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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2026 Term

No. 24-190

STATE OF WEST VIRGINIA,
Plaintiff Below, Respondent,

V.

DAMIAN LANELL B-SMITH,
Defendant Below, Petitioner.

Appeal from the Circuit Court of Berkeley County
The Honorable Bridget Cohee, Judge
Criminal Action No. CC-02-2022-F-149

AFFIRMED

Submitted: October 21, 2026
Filed: November 13, 2026

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CHIEF JUSTICE BUNN delivered the Opinion of the Court.

SYLLABUS BY THE COURT

1. "Under the 'plain error' doctrine, 'waiver' of error must be distinguished from 'forfeiture' of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right—the failure to make timely assertion of the right—does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is 'plain.' To be 'plain,' the error must be 'clear' or 'obvious.'" Syllabus Point 8, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

2. "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." Syllabus Point 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

3. "Assuming that an error is '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. 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." Syllabus Point 9, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

4. "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. To the extent that our prior cases are inconsistent, they are expressly overruled." Syllabus Point 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

5. "When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing

inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt." Syllabus Point 2, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

BUNN, Chief Justice:

This case primarily concerns the procedures that the Circuit Court of Berkeley County used when a child witness testified against Mr. B-Smith in a criminal trial. Specifically at issue is the court's decision to remove the jury and Mr. B-Smith from the courtroom during the child's testimony.

Following an indictment of Mr. B-Smith alleging that he committed sex offenses against R.C., a child, the State sought permission from the circuit court to allow R.C. to testify outside of the presence of Mr. B-Smith, as governed by West Virginia Code §§ 62-6B-1 to -4. Although the record is incomplete, at some point, the court determined that the jury would be required to leave the courtroom, along with Mr. B-Smith, while the child testified. While we find that Mr. B-Smith likely waived his right to appeal the jury's absence from the courtroom while the child testified, due to the incomplete record regarding the court's decision to remove the jury, we also address his contention that the court's removal of the jury was plain error. Though the circuit court plainly erred by removing the jury, this error did not substantially prejudice Mr. B-Smith and we will not disturb the jury's verdict on that ground. As his second assignment of error, Mr. B-Smith also challenges the sufficiency of the evidence supporting his convictions. We find that sufficient evidence supports his convictions and affirm his sentence.

I.

FACTUAL AND PROCEDURAL HISTORY

On June 1, 2022, a Berkeley County grand jury indicted Damian Lanell B-Smith in a six-count indictment. The indictment charged Mr. B-Smith with the following: (1) two counts of first-degree sexual assault, alleging that Mr. B-Smith, eighteen years old or older, engaged in sexual intercourse or sexual intrusion with R.C., who was younger than twelve years old;[1] (2) one count of first-degree sexual abuse, alleging that Mr. B-Smith, eighteen years old or older, subjected R.C. to sexual contact without his consent, with the lack of consent resulting from R.C. being younger than twelve years old;[2] and (3) three counts of sexual abuse by a person in a position of trust, alleging that Mr. B-Smith engaged in or attempted to engage in sexual intercourse, sexual intrusion, or sexual contact with R.C., who was a minor child under the care, custody, or control of Mr. B-Smith.[3] The indictment also alleged that the events occurred in November 2021.

Before trial, in September 2022 the State moved the court to permit R.C., who at the time of the motion was ten years old, to testify via closed-circuit television or, alternatively, to remove Mr. B-Smith from the courtroom during R.C.'s testimony. At the

[1] *See* W. Va. Code § 61-8B-3(a)(2).

[2] *See* W. Va. Code § 61-8B-7(a)(3).

[3] *See* W. Va. Code § 61-8D-5(a).

pretrial hearing on August 15, 2023, the State's expert, Dr. Timothy Saar, testified that R.C. "would suffer emotional harm if required to be in the courtroom to testify in front of [Mr. B-Smith]." Dr. Saar noted that R.C. expressed "significant fear" of Mr. B-Smith, and that R.C. felt that "he would be attacked or harmed" by Mr. B-Smith. Dr. Saar found that the child "would benefit from television presentation" and made recommendations for R.C.'s testimony, including that he be "familiarize[d] . . . with courtroom procedure" because of anxiety and have a "safe adult presence . . . that he can look at and have eye contact during the course of the testimony." Dr. Saar also recommended a fidget spinner or small device for R.C., but noted that "the main thing is to get him familiar with the procedures and also educate him on that where he is at is always safe[.]" He also opined that R.C. was "competent to testify" but "easily confused."

