

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Morgan C. Vandergriff,
Petitioner below, Petitioner

v.) No. 24-202 (Putnam County CC-40-2021-C-105)

Shelby Searls, Superintendent,
Huttonsville Correctional Center and Jail,
Respondent below, Respondent

MEMORANDUM DECISION

Petitioner Morgan C. Vandergriff appeals the March 1, 2024, order of the Circuit Court of Putnam County denying his amended petition for a writ of habeas corpus.¹ The petitioner argues that the circuit court erred in denying habeas relief because, according to the petitioner, he was not provided with effective assistance of trial counsel in his criminal case. Upon our review, finding no substantial question of law and no prejudicial error, we determine that oral argument is unnecessary and that a memorandum decision affirming the circuit court's order is appropriate. *See* W. Va. R. App. P. 21(c).

In May 2018, the petitioner struck the victim with his vehicle, causing the victim's death. A grand jury indicted the petitioner for first-degree murder in March 2019. In August 2019, a jury convicted the petitioner of second-degree murder as a lesser included offense of first-degree murder, and the circuit court sentenced him to forty years of incarceration. In *State v. Vandergrift*,² No. 19-0999, 2020 WL 7231112 (W. Va. Dec. 7, 2020) (memorandum decision), this Court affirmed the petitioner's conviction, stating that "the jury clearly believed beyond a reasonable doubt that petitioner killed the victim unlawfully, willfully, intentionally, and with malice." *Id.* at *8. In addition to challenging the sufficiency of the evidence, the petitioner also argued that the State's motion to instruct the jury on lesser included offenses of first-degree murder following the close of all the evidence was "tantamount to a mid-trial reindictment," depriving him of adequate notice of the lesser included offenses and a meaningful opportunity to be heard. *Id.* at *5. The

¹ The petitioner appears by Joseph A. Curia III and Robby N. Long, and the respondent appears by Attorney General John B. McCuskey and Deputy Attorney General Andrea Nease. The petitioner is currently incarcerated at Huttonsville Correctional Center and Jail. That superintendent has been substituted as the respondent. *See* W. Va. R. App. P. 41(c). Because a new Attorney General took office while this appeal was pending, his name has been substituted as counsel.

² It is not clear from the record whether the petitioner's name is spelled "Vandergriff" or "Vandergrift."

Court rejected this assignment of error by finding that the State complied with Rule 30 of the West Virginia Rules of Criminal Procedure by submitting its proposed lesser included jury instructions to the petitioner at the close of all the evidence. *Id.* at *6. The Court further found that “the evidence supported jury instructions on the lesser-included offenses of murder in the second degree and voluntary manslaughter, and, under [*State v.*] *Allen*, [131 W. Va. 667, 49 S.E.2d 847 (1948)],³ it would have been error for the trial court not to give those instructions.” *Id.* As the Court noted, Rule 31(c) of the West Virginia Rules of Criminal Procedure provides that “[t]he defendant may be found guilty of an offense necessarily included in the offense charged[.]” *Id.* at *7.

The petitioner filed a petition for a writ of habeas corpus in March 2020. The circuit court appointed habeas counsel, who filed an amended habeas petition in July 2021. The circuit court held a habeas hearing in December 2022, at which time the petitioner asserted that trial counsel provided ineffective assistance. The petitioner primarily alleged that trial counsel failed to adequately inform him of the possibility that he could be convicted of a lesser included offense of first-degree murder and, as a result, he decided not to testify in his defense.⁴ The petitioner presented the testimony of both of his trial counsel and introduced documentary evidence. For example, the petitioner admitted into evidence an excerpt from the trial transcript from his criminal case, where the petitioner confirmed to the circuit court that he declined the State’s plea offer allowing him to plead guilty to second-degree murder and the State would stand silent as to sentencing. According to the transcript, trial counsel informed the circuit court that they explained to the petitioner “the difference between second degree murder and first-degree murder.” After the habeas hearing, the circuit court rejected the petitioner’s allegations of ineffective assistance of trial counsel and denied the amended habeas petition. The circuit court found that, to the extent the petitioner’s testimony conflicted with trial counsels’ testimony regarding the possibility of being convicted of a lesser-included offense and his decision not to testify, the petitioner’s

³ In the Syllabus of *Allen*, we held, in pertinent part, that “it is error not to instruct the jury on the nature, elements and punishment for the offense to which such evidence relates, when request therefor is made either by the State or the defendant.” 131 W. Va. at 667, 49 S.E.2d at 847.

