IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-456

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STATE OF WEST VIRGINIA,

Respondent,

v.

CARL RAY SUMMERFIELD,

Petitioner.

RESPONDENT'S BRIEF

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INTRODUCTION

A jury found that Petitioner Carl Ray Summerfield shot and killed Wesley Rohrbaugh. Multiple witnesses provided evidence leading to this conclusion. Those witnesses described Summerfield threatening Rohrbaugh with a gun while screaming at the soon-to-be-victim. The testimony said Summerfield then led Rohrbaugh out of his camper and into a garage. The witnesses heard gunshots, followed by Rohrbaugh yelling out asking Summerfield why he shot him. Finally, more gunshots. One witness even described the follow-up to the event and said that Summerfield threatened to kill her too if she told anybody what happened.

Later, Rohrbaugh's body was discovered in Summerfield's garage. As to the murder weapon, yet another witness told the jury that Summerfield had sold the gun to him. In fact, Summerfield specifically told the witness that he had used the gun to kill Rohrbaugh.

While in jail awaiting trial, Summerfield's cellmate testified that Summerfield bragged about the murder and told him what happened. Summerfield even asked the cellmate to tattoo a specific tattoo on him: It consisted of a grim reaper (representing death), a gun (the murder weapon), three bullets (one for each shot Summerfield put into Rohrbaugh) and a W (for Wesley, the victim's first name).

The jury heard all of this and more. The evidence against Summerfield was overwhelming. And after deliberating for only one-and-a-half hours, the jury unanimously convicted Summerfield of the killing and recommended life without mercy.

Despite the evidence against him, Summerfield now musters four objections to his conviction. But picking at a couple isolated statements during closing arguments, one discretionary evidentiary call, and one witness's purportedly unreliable testimony cannot

overcome the weight of evidence supporting the jury's guilty verdict. As a result, Petitioner's appeal is meritless. The Court should uphold Summerfield's conviction and sentence.

ASSIGNMENTS OF ERROR

Summerfield raises four assignments of error:

1. The Circuit Court erred by failing to grant a mistrial and/or new trial based upon impermissible prosecutorial comment during closing argument.

2. The Circuit Court erred by failing to give the Petitioner's "missing witness" instruction.

3. The Circuit Court erred by failing to grant the Petitioner's motion for judgment of acquittal based upon the State's reliance on inherently incredible testimony.

4. The Petitioner is entitled to a new trial due to the omission of bench conferences from the transcripts.

STATEMENT OF THE CASE

In July 2022, a Grant County grand jury indicted Summerfield on two felony counts: first-degree murder in violation of West Virginia Code § 61-2-1, and use of a firearm during the commission of a felony in violation of West Virginia Code § 61-7-15a. App. 20-21. Both charges arose from the February 2022 shooting death of Wesley Rohrbaugh in Allen's Mobile Village. App. 20-21.

Summerfield went to trial in April 2023. App. 87. During voir dire, a prospective replacement juror announced in the presence of the other jurors that Summerfield "had come to his store several times and used drugs in his store bathroom." App. 87. In response, Summerfield moved for a mistrial. App. 87. After hearing argument on the motion, the circuit court ruled that "since drug use by [Summerfield] was an intrinsic part of the State's case, a pool member advising jurors that [Summerfield] used drugs … was not enough to allow a mistrial because the jury will ultimately hear evidence of [Summerfield's] drug use in the State's case in chief." App. 88. Summerfield objected, and voir dire continued. App. 88.

Then following voir dire, the trial was set to begin. App. 89. But before that could happen, Summerfield's counsel informed the court that just before the trial started "one of the juror went out to smoke and spoke with [Rohrbaugh's] sister." App. 89. The sister confirmed this happened but said that she merely "introduced herself and said that she could not talk to [the juror]." App. 89. Still, the circuit court determined that "the cumulative error at this point was prejudicial to [Summerfield] and a mistrial was appropriate." App. 89. As such, it continued the trial. App. 89.

Summerfield's new trial was held in May 2023. App. 99. The trial lasted three days. App. 110. This time, there were no problems empaneling a jury, and the trial went as planned. App. 102.

Throughout the trial, the State called 11 witnesses.

1. Mitch Allen was a resident of Allen's Mobile Village. App. 314. He testified that in January 2022, his newly purchased Glock Generation Five had gone missing from his trailer. App. 319-20. Allen further testified that he later saw Summerfield holding a gun "that looked identical to the one … [he] bought" and that Summerfield "hit [him] over the head with it." App. 321. Allen concluded by saying that he never got the gun back and did "not even know where it went." App. 324.

2. Jared Michael was also a resident of Allen's Mobile Village. App. 333. Michael testified that he was with Rohrbaugh in his camper on the day he was killed. App. 338. On that day, Michael said he witnessed Summerfield enter the camper, "start[] hollering at [Rohrbaugh]," "produce a gun," "point it at [Rohrbaugh]," and "strike [him] with it." App. 340-41. Then, Michael recalled that Summerfield told Rohrbaugh he "didn't want to make a mess in the camper" before "talk[ing] [Rohrbaugh] into going over to the garage." App. 342-43. Michael then heard

gunshots from the garage and Rohrbaugh yelling at Summerfield, "why the fuck you shoot me for." App. 344-45. Finally, Michael said there were "[o]ne or two" more shots. App. 346.

3. Tammy Lofton is Michael's significant other and lived with him at Allen's Mobile Village. Her testimony corroborated Michael's regarding Summerfield threatening and striking Rohrbaugh with a gun before taking him to a garage from which gunshots were heard. App. 374-82. Additionally, Lofton testified that after the shooting, she heard Summerfield explicitly say he killed Rohrbaugh. App. 385. Lofton concluded her testimony by telling the jury that Summerfield threatened to "kill [her and Michael] if [they] said anything." App. 386.