The court inquired of Dr. Saar about his written recommendation regarding who should ask the questions, asking whether "there is a practice where the presiding judge is the person asking the questions[.]" Dr. Saar said that was not uncommon. In response, the defense attorney noted that Mr. B-Smith would "probably prefer" to have his counsel question R.C. The court noted the objection, then observed that the prosecutor had participated in "cases where the child has testified outside the presence of the judge[,]" where "[t]he jury was in the other room and the defendant was in the other room" and the court used a closed-circuit television from another courtroom "because the defendant asked that the child be in the courtroom, not in judge's chambers or in some other place." The

court recognized that in that case, "[t]he attorneys asked the questions[,]" and therefore the court questioning the witness would differ in that regard. The court asked counsel for their opinions, and the State noted concern regarding whether "the defendant's constitutional rights are being observed[.]"

> In discussing what the child needed to testify, the court noted that:
>
> > So the other pretrial preparation that we may need to do with both attorneys is deciding how the [closed-circuit television] will be set up, what the defendant is asking in terms of whether the child [will] be in the courtroom or in a smaller room that might not be as intimidating, whether the child [will] be in the presence of the jury or just in the presence of the attorneys and whether we can have the prosecutor and the defense attorney meet the child prior to cross-examining -- I would say direct examining and cross-examining. We are not prepared to do that today, but when is our trial?

The court inquired as to whether the defense was "prepared today to say whether you are making a request for the child to be testifying in the courtroom or you will agree that a smaller setting is --" yet according to the transcript, did not finish the sentence. The attorney responded that, "I think we would object to the State's motion to do the [closed-circuit television]. I think there's evidence on the record, and I think we'll abide by the [c]ourt's decision, but I think we would object to the -- on constitutional grounds a right to confront the witnesses."

The court then said, "Okay. So it's up to me. Do you want to make a recommendation, [guardian ad litem (GAL)]?" After the GAL spoke and noted that he would join the State's motion, the Court responded,

> With regard to the recommendations that Dr. Saar has made, . . . that [R.C.] should be permitted to testify via [closed-circuit television] in a setting that does not require him to see the defendant either virtually or in person, I'm going to follow that guidance. I believe that because the defendant is objecting to the use of [closed-circuit television] at all, I'm going to weigh in favor of the defendant and have the child testify in the courtroom with the defendant not present, but able to view the testimony by [closed-circuit television]. And in that regard, we will have [the defense attorney] present in the courtroom.

The court explained that after direct examination of the child, the court would take a break so Mr. B-Smith and defense counsel could consult about cross-examination.

The court then introduced the possibility that the jury would be out of the courtroom during the child's testimony, yet did not finalize the jury's location:

> With regard to whether or not the jury is going to be present for the testimony or also able to watch it remotely so that the jury is in the presence of the defendant during the testimony, I am going to make that decision after I've had an opportunity to follow the guidance [in part of Dr. Saar's recommendation], and that is the child should be introduced to the individuals such as the presiding judge, prosecutor and defense attorney. I believe I'll be able to make a better judgment about whether he would be capable of testifying with a box full of strangers as opposed to just the attorneys and the [c]ourt staff.

The court discussed other ways that R.C. would testify comfortably and instructed that the parties set up a time "for the child to meet the judge, the prosecutor[,] and the defense

attorney." The parties agreed to meet with the court the Friday afternoon before trial started, and the court explained that then, "the child will be familiarized with the room where he will provide his testimony[,]" i.e., the courtroom. The court expressed that at the meeting, the attorneys who would ask questions would "take a turn where you'll stand asking questions at the podium" and a parent and the victim advocate would also attend the meeting and the testimony. The court also explained that during the child's trial testimony, "we won't have anybody in the gallery" but instructed that attendees could watch the testimony from the other courtroom.

The circuit court then asked for "any objections[.]" The court specifically addressed the defense attorney, "I wanted to give you an opportunity if you have any specific objections. I know you are generally objecting to the process of the [closed-circuit television], but did you have any specific objections that you needed to make a record of?" The defense attorney responded that he would ask that "if the victim's advocate would keep the child comfortable, I would ask that the parent not be there, given that may be a potential angle" of the defense. The court responded that it would stay its ruling on that request until after the meeting with the child. The record does not contain a transcript or order memorializing when or how the circuit court decided to remove the jury from the courtroom.

