STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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

State of West Virginia,
Plaintiff below, Respondent,

v.) No. 24-245 (Wood County 23-F-325)

Jamil Adrian Cabral,
Defendant below, Petitioner.

MEMORANDUM DECISION

The petitioner,[1] Jamil Adrian Cabral, was indicted for possession of a controlled substance, to wit, fentanyl, with intent to deliver (Second Offense), conspiracy to commit possession of a controlled substance with intent to deliver (Second Offense), and possession of a controlled substance, to wit, marijuana. A jury acquitted him of possession with intent to deliver fentanyl but convicted him of conspiracy to distribute fentanyl and simple possession of marijuana. The petitioner now appeals the March 22, 2024, Order of the Circuit Court of Wood County, West Virginia that denied his motion for judgment of acquittal, as well as denied his request for probation or other alternative sentence and sentenced him to sixteen years of confinement on the conspiracy conviction and ninety days of incarceration on the marijuana possession charge, with the sentences to run consecutively. The petitioner appeals raising numerous challenges to his conspiracy conviction[2] and sentence. After considering the parties' written and oral arguments, as well as the record on appeal and the applicable legal authorities, this Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

On the evening of January 27, 2023, Parkersburg Police Sergeant Joshua Snyder stopped a vehicle registered to, and being driven by, Lyndia Opitz. The petitioner was in the front passenger seat. Sgt. Snyder had seen this same vehicle several weeks earlier when he confirmed the vehicle's registration was expired. He was unable to stop the vehicle then, so when he again observed the vehicle on January 27th, he stopped it to determine if the registration had been renewed. Ms. Opitz rolled down her window and, when told by Sgt. Snyder about the expired registration, explained that she had proper registration, but it just needed to be switched out. Sgt. Synder smelled the odor of marijuana coming from the vehicle. After obtaining Ms. Opitz's driver's license, Sgt. Snyder contacted Parkersburg Police Officer William Reifsteck to assist him. After running Ms. Opitz's

[1]The petitioner appears by counsel Reggie Bailey. The respondent State of West Virginia appears by Attorney General John B. McCuskey and Assistant Attorneys General William Longwell and Jennifer Polk.

[2]The petitioner does not challenge his marijuana conviction.

license, Sgt. Snyder was advised that it was suspended and that she had an outstanding warrant against her. Once the officers discovered that Ms. Opitz was the subject of a warrant, Sgt. Snyder placed her in custody, handcuffed her, and seated her in the back of Officer Reifsteck's patrol car. Ms. Opitz told Sgt. Snyder that her car smelled of marijuana because she and the petitioner had smoked marijuana in the car earlier that day. Sgt. Synder testified at trial that the petitioner appeared "very nervous" and avoided eye contact with him, only looking straight ahead. The petitioner was smoking a cigarette and every time he took a drag his hand and the cigarette shook. The petitioner's behavior appeared unusual to Sgt. Snyder as most passengers are not nervous since the traffic stop is about the driver rather than the passenger. Sgt. Snyder also testified that he had previously encountered the petitioner and the petitioner's comfortable behavior at those times was in marked contrast to his anxious behavior on the night of the 27th.

Officer Reifsteck testified that he also smelled marijuana coming from the Opitz vehicle. Officer Reifsteck decided to search the Opitz vehicle. He asked the petitioner to step out and patted him down for officer safety. As a result of the pat down, Officer Reifsteck discovered a spongy substance in a plastic bag in the petitioner's front left pocket. According to Officer Reifsteck, the petitioner admitted that the substance was marijuana. Officer Reifsteck also discovered the petitioner had about $2,000 in cash on him, an amount that Sgt. Snyder testified was consistent with a low to mid-level drug dealer.[3] After the pat down, Officer Reifsteck searched the vehicle. In the center console, Officer Reifsteck discovered empty bags commonly used for the distribution of marijuana. He also discovered in the crevice between the driver's seat and the console a bag containing something that was later determined to be six grams of fentanyl. The fentanyl was contained in three separate packs of aluminum foil.[4]

