

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-511

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STATE OF WEST VIRGINIA,

Respondent,

v.

DANIEL MARCUS BATTLE,

Petitioner.

BRIEF OF RESPONDENT

Appeal from the July 20, 2023, Order
Circuit Court of Cabell County
Case No. 18-F-140

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TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Introduction.....	1
Assignment of Error.....	1
Statement of the Case.....	1
A. Indictment and Trial Testimony.....	1
B. Alleged Error by the Court	6
Summary of the Argument.....	8
Statement Regarding Oral Argument and Decision.....	9
Standard of Review	9
Argument	10
A. The trial court did not commit error in questioning counsel about a pending objection.....	10
B. There was no plain error here	12
C. Petitioner’s substantial rights were not affected by the single comment made by the trial judge	14
D. The trial court’s comment did not prejudice Petitioner or impact the fairness of his jury trial.....	15
Conclusion	20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Cook v. Harris</i> , 159 W. Va. 641, 225 S.E.2d 676 (1976).....	12
<i>Michael on Behalf of Estate of Michael v. Sabado</i> , 192 W. Va. 585, 453 S.E.2d 419 (1994).....	11
<i>Miller v. Monongahela Power Co.</i> , 184 W. Va. 663, 403 S.E.2d 406 (1991), <i>overruled on other grounds</i> , <i>Mallet</i> <i>v. Pickens</i> , 206 W. Va. 145, 522 S.E.2d 436 (1999).....	15
<i>Spencer v. United States</i> , 991 A.2d 1185 (D.C.App. 2010).....	13
<i>State v. Austin</i> , 93 W. Va. 704, 117 S.E. 607 (1923).....	11
<i>State v. Blevins</i> , 231 W. Va. 135, 744 S.E.2d 245 (2013).....	9
<i>State v. Burton</i> , 163 W. Va. 40, 254 S.E.2d 129 (1979).....	12, 14
<i>State v. Farmer</i> , 200 W. Va. 507, 490 S.E.2d 326 (1997).....	12
<i>State v. Harris</i> , 230 W. Va. 717, 742 S.E.2d 133 (2013).....	9
<i>State v. Johnson</i> , No. 21-0356, 2022 WL 10076175 (W. Va. Supreme Court, Oct. 17, 2022) (memorandum decision)	11
<i>State v. Keesecker</i> , 222 W. Va. 139, 663 S.E.2d 593 (2008).....	19
<i>State v. Leep</i> , 212 W. Va. 57, 569 S.E.2d 133 (2002).....	11
<i>State v. Malick</i> , 193 W. Va. 545, 457 S.E.2d 482 (1995).....	16
<i>State v. Massey</i> , 178 W. Va. 427, 359 S.E.2d 865 (1987).....	12

<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995).....	10, 13
<i>State v. Spadafore</i> , 159 W. Va. 236, 220 S.E.2d 655 (1975).....	11
<i>State v. Thompson</i> , 220 W. Va. 398, 647 S.E.2d 834 (2007).....	10, 14, 16, 18
<i>State v. Wotring</i> , 167 W. Va. 104, 279 S.E.2d 182 (1981).....	14
Other Authorities	
West Virginia Rules of Appellate Procedure 18(a)(3) and (4)	9
West Virginia Rules of Evidence Rule 103	8, 11, 12

INTRODUCTION

Petitioner Daniel Marcus Battle's sole complaint on appeal relates to a single comment¹ made by the Court. Ignoring the context of the exchange and disregarding the breadth of the State's evidence against him, Petitioner argues that this isolated remark was so prejudicial that it "crippled the defense" (Pet'r's Br. 8) and doomed Petitioner to a guilty verdict. Bald claims notwithstanding, Petitioner fails to support this assertion, and fails to demonstrate prejudice. Respondent disputes that any error occurred, much less plain error, and submits that Petitioner has failed to meet his burden. Accordingly, Respondent requests this Court affirm Petitioner's conviction and sentence.

ASSIGNMENTS OF ERROR

Petitioner, by counsel, raises a single assignment of error in his brief: "Did the court err in making comments bolstering the state's case that implied this suspect could have been fully immune from a murder prosecution had this suspect confessed to this murder while pleading guilty in federal court to possessing a firearm?" Pet'r's Br. 1.

STATEMENT OF THE CASE

A. Indictment and Trial Testimony

At approximately 2:17 a.m. on February 11, 2018, a call was placed to 911 regarding shots fired at Rehmy's Bar,² a nightclub located in Huntington, West Virginia. App. 141, 154. Police officers found the victim, Brent Jackson, laying "facedown" on the stage near the dance floor. App. 155. Barely alive, officers and first responders gave Mr. Jackson emergency aid before

¹ Although the transcript shows this as a declaratory statement, from the record it is not clear whether it was a comment or a question.

