IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Appeal No. 24-245

STATE OF WEST VIRGINIA,

Respondent,

v.

JAMIL ADRIAN CABRAL,

Petitioner.

BRIEF OF RESPONDENT

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INTRODUCTION

Petitioner Jamil Cabral was unemployed at the time officers made a lawful traffic stop and found him with $2,030 dollars cash, marijuana on his person, and fentanyl and drug packaging materials in the vehicle he occupied. His co-defendant pled guilty to a felony drug offense and testified against him. During his own testimony, Petitioner blatantly lied to the jury about his prior criminal history, so, the State properly asked him about his cocaine trafficking conviction from Ohio. After the jury heard all the evidence, Petitioner was convicted of one count conspiracy to commit possession of a controlled substance with intent to deliver, to-wit: fentanyl, second offense; and possession of a controlled substance, to-wit: marijuana. Petitioner's skeletal arguments are difficult to meaningfully respond to; however, all his assignments of error, most being only a paragraph of argument, are without merit and this Court should affirm his conviction.

ASSIGNMENTS OF ERROR

Petitioner sets forth the following twelve assignments of error:

I. "The circuit court erred in erred in allowing evidence of the Fentanyl contained within a sealed pack to be introduced as evidence[.]

II. The court erred in allowing the search of the vehicle[.]

III. The Conspiracy of Possession of a Controlled Substance, Second Offense, conviction is against the weight of the evidence[.]

IV. The court erred in allowing evidence of Petitioner's prior conviction in Washington County after ruling that the evidence could not be admitted at trial[.]

V. The [c]ircuit [c]ourt erred in denying Motion for Judgement of Acquittal at trial, Motion for New Trial, and Post Trial Motion for Judgement of Acquittal[.]

VI. It was plain error for Officer Joshua Snyder to testify that he wanted to talk to either Petitioner or the Codefendant about the delivery of marijuana[.]

VII. The circuit court erred in sentencing [ ] Petitioner to a 16-year determin[ate] sentence [because] [it] was excessive under the facts of the case and a motion for probation or alternative sentence should have been granted[.]

VIII. The conviction and sentence of sixteen years for second offense Conspiracy is excessive and should be set aside[.]

IX. Petitioner believes [he] was not tried before a jury of his peers[.]

X. The court erred in denying a motion for a mistrial after the jury pool was tainted by the comments of a prospective juror[.]

XI. Codefendant Opitz was not allowed to testify that her husband may have planted drugs in the car[.]

XII. Petitioner's right to a fair trial was violated due to cumulative effect of numerous errors committed by the trial court[.]"

Pet'r's Br. 1.

STATEMENT OF THE CASE

A. Pre-trial

In September 2023, Petitioner was indicted for one count possession of a controlled substance with intent to deliver, to-wit: fentanyl, second offense; one count conspiracy to commit possession of a controlled substance with intent to deliver, to-wit: fentanyl, second offense; and possession of a controlled substance, to-wit: marijuana. App. 15-16. Petitioner filed a motion to stipulate to his prior conviction for cocaine trafficking (App. 22-23), which was accepted by the circuit court, without objection. App. 28. He also filed a motion to suppress the vehicle stop and all evidence obtained as a result of the stop[1] (App. 24-25), and a motion to suppress any evidence of the alleged fentanyl (App. 26-27).

[1] Petitioner's motion refers to a "dog search"; however, there was no dog and Petitioner indicated that was a mistaken reference at the pre-trial motions hearing. App. 126.

The court held a pre-trial motions hearing on December 6, 2023. App. 125-77. Regarding the traffic stop, the State presented testimony from Sergeant Joshua R. Snyder of the Parkersburg Police Department who testified that on the evening of January 27, 2023, he encountered a silver 2011 Nissan Rouge that he was familiar with from an incident approximately one month prior. App. 128-29. During the prior incident, he noticed a dark tinted license plate and was able to determine that the registration was expired, but was unable to perform a traffic stop, because when he turned around to pull over the vehicle, it was gone. App. 129. On January 27, 2023, he saw the same vehicle with the same tinted license plate cover, so he caught up to it to see if the registration was still expired, and it was. App. 130. He initiated a traffic stop and observed the license plate was a paper plate from Ohio. App. 131. The driver was Petitioner's co-defendant, Lyndia Opitz, who explained that she did have proper registration but had not yet put it on the vehicle. App. 131. He noticed the passenger, Petitioner, was shaking nervously. App. 132. He testified that the odor of marijuana was coming from within the vehicle, and, after he obtained both parties' information, he contacted Patrolman William Rifesteck of the Parkersburg Police Department to assist him. App. 132-33. Ms. Opitz had a suspended driver's license with multiple prior driving suspended offenses, a valid criminal warrant, and an open capias warrant. App. 133. Because of Ms. Opitz's warrants, she was placed under arrest. App. 134.

Patrolman Rifesteck testified that, upon responding to the scene, he made contact with Petitioner. App. 152-53. He also detected the odor of marijuana coming from the vehicle. App. 153. Because he and Sergeant Snyder were going to search the vehicle, he asked Petitioner to step out and Patrolman Rifesteck conducted a pat down search of Petitioner's person for officer safety. App. 153. In Petitioner's left pocket he felt a spongy material, asked Petitioner what it was, and Petitioner indicated it was marijuana. App. 154. At that time, Petitioner was detained and searched further, and Patrolman Rifesteck found approximately $2,000 in his pocket. App. 155. Thereafter, he searched the vehicle and found small baggies that are commonly used to distribute marijuana in the console, and another sealed bag between the driver's seat and console. App. 155-57. When Sergeant Snyder got back to the station, he touched the sealed bag—which had a stamped logo from the television show *Rick and Morty*—and found it to be hard, so he opened it and found three aluminum foil folds that contained white powder was later determined to be fentanyl. App. 137-38

Petitioner argued that regarding the stop, he did not believe "that it was a reasonable or probable cause search based on one small amount of a marijuana baggie found on the person and nothing else being in plain sight." App. 165-66. The court disagreed finding that Sergeant Snyder had reasonable suspicion to make a traffic stop due to the expired registration. App. 169. Then, because Ms. Opitz had a warrant, a capias, and no driver's license, the officer was entitled to do a pat down search for officer safety and to search the vehicle where a weapon could be reached; additionally, officers had probable cause to search after the arrest of Ms. Opitz. App. 169-70.

