IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0114

STATE OF WEST VIRGINIA,

Respondent,

v.

QUENTON A. SHEFFIELD,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the January 5, 2021, Order
Circuit Court of Cabell County
Case No. 19-F-107

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ASSIGNMENT OF ERROR

The lower court committed reversible error when, after submitting the case to the jury and over Petitioner's objections, it impaneled a discharged and unsworn juror and allowed that alternative juror to participate in the jury's verdicts in both the guilt and penalty phases of Petitioner's bifurcated trial.

STATEMENT OF THE CASE

A. Procedural background.

The Petitioner was indicted by a Cabell County grand jury for murder, malicious wounding, and possessing a firearm while being a person prohibited from possessing a firearm. A.R. 1883. A petit jury convicted the Petitioner on all three counts. A.R. 1884-86. The jury did not recommend mercy. A.R. 1897. The Petitioner was sentenced to: (1) life without the possibility of parole on the murder conviction; (2) an indeterminate period of incarceration of not less than two nor more than ten years for malicious wounding; and (3) a determinate period of five years for possessing a firearm while being prohibited from doing so. A.R. 1895-96. All sentences were to run consecutively to each other. A.R. 1896.

B. Facts relating to the jury.

After voir dire, a jury was empaneled and sworn. A.R. 546. At conclusion of the trial (which lasted roughly five days), the circuit court excused the alternate juror in the case, Kathy Scott. A.R. 1635. The jury began its deliberations on Monday, October 5, at 3:00 p.m. A.R. 1637. Roughly one hour and seven minutes after the jury had commenced its deliberations, the circuit court stated that the jury deliberations had to be recessed and stated that each juror needed to be questioned individually.[1] The circuit court had apparently been informed that one of the jurors might have had

[1]The transcript reflects that the judge acted at 5:07 p.m. A.R. 1637. It subsequently indicates that the judge acted at 4:07 p.m. A.R. 1637. Because the transcript reflects the first juror was questioned at 4:08 p.m., it appears the 5:07 p.m. reference was a typographical error.

a conversation with a witness during the Thursday of trial. A.R. 1637 ("THE COURT: . . . it has come to our attention, just a few minutes ago, that one of the jurors on Thursday afternoon, or Thursday at lunch, may have had a conversation with one of the witnesses."). The circuit court and counsel individually questioned the jurors out of the presence of the other jurors to determine if a juror did speak to a witness. A.R. 1637-51. All of the jurors denied having spoken to any witnesses, including Juror Beckett who told the Court:

> THE COURT: All right. Ms. Beckett, it has recently come to our attention that last Thursday at lunchtime during our lunch recess that one of the jurors may have had a conversation with a witness who had previously testified and maybe even asked that witness a couple of questions on the courthouse lawn. Was that you by any chance?
>
> JUROR BECKETT: No.
>
> THE COURT: You are sure?
>
> JUROR BECKETT: I am positive.

A.R. 1650.

The Petitioner moved for a mistrial, which the State opposed in light of all the jurors' denials of speaking with a witness. A.R. 1651. The Petitioner's counsel argued, "I keep telling you, one of these jurors is not being honest with us, and I think that gives us a lot of room for concern. I think we need to do this right. At this point in time I feel like there is no other remedy but a mistrial." A.R. 1652. When the circuit court asked the Petitioner's counsel if she really wanted a mistrial, counsel replied, "I don't think anybody ever wants one, but I want to make sure to preserve my client's rights now that we have a tainted jury." A.R. 1654.

During the discussions, one of the Assistant Prosecuting Attorneys trying the case suggested obtaining video footage from lunchtime of Thursday. A.R. 1654-55. The circuit court raised the issue of recalling the excused alternate juror, to which the Petitioner's counsel stated, "I

don't think anything we do now can fix it." A.R. 1656. The circuit court then ordered the jury to recess its deliberations and directed the clerk to call the alternate juror to return the next day as well as the witness who had the alleged interaction with the juror. A.R. 1658-59.