4. Jeremiah Dean was visiting the area when the killing occurred. App. 409-10. He testified that he bought a gun from Summerfield around that time. App. 411-12. Dean identified this gun as a "Glock 40 2nd Gen.," but he also admitted that he was "not real familiar with guns." App. 421. Sometime after the sale, Dean said that Summerfield wanted the gun back and confessed it "was the gun that was used for the murder of [Rohrbaugh]." App. 415. Dean did not have the gun on him at the time though because he had sold it for drugs in Baltimore. App. 423-24.

5. Dr. Jacqueline Benjamin worked in the Office of the Chief Medical Examiner in Charleston. App. 427. She testified as an expert with regard to Rohrbaugh's autopsy, including the wounds he suffered and the procedures she used during her examination. App. 428-40.

6. Theodore Chavez worked for the FBI Laboratory and testified as an expert on firearms. App. 455. His testimony concerned the type of gun and ammunition used in the crime. App. 455-71. Based on his examination of the bullet fragments, he testified that a Glock Generation 5 was likely the murder weapon. App. 478. Still, though he "wouldn't expect [a] Gen 2" of having the necessary rifling, Chavez replied "no" when asked if he could rule out the Gen 2 altogether. App. 479.

7. Dewey Bailey was another resident of Allen's Mobile Village. App. 494-95. His testimony informed the jury that Summerfield owned and carried multiple guns. App. 496. Bailey also testified that he discovered Rohrbaugh's body in Summerfield's garage. App. 505.

8. Christina Weese also lived in Allen's Mobile Village. App. 534. She testified that Summerfield lived in the garage where the body was found. App. 536-37. She also said that after she learned about the dead body there, she was the one who "called 911." App. 537.

9. Robert Smith was a Grant County resident who had stored his motorcycle in Summerfield's garage at Allen's Mobile Village. App. 558-59. Smith testified that in February 2023—after Rohrbaugh's death—he went to retrieve his motorcycle from Summerfield. App. 560-62. His testimony consisted primarily of descriptions of Summerfield's behavior at that time. App. 562-65.

10. Jerry Campbell was incarcerated at Potomac Highlands Regional Jail when Summerfield was housed there; he was his cellmate. App. 574. Campbell testified that Summerfield "said he murdered this guy because he thought he was gonna wear a wire on him where he was a snitch." App. 577. Further, at Summerfield's request, Campbell tattooed Summerfield with a "grim reaper" who was holding a "40 caliber pistol" that "looked like it was being shot." App. 578-79. Summerfield specifically asked Campbell to put three bullet casings in the tattoo because "he said he shot the guy three times." App. 582. Additionally, Campbell said the tattoo has a W on it because "Wes Rohrbaugh was the one [Summerfield] shot and killed." App. 583.

11. Lieutenant Kirk Thorne of the Grant County Sheriff's Office was the investigating officer in the case. App. 605. He testified to the nature of his investigation, including the condition of the crime scene, the physical evidence, and his witness interviews. App. 606-29.

For his part, Summerfield called three witnesses:

1. Jonathan Judy was incarcerated with Summerfield at Potomac Highland Regional. App. 673. Judy testified that Campbell was the one who came up with the idea of tattooing the grim reaper on Summerfield's arm. App. 676. He also said that Campbell had done multiple tattoos "that had three bullets" on other people. App. 677. Further, he described "[t]hree bullets or three bullet holes" as Campbell's "trademark." App. 680-81. Finally, Judy testified that Campbell told him that Campbell planned to use the tattoo he gave Summerfield as "leverage for him getting some of his charges lessened." App. 681.

2. Todd Neumyer was a retired member of the Pennsylvania State Police. App. 697. He testified as a firearms expert. App. 698. His testimony consisted of an analysis of Chavez's report as well as his own opinions regarding the firearms in the case and the likely details of the shooting. App. 698-724. He opined that, based on the casings, the gun that killed Rohrbaugh must have been a Glock Generation 5 chambered to fire 40 caliber bullets. App. 707. But he also added that he wasn't sure if Dean "would know a Glock 1st Generation, 2nd Generation, 3rd Generation, Gen 4 or Gen 5 one from the other." App. 727.

Neumyer also testified that Rohrbaugh's injuries indicated that "the first shot went into the upper portion of [his] arm, striking and breaking the humerus." App. 713. He continued that Rohrbaugh likely "then grabbed his left arm with his right hand and the second shot went through the back of his right hand before going through his coat, his sleeve and most of his left arm." App. 713. Finally, Neumyer described the third shot as a fatal "head shot." App. 725.

3. Defense counsel also briefly recalled Lieutenant Kirk Thorne to attest to the gunshot residue test performed in the case. App. 738-39.

After hearing all of the evidence from these witnesses as well as considering a number of exhibits, the jury returned a guilty verdict on both charges. App. 797-98. And because Summerfield had a unitary trial without a separate mercy phase, the jury rendered its verdict without mercy. App. 797-98. Summerfield filed post-trial motions seeking a judgment of acquittal and a new trial, which the circuit court denied. App. 127.

Based on the jury's recommendation, the circuit court sentenced Summerfield to life without mercy. App. 130-32. It is from this order that Summerfield now appeals.

SUMMARY OF THE ARGUMENT

Summerfield's first assignment of error asks the Court to grant him a new trial based on two fleeting remarks from the prosecutor during closing argument. Those remarks did not prejudice Summerfield though, and their mere existence is not enough for a new trial. This is particularly true in the face of all the evidence against Summerfield. And on top of all that, the circuit court cured any potential harm that the comments could have caused through appropriate jury instructions. This first assignment thus fails.

Summerfield also seeks a new trial on his second assignment of error which alleges that the circuit court erred by declining to give a missing witness instruction to the jury. But Summerfield's proposed instruction was an incorrect statement of law. By this Court's precedent, the circuit court was thus correct to reject it—indeed, *giving* an incorrect instruction may have been error. Though Summerfield asks the Court to overturn settled case law to rule for him nonetheless, that precedent should stand. As such, this second assignment does not prevail either.