According to Sgt. Snyder, when he was conducting controlled purchases of fentanyl or heroin while on the Parkersburg narcotics task force, the average amount of fentanyl or heroin that was purchased was less than a gram. He further explained that the average amount a user "could have at any time would approximately be less than – less than a gram, and the most common that we would purchase utilizing the confidential informant was one tenth of a gram at that time." Sgt. Synder testified that six grams of fentanyl is a large amount, inconsistent with personal use, but consistent with drug distribution. Sgt. Snyder also testified that fentanyl can be smoked by placing the fentanyl on foil and then placing a light underneath the foil. Sgt. Snyder testified, without objection, that he initially believed on the evening of the 27th that the petitioner and Ms. Opitz were involved in distributing marijuana.

Prior to trial, Ms. Opitz pled guilty under the general conspiracy statute, West Virginia Code § 61-10-31. At the petitioner's trial, she testified that she and the petitioner smoked marijuana together in the past and had smoked it on the 27th. She further testified that she had previously been involved in a sexual relationship with the petitioner and the two had lived together. She testified that the relationship ended several weeks before trial commenced. She denied having seen

[3]At trial, Sgt. Synder testified that he was unable to establish any legitimate basis for how the petitioner obtained the $2,000. Sgt. Snyder testified he was unable to secure pay stubs, pay slips, or proof of direct deposits from the petitioner.

[4]The circuit court denied the petitioner's pretrial motion to suppress the fentanyl.

the petitioner with the fentanyl packets located in her vehicle. During cross-examination, the circuit court refused to allow Ms. Opitz to testify that her ex-husband could have placed the fentanyl in her car finding such testimony speculative.

At trial, the petitioner testified and admitted that when Ms. Opitz's vehicle was stopped, he had marijuana on him but denied possessing any fentanyl and denied any knowledge that fentanyl was in the vehicle. He denied intending to deliver or conspiring with Ms. Opitz to obtain fentanyl to distribute. He further denied having conspired with Ms. Opitz to commit any crime at all. He testified that the $2,000 was savings that he retrieved from a storage unit of his and that he had it on his person because he was going to place a down payment on a new apartment. He testified that he broke up with Ms. Opitz because of "just the stress and the mental madness of going through a case that I've never been through before" which testimony the circuit court found opened the door to the State questioning him about his prior drug conviction which the circuit court had previously ruled could not be raised during trial.

We first address the petitioner's claim of insufficient evidence to support his conspiracy conviction. The petitioner made a post-verdict motion for judgment of acquittal which the circuit court denied. "This Court applies a de novo standard of review to a circuit court's denial of a motion for judgment of acquittal." Syl. Pt. 5, *State v. Thompson*, 253 W. Va. 23, 927 S.E.2d 885 (2026). "We review the circuit court's denial of the motion using the same standard as used by the circuit court, which in turn is identical to the standard employed to measure the sufficiency of evidence supporting a guilty verdict." *State v. Salmons*, No. 21-0424, 2023 WL 7276668, at *2 (W. Va. Nov. 3, 2023) (memorandum decision).

> 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, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). "It is well settled that this Court's standard of reviewing claims of insufficiency of the evidence places a heavy burden on a criminal defendant." *State v. Stone*, 229 W. Va. 271, 284, 728 S.E.2d 155, 168 (2012). "A criminal defendant challenging the sufficiency of the evidence on appeal . . . must prove there is *no* evidence from which the jury could find guilt beyond a reasonable doubt." *State v. Zuccaro*, 239 W. Va. 128, 145, 799 S.E.2d 559, 576 (2017) (emphasis in original).