The next day the circuit court stated that the courthouse video surveillance footage disclosed that an interaction between a witness and a juror had occurred. A.R. 1695. The circuit court informed the Petitioner that the Petitioner could either choose to proceed with eleven jurors or he could accede to having the excused alternate juror returned to jury service. A.R. 1698. The Petitioner's counsel stated that of the two choices, he would prefer a 12th juror, but emphasized that this choice was not a waiver of his request for a mistrial. A.R. 1700-01. The circuit court allowed the trial witness to be examined. A.R. 1702-1708. After this it then called Juror Beckett:

> THE COURT: My Bailiff was able to get a copy of the courthouse security video, and it shows you talking with [the witness], the owner of Metro Cab, at lunch on Thursday, and that was what I was asking about when you said you did not do it.
>
> I would like to play that for you at this point.
>
> JUROR BECKETT: Oh, okay.
>
> (Video from Bailiff's phone played for all parties.)
>
> JUROR BECKETT: Okay, I did, yeah. I didn't know that—
>
> THE COURT: You didn't know what?
>
> JUROR BECKETT: That I wasn't allowed to speak to him.
>
> THE COURT: No, but I was asking you yesterday whether you spoke with any witness who had testified and you said no.
>
> JUROR BECKETT: I am sorry. I did not understand that.
>
> THE COURT: I think because of that I have no choice [sic] to excuse you from this jury.

A.R. 1711. The Petitioner's counsel confirmed with the circuit court that it was not going to order a mistrial. A.R. 1713.

The circuit court then brought Ms. Scott in and explained to her that the circuit court had determined that one of the deliberating jurors had to be excused due to having a conversation with a witness during the trial. A.R. 1714. The circuit court told Ms. Scott that this necessitated her return. A.R. 1714. The circuit court asked Ms. Scott (admittedly, without swearing her in) if she was "okay serving as a juror in this case[?]" A.R. 1714. Ms. Scott responded affirmatively. A.R. 1715. The Petitioner's counsel then confirmed from Ms. Scott that she did not speak to anyone about the case after she left the courthouse the day prior. A.R. 1715. The circuit court then informed Ms. Scott that the notes she had taken during the trial had been destroyed because she was excused from the case. A.R. 1715. Ms. Scott stated that even without the benefit of her notes that she was still able to be a fair and impartial juror and to remember the testimony and discuss the case with the other jurors. A.R. 1715-16. The circuit court then individually called each of the other jurors to inform them that a juror had talked to a witness on Thursday, that that juror had been excused, and that an alternate juror would be replacing the excused juror. A.R. 1716-29. Each juror was asked if in light of this information if they could remain fair and impartial jurors in the case and each responded affirmatively. A.R. 1716-29.

The circuit court then told counsel and the Petitioner that it was going to instruct the jury that: (1) one of their fellow jurors had been excused; (2) an alternate juror was going to replace the excused juror; (3) both the State and the Petitioner have a right to a verdict reached only after full participation of the juror whose votes determine the verdict; and, (4) this right would only be assured if the jury began deliberations from the beginning and set aside and disregarded all past deliberations. A.R. 1729. The Petitioner's trial counsel stated that "[i]t is our opinion that this

instruction does not fix any prior taint of the jury, and we are still in [sic] the position that the only remedy of this case is a mistrial." A.R. 1731-32.The circuit court instructed the jury:

> THE COURT: Thank you, ladies and gentlemen. Again, I thank you for being here today.
>
> As you know, from what I have said to each of you on the record in chambers, one of your fellow jurors has been excused and an alternate juror is replacing that excused juror.
>
> Do not consider this substitution for any purposes. Under the law, the alternate juror must participate fully in the deliberations that lead to any verdict.
>
> The Prosecution and the Defendant has [sic] the right to a verdict reached only after full participation of the jurors whose votes determine that verdict. This right will only be assured if you begin your deliberations again from the beginning.
>
> Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations have not taken place.

A.R. 1733-34.

The jury convicted the Petitioner on all counts, A.R. 1741-42. After the jury returned its verdict, the Petitioner requested the jury be polled. A.R. 1742. The circuit court instructed the jurors to respond "yes" if it was their verdict and "no" if it was not. A.R. 1742. Ms. Scott responded, [y]es." A.R. 1743. The jury did not recommend mercy after the mercy phase of the trial. A.R. 1842.

The Petitioner filed a post-judgment motion to set aside the verdict arguing, *inter alia,* that

> The jury that convicted [the] Petitioner and recommended he receive life without parole had deliberated with a tainted juror. That juror had initiated conversation with a State's witness after Court regarding the case, and then falsely denied the same to [the] Court until confronted with video evidence. This occurred after the juror had deliberated with the jury, assumingly passing along opinions based on her clandestine and prohibited independent research.
>
> After excusing the tainted juror, the Court asked if the defense would consent to a jury of 11. After the defense declined, a previously excused alternate was reinstated

(after deliberations had occurred without her). The notes she had taken during her time as alternate were destroyed when she was excused.