² Petitioner spells it "Remy's." Pet'r's Br. 1. Respondent will defer to the spelling in the trial transcript, which is "Rehmy's." App. 50-51, 70.

loading him into the ambulance. App. 154. Mr. Jackson was pronounced dead at the hospital, having died of multiple gunshot wounds. App. 149, 465.

In April 2018, Petitioner was indicted on a single count of murder in the first degree, but he was not arraigned until October 2021. App. 5, 25. According to one witness at trial, following the shooting, Petitioner fled to Iowa and then to Florida, where he was eventually arrested on unrelated charges. App. 375, 11. After discharging his Florida sentence in November 2020, he was extradited back to West Virginia. App. 11-12.

Petitioner's jury trial began on July 11, 2023. App. 25-29, 847. Rehmy's Bar was equipped with multiple video surveillance cameras located throughout the establishment's interior and exterior, including the main bar area and the men's restroom. App. 136, 177, 180, 267, 326. Clips from the videos were shown to the jury, from various vantage points throughout the night, including the actual shooting. App. 177, 180. Prior to the murder, one video clip showed a scuffle between the victim and an unidentified male. App. 308. Although the recording of the shooting itself was taken at a distance, there were other clips which showed a clearer image of Petitioner, and definitively placed him at the bar on the night of the murder. App. 267, 322-23. Critically, the clothing and general appearance of Petitioner, as shown by video, matched that of the shooter. App. 267, 322-26.

In addition to the recordings, Stefan Marino testified he saw Petitioner shoot Mr. Jackson. App. 309, 312-13. At the time, Mr. Marino was a part-time bouncer for Rehmy's Bar, and was standing at the deejay booth, near the dance floor, when the shooting began. App. 302-03, 307. Mr. Marino witnessed "a scuffle that took place first, and then there were shots that came after that." App. 308. Mr. Marino did not see who was involved in the scuffle, but when the gunfire began, Mr. Marino saw the victim get shot, and watched the shooter "leave, then come back, and

then there were a couple more shots fired.” App. 309. Mr. Marino identified Petitioner as the person firing the shots. App. 312-13. Although Mr. Marino and Petitioner did not have a relationship, Mr. Marino was familiar with Petitioner, because the two men had previously lived in the same location for a short while, during which time Mr. Marino would see Petitioner “every day,” and knew him by his street name “Sash.” App. 314, 358. In other words, Mr. Marino was not attempting to identify a complete stranger in a dark nightclub, but was instead watching the actions of a man he was able to easily recognize. App. 309, 314, 358. Mr. Marino testified that he was “100%” certain that Petitioner was the shooter. App. 333.

Jazmin Hicks, a bartender working at Rehmy’s Bar that night, testified that a day or two after the shooting she viewed a photo array with police, where she identified Petitioner. App. 276, 280. Treated as a hostile witness by the State, Ms. Hicks hedged on whether police asked her to point out who she saw the night of the murder, or who she saw commit the murder. App. 398, 280-81. When asked if she “identified that person because that person committed the shooting at Rehmy’s that night,” Ms. Hicks responded in the affirmative, but she later indicated that she might have simply seen him in the club that night. App. 282, 284. Detective Chris Sperry with the Huntington Police Department confirmed that when he went through the photo array with Ms. Hicks, “she said she actually saw the shooter,” whom she identified as Petitioner. App. 397-398, 405-06.

A special education teacher by day, Michael Beatty moonlit as a part-time bouncer for Rehmy’s Bar. App. 205. On the night of February 10-11, 2018, he was stationed at the front entrance. App. 205, 247. Mr. Beatty testified that he “heard gunfire. Everyone started running different directions.” App. 247. Mr. Beatty saw “two individuals rushing out the [front] door. When [he] went outside, a lady had said he has a gun. When [he] went to go tell them to stop,

they had already gotten into their vehicle and drove off, and they stopped the vehicle, and then started opening fire on [him].” App. 247. Mr. Beatty testified that Petitioner fired multiple shots at him, and that Mr. Beatty returned fire. App. 252, 256. Throughout his testimony, Mr. Beatty was unwavering in his identification of Petitioner as the man who shot at him mere moments after Mr. Jackson was gunned down. App. 248-49, 253, 258-61. While he did not know Petitioner, Mr. Beatty had seen Petitioner “a few times in Charleston at different clubs,” and “at Rehmy’s about three times.” App. 246. Earlier on the night of the murder, Mr. Beatty saw Petitioner in the bar “across from the dance floor” with two other individuals. App. 249.