Trial began on August 30, 2023. At trial, witnesses for the State included Deputy Amber Weidman from the Berkeley County Sheriff's Department, who testified that she viewed R.C.'s interview at the Child Advocacy Center from a separate room behind a two-way mirror. She observed that R.C. told the interviewer that Mr. B-Smith "exposed his penis to him and his baby brother[,] . . . performed oral sex on him[,] . . . and made him perform oral sex on [Mr. B-Smith] as well." She also described how R.C. "moved his head up and down insinuating oral sex."

R.C.'s mother, D.C., testified that she paid Mr. B-Smith, her brother, to babysit R.C. and her younger son, G.C., while she was at work. In November 2021, G.C. disclosed to D.C. that Mr. B-Smith woke him up and "was shaking his thing" in his face. D.C. asked R.C. "what happened[,]" and R.C. became "upset" and ultimately told her, "I touched it and he touched mine." D.C. asked R.C. to explain what he was referring to, asking "[t]ouched it as in what, the thing he was shaking at your brother's face?" R.C. started crying and replied, "yeah."

The State called R.C. as the next witness. The court immediately stated,

> Let me explain to the jury, because [R.C.] is a child, the parties have agreed, we have made some accommodation for him to testify because the courtroom can be scary for a child. So we are going to have you in the courtroom next door. There will be a camera on the witness stand from my equipment here so you will be able to see him.

The court then instructed the prosecution that "the State will do the direct examination" and that the only people in the courtroom would be the court reporter, the judge, the prosecutors, and the defense attorney. The court also clarified, "[b]ut the jury and [Mr. B-Smith] and anybody else" would be cleared from the courtroom. The court then dismissed the jury for a half-hour break.

With the jury absent, the court inquired as to whether counsel wanted to "see what the Defendant and the jurors are going to see? Do you want to walk next door and see?" Counsel agreed that they wanted to observe the setup in the other courtroom. Although the record is not clear, it appears that the State at that time requested that R.C.'s mother be allowed to stay with R.C. during his testimony, with no objection from Mr. B-Smith. The transcript at this point states "closed proceedings."

The State then called R.C. as a witness. When asked what Mr. B-Smith did, R.C. responded, "[h]e sexually rape [sic] me." When asked to elaborate, R.C. described that "[h]e got my head and made me suck it." R.C. testified that on more than one occasion, Mr. B-Smith performed oral sex on him and forced R.C. to perform oral sex. R.C. confirmed that Mr. B-Smith forced his head down, and described that while the acts occurred, Mr. B-Smith's pants were "down to the ankles" and that Mr. B-Smith also pulled down R.C.'s pants. R.C. further testified that the oral sex occurred at his house and at a tree house. R.C. explained that he did not tell his mother "because I was scared he was going

to hurt me." R.C. also stated that Mr. B-Smith threatened him not to tell, or he would "hurt me and my baby brother."

The State also called an expert in the forensic evaluation of children, child development, process of disclosures, dynamics of child sexual abuse, compliant victims, coaching falsifications, and training forensic interview protocols.[4] She testified regarding R.C.'s interview at the Child Advocacy Center ("CAC"). She described how CAC interviews are performed and how interviewers assess children's credibility. Regarding R.C.'s CAC interview, the expert explained that he described "an incident at his home" where Mr. B-Smith woke him up for school and Mr. B-Smith "was shaking his wee-wee." R.C. also told her that he did not tell his parents, but that Mr. B-Smith "sucked his wee-wee and had made him suck his wee-wee as well." R.C. described another incident in which Mr. B-Smith put his hands down R.C.'s pants and grabbed "his wee-wee and his butt." The expert described demonstrative gestures as "beneficial in assessing credibility" and that R.C. was "consistent in his interview" and due to his speech delay the gestures helped her

[4] Pretrial, Mr. B-Smith's defense attorney objected to the State designating their expert, arguing that whether the child is telling the truth is "best left to the jury as the trier of fact." The State explained that its examination of the expert would "ask questions about elements of credibility and leave the ultimate question of if the victim is credible to the jury[,]" and that the expert would testify to "the elements of coercion or lack there of" but that the State would not ask if the child was credible. The court noted that it "will listen closely to the questions and to the responses to make sure it doesn't cross that line" but instructed the defense attorney also to object if he "believe[s] a question has crossed the line[.]" Mr. B-Smith's defense attorney noted his previous objection for the record at trial.