A.R. 1888. The circuit court denied this request, ruling from the bench:

> THE COURT: Right. Yeah, I think that with the questions that we asked individually of each juror and everything else, I think that it was clear that the jury fairly deliberated and that there is no indication that one juror discussed any of the testimony with the witness, nor is there any—
>
> . . .
>
> nor is there any indication—in fact, all of the jurors said that there was no discussion, that nothing was said by that one juror about talking to the witness during the jury deliberations.
>
> . . .
>
> [s]o I think that the record is clear that everything was done fairly and impartially, and I am going to deny [the] motion at this time.

A.R. 1870-71.

The Petitioner appeals the denial of his motion for a mistrial.

SUMMARY OF ARGUMENT

The Petitioner correctly contends that recalling Ms. Scott violated Rule of Criminal Procedure 24(c). But the error in this regard is harmless. In this case, "[t]he [circuit court] judge made painstaking efforts to minimize the potential prejudice to the defendant[], and determined after the verdict that no prejudice had been sustained. Thus, . . . the [circuit] court properly acted in furtherance of the . . . rules of criminal procedure 'to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.'" *United States v. Hillard*, 701 F.2d 1052, 1057 (2d Cir. 1983) (quoting Fed. R. Crim. P. 2).

Further, the Petitioner did not object to Ms. Scott being re-seated without being re-sworn. Any claim that the Petitioner is entitled to a new trial in this regard is waived. Additionally, Ms. Scott was sworn, albeit at trial and not when recalled. The purpose of a jury oath is to emphasize

to the juror the importance and the seriousness of the juror's task. In this case, the oath administered to Ms. Scott before trial fulfilled that end.

The judgment of the circuit court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not warranted in this case as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. This case is suitable for memorandum decision.

ARGUMENT

Any error committed by the circuit court in denying the Petitioner a mistrial is only harmless error.

The circuit court denied the Petitioner a mistrial in this case. A.R. 1731-32. The Petitioner asserts that the circuit court erred in denying the mistrial and substituting Juror Scott for Juror Beckett. Pet'r Br. at 6. Any error the circuit court committed is harmless and, as such, the judgment of the circuit court should be affirmed.

"The decision to declare a mistrial, discharge the jury, and order a new trial in a criminal case is a matter within the sound discretion of the trial court." Syl. Pt. 8, *State v. Davis*, 182 W. Va. 482, 388 S.E.2d 508 (1989); *see also 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."). The Petitioner asserts, however, that the circuit court erred as a matter of law. "[A] circuit court by definition abuses its discretion when it makes an error of law." *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 17, 483 S.E.2d 12, 17 (1996). Review of legal questions is plenary. *State v. Jenkins*, 204 W. Va. 347, 349, 512 S.E.2d 860, 862 (1998) (per curiam).

West Virginia Rule of Criminal Procedure 24(c) provides, in pertinent part:

> The court may direct that more jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

"Court rules are interpreted using the same principles and canons of construction that govern the interpretation of statutes." Syl. Pt. 2, *Casaccio v. Curtiss*, 228 W. Va. 156, 718 S.E.2d 506 (2011); *see also State ex rel. Wyant v. Brotherton*, 214 W. Va. 434, 440 n.13, 589 S.E.2d 812, 818 n.13 (2003) (quoting 20 Am.Jur.2d *Courts* § 51, at 370 (1995)) ("'[W]hen considering rules promulgated by courts, courts apply the principles of statutory construction.'"). Where a statute's language is plain and unambiguous, the judicial function extends to no more than applying the statute as written. *See, e.g., Tribeca Lending Corp. v. McCormick*, 231 W. Va. 455, 460, 745 S.E.2d 493, 498 (2013) ("If the statutory language is plain and does not lend itself to multiple constructions, the statute's plain language must be applied as it is written."). In the instant case, West Virginia Rule of Criminal Procedure 24(c) is plain—alternate jurors may only replace regular jurors "*prior* to the time the jury retires to consider its verdict[.]" (emphasis added). "An alternate juror who does not replace a regular juror *shall be discharged after the jury retires* to consider its verdict." *Id.* (emphasis added). Thus, West Virginia Rule of Criminal Procedure 24(c) does not countenance the substitution of an alternate juror after deliberations have begun ("post-submission substitution"). Federal courts interpreting the language in Federal Rule of Criminal Procedure 24(c) which mirrors West Virginia Rule 24(c)[2] have so concluded. "Rule 24(c) does not explicitly