Summerfield's third assignment again asks for a new trial, this time because there was allegedly insufficient evidence to convict him. But witnesses described to the jury no fewer than three separate confessions by Summerfield. That evidence, coupled with the circumstantial and

physical evidence in the case, was more than enough for the jury to convict Summerfield. And Summerfield's misplaced reliance on a sexual offense standard does not alter this analysis. So, his third assignment falls in turn with the first two.

Summerfield's final assignment requests a new trial simply because the transcripts in the case do not detail multiple bench conferences. Summerfield never objected to those portions of trial not being transcribed, and he fails to explain how he is prejudiced now by these omissions. In fact, Summerfield himself notes that many of the bench conferences were inconsequential or even resulted in a ruling in his favor. At best, he argues that some of the conferences were unclear. Yet without showing specific prejudice to his appeal, the mere omission of the bench conferences from the trial transcript does not amount to reversible error. Just like the others, this assignment loses.

At bottom, Summerfield asks the Court to overturn a jury verdict. He does not shoulder the immense burden this request levies. As such, the Court should affirm Summerfield's conviction for first-degree murder and his resulting life sentence.

STATEMENT REGARDING ORAL ARGUMENT

This case does not warrant Rule 19 or Rule 20 oral argument. The Court can decide it on the briefs and record, and a memorandum decision would be appropriate.

ARGUMENT

I. The Prosecutor's Comments Did Not Violate Summerfield's Due Process Rights.

Summerfield first argues that two brief comments during closing arguments should afford him a mistrial. The first comment was made by the prosecution during closing argument when he told the jury: "You will send a message with your verdict. And your message will be, this is what's permitted in Grant County." App. 769. The second comment came later in the closing, with the prosecutor this time telling the jury: "I want to introduce you to Wes's father." App. 794.

In both instances, Summerfield's counsel objected, and the circuit court cut off the comments. *See* App. 769 and 794.

These remarks are all that Summerfield points to as warranting a new trial. Yet "[a] judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury" unless those remarks "*clearly* prejudice the accused or result in manifest injustice." *State v. Sugg*, 193 W. Va. 388, 405, 456 S.E.2d 469, 486 (1995) (emphasis added). This is a high bar, and even "undesirable or … universally condemned" remarks do not meet it on their own. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

So, to succeed, Summerfield must show that the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). This determination is "gauged from the facts" of a given case. *Sugg*, 193 W. Va. at 405, 456 S.E.2d at 486. Four factors guide this analysis: "(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. 5, *State v. Mills*, 219 W. Va. 28, 631 S.E.2d 586 (2005). None of those factors weigh in Summerfield's favor, so he cannot show clear prejudice or manifest injustice.

A. The Prosecutor's Comments Did Not Mislead The Jury Or Prejudice Summerfield.

On the first factor, no evidence exists that the prosecutor's remarks here misled the jury or prejudiced Summerfield. First, Summerfield does not allege that the comments were deceptive in any way. Nor could he, as neither comment had anything to do with the law or contested facts.

Rather, Summerfield argues only that the comments were intentionally "inflammatory" and thus prejudiced him. Pet'r's Br. 15.

To "determine[e] prejudice" for purposes of this factor, this Court looks to the "scope of the objectionable comments," "their relationship to the entire proceedings," the "ameliorative effect of any curative instruction given or that could have been given but was not asked for, and the strength of the evidence supporting the defendant's conviction." *State v. Guthrie*, 194 W. Va. 657, 684, 461 S.E.2d 163, 190 (1995). The scope and relationship of the comments to the proceedings as well as the strength of the evidence track the remaining due process factors and will be discussed further below.

Focusing for now on the other features *Guthrie* discusses, the record shows the circuit court prevented both comments from causing any prejudice to Summerfield. And in fact, the lower court sustained "instantaneous" objections to both of the comments. Pet'r's Br. 14. As such, the case can be decided on the first factor based on the circuit court's ameliorative actions.

For the first comment, the prosecutor began to tell the jury that they could "send a message with [their] verdict," but the court sustained an objection and agreed with Summerfield's counsel that the prosecutor is "not allowed to instruct the jury to send a message to the community." App. 769. And at the time, Summerfield did not ask the circuit court to provide any further curative instructions following the sustained objection. So, for this first comment, Summerfield's failure to "request the court to instruct the jury to disregard" the statement means he cannot "take advantage of" the prosecutor's partial remark. *State v. Lewis*, 133 W. Va. 584, 608, 57 S.E.2d 513, 528 (1949). And for the second comment, the court specifically instructed the jury to "not consider the last remarks the Prosecuting Attorney made where he introduced the family." App. 794. The circuit court thus corrected any potential harm that could have arisen from the remarks. *See State*

v. Lambert, 232 W. Va. 104, 114, 750 S.E.2d 657, 667 (2013) (finding no reversible error where prosecutor's potentially improper remarks were "offset" by the "circuit's repeated instructions to the jury"). As such, the "ameliorative effect" of the circuit court's actual actions—and the hypothetical additional actions Summerfield failed to ask for—was sufficient to prevent any prejudice to Summerfield. *Guthrie*, 194 W. Va. at 684, 461 S.E.2d at 190.

Summerfield's only counter to the ameliorative actions—those both "given or that could have been given but w[ere] not asked for," *Guthrie*, 194 W. Va. at 684, 461 S.E.2d at 190—is a general claim that "curative instruction[s] [are] an insufficient remedy," Pet'r's Br. 15. He gives no support for this claim, though, and the suggestion that curative instructions *cannot* address improper remarks flies in the face of this Court's directive to specifically consider the "ameliorative effect of any curative instruction given." *Guthrie*, 194 W. Va. at 684, 461 S.E.2d at 190.