Anthony Stephens testified as a “jailhouse informant.” App. 368-69. Explaining that he knew Petitioner from a prior stint at the Anthony Correctional Center and touching on previous “business dealings” with Petitioner, Mr. Stephens said that he and Petitioner were housed at Western Regional Jail from approximately June 2022 to November 2022, where they occasionally played cards together. App. 370, 372, 374, 382. During this timeframe, Petitioner told Mr. Stephens that he “dropped the clip” (shot a man), because “he had got into it with a guy at the bar who put his nose in his business.” App. 375, 373.

Throughout the trial, Petitioner claimed that Jordan Jeter committed the murder. Pet’r’s Br. 7. Huntington Police Department Sergeant Ronnie Lusk testified that he was approximately a block west of Rehmy’s Bar when he heard shots being fired, which he believed were coming from the bar. App. 161-62. While responding to the shots, Sergeant Lusk “observed two males running southwest across 4th Avenue.” App. 164. He witnessed a man later identified as Mr. Jeter throwing “a metallic object in front of a [parked] Blazer.” App. 165. Sergeant Lusk ordered Mr. Jeter to the ground, and recovered the 9-millimeter Taurus Model PT111 G2 firearm thrown by Mr. Jeter. App. 165, 167. Mr. Jeter was immediately detained for possession of marijuana, and

later pleaded guilty to the federal offense of felon in possession of a firearm. App. 168, 170. Forensic scientist Philip Kent Cochran with the West Virginia State Police Laboratory testified that he was not provided Mr. Jeter's seized pistol, despite the murder weapon being the same caliber. App. 520-21, 554-55. Mr. Cochran testified that the recovered cartridges were inconsistent with a regularly manufactured Taurus, but absent testing, he could not exclude Mr. Jeter's firearm because it was possible that it had an aftermarket slider and aftermarket barrel. App. 544-45, 552.

In support of his theory of the case, Petitioner called trace evidence expert Nicole Macewan, also of the West Virginia State Police Forensic Laboratory. App. 601. Ms. Macewan testified that on February 11, 2018, Mr. Jeter was subjected to a gunshot residue kit, which came back positive for gunshot residue on his left hand and face. App. 608, 614. Ms. Macewan, however, cautioned that "gunshot residue may be the result of discharging a firearm, having been in the environment where gunshot residue was present, or handling an item with gunshot residue on it." App. 615. She went on to explain that "gunshot residue is a lot like chalk dust and is easily transferable," and that Mr. Jeter could have gunshot residue on his person by being in the same room that a gun was fired. App. 618, 619.³

In its rebuttal, the State called Mr. Jeter to testify. Mr. Jeter confirmed that he was at Rehmy's Bar on the night of the murder, and that when the shooting began, he ran outside. App. 626, 628. Mr. Jeter testified that while he was carrying a firearm on his person, he did not brandish it until he tossed it under the vehicle, as witnessed by Detective Lusk. App. 634, 165. During his

³ Petitioner's only other two other witnesses were Kevin Fox and Adrian Patterson, who were in the same "pod" as Petitioner and Mr. Stephens at Western Regional Jail. These gentlemen testified that they never saw Petitioner and Mr. Stephens talking while in jail, and that Petitioner would not have talked about his case with another person in jail with him. App. 577-78, 588, 594.

testimony, Mr. Jeter was adamant that he never shot his firearm that night, or on any night. App. 643-45. Mr. Jeter did not want to be involved in the case, stating he “really didn’t see what happened,” and he “didn’t kill anybody.” App. 633, 645. Mr. Jordan passionately avowed that he was “innocent,” and “[n]ot at all, never in [his] life” did he ever take the life of another person. App. 645.

After hearing and seeing the evidence, including watching video clips from several different angles on many occasions throughout the trial, the jury found Petitioner guilty of the sole count of murder in the first degree. App. 734, 847-48. Following a bifurcated mercy hearing held on July 20, 2023, the same jury from the guilt phase recommended no mercy, and Petitioner was sentenced to life in prison, without the possibility of parole. App. 837, 848-50.

B. Alleged Error by the Court

Petitioner’s only alleged error relates to an exchange between the trial attorneys and the court below. App. 199-200. During Sergeant Lusk’s testimony, the State had the officer read a portion of Mr. Jeter’s stipulation of facts from his plea paperwork in federal court, which had already been admitted into evidence by Petitioner. App. 198, 186. The State questioned Lusk as to whether “use of immunity” would mean that if Mr. Jeter admitted to killing Mr. Jackson, his plea would protect him from prosecution.⁴ App. 198-99. The following exchange ensued, in the presence of the jury:

Mr. Booten: Your Honor, I want to object at this point.

The Court: Wait a minute. Ask your question, and then you can make an objection. Go ahead.

Prosecutor: According to this agreement, it says he wasn’t going to be prosecuted; is that correct?