The petitioner was convicted pursuant to the 2017 version of West Virginia Code § 60A-4-414(a), which provided, "[a]ny person who willfully conspires with one or more persons to commit a felony violation of section four hundred one of this article, if one or more of such persons does any act to effect the object of the conspiracy, is guilty of a felony[.]" While West Virginia Code § 60A-4-414(a) does not define the term "conspires," the term "conspiracy" has a well-settled meaning. "Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act." *Iannelli v. United States*, 420 U.S. 770, 777 (1975). Further, West

Virginia Code § 60A-4-414(a) requires proof that one or more of the conspirators did "any act to effect the object of the conspiracy[.]" This "overt act requirement is merely to show 'that the conspiracy is at work.'" *State v. Less*, 170 W. Va. 259, 265, 294 S.E.2d 62, 67 (1981) (citation omitted). Thus, to prove a conspiracy under West Virginia Code § 60A-4-414(a), the State was obligated to prove both (1) an agreement between the petitioner and Ms. Opitz to possess a controlled substance with intent to deliver and (2) an overt act by either person in furtherance of that agreement. While it is not clear from the petitioner's brief whether he is complaining that there was lack of proof of agreement or of overt act, we believe there was evidence upon which the jury could have found both elements.

"An agreement to commit an offense 'need not be shown to have been explicit[,]' *Iannelli v. United States*, 420 U.S. 770, 777 n.10 (1975), or 'to exist in any formal way.' *Direct Sales Co. v. United States*, 131 F.2d 835, 836 (4th Cir. 1942), *aff'd*, 319 U.S. 703 (1943)." *Salmons*, 2023 WL 7276668, at *5. Hence, "[t]he agreement may be inferred from the words and actions of the conspirators, or other circumstantial evidence[.]" *Less*, 170 W. Va. at 265, 294 S.E.2d at 67. In the instant case, the petitioner and Ms. Opitz denied any agreement to distribute fentanyl. But we have recognized that

> [a]n appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and task of the trier of fact. It is for the jury to decide which witnesses to believe or disbelieve. Once the jury has spoken, this Court may not review the credibility of the witnesses.

Guthrie, 194 W. Va. at 670 n.9, 461 S.E.2d at 176 n.9 (internal citation omitted). "[I]f the jury did disbelieve [the defendant], it was further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt[.]" *Wright v. West*, 505 U.S. 277, 296 (1992) (plurality opinion). Thus, the jury's disbelief of the petitioner's denials is substantive evidence supporting the conspiracy conviction if coupled with some corroborative evidence of guilt. *See, e.g., United States v. Brown*, 53 F.3d 312, 314-15 (11th Cir. 1995). In this case, there was corroborative evidence, including the petitioner being in the same car with Ms. Opitz and the drugs, his unusual nervousness when interacting with Sgt. Snyder on the evening of the 27th, and his possession of $2,000, the origins of which could not be accounted for.

Further, once the conspiratorial agreement has been established, "virtually any act will satisfy the overt act requirement." 2 Wayne R. LaFave, *Substantive Criminal Law* § 12.2(b) at 375 (3d ed. 2018) (footnote omitted). Thus, possession of the fentanyl, especially in an amount exceeding that for personal use and being individually wrapped in foil consistent with how fentanyl is smoked, constituted an overt act in furtherance of the conspiracy to deliver a controlled substance. *See State v. Serr*, 575 N.W.2d 896, 899 (N.D. 1998) ("We conclude possession of a controlled substance can be an overt act indicating conspiracy to deliver a controlled substance."); *cf*. *State v. Hubbard*, 828 P.2d 971, 973 (N.M. Ct. App. 1992) (internal citations omitted) ("Intent to distribute may be inferred when the amount of controlled substance possessed is inconsistent with personal use. Intent may be proved by inference from surrounding facts and circumstances, such as quantity and manner of packaging of the controlled substance."). While the petitioner observes he was acquitted of possession of the fentanyl, the overt act supporting a conspiracy conviction need not be committed by the petitioner but may be committed by any member of the

conspiracy. "It is not necessary that each conspirator involved in the conspiracy commit his or her own overt act. The overt act triggering the conspiracy as to all the conspirators can be committed by any one of their number." *Less*, 170 W. Va. at 265, 294 S.E.2d at 67. Thus, the jury could have found that the overt act was Ms. Opitz's possession of the drugs in her vehicle which supports the jury's decision to convict the petitioner as a member of the conspiracy. We therefore conclude the State provided sufficient evidence to sustain the petitioner's conspiracy conviction.[5]