And all of that assumes that the remarks were damaging in the first place. The circuit court's intervention casts doubt on that proposition. Still, even if Summerfield is correct in saying that "[a] drop of ink cannot be removed from a glass of milk," Pet'r's Br. 15 (quoting *Gov't of V.I. v. Toto*, 529 F.2d 278, 283 (3d Cir. 1976), no such contamination occurred here. The "drop of ink" discussed in *Toto* referred to the admission of "prior criminal acts which ha[d] no purpose except to infer a propensity or disposition [of the defendant] to commit crime." *Toto*, 529 F.2d at 283. That is not the kind of comment at issue here. Yet even assuming the half-spoken comments from the prosecutor started to rise to that level, the circuit court prevented them from getting there. So, at worst, the prosecutor picked up the inkwell, but before he could do anything further, the circuit court removed the pen from his hand. Because of the circuit court's intervention, there is

no reason to suspect that the prosecutor's comments affected Summerfield's "presumption of innocence." *Id.* Thus, the proverbial glass of milk remained unadulterated.

And the prejudice analysis does not change just because Summerfield "declined to ask for a bifurcated mercy phase." Pet'r's Br. 15. Summerfield offers no legal support for that position. In reality, Summerfield was never empowered to make the choice not to have a bifurcated trial in the first place nor did he "g[i]ve up the opportunity to put on testimony in mitigation of punishment." *Id.* Rather—even if Summerfield had asked for it—it is the circuit court who had "discretionary authority to bifurcate [the] trial." *State ex rel. Dunlap v. McBride*, 225 W. Va. 192, 201, 691 S.E.2d 183, 192 (2010).

It is not just Summerfield who could have asked the circuit court for bifurcation either: The State can also move for a split trial. *See Dunlap*, 225 W. Va. at 201, 691 S.E.2d at 192. (upholding a circuit court's decision to bifurcate a trial on the State's motion). So, Summerfield never made a "strategic tradeoff relating to the mercy issue," Pet'r's Br. 15. As a result, there is no reason to suspect "deepened" prejudice, *id.*, from a unitary trial when the State could have simply sought bifurcation if it wanted to present "evidence involving [Summerfield] that may not have been admissible during the guilt phase" but was "relevant as to the decision of whether [he] should receive mercy," *Dunlap*, 225 W. Va. at 201, 691 S.E.2d at 192.

But put aside the fact that Summerfield did not make a strategic call to decline bifurcation. Whether it was his decision is not the deciding factor anyway. The only relevant test is prejudice to the defendant. None of the cases analyzing that question turned on bifurcation, and Summerfield does not offer anything else to show he was prejudiced.

In any case, if Summerfield felt that he was prejudiced by a unitary trial, he still could have sought bifurcation from the circuit court. There is no evidence he did, let alone that such a motion

was improperly denied. Thus, on top of being incorrect, the argument that a unitary—rather than bifurcated—trial prejudiced Summerfield is raised "for the first time on direct appeal" and should not be considered. Syl. pt. 2, *State v. Salmons*, 203 W. Va. 561, 509 S.E.2d 842 (1998).

B. The Remaining Factors Are Against Summerfield As Well.

Summerfield fails to show the most important factor of prejudice stemming from the partial remarks that the judge cured through sustaining quick objections and a curative instruction. He fares no better on the remaining three factors.

First, the prosecutor's remarks were "limited" and lasted mere seconds. *State v. Thomas*, 249 W. Va. 181, ___, 895 S.E.2d 36, 50 (2023). In fact, Summerfield complains of only *two* fleeting comments in total throughout the entire trial. One of those comments was that the jury could "send a message with [its] verdict," App. 768-69, and the other was that the prosecutor "want[ed] to introduce [the jury] to [Rohrbaugh's] father," App. 794. These comments "were of limited duration and were not extensive." *Mills*, 219 W. Va. at 36, 631 S.E.2d at 594. And importantly, Summerfield's counsel immediately objected to both comments. *See* App. 768-69, 794. The circuit court upheld these objections as well, thus cutting off the comments and isolating them from the rest of the closing argument and the trial in general. *See* App. 768-69, 794.

Second, the "strength of the evidence that established [Summerfield's] guilt weighs heavily against" ordering a mistrial. *Thomas*, 249 W. Va. at ___, 895 S.E.2d at 50. For instance, witnesses described a fight between Summerfield and Rohrbaugh. App. 763. Those same witnesses saw Summerfield take Rohrbaugh to the garage. App. 763. They then heard gunshots. App. 763. And there was evidence that Summerfield was at the site of Rohrbaugh's death as well. App. 763. Further, a witness testified that Rohrbaugh shouted Summerfield's name and asked why Summerfield shot him. App. 763-64. Yet another witness discovered Rohrbaugh's body in

Summerfield's garage. App. 780. Finally, there were at least *three* separate confessions made by Summerfield to the murder: one in front of Lofton, one to Dean, and one to Campbell. App. 764-65. In short, "[t]he evidence in this case was overwhelming," and so this factor counsels against vacating Summerfield's conviction, too. *State v. McCartney*, 228 W. Va. 315, 332, 719 S.E.2d 785, 802 (2011).

Third, "there is no evidence to indicate that these isolated comments were deliberately made to divert the jury's attention to an extraneous matter." *State v. Rexrode*, 243 W. Va. 302, 316, 844 S.E.2d 73, 87 (2020). Summerfield argues that it is "apparent" that the "comments were deliberate and calculated" to distract the jury. Pet'r's Br. 16. He bases this idea on the fact that the prosecutor said he intended to mention Summerfield's family in his closing after the reference to Rohrbaugh's family—he says this is evidence of the prosecutor's intention to inappropriately influence the jury. *Id.* But it is unclear how a reference to Summerfield's family could negatively affect his standing before the jury. If anything, it would possibly endear him to the jury by humanizing him. But despite this, Summerfield points to nothing else that indicates an *intention* to impermissibly divert the jury. Without such evidence, this factor—like all the others—is against Summerfield.