"understand what he was trying to say." The expert further stated that R.C. "was consistent throughout the entirety of the disclosure of what happened." She opined that R.C.'s learning disabilities would make it "very difficult" for him to "hold onto the information that he was supposed to lie about or hold onto details if they were not accurate or not something that he experienced." On cross-examination, the defense attorney asked her whether "the phrase sexually assaulted or sexually raped would . . . be child appropriate for somebody his age in his development level?" She responded that "it depends but that is not a word or verbiage he used in my interview." On redirect, she explained that "developmentally, it wouldn't surprise me if he changes his verbiage," but explained also that "this is a child who has been going through the criminal justice system for the last two years, so I imagine there have been conversations that have been had with him and . . . conversations surrounding this where they're using words like sexual assault or rape[.]"

After the State rested its case-in-chief, Mr. B-Smith moved for a judgment of acquittal, with his counsel arguing that there were no "real reliable dates" for the accusations and argued that the expert "essentially just told us that [R.C.] was not a very credible witness today indicating nobody talked to him about anything when clearly they had." He continued, "[h]e was very quick to answer" and without R.C.'s testimony, the State could not meet the elements of the charges. Defense counsel also raised the issue of the location of the offenses. The circuit court denied this motion, finding that the State had

presented sufficient evidence to support the charges in the indictment, that evidence of specific dates was not required, that testimony had established the location, and that R.C.'s credibility was a jury question.

In his defense, Mr. B-Smith called his mother, who was also R.C.'s grandmother. She testified about the living situations of Mr. B-Smith and her daughter, that she did not "believe what was being said," and also admitted that she was not around the entire time that Mr. B-Smith was residing with R.C.'s mother or when R.C. was with Mr. B-Smith. Finally, the defendant testified and denied all the allegations against him, but he admitted that he was a "regular" babysitter for R.C. and G.C. in November 2021. At the conclusion of the trial, the jury convicted Mr. B-Smith of all charges.

Mr. B-Smith filed a post-trial motion requesting a new trial and judgment of acquittal that reiterated the arguments that he made after the State rested its case-in-chief. The circuit court denied Mr. B-Smith's motion and sentenced him to twenty-five to one-hundred years of imprisonment for the two first-degree sexual assault convictions; five to twenty-five years of imprisonment for the first-degree sexual abuse conviction; and ten to twenty years of imprisonment for each of the three convictions for sexual abuse by a parent, guardian, custodian, or person of trust. The court ordered that the sentences run consecutively, for an aggregate sentence of eighty-five to two-hundred eighty-five years of

imprisonment, with a twenty-year term of supervised release following any release from imprisonment. He now appeals.

II.

STANDARD OF REVIEW

Mr. B-Smith's two assignments of error employ different standards of review, and we discuss them each in turn below.

III.

DISCUSSION

We first address Mr. B-Smith's argument that the jury being absent from the courtroom while R.C. testified was error because it prejudiced him, then turn to Mr. B-Smith's challenge to the sufficiency of the evidence supporting his convictions. Ultimately, we affirm his convictions.

A. The Jury's Absence from the Courtroom

Mr. B-Smith argues that when the court allowed the child to testify outside of the presence of both the defendant *and* the jury, the court violated the procedures set forth in West Virginia Code § 62-6B-4(a) relating to child witness testimony and therefore his convictions should be vacated and the case remanded for a new trial. As Mr. B-Smith admits in his brief, he did not preserve an objection before the circuit court relating to the jury's presence. Without an objection, "any error by the trial court is foreclosed from

appellate review unless it rises to the level of plain error[,]" so Mr. B-Smith asks us to employ plain error review here. *State v. Miller*, 194 W. Va. 3, 17, 459 S.E.2d 114, 128 (1995).[5]

The record shows that Mr. B-Smith likely waived the error, as we discuss more below. But, plain error review is only available to Mr. B-Smith if he forfeited the error, rather than waived it. Nonetheless, given the absence of a clear record as to when and why the court decided to remove the jury from the courtroom, we ultimately proceed under plain error review as if Mr. B-Smith forfeited the error. Still, under this review, Mr. B-Smith has not shown that removing the jury from the courtroom affected his substantial rights.