[2]Federal Rule of Criminal Procedure 24 was amended in 1999. West Virginia Rule 24(c) is based on the pre-1999 version of Federal Rule of Criminal Procedure 24(c).

prohibit substitution of alternate jurors after the jury begins its deliberations. However, the rule's language and the weight of authority indicates that Rule 24(c) forbids such a practice." *United States v. Quiroz-Cortez*, 960 F.2d 418, 420 (5th Cir. 1992). "[T]he effect of the rule is to restrict the permissible time period for the replacement of a regular juror to the period prior to the commencement of deliberations." *See, e.g., Hillard*, 701 F.2d at 1057. "It is apparent then that the drafters of Rule 24(c) did not envision post-submission substitution, but expected instead that alternate jurors would be finally discharged when the regular jurors retire." *Id.* at 1058. As explained by one federal court:

> Rule 24(c) provides that "alternate jurors in the order in which they are called shall replace jurors who, *prior to the time the jury retires to consider its verdict*, become or are found to be unable or disqualified to perform their duties" (emphasis added) and that "an alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict." There is no provision for recalling an alternate after he is discharged and we think policy as well as the language we have quoted from the rule (especially the part we have italicized) forbid the practice.

United States v. Josefik, 753 F.2d 585, 587 (7th Cir. 1985).

While Rule 24(c) was violated in this case, the violation was harmless and does not afford the Petitioner the basis for a new trial.

This Court has "noted that '[t]he doctrine of harmless error is firmly established by statute, court rule and decisions as a salutary aspect of the criminal law of this State.'" *State v. Howells*, 243 W. Va. 1, 7, 842 S.E.2d 205, 211 (2020) (quoting *State v. Blair*, 158 W. Va. 647, 659, 214 S.E.2d 330, 337 (1975) (citations omitted)); *see, e.g.*, W. Va. Code Ann. § 62-2-11 ("Judgment in any criminal case, after a verdict, shall not be arrested or reversed upon any exception to the indictment or other accusation, if the offense be charged therein with sufficient certainty for judgment to be given thereon, according to the very right of the case."); W. Va. R. Crim. P. 52 (a) "(**Harmless Error**. Any error, defect, irregularity, or variance which does not affect substantial

rights shall be disregarded."); *State v. Rush*, 108 W. Va. 254, 150 S.E. 740, 742 (1929) ("The rule of 'harmless error' is settled law in this state.").

The Petitioner correctly observes that courts are split on whether violations of Rule 24(c) are subject to harmless error. Pet'r Br. at 9-10. At least one court has observed that the majority rule appears to support application of harmless error to erroneous post-submission substitution. *People v. Roberts*, 824 N.E.2d 250, 258 (Ill. 2005) ("We also note that when postsubmission substitution is found to be erroneous, most jurisdictions have not required reversal unless the defendant was prejudiced by the error."). This is true among the federal courts.

> A number of federal courts have considered the issue of whether the mid-deliberation substitution of an alternate juror for a regular juror constitutes reversible error. Although these courts uniformly hold that mid-deliberation juror substitution is a violation of Fed. R. Crim. P. 24(c), the majority find a harmless violation when the trial court has used safeguards to neutralize the possible prejudice to the defendant and preserve his right to a full consideration of his case by an impartial jury panel.

People v. Burnette, 775 P.2d 583, 589 (Colo. 1989) (footnote omitted); *see also People v. Dry Land Marina, Inc.*, 437 N.W.2d 391, 394 (Mich. Ct. App. 1989) ("The prevailing holding among the circuits is that reinstating a discharged alternate juror during deliberations, absent consent of the defendant, requires reversal of a conviction only when the defendant has been prejudiced by the procedure."); *Hayes v. State*, 735 A.2d 1109, 1119 (Md. 1999) (noting the "Federal approach of applying a liberal harmless error or non-prejudice test to mid-deliberation substitutions.").