Regarding the motion to suppress the fentanyl, Petitioner argued that the bag was found between the driver's side and console so it was not in "constructive custody or control of [Petitioner], and therefore, should be suppressed." App. 170. When the court asked Petitioner for a case to support his position, he indicated that he "believed it to be well-settled in West Virginia that the [S]tate[] [is] required to demonstrate that the–it was either actually in the custody and control of the–the defendant or in the constructive custody and control of the defendant." App. 171. The court found that because the fentanyl was a result of a lawful search, and because possession is a question of fact for the jury at trial, Petitioner's motion to suppress the fentanyl was denied. App. 172-73.

B. Trial

Relevant to this appeal is the jury voir dire with respect to one of the prospective jurors, Juror Braniff. He indicated that his nephew is a deputy in Wirt County. App. 277-78. He stated that his nephew talks to him about his work and Juror Braniff would be unable to sit fairly and impartially on the jury. App. 278. When asked why, he responded, "because they arrest the same people over and over and over." App. 278. The prosecutor asked if Juror Braniff meant in Wirt County, and Juror Braniff responded, "Yeah. They just get off and they do it again." App. 278. He indicated that he has not lived in Wood County for very long, but he thought "it's across the board there's a problem" and he could not sit fairly and impartially. App. 279.

In chambers, Petitioner moved to strike the entire jury based on the "continued questioning of the State, but more importantly, the continued answers by Juror Braniff. He exhibited a clear disgust with[,] I would say[,] defense saying I think, you know—I think his last comment was I think that we're here says it all." App. 282-83. Petitioner then indicated that he did not know if he could "move for a mistrial specifically" because the jury was not sworn, so, he asked for either a "mistrial or this jury to be struck from further service in this case." App. 283-84. The State responded that it appeared that Juror Braniff did not want to be on the jury, and he was not attempting to actively engage other people with his opinion, but merely stated his opinion. App. 284. The court found that Juror Braniff would obviously be stricken for cause; however, it was not enough for a mistrial or grounds to excuse the entire panel. App. 284. The court reasoned that Juror Braniff was merely answering the questions asked and his personal opinions would not affect the jury. App. 285.

Regarding the stipulation that Petitioner had previously been convicted for trafficking in cocaine in 2018, the court specifically cautioned everyone to instruct their witnesses that the prior conviction was not to be mentioned. App. 338-39. Petitioner indicated that he understood he would be stipulating to the prior offense so it would not be mentioned at trial, and he also understood that, if convicted, the prior conviction would result in Petitioner's sentence being doubled. App. 339-41.

The State presented testimony from Sergeant Snyder and Patrolman Reifsteck which was substantially similar to their testimony at the suppression hearing. App. 360-99, 404-20. Patrolman Reifsteck clarified that the location of the *Rick and Morty* package containing the fentanyl could have been reached by the passenger of the Nissan Rouge. App. 420. The crime scene technician, Ketih Roberts, was called to explain the chain of custody of the evidence. App. 420-28.

The State also called Petitioner's co-defendant, Ms. Opitz.[2] App. 429-43. She testified that she pleaded guilty to felony conspiracy in exchange for her testimony. App. 429-30. She said she met Petitioner in a bar the summer prior and they started a romantic relationship. App. 431-32. Around Christmas of that year, Petitioner, who did not have a job, was about to be evicted from his apartment and came to live with her. App. 432. She said that while Petitioner was staying at her house he would periodically have "friends" come by briefly. App. 438-39. Not long after, she changed her mind and decided that she wanted to focus on herself and her children. So, she asked Petitioner to move out, and on January 27, 2023, she and Petitioner were going to pick up money so he could do so. App. 433-34. She said they went to a storage building to get the money. App. 434. Sergeant Snyder pulled them over and she admitted that she and Petitioner had smoked marijuana earlier that day. App. 435. Ms. Opitz admitted that a couple of days before the trial,

[2] Ms. Opitz also has an appeal pending before this Court in *State of West Virginia v. Lyndia Bell Opitz*, West Virginia Supreme Court Case Number 24-226.

Petitioner came to where she was staying, acting stressed out and telling her he felt in his spirit she was turning against him. App. 442-43.

On cross examination she testified that she had never seen the *Rick and Morty* packet, and that sometimes her seventeen-year-old daughter drove that vehicle, and, on very rare occasion, a lady named Tricia Martin drove the vehicle. App. 446-47. Regarding her now-deceased husband, Petitioner's counsel asked Ms. Opitz if she believed he could have put the packet in her vehicle, and she responded, "He'd done multiple things to try to—in his mind. He—he was so out of his mind." App. 448. The State objected because Ms. Opitz was speculating as to what was in his mind and the court sustained that objection. App. 448. In chambers, Petitioner clarified that previously Ms. Opitz told the officer that her deceased husband might have put the packet in her car and called the police to get back at her. App. 449. The State again objected because there was no foundation for that other than Ms. Opitz's speculation and no evidence of such a call. App. 449. The court allowed Petitioner elicit information about the deceased husband's drug use, and if she ever saw him with drugs or saw him keep drugs in her car, but prevented Petitioner from asking her to speculate if he planted any drugs in her car. App. 450-52. Thereafter she did testify about her deceased husband's drug use, specifically fentanyl. App. 454.

The State re-called Sergeant Snyder to ask him about his discussion with Petitioner regarding his employment. App. 455. He said that the discussion happened prior to the discovery of the fentanyl, and at the time of the discussion, Sergeant Snyder thought possibly that Petitioner and Ms. Opitz were involved in marijuana distribution based on the large amount of currency, the empty baggies, and the marijuana found. App. 455. Sergeant Snyder asked Petitioner where the currency came from, and Petitioner stated that he had a job at a window company that paid him by direct deposit; however, he was unable to provide any documentation of the employment or a direct deposit. App. 455-456. There was no objection to this testimony, but the court sua sponte determined that Petitioner's statements the next day should not be admitted. App. 456. The State clarified that Petitioner was never able to provide anything to show he was employed. App. 457. When the State asked Sergeant Snyder about his time in the narcotics task force and asked him to explain what a controlled purchase was, Petitioner objected, which was sustained. App. 457-58.

The State called Rebecca Harrison, the forensic scientist supervisor at the seized drug section of the West Virginia State Police Forensic Laboratory. App. 465. She was declared an expert in the field of drug identification and analysis and testified to the contents of the *Rick and Morty* package, which was fentanyl. App. 468-81. After this witness, the State rested. App 485.