⁴ The inference being that if he had immunity, Mr. Jeter could confess without consequence, and thus there is no reason for Mr. Jeter *not* to confess, other than actual innocence.

Witness: That's correct.

Mr. Booten: Now may I object, Your Honor?

The Court: What's your objection?

Mr. Booten: I'm a federal attorney. I can bring the U. S. attorney [*sic*] over here. The statement attached there is a stipulation of facts as to what he is being prosecuted to. The paragraph that they read from deals with statements he made to law enforcement officers, if he made any, that might incriminate him outside of the stipulation of facts. If he hadn't entered into that stipulation of facts, the judge couldn't accept his guilty plea, the judge couldn't sentence him. The paragraph she is reading, she is trying to allude to that he can't be prosecuted, tell me if I'm wrong, prosecuted for the stipulation of facts. A stipulation of facts is what supports the plea agreement. Your Honor, if I have to, I will bring the U. S. attorney over here to explain this, but she is butchering how the federal system works.

The Court: **I don't know how the federal system works, but she is reading from the agreement.** I'm going to overrule your objection. You can bring somebody if you want to.

Mr. Booten: I will.

The Court: Alright.

Prosecutor: And there's another section, so let's see —

The Court: **Are you claiming under this agreement that if he admitted that he committed a murder, that he would have immunity? Is that what you're saying?**

Prosecutor: I'm asking if that is what this is.

The Court: **So he could have confessed and not been held liable.**

Prosecutor: **I'm asking that question for anything he says.**

App. 199-200 (emphasis added).

Petitioner did not object to the trial court's comment clarifying what the State was asking of the witness. App. 200. The State proceeded to question Sergeant Lusk if Mr. Jeter was required to "be forthcoming and truthful" as a condition of his plea agreement. App. 200-01. Sergeant

Lusk testified that Mr. Jeter admitted to leaving Rehmy's Bar while possessing a firearm, but not having shot or killed anybody while in the bar. App. 201.

This line of questioning was not raised again until Mr. Jeter testified during the State's rebuttal. App. 638. At that time, Petitioner's trial counsel directly asked Mr. Jeter about whether he was granted immunity from prosecution for the murder of Mr. Jackson.

Mr. Booten: You understand there's no statute of limitations on murder?

Witness: I understand that.

Mr. Booten: You understand if you came in here and said, yeah, I shot and killed Brent Jackson, that you could be prosecuted for that crime?

Witness: Yes, I understand that.

Mr. Booten: So you're not going to come in here and admit you did it?

Witness: I didn't do it.

Mr. Booten: You would be a fool to do that, wouldn't you?

Witness: I didn't do it.

App. 638.

The State did not present any evidence or argument to the contrary, although Petitioner's trial counsel did reference it again in his closing remarks:

Mr. Jeter comes in here at the last minute and testifies. Three-time felon. I didn't shoot Mr. Jackson. Well, of course he is going to say that. As he acknowledged, he knows there's no statute of limitations on murder. He comes in here and admits that, guess who is going to jail? He would.

App. 710-11. Petitioner now appeals.

SUMMARY OF ARGUMENT

The trial court did not error in questioning counsel about an objection, as authorized by Rule 103(c) of the West Virginia Rules of Evidence. Further, Petitioner's claim that the trial court's comment was "inadvertent," fails to allege the trial court was biased for or against any

party, and does not set forth a basis for finding that Petitioner's substantial rights were impacted. Pet'r's Br. 8. Nevertheless, Petitioner argues that he suffered prejudice, and that the trial court's comment had a devastating impact on his theory of the case. This assertion, however, does not hold water. The record not only establishes that Petitioner enjoyed an impartial judge, but also a fair trial, replete with liberal opportunity to present his theory of the case. The trial court's inquiry of the prosecutor, while discussing the merits of an objection, does not negate the overwhelming evidence against Petitioner, nor does it render Petitioner prejudiced. Petitioner cannot sustain his burden in proving plain error, and, thus, his sentence should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary, and this case is suitable for disposition by memorandum decision, because the record is fully developed and the arguments of both parties are adequately presented in the briefs. W. Va. R. App. P. 18(a)(3) and (4).

STANDARD OF REVIEW

When reviewing a trial court's actions concerning the admissibility of evidence, this Court has held, "[t]he action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syl. pt. 2, *State v. Harris*, 230 W. Va. 717, 742 S.E.2d 133 (2013) (internal citations and quotation marks omitted). "A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syl. pt. 8, *State v. Blevins*, 231 W. Va. 135, 744 S.E.2d 245 (2013) (quoting syl. pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998)).

