STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Donald Ashley Johnson,
Petitioner Below, Petitioner

FILED
November 4, 2020
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 19-0788 (Randolph County 18-C-60)

R.S. Mutter, Superintendent,
McDowell County Correctional Center,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Donald Ashley Johnson, by counsel Clinton W. Smith, appeals the Circuit Court of Randolph County's August 9, 2019, order denying his petition for a writ of habeas corpus. Respondent R.S. Mutter, Superintendent, by counsel Scott E. Johnson, filed a response. Petitioner filed a reply. On appeal, petitioner argues that his due process rights were violated and that his trial counsel was ineffective.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the 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.

In June of 2015, petitioner was indicted on two counts of soliciting a minor via computer, in violation of West Virginia Code § 61-3C-14(b) (Counts 1 and 2); one count of distribution and display of obscene matter to a minor, in violation of West Virginia Code § 61-8A-2(a) (Count 3); one count of use of obscene matter with intent to seduce a minor, in violation of West Virginia Code § 61-8A-4 (Count 4); one count of possession of material depicting a minor engaged in sexually explicit conduct, in violation of West Virginia Code § 61-8C-3 (Count 5); and thirteen counts of attempted possession of material depicting a minor engaged in sexually explicit conduct.[1]

[1]The State eventually dismissed two counts of attempted possession of material depicting a minor engaged in sexually explicit conduct.

The victim of petitioner's offenses was S.M., a then-fifteen-year-old student at the high school where petitioner was employed as a librarian.[2] The State's evidence at trial consisted mainly of S.M.'s testimony, along with some photographs discovered on petitioner's external hard drive and information contained in his journal, which were seized pursuant to a search warrant. S.M. testified that she and petitioner initially began a friendship, but their relationship eventually became sexual in nature. S.M. stated that she and petitioner exchanged sexually explicit text messages via a texting application which would allow the two to communicate and would automatically delete the messages after a period of time. Police never discovered such an application on either S.M.'s or petitioner's devices, nor did they ever discover any text messages or pictures sent between the two. Rather, the State relied on S.M.'s testimony to prove the communications. However, both the State and petitioner presented the testimony of their respective expert witnesses regarding the alleged texting application. The State's expert testified that evidence of the texting application on S.M.'s device could have been deleted. Conversely, petitioner's expert testified that it could not. Interestingly, police discovered a deleted search history on petitioner's phone and/or computer which included a search for how to clear information from a computer. Also testifying at trial were Corporal Josh Wince of the West Virginia State Police; the executive director of the Randolph-Tucker Children's Advocacy Center; and P.B. and K.S., students from S.M.'s high school. P.B. testified that petitioner asked her whether she would hurt someone for $1,000. K.S. testified that petitioner asked her to bully S.M. by calling her fat until she starved herself.

Following the trial, petitioner was convicted of two counts of soliciting a minor via computer; one count of distribution and display of obscene matter to a minor; one count of use of obscene matter with intent to seduce a minor; and one count of possession of material depicting a minor engaged in sexually explicit conduct (Counts 1-5) and was acquitted of the remaining eleven counts. In May of 2016, the circuit court sentenced petitioner to serve two concurrent terms of two to ten years in prison for the two counts of soliciting a minor via computer; a determinate sentence of three years, consecutive to the former terms, for his conviction of distribution and display of obscene matter to a minor; a determinate term of two years, consecutive to the former terms, of home confinement for his conviction of use of obscene matter with intent to seduce a minor; and a determinate term of two years in prison, consecutive to the former terms, which was suspended to five years of supervised probation, for his conviction of possession of material depicting a minor engaged in sexually explicit conduct. The circuit court also required that petitioner submit to twenty years of intensive supervision upon the fulfillment of his sentence and register as a sexual offender.

Petitioner filed a direct appeal of his conviction in September of 2017. This Court affirmed petitioner's convictions and sentence by memorandum decision. *See State v. Johnson*, No. 16-0531, 2017 WL 3821804 (W. Va. Sept. 1, 2017)(memorandum decision).

[2]Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *Melinda H. v. William R. II*, 230 W. Va. 731, 742 S.E.2d 419 (2013); *State v. Brandon B.*, 218 W. Va. 324, 624 S.E.2d 761 (2005); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

Petitioner, by counsel, filed a petition for a writ of habeas corpus in July of 2018. Petitioner alleged two grounds for relief: that his due process rights were violated and that his trial counsel was ineffective. More specifically, petitioner argued that the State failed to present evidence of key elements of certain crimes charged, that he was prejudiced by the introduction of certain evidence, that he was prohibited from cross-examining witnesses, and that the prosecutor made inappropriate comments, among other things. The circuit court held an omnibus hearing in February of 2019. The sole witness was Rebecca A. Judy, petitioner's trial counsel. Ms. Judy testified that petitioner's trial was her "first ever" jury trial and she believed in retrospect that she made several errors in her trial performance which constituted ineffective assistance.

