Lloyd's, London*, No. 12-0293, 2013 WL 3185081, at *2 (W. Va. Supreme Court, June 24, 2013) (memorandum decision) ("[W]e require that arguments before this Court be supported by 'appropriate and specific citations to the record on appeal.'" (quoting W. Va. R. App. P. 10(c)(7)). Petitioner does not show that he was absent during the jury instruction conference. Thus, Petitioner's brief does not comply with the requirements set forth in the West Virginia Rules of Appellate Procedure. Because Petitioner presents no evidence on this issue, this Court should deny this ground for relief.

CONCLUSION

For the reasons stated, this Court should affirm the order denying Petitioner habeas relief.

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-107

WILLIAM BALLENGER,
Petitioner,

v.

ROBIN MILLER, Superintendent,
Huttonsville Correctional Center,
Respondent.

CERTIFICATE OF SERVICE

I, Jason David Parmer, do hereby certify that on the 10th 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, and further, a courtesy copy was mailed to said individuals at the addresses below:

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