The petitioner next alleges that the circuit court erred in denying his motion to suppress the fentanyl seized from Ms. Opitz's car. "The Fourth Amendment generally requires police to secure a warrant before conducting a search." *Maryland v. Dyson*, 527 U.S. 465, 466 (1999) (per curiam). "[T]here is an exception to this requirement for searches of vehicles." Id. "[A] warrantless search incident to a lawful stop of the vehicle is allowed where after the stop, probable cause arises to believe the vehicle contains contraband or evidence of a crime." *State v. Moore*, 165 W. Va. 837, 842 n.4, 272 S.E.2d 804, 809 n.4 (1980), *overruled on other grounds by State v. Julius*, 185 W. Va. 422, 408 S.E.2d 1 (1991).Hence, "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Dyson*, 527 U.S. at 467 (quoting *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam)). No further exigency is required to permit a vehicle search other than the ready mobility of the vehicle. *Id*. "When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below." Syl. Pt. 1, in part, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996). Both Sgt. Snyder and Officer Reifsteck testified at the suppression hearing that they smelled marijuana emanating from Ms. Opitz's vehicle. "The odor of marijuana, without more, may provide requisite probable cause to support the warrantless search of a vehicle and baggage contained in that vehicle." *State v. Chapman*, No. 13-0111, 2013 WL 5676630, at *4 (W. Va. Oct. 18, 2013) (memorandum decision). The circuit court did not err in denying the petitioner's motion to suppress.[6]

The petitioner also claims that the circuit court erred by admitting testimony concerning his prior felony drug conviction. "We review a trial court's decisions to admit or exclude evidence under an abuse of discretion standard." *State v. Brendan W*., 253 W. Va. 397, ___, 931 S.E.2d 797, 803 (2026). Before trial, the petitioner stipulated that he had a previous felony drug conviction. The circuit court precluded the jury from hearing of it. During trial, though, the petitioner testified that he and Ms. Opitz broke up because of "the stress and mental madness of going through a case that I've never been through before." The State then sought to admit evidence of the petitioner's prior drug conviction. The circuit court concluded that this opened the door to admission of the

[5]The petitioner also claims that the jury's verdicts acquitting him of the substantive offense but convicting him of conspiracy were inconsistent. Even if so, this argument does not aid him because "appellate review of a claim of inconsistent verdicts is not generally available." *State v. Hall*, 174 W. Va. 599, 602, 328 S.E.2d 206, 210 (1985).

[6]At oral argument before this Court, the petitioner argued that permitting a vehicle search based on the odor of marijuana should be reconsidered given West Virginia's legalization of medical marijuana. The petitioner did not make this argument in his appellate brief, and we normally do not address arguments raised for the first time at oral argument. *Argus Energy, LLC v. Marenko*, 248 W. Va. 98, 103-04, 887 S.E.2d 223, 228-29 (2023).

prior drug offense because it was not true that the petitioner had never previously been through a criminal proceeding. "[I]t is well within the [trial] court's discretion to deem previously-excluded evidence admissible after the party seeking exclusion 'open[s] the door.'" *United States v. Young*, 916 F.3d 368, 381 (4th Cir. 2019) (quoting *United States v. Blake*, 571 F.3d 331, 348 (4th Cir. 2009)). The circuit court did not abuse its discretion regarding admission of the petitioner's prior drug conviction.

The petitioner additionally asserts it was plain error by the circuit court to permit Sgt. Synder to testify that he was concerned on the evening of January 27th that the petitioner and Ms. Opitz were involved in marijuana distribution. "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." Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 7, 459 S.E.2d 114, 118 (1995). "Petitioner 'bears the burden of persuasion on each of the four prongs of the plain error standard.' *Lowery v. United States*, 3 A.3d 1169, 1173 (D.C. 2010). 'Satisfying all four prongs of the plain-error test is difficult[.]' *United States v. Williamson*, 706 F.3d 405, 413 (4th Cir. 2013)." *State v. Vance*, No. 21-0523, 2022 WL 1693662, at *4 (W. Va. May 26, 2022) (memorandum decision). "The plain error doctrine is to be used sparingly." *State v. Fleming*, 237 W. Va. 44, 55, 784 S.E.2d 743, 754 (2016). Thus, "relief on plain error review is 'difficult to get, as it should be.'" *United States v. Carthorne*, 726 F.3d 503, 510 (4th Cir. 2013) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)). We do not believe the petitioner has carried his heavy burden to establish plain error. While the petitioner's brief cites the plain error standard, he provides no authority showing the circuit court erred or how any error was so clear or obvious that the circuit court was derelict in permitting the now challenged testimony even absent an objection. *State v. Marple*, 197 W. Va. 47, 52, 475 S.E.2d 47, 52 (1996). "Accordingly, because the petitioner failed to provide any argument regarding the factors for plain error or why he is entitled to such relief, we decline to make an argument for him and, therefore, find no merit to these unsupported claims." *State v. Vance*, No. 23-542, 2026 WL 383794, at *5 (W. Va. Feb. 11, 2026) (memorandum decision).