1. Waiver. We first address the State's argument that Mr. B-Smith waived the error relating to the jury's absence, obviating the need for the Court to address his assertion of plain error. While we agree with the State that Mr. B-Smith likely waived this error, due to the circuit court's unclear record regarding its decision to remove the jury, we ultimately proceed to plain error review. In the context of plain error review, we have

[5] Typically, we review challenges to the application of statutes such as West Virginia Code § 62-6B-4 de novo. *See* Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.").

discussed the distinction between a waiver of error and a forfeiture of a right, noting that we will examine a purported error if a defendant forfeits his right by failing to make a timely assertion of that right, rather than making a knowing and intentional waiver:

> Under the "plain error" doctrine, "waiver" of error must be distinguished from "forfeiture" of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right—the failure to make timely assertion of the right—does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is "plain." To be "plain," the error must be "clear" or "obvious."

Syl. Pt. 8, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. In *State v. Caleb T.*, the Court found that a defendant waived his objection to a deviation from West Virginia Code § 62-6B-4's requirements. No. 21-0699, 2022 WL 9925068, at *3 (W. Va. Oct. 17, 2022) (memorandum decision). On review, the Court refused to find plain error because counsel "acknowledged that the trial court intended to take the victim's testimony outside of the jury's presence," then unequivocally "informed the trial court that he knew of no reason why such a procedure could not be employed[,]" resulting in waiver. *Id*.[6] On the other hand, when counsel simply failed to object to a courtroom procedure, we have deemed that a

[6] Similarly, in *State v. Caleb T.*, the trial court required the defendant, alongside the jury, to watch the child victim's testimony remotely while the child testified in the courtroom. No. 21-0699, 2022 WL 9925068, at *2 (W. Va. Oct. 17, 2022) (memorandum decision). However in that case, the defendant's subsequent waiver of any error associated with this procedure was clear.

forfeiture and the purported error is reviewable under a plain error analysis. *State v. Jeremy S.*, 243 W. Va. 523, 530 & n.11, 847 S.E.2d 125, 132 & n.11 (2020) (finding forfeiture when defense counsel failed to object to the method the court used to poll the jury and employing plain error review).

Here, we find that, although the record is partial and unclear, the existing record demonstrates that Mr. B-Smith likely waived the error, although not as unequivocally as defendant's waiver in *Caleb T*. At the pretrial hearing, Mr. B-Smith did not specifically object to the jury leaving the courtroom, but instead generally objected to the use of closed-circuit television as a confrontation clause violation. Still, although the court did not explicitly specify where the jury would be located during the child witness's testimony at the pretrial hearing, the court indicated that the jury's removal would be a possibility and that the determination would be made after meeting with the child pretrial. The court inquired as to whether the parties had any objections, directly addressing defense counsel. Defense counsel objected only to having the mother in the courtroom with the child, suggesting that Mr. B-Smith's remaining concern was only the mother's location.

We hesitate, on this partial record, to make a final ruling that Mr. B-Smith waived the error and thus foreclose plain error review, particularly considering the pretrial meeting where apparently the child witness and counsel for both the State and Mr. B-Smith attended (without Mr. B-Smith). We have no record of this pretrial meeting and note the

possibility that the court made its decision regarding the jury's location at that time. Given this uncertainty in the record, we proceed to review Mr. B-Smith's contentions regarding the jury's absence under plain error review.[7] Even then, however, Mr. B-Smith "cannot establish that he is entitled to relief under plain error because he cannot prove prejudice[.]" *State v. Lyon*, 250 W. Va. 90, 99, 902 S.E.2d 422, 431 (2024) (finding waiver but also considering prejudice prong of plain error review).

2. Plain error. In considering whether sending the jury out of the courtroom alongside Mr. B-Smith while R.C. testified was plain error, we use the following standard: "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, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. We first consider whether there was an error that was plain. While an error may be plain "under existing law" or plain due to a "new legal principle" pursuant to clarification on appeal, here, we focus on the first type of plain error. *See* Syl. Pt. 6, in part, *State v.*

[7] We recognize that "[t]he plain error rule presupposes that the record is sufficiently developed to discern the error." Syl. Pt. 7, in part, *State v. Spence*, 182 W. Va. 472, 388 S.E.2d 498 (1989). Here, although the record is not fully developed regarding the court's decision regarding when or how it reached the determination that the jury would leave the courtroom while the child witness testified, the record "is sufficiently developed" regarding the fact that the jury was not in the courtroom while the child testified—the main issue raised in Mr. B-Smith's assignment of error. *See State v. Myers*, 204 W. Va. 449, 456, 513 S.E.2d 676, 683 (1998) (finding record sufficiently developed to address assignment of error under plain error).