Petitioner moved for a directed verdict regarding the possession with intent to deliver and conspiracy charges, arguing that the co-defendant testified that she was not aware of the packet and did not get it from the Petitioner, did not see Petitioner distribute drugs, and Petitioner was not permitted to use her vehicle. App. 486. The State argued that there was more evidence presented than that of the co-defendant, in the form of testimony from the officers and testimony from the forensic scientist. App. 488. The court found it was a question of fact for the jury, so the motion for directed verdict of acquittal was denied. App. 488.

Petitioner testified on his own behalf. App. 490. He said that he and Ms. Opitz met in the summer of 2022, and became romantically involved. App. 491. About one month prior to trial, the relationship ended—according to him—due to "the stress and mental madness of going through a case that I've never been through before." App. 492. He said that he and Ms. Opitz were going to pick up some "funds to put down first months rent on a[n] actual apartment so [he] could gain custody of [his] daughter." App. 492. When he and Ms. Opitz were pulled over, he had just retrieved that money from his storage unit, and he was not employed at that time. App. 492-93. He did admit to having marijuana but denied that he possessed fentanyl. App. 493. He denied intending to deliver the fentanyl and denied conspiring with Ms. Opitz to commit any crime. App. 493-95.

Prior to cross examination, the State asked to meet in chambers to discuss Petitioner's testimony that he was going through a case that he'd never been through before. App. 497-98. The State argued that because he had been convicted before, this was a lie, and the State sought introduction of Petitioner's prior conviction. App. 498. Petitioner argued that he had only entered a plea in Ohio, and that was different than going through the stress of a trial. App. 498. The State pointed out that Petitioner didn't specify the stress of a trial, and at the time of the breakup he was not in a trial. App. 498. The court ruled that because he didn't just say he was going through this case, but added "I have never been through this before," his statement misled the jury; therefore, the State was permitted to question him about it. App. 502.

On cross examination Petitioner admitted that he previously had a job where he was making about $11.75 per hour, and he worked there for about four months. App. 503-04. When the State asked about the prior conviction, Petitioner admitted to pleading guilty to trafficking cocaine in Ohio from an incident in 2017. App. 505-06. Thereafter, the court directed the State to limit the prior conviction strictly to the facts of the guilty plea in its closing. App. 512.

The jury found the Petitioner not guilty of count one, but guilty of count two—conspiracy to commit the offense of possession with intent to deliver a schedule II controlled substance, fentanyl, and guilty of count 3—possession of a controlled substance, marijuana. App. 548-49. Sentencing was scheduled for February 16, 2024; however, Petitioner absconded and was later apprehended in Marietta, Ohio, where he was also arrested on two new felony drug charges. App. 46.

C. Post trial motions

Thereafter, Petitioner filed his motion for post-verdict judgement of acquittal and motion for new trial. App. 48-53. In his post-verdict motion for judgement of acquittal, Petitioner argued that there was not sufficient evidence to prove that he committed the offense of conspiracy to commit possession of a controlled substance with intent to deliver, second offense, because he was acquitted of the possession of fentanyl, and he and the co-defendant both denied possessing fentanyl. App. 48-49. Further, he argued that because the State did not test the marijuana and did not submit the packaging for fingerprint analysis there was insufficient evidence to convict him of either charge. App. 49. In his motion for new trial, Petitioner set forth many of the same arguments he argues in this appeal. App. 50-53. At the hearing, the court heard arguments of counsel and determined that the jury heard the evidence and arguments and there was sufficient evidence to support the conviction; thus, both motions were denied. App. 571. The court issued its sentencing order wherein it sentenced Petitioner to sixteen years of incarceration on count two of the indictment, to run consecutive to ninety days in jail for count three of the indictment. App. 53-56.

It is from that order Petitioner now appeals.

SUMMARY OF ARGUMENT

Petitioner's skeletal brief has little argument or legal analysis for Respondent or this Court to analyze. Nonetheless, Petitioner is under the mistaken belief that the State cannot show constructive possession of a substance if it is found in a car within reach—yet the case he relies on is factually distinguishable because the substance was found in a common area of a house.

Petitioner's argument that the car should not have been searched is completely unsupported by the record because there was a lawful stop, the strong odor of marijuana, and marijuana found on Petitioner's person, following a proper pat down search. The car was not searched until after all this occurred.

The jury made a factual determination that Petitioner was guilty of conspiracy of possession of a controlled substance, to-wit: fentanyl, second offense, and the State presented overwhelming evidence to prove that conviction beyond a reasonable doubt. Petitioner's argument regarding the denial of his motion for judgement of acquittal at trial, motion for new trial, and post-trial motion for judgement of acquittal is so scant Respondent is unable to meaningfully respond to it.

Petitioner's evidentiary claims also fail. Petitioner attempts to mislead the Court by claiming the State improperly used Petitioner's prior conviction after it agreed not to. But while the State did agree to a stipulation of the conviction, it was proper to ask about the prior conviction, in response to Petitioner's testimony that he had never been involved in a case before. Petitioner has failed to show that Officer Snyder's testimony that Ms. Opitz or Petitioner may have "just been involved in the distribution of marijuana" was plain error. Petitioner mischaracterizes what he claims was an impermissible prohibition on Ms. Opitz's testimony. The court correctly prohibited Ms. Opitz from speculating about her deceased husband's thoughts; however, she was permitted to testify, about his drug use and if she ever saw him place drugs in her car.

Petitioner's sixteen-year determinate sentence was well within statutory guidelines as he faced a potential twenty-year determinate sentence. Further, he has failed to allege that the sentence was based on any impermissible factor. The court correctly determined the sentence based on the facts of the case, as well as other factors, such as Petitioner's prior history of cocaine trafficking, that he absconded prior to sentencing, and that following his conviction in this matter, he incurred new felony drug charges in another state. Accordingly, it was not improper for the circuit court to deny Petitioner's motion for probation or alternative sentence. Petitioner also makes a proportionality argument; however, that analysis is not applicable to this case.

Petitioner failed to object to the jury pool on the grounds of demographic make-up, nor has he claimed that the jury was not selected at random from a fair cross section of the population. Petitioner has also failed to show the manifest necessity required for a mistrial based on an isolated opinion expressed by a single juror, who the court properly struck for cause.

Finally, Petitioner has not shown any error, let alone cumulative error.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rules of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record. This case is appropriate for resolution by memorandum decision.