In this case, Petitioner's trial counsel did not object to the trial court's comment. App. 200. Therefore, the Petitioner's only assignment of error is subjected to a plain error standard of

review.⁵ “The ‘plain error’ doctrine grants appellate courts, in the interest of justice, the authority to notice error to which no objections has been made.” *State v. Miller*, 194 W. Va. 3, 18, 459 S.E.2d 114, 129 (1995). “To trigger application of the ‘plain error’ doctrine, there must be (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.” *Id.*, at syl. pt. 7. “Assuming that an error in ‘plain,’ the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial.” *Id.*, at syl. pt. 9. **“It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.”** *Id.* (emphasis added).

“An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice.” Syl. pt. 8, *State v. Thompson*, 220 W. Va. 398, 647 S.E.2d 834 (2007) (quoting syl. pt. 7, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996)). “The discretionary authority of this Court invoked by lesser error should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.” *Id.*

ARGUMENT

A. The trial court did not commit error in questioning counsel about a pending objection.

Petitioner assigns as error a single comment by the judge. Pet’r’s Br. 8. Petitioner admits, however, that “it is likely that this specific comment was inadvertent and made in the context of

⁵ The Petitioner does not set forth a standard of review in his brief.

the court trying to comprehend the point the state was trying to make”. *Id.* Respondent agrees with Petitioner’s assessment. Pursuant to Rule 103(c) of the West Virginia Rules of Evidence, when a party objects “[t]he court may make any statement about the character or form of evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.” W. Va. R. Evid. 103(c); *see also Michael on Behalf of Estate of Michael v. Sabado*, 192 W. Va. 585, 602 n. 18, 453 S.E.2d 419, 436 n. 18 (1994). “To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.” W. Va. R. Evid. 103(d).

As with any comment by a trial court, the primary obligation is that the trial court is “extremely cautious not to intimate in any manner, by word, tone, or demeanor, his opinion upon any fact in issue.” Syl. pt. 7, *State v. Austin*, 93 W. Va. 704, 117 S.E. 607 (1923). ““As a general rule, West Virginia courts are not permitted to comment on the weight of the evidence[.]” Syl. Pt. 3, *in part, State v. Spadafore*, 159 W. Va. 236, 220 S.E.2d 655 (1975).” Syl. pt. 6, *State v. Leep*, 212 W. Va. 57, 569 S.E.2d 133 (2002). In *Johnson*, however, the Court found that when a trial court’s “comment sought to explain to petitioner’s counsel the difference between speculation and reasonable belief by mentioning an unrelated case regarding an alleged suicide”, the “comments did not demonstrate partiality to the State or intimate any opinion about the quality of petitioner’s evidence of the credibility of his...witness.” *State v. Johnson*, No. 21-0356, 2022 WL 10076175, at *4 (W. Va. Supreme Court, Oct. 17, 2022) (memorandum decision). Accordingly, a trial court seeking an explanation or speaking to explain a legal matter with counsel is not acting improperly, so long as the trial court’s comment or question is not intended to convey his personal opinion.

Here, like *Johnson*, the court sought to clarify what was being asked of the witness and did not offer any opinion about the quality of evidence or the credibility of the witness. The trial court

initially sustained the objection, but before allowing the State to proceed, the trial court interceded once again in order to clarify the prosecutor's position, and asked if the State was "claiming under this agreement that if [Mr. Jeter] admitted that he committed a murder, that he would have immunity? Is that what you're saying?" App. 200. When the prosecutor advised, "I'm asking if that is what this is," the trial court said, "So he could have confessed and not been held liable." *Id.* The prosecutor confirmed, "I'm asking that question for anything he says." *Id.*

In order to effectively rule on Petitioner's objection, the trial court was attempting to understand the issue at hand, which is precisely what is required under Rule 103. After all, "[a] trial judge is not merely a referee." Syl. pt., *Cook v. Harris*, 159 W. Va. 641, 225 S.E.2d 676 (1976). "A trial judge in a criminal case has a right to control the orderly process of a trial and may intervene into the trial process for such purpose, so long as such intervention does not operate to prejudice the defendant's case." Syl. pt. 4, *State v. Burton*, 163 W. Va. 40, 254 S.E.2d 129 (1979); *see also*, *State v. Massey*, 178 W. Va. 427, 359 S.E.2d 865 (1987) and *State v. Farmer*, 200 W. Va. 507, 490 S.E.2d 326 (1997). The trial court did not abuse its discretion in questioning counsel about the character or form of evidence the State was seeking to introduce. Accordingly, Petitioner fails to meet the first prong of the plain error analysis.

B. There was no plain error here.

When the State asked Sergeant Lusk if Mr. Jeter's federal plea documents stated that "he wasn't going to be prosecuted," Petitioner's trial counsel objected, vehemently, to the State's line of questioning. App. 199-200. Petitioner's trial counsel did not, however, object to the trial court's comment, or in any way acknowledge that the trial court made a supposedly improper comment. App. 200.