Next, the petitioner challenges his sixteen-year sentence as constitutionally disproportionate. This Court typically will not consider a disproportionate sentencing claim unless the sentence challenged was without a statutory maximum or was a life recidivist sentence. *See, e.g.*, *Ray v. Pszczolkowski*, No. 16-0022, 2017 WL 663573, at *12 (W. Va. Feb. 17, 2017) (memorandum decision) ("[T]he rules regarding disproportionate sentences are generally limited to sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence."). In the present case, the petitioner was sentenced under a statutory scheme having a fixed maximum penalty and did not involve a life recidivist sentence. *See* W. Va. Code § 60A-4-414(a) (conspiracy to commit a drug offense punishable by a determinate 2-to-10-year sentence) and W. Va. Code § 60A-4-408(a) (doubling a drug offense penalty if it is a second or subsequent offense). "Because this case involves neither the possibility of unlimited sentences nor a life recidivist statute, we need not apply proportionality principles to petitioner's sentence." *State v. Sandy*, No. 22-868, 2024 WL 1903810, at *2 (W. Va. Apr. 30, 2024) (memorandum decision).

The petitioner moreover contends that the circuit court should have granted him probation, home confinement, or another alternative sentence. "[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). "The 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. 2, *State v. Shafer*, 168 W. Va. 474, 284 S.E.2d 916 (1981). "[A] petitioner'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. Aug. 27, 2021) (memorandum decision). In this case, the circuit court denied the petitioner's request for probation or alternative sentence "based upon his criminal history and the seriousness of his crime." The circuit court found the petitioner had three prior felony convictions each one occurring in a different State. The Court also observed that the petitioner did not appear at his original sentencing as he fled to Ohio. On this record, we cannot find the circuit court palpably abused its discretion in denying the petitioner probation or other alternative sentence.

The petitioner next asserts that he was not tried before a jury of his peers. He specifically asserts "the 29-member jury pool contained no minorities. Although not apparent from the record, counsel proffers that Petitioner is a minority and counsel does not recall any minorities in the 29-member jury pool." The petitioner has not identified when and how he raised this claim in the circuit court. We disregard his claim based on this failure. *See* W. Va. R. App. P. 10(c)(7) ("The argument [section of a petitioner's brief] 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. The . . . Supreme Court may disregard errors that are not adequately supported by specific references to the record on appeal.").

Additionally, the petitioner claims that the circuit court erroneously denied his mistrial motion during jury voir dire. During voir dire, a member of the jury pool stated, in front of the other potential jurors, that he was unable to sit fairly as a juror. The potential juror explained that his nephew was a deputy sheriff and that - based on his conversations with the nephew - the potential juror believed that the same people commit crimes repeatedly. While the circuit court struck this potential juror for cause, it denied the petitioner's motion for mistrial against the petitioner's claim that the potential juror's answers tainted the jury pool.[7] We give due deference to the circuit court's decision to deny the petitioner's motion as the circuit court had a firsthand view of the impact of the potential juror's comments on other potential jurors. "The common and most significant thread running through the jurisprudence in this area of the law is that an appellate court must give due deference to the trial judge who has seen and heard the jurors and has determined whether a remark has prejudiced or tainted the panel." *State v. Lucky*, 755 So. 2d 845, 854 (La. 1999). And the result in this case cuts against a claim that the jury pool was tainted because the petit jury that ultimately was seated from the pool acquitted the petitioner of possession with the intent to distribute, showing that the jury was not biased. *See United States v. Cantwell*,