ARGUMENT

As a preliminary matter, Petitioner's brief is difficult to meaningfully respond to because all twelve assignments of error are so scarcely supported by legal authority or legal analysis. In *State v. Greene*, No. 22-895, 2024 WL 3618923 (W. Va. Supreme Court, July 31, 2024) (memorandum decision), this Court again reiterated that a petitioner's failure to comply with Rule 10 of the West Virginia Rules of Appellate Procedure is a fatal deficiency. Rule 10(c)(7) requires the argument section of a Petitioner's Brief contain "an argument clearly exhibiting the points of fact and law presented . . . . The argument must 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." Here, evidence of Petitioner's complete lack in meeting his burden to show error is reflected in the length of Petitioner's brief: sixteen pages, with only twelve pages being dedicated to his twelve assignments of error. This Court has made clear on several occasions that the West Virginia Rules of Appellate Procedure must be followed. *See, e.g.*, Administrative Order, *Filings that do not comply with the rules of appellate procedure* (Dec. 10, 2012).

Consequently, Petitioner's brief is difficult to respond to as the arguments are usually a mere paragraph containing only conclusory statements and devoid of any legal authority. On the occasions when Petitioner does cite to the law, it is only to provide blanket statements without any legal analysis. Petitioner further violates his obligations under Rule 10(c)(7) by failing to set forth the standards of review applicable to each of his arguments, which is particularly egregious as each of his multiple arguments have different standards of review.

"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 omitted). It is not this Court's job to search Petitioner's brief in an attempt to find cogent arguments. Accordingly, this Court should disregard Petitioner's arguments for failure to comport with the Rules of Appellate Procedure and for failure to meet his burden of showing error. Should the Court determine that it will address the merits of the appeal, Respondent addresses each below.

I. The trial court properly denied the motion to suppress evidence of fentanyl.

Petitioner argues that the package of fentanyl shouldn't have been admitted as evidence "because there was no other evidence tying the evidence to Petitioner." Pet'r's Br. 6. He relies on *State v. Chapman,* 178 W. Va. 678, 681, 363 S.E.2d 755, 758 (1987), where the Court held that the "State must prove beyond a reasonable doubt that the defendant had knowledge of the controlled substances and that it was subject to the defendant's dominion and control."

This Court has held that, on appeal, a circuit court's factual findings regarding a motion to suppress are reviewed for "clear error," and all facts are construed in the light most favorable to the State. Syl. pt. 1, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996). This Court affirmed the holding in *Lacy* more recently by finding that, when examining a circuit court's ruling on a motion to suppress, this Court should give "particular deference" to the "findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues."

Syl. pt. 1, *State v. Snyder*, 245 W. Va. 42, 857 S.E.2d 180 (2021) (quotation omitted). Moreover, "a circuit court's denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made." *Id.* at syl. pt. 2. Here, Petitioner confuses his own argument. He claims that the evidence should have been suppressed pursuant to *Chapman*, but *Chapman* relates to a sufficiency of the evidence claim, and not to a pretrial evidentiary issue.

Addressing Petitioner's argument, the facts in this case are distinguishable from *Chapman* because instead of being found at a house in a common area, Patrolman Reifsteck testified that the location of the *Rick and Morty* package containing the fentanyl could have been reached by the passenger of the Nissan Rouge. App. 420. Further, whether Petitioner was in possession or constructive possession of the packet that contained fentanyl is a factual question for the jury to decide. After all, "[t]he offense of possession of a controlled substance also includes constructive possession, but the State must prove beyond a reasonable doubt that the defendant had knowledge of the controlled substance and that it was subject to the defendant's dominion and control." Syl. pt. 4, *State v. Cummings,* 220 W. Va. 433, 647 S.E.2d 869 (2007). To prove a conspiracy, however, the State does not have to prove possession at all, but only "that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy." Syl. pt. 4, *State v. Less*, 170 W. Va. 259, 294 S.E.2d 62 (1981). Here, the State presented evidence that Petitioner had a large amount of cash, marijuana, and could have reached the area where the packet was located. App. 420. The State further presented the entire picture—including the cash, the baggies, and Petitioner's relationship with Ms. Opitz—which supported his conviction for conspiracy to possess with intent to deliver. *See* syl. pts. 1 and 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

Crucially, while Petitioner's assignment of error is that the trial court should have suppressed the evidence pursuant to *Chapman*, *Chapman* does not stand for such a proposition. Petitioner argues that the trial "court erred in allowing the evidence of fentanyl to be introduced," but the weight of the evidence—the *strength* of the evidence—is a jury question, not a question to be determined in the pretrial stage. Pet'r's Br. 6. A defendant seeking to suppress seized evidence is afforded the protections of the Fourth Amendment of the United States Constitution and Section 6 of Article III of the West Virginia Constitution; he is not afforded the protections of a trial court willing to divine how a jury will consider the evidence at trial. Nothing in *Lacy* or West Virginia case law suggests otherwise. The trial court was correct to find that this was a question of fact for the jury.

Construing the facts in the light most favorable to the State and giving particular deference to the circuit court as required by *Lacy,* Petitioner has failed to show that the denial of the motion to suppress was unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made. In fact, Petitioner does not even attempt to show this, as he fails to identify the appropriate standard for this Court to consider and does not attempt to make any meaningful analysis of the factors this Court should consider. The court properly denied the motion to suppress, and Petitioner is not entitled to relief on this ground.

II. The trial court properly denied the motion to suppress the search.

Petitioner's one paragraph argument under this assignment of error is merely that the search was based on the odor of marijuana and a baggie of substance believed to be marijuana, and there was no other evidence of wrongdoing. Pet'r's Br. 7. He also gives the incorrect standard of review when he argues it should be de novo for the admissibility of evidence. Pet'r's Br. 7. Instead, the standard of review is the same as the first assignment of error since they both deal with a motion to suppress.

First, Petitioner does not have standing to challenge the search. He was not the owner of the vehicle, nor was he driving. *See State v. Tadder*, 173 W. Va. 187, 313 S.E.2d 667 (1984); *State v. Brown*, No. 16-0154, 2017 WL 969152 (W. Va. Supreme Court, Mar. 13, 2017). Even if he did have standing, the search was still permissible. Although warrantless searches are generally "per se unreasonable," syl pt. 3, *State v. Kimble*, 233 W. Va. 428, 759 S.E.2d 171 (2014), courts have long recognized several exceptions, including, "searches incident to a valid arrest, seizures of items in plain view, searches and seizures justified by exigent circumstances, consensual searches, and searches in which the special needs of law enforcement make the probable cause and warrant requirements impracticable," *id.* at 433, 759 S.E.2d at 176 (quoting *State v. Farley*, 230 W. Va. 193, 197, 737 S.E.2d 90, 94 (2012)). The stop in this case involves a permissible exception.