“To be ‘plain,’ the error must be ‘clear’ or ‘obvious.’” Syl. pt. 8, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Respondent strongly contends that no error occurred, but if it did, it was not “plain.” Petitioner argues that the trial court “made comments⁶ that on their face appears to support the implication by the state that Jordan Jeter could have insulated himself from possible criminal liability by admitting to have [*sic*] committed a murder while pleading guilty to a distinctly different crime.” Pet’r’s Br. 7. Yet, during the subject exchange with counsel, the trial court said, “I don’t know how the federal system works, but [the prosecutor] is reading from the agreement.” App. 200.

“[T]he four-pronged plain error analysis is conjunctive,” *Spencer v. United States*, 991 A.2d 1185, 1192 (D.C.App. 2010), and Petitioner carries the burden of satisfying all four prongs before he is entitled to relief. Petitioner has to prove all of them, and he can’t prove any here. A trial court following its obligations to consider and rule on objections is not committing an obvious error. This is particularly true when the trial court prefaces its ruling by admitting unfamiliarity with the underlying subject matter, but decided to permit the State to continue to read from an exhibit which was admitted into evidence by the Petitioner. App. 200, 186. The trial court was careful not to endorse the State’s examination of the witness, and made clear that he would not know whether the State was correct in its theory of the stipulation in the plea agreement. When looking at the entire context of the exchange, it is not surprising that Petitioner’s counsel below did not object to the trial court’s questioning of the State because what is reasonably apparent in a cold transcript must have been painfully self-evident in a live courtroom. There was no error here,

⁶ Throughout his brief, Petitioner interchangeably refers to both “comments”, in the plural, and “comment,” in the singular. The only comment which Petitioner explicitly complains of is as follows: “So, had he could have confessed and not been held liable.” At trial, the court below only engaged in a single exchange relating to Mr. Jeter’s federal plea, and it is not clear what other “comment”, if any, Petitioner contests.

let alone a plain error. Accordingly, Petitioner fails to meet the first or second prong of the plain error analysis.

C. Petitioner's substantial rights were not affected by the single comment made by the trial judge.

Likewise, Petitioner cannot meet the third prong of the plain error test. Petitioner acknowledges that the trial court's comment was "inadvertent," but proceeds to argue that "the motivation or purpose does not matter." Pet'r's Br. 8. This argument completely disregards the current legal principle, which focuses significantly on whether the trial court has portrayed any bias.

Where a defendant on appeal in a criminal case asserts that a trial court's questioning of witnesses and comments **prejudiced the defendant's right to present evidence and jeopardized the impartiality of the jury**, this Court upon review will evaluate the entire record to determine whether the conduct of the trial has been such that jurors have been impressed with the trial judge's partiality to one side to the point that the judge's partiality became a factor in the determination of the jury so that the defendant did not receive a fair trial.

Syl. pt. 3, *Thompson*, 220 W. Va. 398, 647 S.E.2d 834 (emphasis added).

Impropriety by the trial court depends on the trial court's opinion influencing the jury, and that did not happen here. Petitioner agrees that the comment in controversy was an attempt to clarify an argument, and was not intended to express an opinion by the trial court or to show preference for either Petitioner or the State. "This Court has consistently required trial judges not to intimate an opinion on any fact in issue in any manner. In criminal cases, we have frequently held that conduct of the trial judge which indicates his opinion on any material matter will result in a guilty verdict being set aside and a new trial awarded." Syl. pt. 4, *State v. Wotring*, 167 W. Va. 104, 279 S.E.2d 182 (1981); *see also State v. Burton*, 163 W. Va. 40, 254 S.E.2d 129 (1979).

A trial court cannot impress his opinion upon a jury when, as Petitioner admits, the trial court's comment was not meant to convey an opinion.

In looking to the entire record, the trial court does not give any impression as to whether he believed Petitioner was guilty, whether he believed Mr. Jeter was a viable alternative suspect, or whether he believed that the State's case was strong or weak. In short, the trial record is void of any reference to the trial court's opinion on the parties or the merits of the case. The law affords Petitioner the right to a fair and impartial trial judge. He got one. Accordingly, Petitioner fails to meet the third prong of the plain error analysis.

D. The trial court's comment did not prejudice Petitioner or impact the fairness of his jury trial.

Finally, Petitioner cannot meet the fourth prong of the plain error test. Despite agreeing that the court's comment was an attempt to clarify the questioning by the State, Petitioner focuses primarily on the materiality of the trial court's comment, claiming it "prevented Petitioner from receiving a fair trial." Pet'r's Br. 8. This argument rests on an assumption that the jury is not sophisticated enough to understand how arguments work, or to interpret the trial court's so-called comment as an attempt to gather information. It further requires an assumption that jurors are highly gullible and easily influenced. To this end, Petitioner asserts the State's argument was "an absurd notion, but popular culture is rife with legal theories and myths equally preposterous." *Id.* at 7. Petitioner then infers that the jury is primed to accept ridiculous arguments because they may believe that a twenty-five-year-old movie was based on a real legal premise. *Id.* at 7 n. 55.