[7]Before the circuit court, the petitioner was unsure if he should move for a mistrial or move to strike the jury panel. In any event, whether termed a motion for mistrial or to dismiss the jury pool, we review the circuit court's ruling on the petitioner's motion only for an abuse of discretion. *See, e.g.*, *State v. Lowery*, 222 W. Va. 284, 288, 664 S.E.2d 169, 173 (2008) (per curiam) ("The decision to grant or deny a motion for mistrial is reviewed under an abuse of discretion standard."); *State v. McKean*, No. 14-0437, 2015 WL 1881021, at *3 (W. Va. Apr. 23, 2015) (memorandum decision) ("Based upon the facts in this case, we simply have not found any evidence to show that the trial court abused its discretion in denying Mr. McKean's motion to dismiss the jury pool.").

41 F. App'x 263, 269 (10th Cir. 2002) ("The lack of taint is additionally demonstrated by the fact that the jury ultimately empaneled acquitted Cantwell on seven of the nine counts presented to it.").

Penultimately, the petitioner complains that the circuit court denied him the opportunity to have Ms. Opitz blame her ex-husband for placing the fentanyl in her vehicle. During trial, the petitioner cross-examined Ms. Opitz and asked if she believed her ex-husband could have placed the drugs in Ms. Opitz's vehicle. The circuit court sustained the State's objection that such an opinion was speculation. We agree that the evidence was speculative and, thus, inadmissible. We have held that:

> In a criminal case, the admissibility of testimony implicating another person as having committed the crime hinges on a determination of whether the testimony tends to directly link such person to the crime, or whether it is instead purely speculative. Consequently, where the testimony is merely that another person had a motive or opportunity or prior record of criminal behavior, the inference is too slight to be probative, and the evidence is therefore inadmissible. Where, on the other hand, the testimony provides a direct link to someone other than the defendant, its exclusion constitutes reversible error.

Syl. Pt. 1, *State v. Harman*, 165 W. Va. 494, 270 S.E.2d 146 (1980). While Ms. Opitz testified that her ex-husband was "under the influence of a lot of drugs" and was "out of his mind," this testimony does not provide a direct link to Ms. Opitz's ex-husband placing the drugs in her vehicle and is, therefore, inadmissible speculation under *Harman*. Accordingly, we find no error in the trial court's ruling.

Finally, the petitioner invokes the cumulative error doctrine, which provides that, "[w]here 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). The cumulative error doctrine does not apply to a case, such as the present one, where there are no errors. "Because we have found no error, the cumulative error doctrine does not apply. Thus, we reject this assignment of error." *State v. Bailey*, No. 16-0740, 2018 WL 300588, at *5 (W. Va. Jan. 5, 2018) (memorandum decision).

For the above reasons, we affirm the March 22, 2024, Order of the Circuit Court of Wood County, West Virginia.

Affirmed.

ISSUED: October 29, 2026

CONCURRED IN BY:

Chief Justice C. Haley Bunn
Justice Charles S. Trump IV

Justice H.L. Kirkpatrick
Justice James W. Flanigan

CONCURRING, IN PART, AND DISSENTING, IN PART:

Justice William R. Wooton

Wooton, Justice, concurring, in part, and dissenting, in part:

I respectfully dissent from the majority's affirmance of the petitioner's conviction of conspiracy to commit possession of a controlled substance with intent to deliver (second offense), W. Va. Code § 60A-4-414-(a) (2017), as the State failed to prove either the existence of a conspiracy between the petitioner and Lyndia Opitz or that one or both of the alleged conspirators did "any act to effect the object of the conspiracy[.]" *See State v. Less*, 170 W. Va. 259, 262, 294 S.E.2d 62, 64 (1981).