Based on Petitioner's brief, it is difficult to ascertain which portion of the search Petitioner takes issue with; however, all stages of the search were permissible in this case. This Court has found that "[a]n automobile may be stopped for some legitimate state interest." Syl. pt. 3, *State v. Noel,* 236 W. Va. 335, 779 S.E.2d 877 (2015) (internal quotation omitted). As the circuit court correctly found, Sergeant Snyder had reasonable suspicion to make a traffic stop due to the expired registration. App. 169.

"Once the vehicle is lawfully stopped for a legitimate state interest, probable cause may arise to believe the vehicle is carrying weapons, contraband or evidence of the commission of a crime, and, at this point, if exigent circumstances are present, a warrantless search may be made." Syl. pt. 3, *Noel,* 236 W. Va. 335, 779 S.E.2d 877. Because Ms. Opitz had an active warrant, an open capias, and no driver's license, the officer arrested her. App. 169-70. "A warrantless search of the person and the immediate geographic area under his physical control is authorized as an incident to a valid arrest." Syl. pt. 1, *State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991). Officer had probable cause to search based on the strong odor of marijuana. Before the search of the vehicle, Petitioner was required to exit the vehicle, at which time, he was subjected to a lawful pat down search for officer safety. App. 169-70; *see* syl. pt. 5, *Lacy*, 196 W. Va. 104, 468 S.E.2d 719. Upon finding marijuana and large sums of cash on Petitioner's person, officers had—in addition to a right to conduct a protective sweep—also developed sufficient probable cause to search the vehicle. As several exceptions to the warrant requirement were present at this traffic stop, Petitioner is not entitled to relief on this ground. App. 169-70.

III. There was sufficient evidence to convict Petitioner of conspiracy of possession of a controlled substance, second offense.

Petitioner argues that because the jury acquitted Petitioner of the charge of possession of a controlled substance with intent to deliver, second offense, and because he denied possession of the fentanyl, the conviction is against the weight of the evidence. Pet'r's Br. 7-8. In support of this argument, Petitioner cites solely to his own testimony, and disregards any and all evidence submitted by the State. Pet'r's Br. 7-8. This contradicts the standard of review set forth by this Court.

This Court has held that:

> The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry 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. Further,

> [a] criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the

> evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt....

Syl. pt. 3, *id.*

Petitioner contends that the State did not produce sufficient evidence of a conspiracy.

> In order for the State to prove a conspiracy under W. Va. Code, 61-10-31(1), it must show that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy.

Syl. pt. 4, *Less*, 170 W. Va. 259, 294 S.E.2d 62. "The agreement to commit an offense is the essential element of the crime of conspiracy—it is the conduct prohibited by the statute." *Id.* at 265, 294 S.E.2d at 67. Such an agreement "may be inferred from the words and actions of the conspirators, or other circumstantial evidence, and the State is not required to show the formalities of an agreement." *Id.* (first citing *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946); then citing *Interstate Cir. v. United States*, 306 U.S. 208 (1939); and then citing *State v. Wisman*, 94 W. Va. 224, 118 S.E. 139 (1923)). In addition, not all of the conspirators need to commit an overt act. *Id.* "The overt act triggering the conspiracy as to all the conspirators can be committed by any one of their number." *Id.* (first citing *Bannon v. United States*, 156 U.S. 464 (1895); then citing *United States v. Montgomery*, 440 F.2d 694 (9th Cir. 1971)).

"By its very nature, a conspiracy is clandestine and covert, thereby frequently resulting in little direct evidence of such an agreement." *United States v. Burgos*, 94 F.3d 849, 857 (4th Cir. 1996) (first citing *Blumenthal v. United States*, 332 U.S. 539, 557 (1947); then citing *United States v. Wilson*, 721 F.2d 967, 973 (4th Cir. 1983)). "Indeed, a conspiracy may be proved wholly by circumstantial evidence." *Id.* at 858 (first citing *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975); then citing *United States v. Durrive*, 902 F.2d 1221, 1229 (7th Cir. 1990); and then citing *United States v. Laughman*, 618 F.2d 1067, 1074 (4th Cir. 1980)). "[T]he fact that a conspiracy is loosely-knit, haphazard, or ill-conceived does not render it any less a conspiracy—or any less unlawful." *Id.*

Viewing the evidence in the light most favorable to the State, *see* syl. pt. 1, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163, there was sufficient evidence from which the jury could find Petitioner guilty of conspiracy. The jury heard testimony that Petitioner was found with marijuana on his person, fentanyl within his reach, drug packaging materials next to him, and a large amount of cash in his pocket. App. 360-99, 404-20. Petitioner was unemployed, making the large amount of cash even more unusual. App. 455-56. Petitioner's co-defendant accepted a guilty plea to felony conspiracy, and she acknowledged that in her testimony. App. 429-30. Possession is not an element of conspiracy, and the State was not required to prove possession; thus, it is irrelevant that Petitioner was acquitted of the possession charge.

Simply because the jury could not determine which party was in possession of the fentanyl does not mean they could not determine that Petitioner and Ms. Opitz were in conspiracy to deliver a controlled substance. Despite Petitioner's vehement denials that he was not conspiring to sell drugs, the jury did not believe him. Under *Guthrie,* credibility determinations are for the jury, and a verdict should not be set aside unless there is no evidence from which the jury could find guilt beyond a reasonable doubt. That is not the case here because the State presented sufficient evidence for the jury to find Petitioner guilty, and, thus, he is not entitled to relief on this ground.

IV. Petitioner opened the door to his prior Washington County conviction.

Petitioner claims that the court erred because it let the State question Petitioner about his prior felony conviction, after he agreed to stipulate to that conviction. Pet'r's Br. 9. In support, Petitioner offers no standard of review, and cites to no case, statute, rule, or other legal provision. Pet'r's Br. 9. Petitioner concludes he was "unfairly prejudic[ed]" without providing any argument in support. Pet'r's Br. 9.