Myers, 204 W. Va. 449, 513 S.E.2d 676 (1998). We note that "an error may be plain under existing law, which means that the plainness of the error is predicated upon legal principles that the litigants and trial court knew or should have known at the time of the prosecution." *Id*.

Mr. B-Smith argues that he essentially chose to voluntarily remove himself from the courtroom during R.C.'s testimony, and it was error for the court to alter the provisions of West Virginia Code § 62-6B-4(a) by *also* removing the jury from the courtroom. The State responds that removing the jury was not an error because the statute requires the child to testify in the courtroom, yet the statute does not address the jury's presence in the courtroom at all. The State further argues that R.C. testified before the jury because his testimony was seen and heard by the jury, "albeit not in the same room." We disagree with the State and explain below that the statute's language indicates that the court plainly erred when removing both the jury and the defendant while the child testified in the courtroom.

The statute's provisions are our starting point. West Virginia Code § 62-6B-4 and related statutes "allow[] a child to testify outside the physical presence of a defendant when required by 'the interests of justice.'" *State v. David K.*, 238 W. Va. 33, 40, 792

S.E.2d 44, 51 (2016) (footnote omitted).[8] As this Court explained in *David K.*, the statute "seeks to balance the welfare of a child with the defendant's constitutional right to confront his [or] her accuser." *Id.*; *see also* W. Va. Code § 62-6B-1 (setting forth the statute's legislative purpose). A court must first determine there is sufficient justification for a child to testify outside the presence of the defendant by following the procedure set forth in West Virginia Code § 62-6B-3, which Mr. B-Smith does not challenge here. Syl Pts. 1-3, *David K.*, 238 W. Va. 33, 792 S.E.2d 44.

West Virginia Code § 62-6B-4(a) dictates the procedures a court must follow if it "determines that the use of live, two-way closed-circuit testimony is necessary and orders its use[.]" The statute provides that "the defendant may, at any time prior to the child witness being called, elect to absent himself from the courtroom during the child witness'[s] testimony." W. Va. Code § 62-6B-4(a); *see also* Syl. Pt. 4, *David K.*, 238 W. Va. 33, 792 S.E.2d 44. If the defendant opts to be outside of the courtroom during the child's testimony, the "child shall be required to testify in the courtroom." W. Va. Code § 62-6B-4(a); *see also* Syl. Pt. 4, *David K.*, 238 W. Va. 33, 792 S.E.2d 44. In other words, to keep the defendant separate from the child witness, the statute provides the defendant a choice: either the defendant remains outside of the courtroom observing while the child

[8] These statutes are located in Article 6B of Chapter 62 of the West Virginia Code, entitled "Protection and Preservation of Statements and Testimony of Child Witness."

testifies in the courtroom, or the child witness testifies outside of the courtroom by closed-circuit television.

Subsection (b) describes in detail how the court must manage either the defendant being absent from the courtroom or the child testifying by closed-circuit television. W. Va. Code § 62-6B-4(b). West Virginia Code § 62-6B-4(b)(1) addresses a child witness's testimony if he or she testifies by way of closed-circuit television from a "testimonial room," including who may be in the room with the child, and notes that the defendant remains in the courtroom:

> If live, closed-circuit television is used in the testimony of the child witness, he or she shall be taken into the testimonial room and be televised live, by closed-circuit equipment to the view of the defendant, counsel, the court and, if applicable, the jury. The projected image of the defendant shall be visible for child witness to view if he or she chooses to do so and the view of the child witness available to those persons in the courtroom shall include a full body view. Only the prosecuting attorney, the attorney for the defendant, and the operator of the equipment may be present in the room with the child witness during testimony. Only the court, the prosecuting attorney and the attorney for the defendant may question the child. . . . The court shall permit the defendant to observe and hear the testimony of the child witness contemporaneous with the taking of the testimony. The court shall provide electronic means for the defendant and the attorney for the defendant to confer confidentially during the taking of the testimony.