In upholding this conviction, the majority follows two strands of analysis. With respect to the existence of a conspiracy, it holds that the petitioner's testimony that he was unaware there was fentanyl in Ms. Opitz's automobile, if disbelieved by the jury, was affirmative evidence of his guilt so long as it was coupled with corroborative evidence. This sweeping proposition may or may not be the law, as the majority cites only a plurality opinion of the United States Supreme Court[1] and an opinion from the United States Court of Appeals for the 11th Circuit[2] – both cases decided more than thirty years ago and both factually distinguishable – as support therefor. My disagreement with the majority is its implicit holding that *any* corroborative evidence, no matter how attenuated the inferences to be drawn from it, constitutes proof beyond a reasonable doubt if coupled with a defendant's denial of complicity.

In this regard, the majority cites three facts established by the evidence: that the petitioner and Ms. Opitz were in a car together, that the petitioner was nervous while interacting with the arresting officer, and that the petitioner had $2,000.00 in his possession whose source the police were unable to trace. In my view, the first two facts establish nothing. There was not a scintilla of evidence that the petitioner and Ms. Opitz were in the car together for an illicit purpose; to the contrary, the unrebutted testimony of both was that the purpose of the trip was to access the petitioner's storage facility. The arresting officer's testimony that the petitioner was extremely nervous while interacting with law enforcement is susceptible of two inferences, neither supportive of the State's position: that the petitioner, an African-American male whose companion had just been arrested and who was now being patted down and questioned, was apprehensive as to how this encounter might end; and/or that the petitioner, who had marijuana in his possession and admitted smoking it that day, realized that his arrest on a marijuana charge was inevitable.

[1] *See Wright v. West*, 505 U.S. 277, 297 (1992).

[2] *See United States v. Brown*, 53 F.3d 312, 314-15 (11th Cir. 1995).

I agree that the amount of cash found on the petitioner's person was a suspicious circumstance which, when coupled with the fact that he was in possession of marijuana and admitted to smoking it, was sufficient to support an inference that he was dealing *marijuana* – an inference immediately drawn by the investigating officers, but one which later proved to be incorrect (or at least unfounded). However, I cannot agree that it is sufficient to establish beyond a reasonable doubt that the petitioner possessed *fentanyl* with the intention to distribute it, where, as here, the petitioner was acquitted of the possession charge.

Further, in the absence of any evidence showing any action taken by either the petitioner or Ms. Opitz to further the alleged conspiracy,[3] the majority relies on a single case from North Dakota as support for its sweeping pronouncement that "possession of the fentanyl, especially in an amount exceeding that for personal use and being individually wrapped in foil consistent with how fentanyl is smoked, constituted an overt act in furtherance of the conspiracy to deliver a controlled substance." *See State v. Serr*, 575 N.W.2d 896, 899 (N.D. 1998). First, this Court has never held, either in the text of an authored opinion or in a syllabus point, that a defendant's mere possession of a controlled substance constitutes an overt act in a charge of conspiracy to distribute it. Additionally, the petitioner was acquitted of possessing the fentanyl, which makes the *Serr* rule inapplicable in any event to prove his commission of an overt act. The majority solves this problem by speculating that "the jury could have found that the overt act was Ms. Opitz's possession of the drugs in her vehicle[.]"

The fatal flaw in the majority's reasoning is that its speculation flies in the teeth of the evidence and argument at trial. The State's theory of the case was that the fentanyl was within the *petitioner's* reach and that *he* therefore was in constructive possession of it. We do not know enough about Ms. Opitz's plea deal to know whether her plea to a conspiracy charge involved an admission to possession, and indeed, the only evidence at trial as to that issue was her denial that she even knew the fentanyl was in the car.

In short, the State failed to prove either the existence of a conspiracy or that an overt act was taken by either party to effect its object, and I would therefore reverse the conviction on the conspiracy count and remand for resentencing.

I concur with the majority's resolution of all other issues raised in this appeal.

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[3] It is well established that an overt act may be committed by any party to an alleged conspiracy, not necessarily by the defendant. *See, e.g.*, Syl. Pt. 9, in part, *State v. Bouie*, 235 W. Va. 709, 776 S.E.2d 606 (2015) ("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.") (citations omitted)).