This is a case where Petitioner opened the door to his prior conviction, and then attempted to prohibit the prosecutor from putting his testimony in the proper context. "The opening the door 'doctrine operates to prevent a defendant from successfully excluding from the prosecution's case-in-chief inadmissible evidence and then selectively introducing pieces of this evidence for the defendant's own advantage, without allowing the prosecution to place the evidence in its proper context.'" *State v. Baker,* 230 W. Va. 407, 412, 738 S.E.2d 909, 914 (2013) (citing *State v. James*, 677 A.2d 734, 742 (N.J. 1996)). In *Baker* this Court noted that with respect to the scope of cross-examination,

> [n]ormally, the scope of cross-examination is limited to the subject matter [,] or issues[,] or events to which the witness testified on direct examination.... [This] means the subject matter opened up, such as: (1) the period of time; (2) the relationship between two parties; or (3) an element of the offense.... It is always permissible to inquire into the details of the events testified to on direct. Statements relate to the direct testimony of a witness when they relate generally to the events and activities [to which the witness] testified. 1 Cleckley, Palmer, and Davis, Handbook on Evidence, § 611.02[3][d][iv].

Id. at 413, 738 S.E.2d at 915.

During direct, Petitioner testified that he and Ms. Opitz broke up due to "the stress and mental madness of going through a case that I've never been through before." App. 492. Prior to beginning cross examination, the State asked to meet in chambers to discuss Petitioner's testimony that he was going through a case that he'd never been through before. App. 497-98. The State argued that because he had been previously convicted, he has been through it before, and the State wanted to introduce that information. App. 498. Petitioner argued that he had only entered a plea in Ohio, and that was different than going through the stress of a trial. App. 498. The State pointed out that Petitioner didn't specify the stress of a trial, and at the time of the breakup he was not in a trial. App. 498. The court ruled that because he didn't just say he was going through this case, instead he added that "I have never been though before" that might mislead the jury and so the State was permitted to question him about it. App. 502. Petitioner attempted to mislead the jury; by saying he was going through a case he had never been through before and the court permitted the State to ask him about it. At the time of the breakup, approximately one month before trial, Petitioner was not going through the stress of a trial, he was going through the stress of criminal case, which is exactly like to cocaine trafficking he had been through in Ohio. Petitioner opened the door as per *Baker;* thus, Petitioner is not entitled to relief on this ground.

V. The court properly denied Petitioner's two motions for judgement of acquittal and motion for new trial.

As an extension of his earlier claim that there was insufficient evidence, Petitioner sets forth this assignment of error to argue that "[t]he verdict in this case suggests a compromise[d] verdict," which supports a finding of insufficient evidence. Pet'r's Br. 9. Although Petitioner cited to *Guthrie* in his third assignment of error, he produces no legal authority for a finding of a "compromise[d] verdict." Pet'r's Br. 9.

It is unsurprising that Petitioner would avoid any case law on this issue, as this Court has held that "[a]ppellate review of a claim of inconsistent verdicts is not generally available." Syl. pt. 5, *State v. Bartlett*, 177 W. Va. 663, 355 S.E.2d 913 (1987). As the U. S. Supreme Court has "reject[ed], as imprudent and unworkable, a rule that would allow criminal defendants to challenge inconsistent verdicts on the grounds that in their case the verdict was not the product of lenity, but of some error that worked against them." *U.S. v. Powell*, 469 U.S. 57, 66 (1984). This is because "[s]uch an individualized assessment of the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake. *Id.* Here, Petitioner claims that the verdict must be the result of a "compromise," but such allegation is based on "pure speculation." Pet'r's Br. 9; *Powell*, 469 U.S. at 66.

As the U. S. Supreme Court has held, "a criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts," and such "review should not be confused with the problems cause by inconsistent verdicts." *Powell*, 469 U.S. at 67. Argument relating to sufficiency of the evidence has already been addressed in relation to the third assignment of error. There is simply no need to consider whether the verdict for count one was inconsistent with the verdict for count two, so long as the evidence is sufficient to sustain the conviction for the latter.

VI. The testimony of Officer Joshua Snyder was not plain error.

Petitioner argues that it was plain error for Sergeant Snyder to testify that Ms. Opitz or the Petitioner may have "just been involved in the distribution of marijuana." Pet'r's' Br. 10. Although he correctly identifies the plain error standard that is applicable here due to his lack of objection at trial, he fails to cite to any legal authority to support his contention that this testimony was impermissible. Moreover, this Court has defined plain error as: "(1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Petitioner has failed to identify any error, let alone one that is plain. Likewise, he fails to show how any alleged error has affected his substantial rights, nor how the alleged error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. Sergeant Snyder's testimony was not an error, and Petitioner is not entitled to relief on this ground.

This Court has explained:

> [i]n order for a lay witness to give opinion testimony pursuant to Rule 701 of the West Virginia Rules of Evidence (1) the witness must have personal knowledge or perception of the facts from which the opinion is to be derived; (2) there must be a rational connection between the opinion and the facts upon which it is based; and (3) the opinion must be helpful in understanding the testimony or determining a fact in issue.

Syl. pt. 9, *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303 (2014). Here, Sergeant Snyder possessed the personal knowledge of the underlying facts required by Rule 701, because he personally observed all the evidence in this case. Because of the drugs and drug packaging material (App. 154), the approximately two thousand dollars in cash (App. 155), and the fact that Petitioner was never able to provide anything to show he was employed (App 457), under Rule 701, there was no plain error. Sergeant Snyder had the requisite training to testify to the markers reflecting someone involved in the drug trade.

Second, Petitioner was not prejudiced by Sergeant Snyder's testimony that he thought possibly that Petitioner and Ms. Opitz were involved in marijuana distribution. App. 457. This was no more than a cursory statement that didn't trigger any prejudice, which is likely the reason his counsel did not object. Petitioner has failed to even allege how the cursory statement seriously affected the fairness, integrity, or public reputation of the judicial proceedings. Therefore, Petitioner is not entitled to relief on this ground.

VII. The court did not err in Petitioner's sentence.

Petitioner provides a blanket statement of the law for this assignment of error, but his substantive argument is merely one sentence: "Based on all these considerations, especially the weak circumstantial case against Petitioner, the circuit court erred in not granting Petitioner probation, home confinement or other alternative sentencing." Pet'r's Br. 11.

"Sentences imposed by a trial court, if within statutory limits and not based on some [im]permissible factor, are not subject to appellate review." Syl. pt. 3, *State v. Georgius*, 225 W. Va. 716, 696 S.E.2d 18 (2010) (quoting syl. pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982)); *State v. Slater*, 222 W. Va. 499, 507-08, 665 S.E.2d 674, 682-83 (2008) (stating that "[w]e deem it generally to be the better practice to decline to review sentences that are within statutory limits and where no impermissible sentence factor is indicated."). A circuit court's discretion in imposing sentence generally may not be interfered with save for an abuse of discretion:

> Moreover, in *State v. Sugg*, 193 W. Va. 388, 406, 456 S.E.2d 469, 487 (1995), we held that "[a]s a general proposition, we will not disturb a sentence following a criminal conviction if it falls within the range of what is permitted under the statute." It is not the proper prerogative of this Court to substitute its judgment for that of the trial court on sentencing matters, so long as the appellant's sentence was within the statutory limits, was not based upon any impermissible factors, and did not violate constitutional principles.