* * *

In the end, "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context." *United States v. Young*, 470 U.S. 1, 11 (1985). Here, the context shows it is "highly probable the [comments] did not contribute to the judgment." *Guthrie*, 237 W. Va. at 311, 787 S.E.2d at 582. The prosecutor did not compare Summerfield to a "vulture" who "came to West Virginia to victimize dumb hillbillies," and he did not "argue[] facts not in evidence." *State v. Critzer*, 176

W. Va. 655, 661, 280 S.E.2d 288, 292 (1981). And the circuit court did not "overrule[] or fail[] to rule on [Summerfield's] objections," either. *Id.* Yet those are the kinds of egregious remarks and failures that this Court has said create prejudice. Nothing of the kind exists here. Thus, Summerfield was not denied due process, and the Court should not grant a new trial based on this assignment of error.

II. The Circuit Court Did Not Err By Declining To Give A "Missing Witness" Jury Instruction.

Summerfield next seeks a new trial because the circuit court followed this Court's precedent and declined to give an unneeded jury instruction regarding missing witness inferences. He does not allege that any of the jury instructions given were defective. He argues only that the circuit court should have given another instruction. And he admits that this Court has already rejected the argument that he was somehow entitled to that instruction in a criminal trial. The Court should hold to that precedent.

Regardless, Summerfield would face a difficult challenge as "the refusal to give a requested jury instruction is reviewed for an abuse of discretion." Syl. pt. 1, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996). In fact, this Court "will presume that the trial court acted correctly unless it appears from the record in the case that the instructions refused were correct and should have been given." *Kessel v. Leavitt*, 204 W. Va. 95, 144, 511 S.E.2d 720, 769 (1998) (cleaned up). To overcome this presumption, Summerfield must prove that his proposed instruction "is a correct statement of the law," "is not substantially covered in the charge actually given," and "concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense." *State v. Derr*, 192 W. Va. 165, 180, 451 S.E.2d 731, 746 (1994). Summerfield's proposed instruction was not a correct statement of law, so his challenge ends at the first and most important requirement.

A. Summerfield's Proposed Jury Instruction Was Not A Correct Statement Of Law.

Summerfield's proposed instruction read as follows:

> MISSING WITNESS:
>
> The Court Instructs the jury that the failure of the State to call available material witnesses gives rise to the inference that had those witnesses testified, their testimony would have been adverse to the State's case.

App. 95.

Summerfield's proposed instruction was based on this Court's holding in *McGlone v. Superior Trucking Co., Inc.*, 178 W. Va. 659, 363 S.E.2d 736 (1987). In that case, this Court upheld a jury instruction given in a *civil* trial that an "unjustified failure … to call an available material witness *may* … give rise to an inference that the testimony of the 'missing' witness would … have been adverse to the party failing to call such witness." Syl. pt. 3, *id.* (emphasis added). *McGlone* always had a limited scope—and one outside the criminal context. *State v. James*, 211 W. Va. 132, 135, 563 S.E.2d 797, 800 (2002), for instance, explained that in *McGlone* this Court "cautiously approved a non-binding [missing witness] instruction … for use in appropriate civil cases." But the "instruction tendered by [Summerfield] did not inform the jury that it '*may'* infer that [the missing witness] would have testified adverse to the prosecution." *Pullin v. State*, 216 W. Va. 231, 236, 605 S.E.2d 803, 808 (2004) (emphasis added). Thus, the mandatory language in Summerfield's proposed instruction dooms it out of the gate. Even *McGlone* itself agrees: "[A]n instruction directing the jury's attention to the failure of a party to call a particular witness … must be carefully drafted so as not to be binding upon the jury." *McGlone*, 178 W. Va. at 667, 363 S.E.2d at 744. Yet Summerfield's language would have "g[iven] the jury no choice but to infer [the missing witness] would have testified adverse to the prosecution." *Pullin*, 216 W. Va. at 236, 605 S.E.2d at 808. Such an instruction "should not [be] given." *Id.*

And while Summerfield alleges that he requested "permissive language" be added after the circuit court declined his instruction, the record shows this is not the case. Pet'r's Br. 19. It is true that Summerfield's counsel asked the court to consider an alternative instruction. App. 736-37. But when the court asked specifically what he "want[ed] it to say," Summerfield's counsel again requested mandatory language that the "failure to call an available witness in this case Denise Shanholtz and Caterina Mullins leads to an adverse inference that the testimony would have been adverse to the State's case." App. 737. Thus, the key requirement of permissive "may" language is absent from every potential jury instruction Summerfield requested.

But even if Summerfield had asked for the permissive "may" language in the instruction—which the record shows he did not—*Pullin* still defeats Summerfield's claim because it shows that *McGlone* does not apply at all in criminal contexts like this. Summerfield himself concedes that "the holding of [*Pullin*] supports the Circuit Court's ruling." Pet'r's Br. 20. And he is also right about what that holding says: "[I]n a criminal case," missing witness instructions are improper where "the witness was equally available to be called by the defendant." *Id.* (citing *Pullin*, 216 W. Va. 236-37, 605 S.E.2d at 808-09). To make even a non-mandatory instruction proper, then, Summerfield still needed to "show that the government possesse[d] the sole power to produce the witness." *Pullin*, 216 W. Va. at 236, 605 S.E.2d at 808. Yet here, it is "straightforwardly the case" that Summerfield "could have called his mother and/or sister to testify." Pet'r's Br. 20.

Because his language is incorrect on the law, and he did not make the necessary factual showing of being unable to produce the witness himself, the holding in *Pullin* plainly applies and ends Summerfield's challenge. In short, Summerfield cannot show that the instruction he wanted got the law right. For that reason alone, this assignment of error falls. *Derr*, 192 W. Va. at 180, 451 S.E.2d at 746.

B. *Pullin* Controls Here And Should Not Be Overturned.

In the face of this failure, Summerfield beseeches the Court to "reject the *Pullin* rationale for two reasons." Pet'r's Br. 20. The Court should not.