⁴ As a second or alternative ground for habeas relief, petitioner asserted “cumulative error,” arguing that trial counsels’ failure to inform him of possible lesser included offenses of first-degree murder, combined with other alleged deficiencies, cumulatively denied him his right to effective representation. *See State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 322 n.7, 465 S.E.2d 416, 424 n.7 (1995) (a habeas petitioner may show the prejudice necessary to establish a claim of ineffective assistance of counsel through a demonstration of the cumulative effect of counsel’s deficiencies). However, while using the label “cumulative error,” the petitioner did not assign any other error to the circuit court. Instead, the petitioner made two claims of ineffective assistance of trial counsel—the second such claim being asserted in the alternative. Although the petitioner raised a third ground for habeas relief in the circuit court—severer sentence than expected—the petitioner states that he is not raising that issue on appeal. Finally, we note that the petitioner waived all other grounds for habeas relief by initialing and signing his *Losh* checklist. *See Losh v. McKenzie*, 166 W. Va. 762, 768-70, 277 S.E.2d 606, 611-12 (1981). The checklist of grounds typically used in habeas corpus proceedings, usually referred to as the *Losh* checklist, originates from our decision in *Losh*, wherein we set forth the most common grounds for habeas relief.

testimony was not credible.⁵ The petitioner now appeals the circuit court’s March 1, 2024, order denying habeas relief. We review the circuit court’s order “and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.” Syl. Pt. 1, in part, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006).

The circuit court thoroughly considered and addressed each of the petitioner’s claims. Upon our review, we conclude that the petitioner has not satisfied his burden of demonstrating error in the court’s rulings, and we find none. See Syl. Pt. 2, *Dement v. Pszczolkowski*, 245 W. Va. 564, 859 S.E.2d 732 (2021) (“On an appeal to this Court the appellant bears the burden of showing that there was error in the proceedings below resulting in the judgment of which he complains, all presumptions being in favor of the correctness of the proceedings and judgment in and of the trial court.” (quoting Syl. Pt. 2, *Perdue v. Coiner*, 156 W. Va. 467, 194 S.E.2d 657 (1973))). Accordingly, we find that the circuit court did not abuse its discretion in denying habeas relief.

For the foregoing reasons, we affirm.

Affirmed.

⁵ The circuit court addressed the petitioner’s credibility in two separate findings set forth in its March 1, 2024, order. Both trial counsel testified that they discussed with the petitioner about whether he should testify in his own defense and that the petitioner exercised his Fifth Amendment right not to testify. The circuit court found that the petitioner’s testimony stating that he chose not to testify because he wanted his trial to be about the facts instead of being about him, was consistent with trial counsels’ testimony and inconsistent with his contention that he based that decision on the “false premise” that the jury would not consider lesser-included offenses. However, to the extent that petitioner testified that trial counsel provided no help regarding whether he should testify, the circuit court determined that the petitioner’s testimony was not credible as it conflicted with the testimony of counsel. We note that, in habeas proceedings, “where there is a conflict of evidence between defense counsel and the defendant, the circuit court’s findings will usually be upheld.” *Legursky*, 195 W. Va. at 327, 465 S.E.2d at 429; see *State v. Guthrie*, 194 W. Va. 657, 669 n.9, 461 S.E.2d 163, 175 n.9 (1995) (judging the credibility of witnesses exclusively belongs to the finder of fact). The petitioner testified at his habeas corpus evidentiary hearing that had he been aware that the jury was going to be permitted to consider lesser, included offenses, he might have made a different decision on exercising his Fifth Amendment rights, and testified at his trial. However, during his habeas corpus hearing, the petitioner offered no evidence regarding what his trial testimony would have been. Under Syl. Pt. 5 of *State v. Miller*, 194 W. Va. 3, 459 S.E. 2d 114 (1995) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)), in order for a habeas petitioner to prevail on a claim of ineffective assistance of counsel, he must establish (1) that trial counsel’s performance was deficient under an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. At his habeas corpus hearing, the petitioner failed to offer any evidence of what testimony he might have given at trial, much less how that testimony might have mitigated the evidence against him or the outcome of his trial. Accordingly, the petitioner failed to satisfy the second prong of the *Strickland/Miller* test.

ISSUED: November 25, 2025

CONCURRED IN BY:

Chief Justice William R. Wooton
Justice C. Haley Bunn
Justice Charles S. Trump IV
Justice Thomas H. Ewing
Senior Status Justice John A. Hutchison