On the other hand, "[s]tate courts appear to have been more willing than federal courts to view post-submission substitution as reversible error or error that must be proven harmless." *State v. Sanchez*, 6 P.3d 486, 490 (N.M. 2000). *Compare State v. Amick*, 462 S.W.3d 413, 416 (Mo. 2015) (finding "[t]he trial court erred by substituting a discharged alternate juror after the jury had retired to consider its verdict" and concluding "[t]he violation [of the State equivalent to Rule

24(c)]. . . constitutes reversible error."); *State v. Murray*, 757 A.2d 578, 591 (Conn. 2000) ("The remaining question is whether the trial court's violation of [State equivalent to Rule 24(c)] is subject to harmless error analysis. We conclude that it is not.") *with Sanchez*, 6 P.3d at 495 ("We therefore interpret our rule [24(c)] to require reversal unless in the circumstances of a particular case the trial court has taken sufficient measures to protect the defendant's right to proper jury deliberations. We hold that post-submission substitution is error under [State equivalent to Rule 24(c)]; it is error that creates a presumption of prejudice; the state must show under the circumstances of a particular case that the trial court took adequate steps to ensure the integrity of the jury process."). West Virginia should follow federal precedent in this case and find that violations of West Virginia Rule of Criminal Procedure 24(c) are subject to harmless error review.

The West Virginia Rules of Criminal Procedure are patterned on the Federal Rules of Criminal Procedure. *State v. Arbaugh*, 215 W. Va. 132, 139 n.2, 595 S.E.2d 289, 296 n.2 (2004) (Davis, J., dissenting). Indeed, West Virginia Rule of Criminal Procedure 24(c) is practically identical to pre-1999 Federal Rule of Criminal Procedure 24(c). *State v. Lightner*, 205 W. Va. 657, 661 n.5, 520 S.E.2d 654, 658 n.5 (1999). This Court has "'repeatedly recognized that when codified procedural rules . . . of West Virginia are patterned after the corresponding federal rules, federal decisions interpreting those rules are persuasive guides in the interpretation of our rules.'" *State v. Kaufman*, 227 W. Va. 537, 553 n.33, 711 S.E.2d 607, 623 n.33 (2011) (quoting *State v. Sutphin*, 195 W. Va. 551, 563, 466 S.E.2d 402, 414 (1995)). "'[T]he decisions of this Court have indicated that, "[t]o aid in defining the meaning and scope of this state's individual . . . rules of procedure, this Court often gives substantial weight to federal cases interpreting virtually identical federal rules."'" *Pristine Pre-Owned Auto, Inc. v. Courrier*, 236 W. Va. 720, 726, 783 S.E.2d 585, 591 (2016) (quoting *State ex rel. J.C. v. Mazzone*, 233 W.Va. 457, 463, 759 S.E.2d 200, 206 (2014)

(quoting *State ex rel. Erie Ins. Prop. & Cas. Co. v. Mazzone*, 220 W.Va. 525, 533 n.6, 648 S.E.2d 31, 39 n.6 (2007)). Thus, given that this Court has already acknowledged that federal case law supplies a corpus juris that provides guidance to the interpretation of State procedural rules based on federal rules, this Court should follow the majority rule in the federal courts and find that violations of Rule 24(c) are subject to harmless error.

While the circuit court in this case erred under Rule 24(c), "a violation of Rule 24(c) does not require reversal per se, absent a showing of prejudice." *Hillard*, 701 F.2d at 1058 Indeed, "[s]ince 1983, federal courts have continued to express the view that substitution of an alternate juror during mid-deliberations violates Rule 24(c) but that violation of the rule is not reversible error unless it prejudices the defendant." *Sanchez*, 6 P.3d at 491. *See, e.g., State v. Murray*, 757 A.2d 578, 593 (Conn. 2000) (McDonald, C.J., concurring in part and dissenting in part) (footnote omitted) ("In *United States v. Hillard*, 701 F.2d 1052, 1058 (2d Cir.1983), that court held that, despite the rule 24(c) of the Federal Rules of Criminal Procedure . . . the substitution of an alternate juror after deliberations have begun does not lead to reversal per se, absent a showing of prejudice. A great number of other Circuit Courts of Appeal have so held as well. *See United States v. Quiroz–Cortez*, 960 F.2d 418, 420 (5th Cir. 1992) (same); *United States v. Huntress*, 956 F.2d 1309, 1316 (5th Cir. 1992) (same); *United States v. Gambino*, 788 F.2d 938, 948 (3d Cir. 1986) (same); *United States v. Josefik*, 753 F.2d 585, 587 (7th Cir. 1985) (same); *United States v. Kopituk*, 690 F.2d 1289, 1309 (11th Cir. 1982) (same).").