First, he says that the missing witness discussion in *Pullin* is dicta and therefore not binding. Pet'r's Br. 20. The Court in *Pullin*, though, was clear that although it "reversed th[e] case on [a different assignment of error]," it "*must* nevertheless address [the] 'missing witness' assignment of error" as well. *Pullin*, 216 W. Va. at 235, 605 S.E.2d at 807 (emphasis added). And addressing the assignment was no academic exercise. The Court was required to do so because "the issue could arise again during a retrial of this case." *Id.* at 235-36, 605 S.E.2d at 807-08. By the Court's own recognition that it "must" address the error, *id.* at 235, 605 S.E.2d at 807, the missing witness discussion was "necessary to a decision of the case," *In re Assessment of Kanawha Valley Bank*, 144 W. Va. 346, 382-83, 109 S.E.2d 649, 669 (1959), and therefore set a precedent.

Second, Summerfield argues that *Pullin* "improperly dilutes the State's burden of proof and the Petitioner's right to refrain from putting on evidence." Pet'r's Br. 20. This argument is nothing more than Summerfield disagreeing with the holding in *Pullin* though. Yet "the doctrine of stare decisis requires this Court to follow its prior opinions." *State ex rel. W. Va. Dept. of Transp., Div. of Highways v. Reed*, 228 W. Va. 716, 719, 724 S.E.2d 320, 323 (2012). To overturn *Pullin* then, Summerfield would need to show "changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis." *Id.* But Summerfield does not bring up this Court's stare decisis factors at all, let alone show that *Pullin* is a "palpable mistake or error." *Verba v. Ghaphery*, 210 W. Va. 30, 34, 552 S.E.2d 406, 410 (2001). Summerfield simply disagrees with *Pullin* and nothing more. His disagreement is

hardly an "urgent reason requir[ing] deviation." *Woodrum v. Johnson*, 210 W. Va. 762, 766 n.8, 559 S.E.2d 908, 912 n.8 (2001).

But even if the Court were inclined to revisit *Pullin* wholesale, Summerfield offers nothing to support the claim that declining to call a witness reduces the State's burden. And indeed, there is no reason to think that not calling a witness changes the State's requirement of "proving each element of a criminal offense beyond a reasonable doubt." *State v. Hulbert*, 209 W. Va. 217, 227, 544 S.E.2d 919, 929 (2001). The witnesses and evidence the State *does* offer either do or do not prove guilt beyond a reasonable doubt.

As to a defendant's right to refrain from putting on evidence, Summerfield compares his situation to that of the petitioner in *James*. But that case has no bearing here. There, this Court disapproved of a jury instruction suggesting that a defendant "had some obligation to produce witnesses to prove or tend to prove her innocence." *James*, 211 W. Va. at 136, 563 S.E.2d at 801. In doing so, the Court said that the instruction "amount[ed] to a comment by the trial court on Appellant's evidence or the lack of evidence offered by her." *Id.*

Thus, the Court in *James* did not repudiate a *rejected* instruction; it took issue with an *approved* instruction that appeared to increase the burden on a defendant. No such instruction was given here, and there is no indication that the lower court did anything to suggest to the jury that Summerfield had to present evidence of his innocence. As such, Summerfield's "presumption of innocence" was untouched. *James*, 211 W. Va. at 136, 563 S.E.2d at 801.

III. The Evidence Presented To The Jury Was Sufficient To Convict Summerfield.

In his third assignment of error, Summerfield mounts a claim of "insufficient competent evidence to sustain the elements of the offenses" of which the jury convicted him. Pet'r's Br. 22. As with the first two assignments, this third argument meets steep resistance: The question for the

Court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syl. pt. 1, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163. Under this standard, "a jury verdict should be set aside only when the record contains *no evidence* … from which the jury could find guilt beyond a reasonable doubt." Syl. pt. 3, *id.* (emphasis added). In short, Summerfield bears a "heavy burden." *Id.* With the evidence here, he cannot shoulder it.

A. The Record Contains Sufficient Evidence Of First-Degree Murder And Commission Of A Felony Using A Firearm.

"[V]iewed from the prosecutor's coign of vantage," more than enough evidence exists against Summerfield to support the jury's verdict. Syl. pt. 4, *State v. Costello*, 245 W. Va. 19, 857 S.E.2d 51 (2021).

Just look at Tammy Lofton's testimony. Lofton testified that Summerfield and Rohrbaugh were arguing on the day Rohrbaugh was killed. App. 373-74. She further testified that Summerfield "[p]ulled a gun out" during the argument. App. 375. Next, Lofton said that she saw Summerfield "hit [Rohrbaugh] with the butt of [the gun]." App. 378. According to Lofton, Summerfield then ordered Rohrbaugh to "[p]ut [his] shoes on" because Summerfield "d[idn't] want to make a mess in here." App. 379. The two men then left, and shortly after, Lofton reported hearing "[t]wo gunshots" followed by Rohrbaugh "holler[ing] at [Summerfield] why the fuck you shoot me for." App. 381. "[A] couple more" shots followed, and she did not hear Rohrbaugh again. App. 382. Then, the witness saw Summerfield and heard him confess to his sister that "I killed him." App. 385. The witness concluded her testimony by telling the jury that Summerfield threatened to "kill [her and the other witnesses] if [they] said anything." App. 386.

This testimony alone is enough to allow the jury to "have found the essential elements of the crime proved beyond a reasonable doubt." Syl. pt. 1, *State v. Boyd*, 238 W. Va. 420, 796

S.E.2d 207 (2017). Summerfield was convicted of two crimes: first-degree murder and use of a firearm during commission of a felony. App. 797-98. "[M]urder in first degree is when one person kills another unlawfully, maliciously, deliberately, and premeditatedly." *State v. Gibson*, 186 W. Va. 465, 471, 413 S.E.2d 120, 126 (1991); *see also* W. VA. CODE § 61-2-1 (First-degree murder is "any willful, deliberate and premeditated killing."). Lofton's testimony alone covered all those elements. In turn, the jury heard that a firearm was used in commission of that murder, so finding guilt on the murder charge would also satisfy the elements of the latter charge as well. *See* W. VA. CODE § 61-7-15a ("[A]ny person who, while engaged in the commission of a felony, uses or presents a firearm shall be guilty of a felony.").