Georgius, 225 W. Va. at 722, 696 S.E.2d at 24. This Court has established that "the impermissible factors a court should not consider in sentencing include such matters as 'race, sex, national origin, creed, religion, and socioeconomic status . . . .' *United States v. Onwuemene*, 933 F.2d 650, 651 (8th Cir. 1991)." *State v. Moles*, No. 18-0903, 2019 WL 5092415, at *2 (W. Va. Supreme Court, Oct. 11, 2019) (memorandum decision).

Petitioner was sentenced to sixteen years, on count two of the indictment under West Virginia Code §§ 60A-4-408(a) and 414(a) to run consecutive to ninety days for count three of the indictment under West Virginia Code § 60A-4-401(c). App. 16, 53-56. The sentence in this case was within statutory guidelines, and Petitioner has not made any allegation that an impermissible factor was considered; thus, he is not entitled to relief on this ground.

Petitioner's request for an alternative sentence should also fall on deaf ears. An alternative sentence such as probation is a grace of the sentencing court. "[T]he decision as to whether the imposition of probation is appropriate in a certain case is entirely within the circuit court's discretion." *State v. Duke*, 200 W. Va. 356, 364, 489 S.E.2d 738, 746 (1997). Accordingly, "[t]he decision of a trial court to deny probation will be overturned only when, on the facts of the case, that decision constituted a palpable abuse of discretion." Syl. pt. 3, *State v. Shaw*, 208 W. Va. 426, 541 S.E.2d 21 (2000). As this Court has repeatedly found, "[p]robation is a matter of grace and not a matter of right." Syl. pt. 2, *State v. Hosby*, 220 W. Va. 560, 648 S.E.2d 66 (2007). The court was correct in refusing any alternative sentence.

"[P]etitioner's desire for a different outcome—probation—does not establish a 'palpable abuse of the court's discretion.'" *State v. Zackoski*, No. 20-0518, 2021 WL 3833719, at *2 (W. Va. Supreme Court, Aug. 27, 2021) (memorandum decision). Moreover, "[a] trial court has wide discretion in the sources and types of evidence used in determining the kind and extent of punishment to be imposed." *State ex rel. Dunlap v. McBride*, 225 W. Va. 192, 202, 691 S.E.2d 183, 193 (2010). "[M]erely because one qualifies for probation consideration does not mean that probation must be awarded." *State v. Lott*, 170 W. Va. 65, 68, 289 S.E.2d 739, 742 (1982). This is particularly true in this case, where Petitioner absconded almost immediately following his conviction. The lower court's sentence should be affirmed.

VIII. Petitioner's sentence does not violate the proportionality principle nor is it excessive.

Petitioner argues that his sentence is excessive and, although it was within statutory guidelines, he argues that he "believes his sixteen-year sentence under the Second Offense sta[tute] is excessive and should be reduced either to a one to five year sentence under the general conspiracy statue, or to a determinate sentence of ten (10) years." Pet'r's Br. 12.

This Court has held that because proportionality standards are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence. *See State v. Cook*, No. 22-950, 2024 WL 3618909 (W. Va. Supreme Court, July 1, 2024). *See* syl. pt. 4, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981). Petitioner's sentence does not fall into either of these categories; thus, a proportionality analysis is not appropriate.

If the Court determines to undergo a proportionality analysis, to determine if a sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, this Court applies a two-part test. The first part of the test is subjective, and "asks whether the sentence for the particular crime shocks the conscience of the court and society." *State v. Cooper*, 172 W. Va. 266, 272, 304 S.E.2d 851, 857 (1983). The second part of the test is objective, where "consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction." Syl. pt. 5, *Wanstreet*, 166 W. Va. 523, 276 S.E.2d 205. It is Petitioner's burden to prove that his sentence violated proportionality; here, Petitioner not only fails to recognize the appropriate test, but he fails to make a cogent argument.

Although not entirely clear, it appears that Petitioner is attempting to argue either that the evidence was not sufficient (Pet'r's Br. 12), or that the second offense under West Virginia Code § 60A-4-408(a), violates double jeopardy. Pet'r's Br. 11-12. It is difficult to meaningfully respond to this assignment of error other than to say that the potential sentence under West Virginia Code

§ 60A-4-414(a) is up to a determinate term of ten years, and Petitioner was sentenced to a determinate term of eight years. App. 53-56. Further, under West Virginia Code § 60A-4-408(a), "[a]ny person convicted of a second or subsequent offense under this act may be imprisoned for a term up to twice the term otherwise authorized," and, accordingly, the trial court sentenced Petitioner to sixteen years in prison, App. 53-56. The court followed the statutory mandates for sentencing. Petitioner argues that this is excessive, violates double jeopardy, and the evidence was not sufficient, however, he has failed to adequately argue any of these contentions, and, therefore, Petitioner is not entitled to relief on this ground.

IX. Petitioner was tried by a jury of his peers.

Petitioner contends that he was not tried by a jury of his peers because, based only upon his recollection, the twenty-nine-member jury pool contained no minorities; however, once again, Petitioner fails to cite supportive legal authority or make any substantive legal analysis as to how Petitioner was denied his right to a fair trial on this basis. In fact, Petitioner concedes that nothing in the record even establishes the racial makeup of the jury. Pet'r's Br. 12.

In the concurrence of *State v. Hagerman*, 249 W. Va. 361, 895 S.E.2d 216 (2023), this Court explained jurors must "be selected at random from a fair cross section of the population," which requires circuit courts to follow a detailed process for the selection of petit jury members. *Id.* at ___, 895 S.E.2d at 226 (citing W. Va. Code § 52-1-1). Further, "[t]he Legislature has also created a process for . . . criminal defendants . . . to timely object to that process." *Id. See* W. Va. Code § 52-1-15. This Court also explained that "West Virginia Code §§ 52-1-6 to -9 sets forth a process for the random selection of petit jury panel members from which a trial jury is ultimately selected." *Id.*

A party may challenge "compliance with [jury] selection procedures" by following a process established by the Legislature. *See* W. Va. Code § 52-1-15 (entitled "Challenging compliance with selection procedures"). Specifically,

> [w]ithin seven days after the moving party discovers, or by the exercise of due diligence could have discovered, the grounds [to challenge jury selection procedures], and in any event before the petit jury is sworn to try the case, a party may move to stay the proceedings, quash the indictment or move for other relief as may be appropriate under the circumstances or the nature of the case.