As the late Chief Justice Richard Neely found, "juries are not stupid." *Miller v. Monongahela Power Co.*, 184 W. Va. 663, 669, 403 S.E.2d 406, 412 (1991), *overruled on other grounds*, *Mallet v. Pickens*, 206 W. Va. 145, 522 S.E.2d 436 (1999). Prior to closing arguments, the trial court charged the jury that "[a] reasonable doubt is the doubt based upon reason and

common sense,” but inexplicably and without any basis in support, Petitioner now begs this Court to find that the jury is incapable of using either reason or common sense. App. 661.

This is truly at the heart of Petitioner’s argument. In his *Statement of the Case*, Petitioner proclaims the State’s case was weak, the State’s witnesses were unreliable, and Mr. Jeter was guilty. Pet’r’s Br. 1-3, 5. Therefore, Petitioner concludes that the *only* reasonable explanation for a guilty verdict was that the jury was swayed by the trial court’s comment relating to Mr. Jeter’s federal plea agreement, which “crippled the defense by creating the implication that Jordan Jeter would have had nothing to lose and everything to gain by confessing to the killing.” *Id.* at 8. Yet, Petitioner’s self-serving view of the trial omits and wholly ignores any reference to the video of the shooting, which the jury got to view frequently throughout the trial, and eyewitness testimony positively identifying Petitioner as the person who shot Mr. Jackson. Moreover, Petitioner rejects the possibility, and quite frankly, the reality, that despite defense counsel’s valiant attempts to impeach many of the State’s witnesses, the jury was in the best and sole position to determine their credibility. Finally, Petitioner glosses over the impact of having Mr. Jeter testify fervently, and apparently convincingly, as to his own innocence. App. 643-45. The record below simply does not support the contention that the judge’s actions “became a factor in the determination of the jury”. Syl. pt. 3, *Thompson*, 220 W. Va. 398, 647 S.E.2d 834.

Further, Petitioner does not claim – nor could he – that the trial court’s comment prejudiced his right to present evidence. *Thompson*, 220 W. Va. 398, 647 S.E.2d 834. To the contrary, Petitioner was afforded significant leeway in developing Mr. Jeter as an alternative perpetrator of the crime. *See State v. Malick*, 193 W. Va. 545, 457 S.E.2d 482 (1995) (“For evidence of the guilt of someone other than the accused to be admissible, it must tend to demonstrate that the guilt of the other party is inconsistent with that of the defendant”). The exchange objected to by Petitioner

occurred on the first day of trial, with Sergeant Lusk being the State's third witness of the day. App. 50. After Sergeant Lusk testified, Petitioner was permitted to continue to develop his theory as to Mr. Jeter's guilt, including challenging the identification of the State's eyewitnesses; pressing law enforcement officers as to why Mr. Jeter was not treated as a suspect in the murder, including his photograph's omission from photo arrays and failing to interrogate him while in police custody; questioning one forensic expert about a failure to eliminate Mr. Jeter's firearm as the murder weapon; and calling another forensic expert to testify as to the results of Mr. Jeter's gunshot residue test. App. 185, 190, 261, 335-36, 339-40, 441-45, 552, 554, 577-78, 587-88, 614-15.

Critically, Petitioner had the opportunity to directly challenge the State's implication that Mr. Jeter's federal plea granted him immunity for Mr. Jackson's murder. Petitioner cross-examined Mr. Jeter before the jury, where he effectively established that Mr. Jeter did not have immunity for murder, there was no statute of limitation for murder, and Mr. Jeter would be a "fool" to confess to killing Mr. Jackson. App. 638. In Petitioner's closing, it was reiterated to the jury that if Mr. Jeter admitted to the shooting, instead of enjoying immunity, he would be enjoying prison. *Id.* at 710-11. Petitioner's questioning of Mr. Jeter and closing remarks were made without objection, comment, or dispute by either the State or the trial court.