And Lofton was just one witness: Summerfield confessed to the murder on at least three separate occasions. To succeed in his challenge, Summerfield needed to show that there was "no evidence whatsoever" on which the jury could have based its verdict. *State v. Foster*, 221 W. Va. 629, 639, 656 S.E.2d 74, 84 (2007). That is not the case. The Court should not disturb the jury's verdict.

B. Summerfield's "Incredible Evidence" Standard Is Inappropriate Here, And He Fails To Meet It Anyway.

Summerfield fails to cast doubt on Lofton's testimony, nor that from most of the other key witnesses, let alone demonstrate that all of it is insufficient evidence for conviction when the Court credits "all inferences and credibility assessments the jury might have drawn in favor of the prosecution." Syl. pt. 3, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163. In truth, Summerfield does not engage with most of the evidence against him. Instead, he focuses exclusively on the testimony of Jeremiah Dean and its interaction with the expert testimony regarding the murder weapon. Together, Summerfield believes these testimonies are "inherently incredible," and "def[y] physical

laws," thus warranting reversal. Pet'r's Br. 22 (quoting *State v. McPherson*, 371 S.E.2d 333, 338, 179 W. Va. 612, 617 (1988)).

The principal problem with Summerfield's argument is that it misstates the standard for insufficiency of the evidence. The incredible evidence standard advanced by Summerfield does not concern insufficiency of the evidence generally but instead is "the standard for assessing a motion for acquittal" in "sexual offense case[s]." *McPherson*, 179 W. Va. at 616, 371 S.E.2d at 337; *see also State v. Haid*, 228 W. Va. 510, 521, 721 S.E.2d 529, 540 (2011) (noting that *McPherson* "reiterated" the "standard for assessing a motion for acquittal in a *sexual offense case*" as the "standard of inherent incredibility" (emphasis added)). So, for the purposes of overturning a conviction, the inherent incredibility standard applies only to sexual offense cases. This makes sense because in those cases "[a] conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible." Syl. pt. 5, *State v. Beck*, 167 W. Va. 830, 844, 286 S.E.2d 234, 243 (1981); *see also McPherson*, 179 W. Va. at 616, 371 S.E.2d at 337 ("For the trial judge hearing a sexual offense case, the standard for assessing a motion for acquittal is stated in syllabus point 5 of [*Beck*].") Because Summerfield brings a sufficiency of the evidence claim outside of that context, *McPherson* and its ilk do not apply here at all.

Even if this standard did apply—which it does not—and even if the unchallenged evidence could not sustain the conviction on its own—and it does—Summerfield still would not prevail. All Summerfield argues is that Dean testified as to something that other evidence indicates may be incorrect. But inherent incredibility needs "more than contradiction." *McPherson*, 179 W. Va. at 617, 371 S.E.2d at 338. Rather, proving the inherent incredibility of a witness's testimony "require[s] a showing of 'complete untrustworthiness.'" *Id.* Summerfield has not made this

showing. Therefore, this assignment fails regardless—because Dean's testimony was not inherently incredible as a matter of law, the jury was entitled to give it whatever weight it deemed appropriate.

Looking closer at Dean's testimony shows why: He testified that he bought a gun from Summerfield. App. 412. Specifically, Dean said he received a black "Glock 40 I think 2nd Gen pistol." App. 412. He further described that the gun "had an extra lock that locked the slide from coming back." App. 421. Dean was also clear that he was "not real familiar with guns." App. 421.

Summerfield claims that the problem with this testimony is that both experts in this case said that "only certain models of a Generation 5 Glock were capable of firing the shots that killed [Rohrbaugh]." Pet'r's Br. 22. But the record shows less certainty. Although Theodore Chavez, the State's expert, did say that he believed the shots must have been fired from a Generation 5 Glock, he said this was only because he "wouldn't *expect* Gen 2, an earlier version … to also" have been capable. App. 478-79 (emphasis added). Thus, in response to being asked if that "rule[d] out the possibility that a Glock Gen 2 pistol fired those bullets," Chavez explained his reasoning but concluded "no." App. 478-79. Todd Neumyer, Summerfield's expert, was more definitive and opined that the bullets "had to have been discharged from a Glock pistol Gen 5." App. 707. But he also added that he "d[idn't] know if Mr. Dean would know a Glock 1st Generation, 2nd Generation, 3rd Generation, Gen 4 or Gen 5 one from the other." App. 727.

So that left the jury with potential "contradiction" between the witnesses' testimonies on this point. Again, inherent incredibility requires "more than" that. *McPherson*, 179 W. Va. at 617, 371 S.E.2d at 338. Here, the jury could have resolved those potential inconsistencies in a few ways. It could have discounted Dean's statement that the gun was a second generation based on

his own hedging, for one thing: Dean did not testify that he was sure the gun Summerfield gave him was a Glock Generation 2. Indeed, Dean stated that he was "not real familiar with guns." App. 421. He only confirmed that "as far as [he] kn[e]w" it was a Glock Generation 2. App. 421. But Dean did not even know "what [Summerfield's counsel] mean[t]" by the term "model" with regards to the gun. App. 421. The jury also could have disregarded Summerfield's expert's definite testimony and given more weight to Chavez's more equivocal testimony. Those are not the *only* appropriate conclusions the jury could have drawn, but they do not "def[y] physical laws." Pet'r's Br. 22 (quoting *McPherson*, 371 S.E.2d at 338, 179 W. Va. at 617).

At best, Dean's testimony created an "evidentiary conflict[]" that must be "resolve[d] … in the prosecution's favor." Syl. pt. 2, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996). But more likely, the question for the jury was simply whether to believe this portion of Dean's testimony. And "[c]redibility determinations are for a jury." Syl. pt. 5, *State v. Whittaker*, 221 W. Va. 117, 650 S.E.2d 216 (2007). As such, it was up to the jury to determine whether Dean was credible with regards to both his knowledge of the gun model and the statements he claimed Summerfield made to him.