W. Va. Code § 62-6B-4(b)(1). West Virginia Code § 62-6B-4(b)(2) explains the procedure the court must follow if the defendant chooses to be outside of the courtroom while the

child testifies, and provides that the absent defendant is televised back to the "finder of fact[,]" which is present in the courtroom:

> If the defendant elects to not be physically present in the courtroom during the testimony of the child witness, the defendant shall be taken into the testimonial room and be televised live, by two-way closed-circuit equipment to the view of the finder of fact and others present in the courtroom. The defendant shall be taken to the testimonial room prior to the appearance of the child witness in the courtroom. There shall be made and maintained a recording of the images and sounds of all proceedings which were televised pursuant to this article. While the defendant is in the testimonial room, the defendant shall be permitted to view the live, televised image of the child witness and the image of those other persons in the courtroom whom the court determines the defendant is entitled to view. Only the court, the prosecuting attorney and the attorney for the defendant may question the child. . . . The transmission from the courtroom to the testimonial room shall be sufficient to permit the defendant to observe and hear the testimony of the child witness contemporaneous with the taking of the testimony. No proceedings other than the taking of the testimony of the child witness shall occur while the defendant is outside the courtroom. In the event that the defendant elects that the attorney for the defendant remain in the courtroom while the defendant is in the testimonial room, the court shall provide electronic means for the defendant and the attorney for the defendant to confer confidentially during the taking of the testimony.

W. Va. Code § 62-6B-4(b)(2).

Certainly, as the State points out, § 62-6B-4(a) does not mention the jury, but it need not: either the child testifies outside of the courtroom, or the defendant leaves the courtroom. Subsection (b) reinforces that subsection (a) has two options and directly

addresses the jury in both subsections. Subsection (b)(1) requires that, when child witness testifies via closed-circuit testimony, testimony must "be televised live, by closed-circuit equipment to the view of the defendant, counsel, the court and, if applicable, the jury." W. Va. Code § 62-6B-4(b)(1). Thus, the statute specifically contemplates that the remote child witness is outside of the presence of the jury, but the jury is with the defendant. *Id.* Subsection (b)(2) concerns the second option, when the defendant leaves the courtroom, and instructs that during the child's testimony the defendant must be televised live "to the view of the finder of fact and others present in the courtroom." W. Va. Code § 62-6B-4(b)(2). In a trial such as the one here, the finder of fact is the jury, so the statute specifically envisions that the jury remains in the courtroom, present for the child's live testimony while being able to observe the absent defendant on closed-circuit television. *See id.*

In addition to the plain text of the statute, in dicta, this Court has also stated that the jury must stay in the courtroom if the defendant elects to leave while the child witness testifies. In *State v. Gary A.*, the Court explained that when a defendant "elected to leave the courtroom during [the child witness's] testimony" the statute required the child witness "to testify in the courtroom before the jury." 237 W. Va. 762, 768, 791 S.E.2d 392, 398 (2016). Additionally, the West Virginia Trial Court Rules also contemplate situations where a witness may testify to the factfinder via videoconference, but do not state or suggest that the jury may be absent from the courtroom while a trial proceeds. *See* W. Va.

Tr. Ct. R. 14. In fact, Trial Court Rule 14.01(a) notes that "[p]roceedings conducted by videoconferencing shall be conducted in the same manner as if the parties had appeared in person[,]"—indicating that the only person removed from the courtroom setting with the use of videoconference is the witness, not the jury. A related rule also recognizes videoconferencing testimony by child witnesses in the circumstances faced by the court here, but again does not contemplate the removal of a jury. W. Va. Tr. Ct. R. 14.03(b) ("**Testimony of Child Witnesses** - The court may use videoconferencing to obtain the testimony of a child witness in accordance with West Virginia Code §[§] 62-6B-1 to -4."). In fact, nothing in the Trial Court Rules or the West Virginia Rules of Criminal Procedure countenances an absent jury.

For all these reasons, by removing the jury in addition to the defendant from the courtroom, the circuit court committed error that was plain. Furthermore, based on the language of the statute and our rules, this error was plain "under existing law." *See* Syl. Pt. 6, in part, *Myers*, 204 W. Va. 449, 513 S.E.2d 676. We now turn to the remainder of the plain error test.

3. Lack of Prejudice. After we find an error to be plain, to receive relief from the error, the defendant must show that it affects his substantial rights:

> Assuming that an error is "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. 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.

Syl. Pt. 9, *Miller*, 194 W. Va. 3, 459 S.E.2d 114.