This is far cry from the facts in *State v. Crockett*, where the trial court prevented defense counsel from questioning whether the named victim was a "reluctant witness," and limited the defense's cross-examination of a "key" State witness. 164 W. Va. 435, 438, 265 S.E.2d 268, 270 (1979). In overturning the defendant's conviction for robbery by violence, the Court in *Crockett* held that "the cumulative effect of numerous errors, particularly the improper intervention and discriminatory conduct of the court...denied [the defendant] her constitutional right to a fair trial." *Id.* at 436, 265 S.E.2d at 269. The Court admonished that "[a] trial judge should not comment on

the weight of evidence bearing upon any factual matters to be submitted to the jury for decision. A violation of this general rule may constitute reversible error.” *Id.* at syl. pt. 2. Contrary to *Crockett*, in the present case, the trial judge did not comment on the weight of the evidence; rather, he advised that he was unfamiliar with the federal system, and then questioned the State for further information. The comment was merely a clarification, not an example of a judge offering his opinion.

A more analogous circumstance to the present case would be *State v. D.S.*, where the petitioner claimed that the trial judge had an undisclosed conflict of interest. Nov. 16-0693, 2017 WL 5509925, at *3 (W. Va. Supreme Court, Nov. 17, 2017) (memorandum decision). The Court relied upon the *Thompson* test to uphold the conviction. Syl. pt. 7, *Thompson*, 220 W. Va. 398, 647 S.E.2d 834. “Petitioner fails to identify anywhere in the record any conduct that evidences a lack of impartiality by the trial judge in his particular case.” *D.S.*, 2017 WL 5509925, at *3. “Further, petitioner fails to articulate how or why the judge was biased against him or unable to be impartial, or how he suffered any prejudice as a result.” *Id.* Just as in *D.S.*, Petitioner has failed to articulate any prejudice suffered from the court’s comment.

It is important to recognize that *even when* the Court has found improper influence by a trial court, it is a steep climb to prove that it constitutes plain error. In *State v. Waugh*, the trial court questioned a murder victim’s mother in what the defense claimed to be an attempt to rehabilitate her credibility, and what the State argued was an attempt to make the witness “feel better about herself.” 221 W. Va. 50, 56-57, 58, 650 S.E.2d 149, 155-156, 157. On appeal, the Court made two primary findings: (1) the trial court’s questions were “inappropriate in both scope and duration”; but (2) they did not constitute plain error. *Id.* at 53, 58-59, 650 S.E.2d at 157-158. The witness’s “credibility was not in need of rehabilitation as her testimony was not necessary for

the conviction.” *Id.* at 53, 59, 650 S.E.2d at 152, 158. Contrary to Petitioner’s assertions, the State’s case was robust and the evidence was direct. The jury did not have to exclude Mr. Jeter as the perpetrator before it could find Petitioner guilty; instead, the jury was able to determine Petitioner was guilty based exclusively upon the admitted evidence.

Ultimately, the trial court did not err by trying to understand the State’s line of questioning before allowing the prosecutor to proceed with a witness; Petitioner’s rights were not impugned by a fair and impartial judge trying to make sound decisions on objections; and a single comment was not enough to thwart Petitioner’s entire theory of the case. “The plain error doctrine is utilized sparingly and only in extreme circumstances.” *State v. Keesecker*, 222 W. Va. 139, 148, 663 S.E.2d 593, 602 (2008). Petitioner’s claim and facts in his sole assignment of error in this case are extraordinarily narrow.

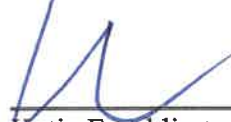
The Petitioner does not sit in prison because the judge – in ten words or less – improperly influenced a simple and susceptible jury, incapable of weighing evidence or making sound decisions. Rather, Petitioner was found guilty because the State introduced substantial videographic and eyewitness evidence proving, beyond a reasonable doubt, that Petitioner gunned down a man in the middle of an open bar. Petitioner received a fair trial before a fair judge. He cannot show that this singular comment overcame the weight of the jury seeing him on video committing this cold-blooded killing; hearing from eyewitnesses standing in the room when the gun blast went off, or at the door when Petitioner fled from his scene, still firing his pistol; and observing Mr. Jeter’s testimony where he adamantly and emotionally denied any involvement in Mr. Jackson’s murder. Accordingly, Petitioner fails to meet the fourth and final prong of the plain error analysis.

CONCLUSION

For the foregoing reasons, Respondent respectfully asks this Court to affirm the jury verdict finding Petitioner guilty of murder in the first degree.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-511

STATE OF WEST VIRGINIA,

Respondent,

v.

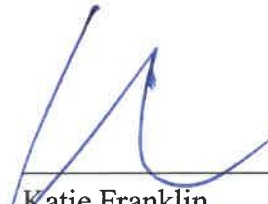
DANIEL MARCUS BATTLE,

Petitioner.

CERTIFICATE OF SERVICE

I, Katie Franklin, do hereby certify that the foregoing Brief of Respondent is being served on [all] counsel of record by File & Serve Xpress this 28th day of February, 2024, [and for additional counsel who are not e-filing users, by email and by depositing a copy of the same in the United States Mail, via first-class postage prepaid, addressed as follows:]

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