In the instant case, the circuit court took appropriate steps to obviate any prejudice to the Petitioner regarding Ms. Scott. The circuit court brought Ms. Scott in and explained to her that the circuit court had determined that one of the deliberating jurors had to be excused due to having a conversation with a witness during the trial. A.R. 1714. The circuit court told Ms. Scott that this

necessitated her return. A.R. 1714. The circuit court queried Ms. Scott if she was "okay serving as a juror in this case[?]" A.R. 1714, who responded affirmatively. A.R. 1715. The Petitioner's counsel then confirmed from Ms. Scott that Ms. Scott did not speak to anyone about the case after Ms. Scott left the courthouse the day prior. A.R. 1715. The circuit court then informed Ms. Scott that the notes she had taken during the trial had been destroyed because she was excused from the case. A.R. 1715. Ms. Scott stated that even without the benefit of her notes that she was still able to be a fair and impartial juror and to remember the testimony and discuss the case with the other jurors. A.R. 1715-16.

The circuit court then individually called each of the other jurors to inform them that a juror had talked to a witness on Thursday, that that juror had been excused, and that an alternate juror would be replacing the excused juror. A.R. 1716-29. Each juror was asked if, in light of this information, they could remain fair and impartial jurors in the case and each responded affirmatively. A.R. 1716-29.

The circuit court instructed the jury:

> THE COURT: Thank you, ladies and gentlemen. Again, I thank you for being here today.
>
> As you know, from what I have said to each of you on the record in chambers, one of your fellow jurors has been excused and an alternate juror is replacing that excused juror.
>
> Do not consider this substitution for any purposes. Under the law, the alternate juror must participate fully in the deliberations that lead to any verdict.
>
> The Prosecution and the Defendant has [sic] the right to a verdict reached only after full participation of the jurors whose votes determine that verdict. This right will only be assured if you begin your deliberations again from the beginning.
>
> Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations have not taken place.

A.R. 1733-34.

The Petitioner contends that prejudice was demonstrated because "the lower court never asked Ms. Scott if she had investigated the case (i.e., conducted an internet search, watched the news, read a newspaper), instead the court only asked Ms. Scott if she was okay serving as a juror on this case." Pet'r Br. at 10. This does not show prejudice as "there is no suggestion that [Ms. Scott] did anything or talked to anyone that in any way impaired her ability to serve as an impartial juror." *United States v. Barker*, 735 F.2d 1280, 1283 (11th Cir. 1984). Further, the Petitioner's counsel was permitted to ask Ms. Scott questions after her recall but before she returned to the jury, A.R. 1715, but did not ask any of these questions either. To the extent the Petitioner avers that the circuit court never asked the jurors if they could disregard their previous deliberations, Pet'r Br. at 10, the circuit court specifically instructed them "you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations have not taken place." A.R. 1734. The fact the jury deliberations were shorter after Ms. Scott rejoined the jury does not necessarily imply that the jury disregarded the circuit court's jury instruction to begin the deliberation anew. *State v. Kolmann*, 367 P.3d 61, 63, 66 (Ariz. 2016) (stating the reconstituted jury's seventy-minute deliberation, after the original jury deliberated for "several hours," "does not itself suggest a failure by the jury to deliberate anew"). Additionally, the circuit court polled the jury after the verdict which also helps to alleviate any prejudice. *Gonzalez v. State*, 616 S.W.3d 585, 594 (Tex. Ct. Crim. App. 2020), *pet'n for writ of certiorari docketed, Gonzalez v. Texas*, No. 21-5327 (U.S. Aug. 9, 2021). Finally, that the jury did not elect a new foreperson is simply irrelevant because the jury was instructed to begin deliberations anew and "[t]he selection of a foreperson . . . is not a part of jury deliberations." *State v. West*, 877 A.2d 787, 817 (Conn. 2005).

The Petitioner finally contends that he is entitled to relief because Ms. Scott was never sworn back in as a juror after being discharged. Pet'r Br. at 11. The failure to swear Ms. Scott back in is either waived by the Petitioner's failure to alert the circuit court that he desired Ms. Scott to be re-sworn and is, at best, harmless error.