Under the "inference that best fits the prosecution's theory of guilt," for example, the jury may have believed Dean was wrong about the gun model but right about Summerfield's confession. Syl. pt. 2, *LaRock*, 196 W. Va. 294, 470 S.E.2d 613. This is exactly what the State said in response to Summerfield's post-trial motion for acquittal, too. *See* App. 123 ("The jury could well have believed, since [Dean] wasn't a gun person, that he misidentified the Model and generation of the gun that [Summerfield] brought him."). And weighing the evidence that way, "the jury could find guilt beyond a reasonable doubt" based on Dean's testimony. Syl. pt. 3, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163. Because "the trier of fact is uniquely situated to make

such determinations," this Court "is not in a position to, and will not, second guess such determinations." *Michael D.C. v. Wanda L.C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997).

In short, Summerfield cannot show that Dean's testimony is so legally flawed that the Court needs to effectively excise it from the record when conducting an insufficiency analysis. The evidence against Summerfield was overwhelming even without Dean's testimony. The Court should not grant relief on this assignment.

IV. Summerfield Fails To Affirmatively Show Specific Prejudice Caused By The Missing Bench Conferences.

In his fourth and final assignment of error, Summerfield asks the Court to overturn the jury's guilty verdict based on the omission of various bench conferences from the trial transcripts. Although he claims that the "missing bench conferences in this case are extensive," Pet'r's Br. 23, "[o]missions from a trial transcript" alone do not "warrant a new trial," syl. pt. 8, *State v. Graham*, 208 W. Va. 463, 541 S.E.2d 341 (2000). Instead, Summerfield must show that the "missing portion[s] of the transcript specifically prejudice[] [his] appeal." *Id.* Without showing specific harm, even a "regrettable number of unclear passages" is not enough to meet that burden. *Id.* at 471, 541 S.E.2d at 349. Summerfield shows no such harm, and so this assignment fails.

Summerfield alleges there are eight missing conferences. Yet despite needing to show "specifically" how he was prejudiced by these omissions, Summerfield's objections to each are general and speculative.

Summerfield himself admits the first omitted conference "is not central to this assignment of error." Pet'r's Br. 23. Next, he points to a second conference during voir dire and says that "it is unclear what transpired." *Id.* Summerfield then confesses a lack of knowledge regarding his third listed conference. *See id.* at 23-24 (saying there is "no further discussion of what occurred"). In the fourth conference Summerfield's counsel "successfully forestalled [a witness] from

improperly discussing [Summerfield's] collateral conduct"—so it appears that Summerfield already got the relief he was hoping for at that conference. *Id.* at 24. And while Summerfield on one hand says his fifth example is "unclear" in both "purpose [and] result," he also—without support—claims that the "exchange is clearly relevant to [his] second assignment of error." *Id.* The sixth missing conference "did not lead to objections by either party." *Id.* Summerfield has no specific objections to the seventh conference either and acknowledges that its "details … are uncertain." *Id.* Finally, Summerfield concludes with an eighth conference in which "it is unlikely any error transpired." *Id.*

That's eight conferences missing, but zero conferences objected to or alleged to have specifically prejudiced Summerfield's appeal in any way. Summerfield hopes to get around the specificity requirement by arguing that "[i]t cannot be known whether any objection was made and/or preserved" during these conferences. Pet'r's Br. 24. But he does not allege why that should matter; he does not, for instance, argue that counsel might have made an objection relevant to any of his assignments of error that could give him a more favorable standard of review now. More generally, Summerfield does not demonstrate how any of the missing conferences will cause the Court any "difficulty in assessing [Summerfield's] alleged errors." *Graham*, 208 W. Va. at 471, 541 S.E.2d at 349. To the contrary, Summerfield received transcripts including everything the jury heard and has used them to assert each of his—albeit meritless—assignments of error. He does not allege he needed anything from the missing portions to bring this appeal, nor even hint how they could have formed the basis of an additional argument on appeal. Last year this Court reemphasized that a petitioner "cannot simply assert that the missing portions [of a transcript] *might* reveal the existence of error warranting reversal," but must instead "identify possible appellate issues which, if meritorious, would otherwise warrant a new trial." *State v. Leslie G.*,

2023 WL 7299893, at *4 (W. Va. Nov. 6, 2023). Summerfield did not. And so, "he has shown no prejudice by" the lack of bench conferences. *State v. Mayle*, 178 W. Va. 26, 30, 357 S.E.2d 219, 223 (1987).

On top of failing to allege specific prejudice, "[t]here is no indication that at any point [Summerfield] was prevented from making any record which he chose to make." *State v. Gilbert*, 184 W. Va. 140, 148, 399 S.E.2d 851, 859 (1990). "There is further no indication that [he] at any point objected to the failure of the court reporter to transcribe[] what was occurring." *Id.* Yet "proceedings of trial courts are presumed regular, unless the contrary affirmatively appears upon the record." Syl. pt. 17, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974). So, "the lack of an objection on [Summerfield's] part to the failure of the court reporter to transcribe matter[s] which occurred off the record" coupled with the fact that he has not "affirmatively shown that the proceedings were irregular," further shows how this assignment of error "is without merit." *Gilbert*, 184 W. Va. at 148, 399 S.E.2d at 859.

The Court should not grant a new trial on this final assignment of error.

CONCLUSION

For these reasons, the Court should affirm Summerfield's conviction and sentence.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-456

STATE OF WEST VIRGINIA,

Respondent,

v.

CARL RAY SUMMERFIELD,

Petitioner.

CERTIFICATE OF SERVICE

I, Caleb A. Seckman, do hereby certify that on this 7th day of March 2024, the forgoing **RESPONDENT'S BRIEF** was served on all counsel of record 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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