Mr. B-Smith's arguments regarding substantial prejudice primarily rest on his contention that the trial court deviated from the statute, and as a result, he was unable to "confront his accuser in the same manner and method afforded all other criminal defendants" because he was not able to cross examine the witness "in front of a jury of his peers." He also argues that the court overstepped its boundaries in ensuring that R.C. was "comfortable." We agree that, by removing the jury from the courtroom, the court abandoned typical procedure and West Virginia Code § 62-6B-4's instructions, and further caution courts to follow the statutory requirements when allowing a child witness to testify pursuant to West Virginia Code §§ 62-6B-1 to -4.[9] However, Mr. B-Smith does not demonstrate how the outcome of the trial would have been different had the jury been in the same room with R.C. while R.C. testified. As he has not met his burden pursuant to Syllabus Point 9 of *Miller*, we do not find that the error substantially affected Mr. B-Smith's substantial rights and he is afforded no relief on this ground.

[9] It is apparent from the circuit court's discussion at the pretrial hearing that the court had removed the jury from the courtroom in other cases, with no statutory or procedural authority, while a child witness testified.

B. Sufficient Evidence Supported Mr. B-Smith's Convictions

Regarding Mr. B-Smith's second assignment of error—that the circuit court erred in denying his motion for a judgment of acquittal based on the sufficiency of the evidence—we examine that issue de novo. Syl. Pt. 5, *State v. Thompson*, 253 W. Va. 23, 927 S.E.2d 885 (2026) ("This Court applies a de novo standard of review to a circuit court's denial of a motion for judgment of acquittal.").

When we examine a purported error claiming insufficient evidence, our function 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." Syl. Pt. 1, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). Thus, our inquiry must focus on "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." *Id.* As we have often repeated, a defendant's burden when alleging insufficient evidence to support the jury's verdict is challenging:

> 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. To the extent that our prior cases are inconsistent, they are expressly overruled.

Syl. Pt. 3, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163. Furthermore, all reasonable inferences and credibility conflicts must be resolved in the State's favor:

> When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt.

Syl. Pt. 2, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996). Similarly, when considering cases where convictions are for sexual offenses, we have noted that "[a] conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury." Syl. Pt. 5, *State v. Beck*, 167 W. Va. 830, 286 S.E.2d 234 (1981). "Inherent incredibility," the Court has explained, "is more than contradiction and lack of corroboration." *State v. McPherson*, 179 W. Va. 612, 617, 371 S.E.2d 333, 338 (1988) (per curiam). Rather, inherent incredibility requires testimony that "defies physical laws." *Id.*

Regarding the crimes for which he was convicted, Mr. B-Smith identifies no missing elements nor lack of evidence regarding them. *See* Syl. Pt. 1, *Guthrie*, 194 W. Va.

657, 461 S.E.2d 163. Instead, Mr. B-Smith's entire argument focuses on R.C.'s credibility. Mr. B-Smith argues that R.C. used specific and unusual terminology in his testimony, such as the term "sexually raped," and Mr. B-Smith describes this phrase as "not often used by a young child with developmental delays." Mr. B-Smith also contends that R.C. did not tell his parents that Mr. B-Smith had performed oral sex on him and only revealed Mr. B-Smith's actions after R.C.'s younger brother alleged inappropriate contact, although the younger brother did not make any additional disclosures and did not testify at trial. He also argues that R.C.'s testimony was inconsistent, that R.C. had developmental delays, and that his testimony was bolstered by the CAC's interviewer.[10]

Here, as the State points out, Mr. B-Smith has not overcome his burden, as credibility determinations remain with the jury. Syl. Pt. 3, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163; Syl. Pt. 1, *State v. Harlow*, 137 W. Va. 251, 71 S.E.2d 330 (1952) ("In the trial of a criminal prosecution, where guilt or innocence depends on conflicting evidence, the weight and credibility of the testimony of any witness is for jury determination."). He similarly has not shown that R.C.'s testimony was inherently incredible. Syl. Pt. 5, *Beck*, 167 W. Va. 830, 286 S.E.2d 234. Because we "must credit all inferences and credibility

[10] Mr. B-Smith admits in his brief that the evidence "may be barely sufficient" to support his conviction of one count of first-degree sexual assault and one count of sexual abuse by a parent, guardian, custodian, or person in a position of trust, but contends "even that is tenuous at best." However, he fails to elaborate on which elements are purportedly missing from the other convictions.

assessments that the jury might have drawn in favor of the prosecution[,]" we refuse to disturb the jury's verdict and affirm the circuit court's denial of his motions for a judgment of acquittal. Syl. Pt. 2, in part, *LaRock*, 196 W. Va. 294, 470 S.E.2d 613.

IV.

CONCLUSION

For the reasons explained above, we affirm the March 3, 2024 order of the Circuit Court of Berkeley County sentencing Mr. B-Smith for his six convictions.

Affirmed.