In the instant case, the Petitioner complains that Ms. Scott was not sworn back in after being recalled to the courthouse. Pet'r Br. at 11. The Petitioner relies on *State v. Moore*, 49 S.E. 1015 (W. Va. 1905) to argue that an unsworn jury cannot return a valid conviction. Pet'r Br. at 11. In *Moore*, an order empaneling the jury provided that the jurors "'were elected according to law to well and truly try and true deliverance make between the state of West Virginia[,]' etc." *Id.* at 1015. Because the order did not use the word "sworn," this Court held the verdict was fatally defective. *Id.* This Court further explained, "the record must affirmatively show somewhere and in some way that the jury were sworn in the manner prescribed by law, before there can be a legal conviction." *Id.* at 1016. *Moore* is not applicable in the present case.

First, the Petitioner never requested that the circuit court re-swear Ms. Scott before allowing her to deliberate and as such, the claim is waived. To the extent that *Moore* may be read as excusing the obligation of a contemporaneous objection, *Moore* has been superseded by more modern authority. The kind of legal formalism undergirding *Moore* "has since given way to a more functional approach." *State v. Vogh*, 41 P.3d 421, 426 (Or. Ct. App. 2002) (specifically rejecting *Moore*). *See, e.g.*, W. Va. R. Crim. P. 2 ("These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay."). This functional approach includes the raise or waive rule. "When a litigant deems himself or herself aggrieved by what he or she considers to be an important occurrence in the course of a trial . . . he

or she ordinarily must object then and there or forfeit any right to complain at a later time." *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996). Consequently, "[a] defendant may not obtain an automatic reversal of a conviction by raising an objection to the court's failure to swear the jury only after an adverse judgment has been returned and the jury has been discharged. Instead, such an objection, like others that also seek to ensure defendant's fair trial interests, must be raised timely, and prejudice must be shown, for a defendant to be entitled to relief." *Vogh*, 41 P.3d at 429; *see also United States v. Turrietta*, 696 F.3d 972, 973–74 (10th Cir. 2012).

Second, any error in not re-swearing Ms. Scott is, at best, harmless. This is not a case where Ms. Scott was never sworn as a juror; Ms. Scott was sworn as a juror, albeit at the end of voir dire and before the trial actually commenced—a fact that the record in this case conclusively demonstrates. A.R. 546 ("The Clerk, Janet Weaver, swears the Jury Panel."). Consequently, "the record . . . affirmatively show[s] somewhere and in some way that [Ms. Scott] w[as] sworn in the manner prescribed by law[.]" *Moore*, 49 S.E. at 1016. Indeed, the purpose of swearing a juror is "to emphasize the importance and the seriousness of the juror's task[.]" *United States v. Martin*, 740 F.2d 1352, 1358 (6th Cir. 1984). "A juror impressed with the seriousness of his charge is more likely to be attentive at trial and, in turn, more likely to carry out his duty faithfully, with due respect for the ideals underlying the criminal process." *Turrietta*, 696 F.3d at 978; *see also People v. Pribble*, 249 N.W.2d 363, 366 (Mich. Ct. App. 1976) ("The oath is administered to insure that the jurors pay attention to the evidence, observe the credibility and demeanor of the witnesses and conduct themselves at all times, as befits one holding such an important position."). Since Ms. Scott took the jury oath after voir dire and before trial, any error in not re-administering it when she was recalled was not prejudicial. The oath she previously took impressed on her the seriousness of her task in serving as a juror, paying attention to the evidence and observing the credibility and

demeanor of the witnesses. Thus, the purpose underlying the juror oath was met in this case and the Petitioner would have received nothing more from re-swearing Ms. Scott than he received from Ms. Scott's initial oath. *Cf. State v. Varner*, 212 W. Va. 532, 536, 575 S.E.2d 142, 146 (2002) ("Our rules of practice are not simply normative, but are crafted to achieve desirable ends. When applying them would not effectuate their underlying goals, we eschew their application."). Consequently, the Petitioner is not entitled to relief.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Cabell County, West Virginia, should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,

Respondent,

By counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0114

STATE OF WEST VIRGINIA,

Respondent,

v.

QUENTON A. SHEFFIELD,

Petitioner.

CERTIFICATE OF SERVICE

I, Scott E. Johnson, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, September 13, 2021, and addressed as follows:

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