W. Va. Code § 52-1-15(a). Petitioner has not alleged that the jury was not selected at random from a fair cross section of the population. Because of the lack of objection, this is again a plain error standard and Petitioner has failed to identify or argue any of the elements that this is plain error. Petitioner has not argued that anything about the jury was improper. He certainly has not followed the procedures set forth in West Virginia Code § 52-1-15(a). Petitioner has failed to show any error in the jury panel, and he is not entitled to relief on this ground.

X. The court properly denied the motion for a mistrial.

Petitioner argues that he should have been granted a mistrial due to some statements made by one of the prospective jurors because "[t]hese are not the typical comments made by prospective jurors." Pet'r's Br. 14. Petitioner offers no legal authority nor pertinent legal analysis for his contention.

"The decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is a matter within the sound discretion of the trial court." *State v. Williams*, 172 W. Va. 295, 304, 305 S.E.2d 251, 260 (1983) (citing *State v. Craft,* 131 W. Va. 195, 47 S.E.2d 681 (1948)). The court should exercise this discretion only when there is a "manifest necessity" for discharging the jury before it has rendered its verdict. *Id.* "This power of the trial court must be exercised wisely; absent the existence of manifest necessity, a trial court's discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy." *Id.* Moreover, declaring a mistrial may not be necessary in all circumstances. Other corrective measures, such as cautionary instructions or excusing individual jurors, may be more appropriate, depending upon the facts and circumstances of each case. *See* W. Va. Code § 62-3-7; *U.S. v. Hankish*, 502 F.2d 71 (4th Cir.1974).

This Court has upheld a lower court's refusal to strike an entire panel when a single juror makes a questionable statement before the panel. *Nenigar v. Ballard*, No. 13-0385, 2013 WL 6153154, at *2 (W. Va. Supreme Court, Nov. 22, 2013) (memorandum decision). In *Nenigar*, a prospective juror mentioned that she knew the petitioner "from a previous placement that he was in," meaning incarceration or other confinement. *Id*. at *12-13. The lower court found that the juror in question was stricken, and the jury was not biased. *Id*. at *13. This Court affirmed, finding that "none of the jurors became biased against petitioner based on this isolated comment." *Id*. at *2-3. Such is the case here. Petitioner has failed to allege "manifest necessity," but instead merely alleges the prospective juror made comments that were "not the typical comments made by prospective jurors." Pet'r's Br. 14. The comments he complains of are the ones where Juror Braniff offers his sentiments that the police must arrest the same people over and over and "[t]hey just get off and they do it again." App. 278. This does not meet the manifest necessity burden; thus, Petitioner is not entitled to relief on this ground.

XI. The testimony of codefendant Opitz was not improper.

In this assignment of error, not only does Petitioner fail to set forth a standard of review or to cite any legal authority, but he also misleads this Court by making incorrect factual assertions. Pet'r's Br. 15. He argues that the codefendant was prevented from answering the question regarding if she knew of anyone else that could have placed the *Rick and Morty* baggie in her vehicle. App. 15. He argues this would have offered an important alternative for the jury to consider. App. 15.

In a criminal case, admissibility of testimony implicating another party as having committed the crime hinges on a determination of whether the testimony tends to directly link such a party to crime, or whether it is instead purely speculative; consequently, where testimony is merely that another person had motive or opportunity or prior record of criminal behavior, the inference is too slight to be probative, and the evidence is therefore inadmissible; however, where testimony provides direct link to someone other than defendant, its exclusion constitutes reversible error. *See State v. Harman*, 165 W. Va. 494, 270 S.E.2d 146 (1980).

Regarding her deceased husband, Petitioner's counsel asked Ms. Opitz if she believed he could have put the packet in her vehicle, and she responded, "He'd done multiple things to try to—in his mind. He—he was so out of his mind." App. 448. The State objected because Ms. Opitz was speculating as to what was in his mind and the court sustained that objection. App. 448. In chambers, Petitioner clarified that Ms. Opitz told the officer that her deceased husband might have put the packet in her car and called the police to get back at her. App. 449. The State again objected because there was no foundation for that other than Ms. Opitz's speculation. App. 449. The court allowed Petitioner to get some information about the deceased husband's drug use, and if she ever saw him with drugs or saw him plant drugs in her car but could not ask her to speculate if he planted any drugs in her car. App. 450-452. Thereafter she did testify about her deceased husband's drug use, specifically fentanyl. App. 454.

The court correctly determined that Ms. Opitz could not speculate as to what was in her deceased husband's mind or whether he planted the drugs in her car; however, it did allow her to testify to her personal knowledge about his severe drug use issue and the fact that he used fentanyl. App. 454. Petitioner has failed to establish there was any error in this testimony or the court's ruling and he is not entitled to relief on this ground.

XII. There was no error, thus, no cumulative error.

In Petitioner's final assignment of error, he contends that the trial is filled with errors, so he was deprived of his constitutional right to a fair trial. Pet'r's Br. 15.

This Court has held that "where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." Syl. pt. 5, *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972). Under the decision in *Smith,* "the cumulative error doctrine is applicable only when numerous errors have been found. *State v. Tyler G.*, 236 W. Va. 152, 165, 778 S.E.2d 601, 614 (2015) (quotations omitted); *see State v. McKinley*, 234 W. Va. 143, 167 n.22, 764 S.E.2d 303, 327 n.22 (2014). Further, this Court has recognized that the cumulative error doctrine "should be used sparingly" and only where the errors are apparent from the record. *Tennant v. Marion Health Care Found., Inc.,* 194 W. Va. 97, 118, 459 S.E.2d 374, 395 (1995). Petitioner has failed to show any error, let alone cumulative error, thus he is not entitled to relief on this ground.

CONCLUSION

For the foregoing reasons, the Respondent respectfully asks this Court to affirm Petitioner's convictions.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Appeal No. 24-245

STATE OF WEST VIRGINIA,

Respondent,

v.

JAMIL ADRIAN CABRAL,

Petitioner.

CERTIFICATE OF SERVICE

I, Jennifer Polk, do hereby certify that the foregoing Brief of Respondent is being served on counsel of record by File & ServeXpress this 4th day of September, 2024.

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