The habeas court entered an order denying petitioner habeas relief on August 9, 2019. The habeas court found that, contrary to petitioner's argument, the State did not fail to present a necessary element of Counts 6-16 and that the display of photographs regarding those counts did not prejudice the jury given petitioner's acquittal on those counts. The habeas court also found no error with regard to petitioner's claims that he was prevented from cross-examining certain witnesses. Although petitioner desired to cross-examine the victim and another juvenile witness, petitioner was able to elicit the information desired from the arresting officer through other questioning. The habeas court found no merit in petitioner's argument that evidence was admitted in violation of Rule 404(b) of the West Virginia Rules of Evidence.[3] According to the habeas court, the evidence was intrinsic to the charges and, therefore, did not implicate Rule 404(b).

Additionally, the habeas court found no merit in petitioner's claim regarding hearsay because the statement at issue was not offered to prove the truth of the matter. Further, the habeas court found that petitioner's claims of improper prosecutorial comments were unmeritorious given that petitioner's counsel also used the complained-of term, "pornography," and no objection was lodged regarding the use of that term. The habeas court likewise denied petitioner habeas relief based upon his ineffective assistance of counsel claim. It is from this order that petitioner appeals.

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[3]Rule 404(b) provides as follows:

Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice Required. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Any party seeking the admission of evidence pursuant to this subsection must:

(A) provide reasonable notice of the general nature and the specific and precise purpose for which the evidence is being offered by the party at trial; and

(B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.

This Court reviews appeals of circuit court orders denying habeas corpus relief under the following standard:

> "In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review." Syl. Pt. 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006).

Syl. Pt. 1, *Anstey v. Ballard*, 237 W. Va. 411, 787 S.E.2d 864 (2016).

On appeal, petitioner first claims that he was denied due process of law. Petitioner sets forth numerous alleged violations, including that the State failed to introduce any evidence establishing the age of the individuals depicted in the photographs as alleged in Count 5 of the indictment. Petitioner also argues that the State introduced the testimony of P.B. and K.S. in violation of Rule 404(b) of the West Virginia Rules of Evidence. Petitioner additionally contends that he was denied the opportunity to cross-examine certain witnesses, that the State erroneously introduced "anticipatory rebuttal evidence," and that the prosecutor made inappropriate comments by referring to the pictures introduced as "pornography." Petitioner further claims that his expert witness's testimony was uncontradicted; that he was prejudiced by the State's failure to offer evidence regarding the ages of the individuals depicted in the materials alleged in Counts 6-16, which prejudiced the jury such that it made it more likely that he would be convicted on Counts 1-5; and that the above-mentioned errors, cumulatively, prejudiced petitioner to a degree so as to violate his right to due process of law.

At the outset, we note that petitioner does not challenge the circuit court's findings of fact as "clearly wrong," nor does he offer any particular arguments as to why the circuit court's conclusions of law are erroneous. Our review of the record on appeal, the parties' argument, and the circuit court's order lead us to the conclusion that the circuit court did not abuse its discretion when it denied petitioner habeas relief.

We dispense with several of petitioner's claims without addressing them on the merits. First, petitioner's claims involving evidentiary rulings, such as the admission of Rule 404(b) evidence and hearsay, are not cognizable in habeas proceedings. We have previously held that "[a] habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Syl. Pt. 4, *State ex rel. McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979). Further, "evidentiary rulings respecting the admission of evidence are cognizable in habeas corpus only to the extent they violate specific constitutional provisions or are so egregious as to render the entire trial fundamentally unfair and thereby violate due process under the Fourteenth Amendment." *Hatcher v. McBride*, 221 W. Va. 5, 11, 650 S.E.2d 104, 110 (2006) (citing *Estelle v. McGuire*, 502 U.S. 62 (1991)). Moreover, "[a]bsent 'circumstances impugning fundamental fairness or infringing specific constitutional protections,' admissibility of evidence does not present a state or federal constitutional question." *Id.* (quoting *Grundler v. North Carolina*, 283 F.2d 798, 802 (4th Cir.1960)); *see also Richardson*

v. Ames, No. 18-0999, 2020 WL 4354920, at *2 (Jul. 30, 2020 W. Va.)(memorandum decision) (finding that the petitioner's raising of Rule 404(b) claims in his habeas petition constituted plain trial errors that did not involve alleged constitutional violations and, therefore, were not subject to review in habeas proceedings). Petitioner fails to demonstrate how the habeas court's alleged evidentiary rulings rise to the level of infringing on his constitutional protections and, as such, is not entitled to relief. Moreover, petitioner assigned as error the admission of alleged Rule 404(b) evidence on direct appeal but failed to raise issue with the specific evidence he complains of in his habeas petition.[4] This Court has noted that an error that was readily apparent at the time it was alleged to have been committed is subject to waiver. *See Ford v. Coiner*, 156 W. Va. 362, 367-68, 196 S.E.2d 91, 95 (1973). Petitioner's allegations of evidence admitted in violation of Rule 404(b) should have been readily apparent at the time the alleged error occurred. Indeed, petitioner raised issue with certain alleged Rule 404(b) violations on direct appeal but fails to explain why he did not raise issue with the evidence of which he now complains. Accordingly, we further find that this argument has been waived.

Second, two of petitioner's arguments are in clear violation of Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure, which requires that

> [t]he brief must contain an argument exhibiting clearly the points of fact and law presented, the standard of review applicable, and citing the authorities relied on, under headings that correspond with the assignments of error. The argument must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The Court may disregard errors that are not adequately supported by specific references to the record on appeal.

Additionally, in an Administrative Order entered December 10, 2012, Re: Filings That Do Not Comply With the Rules of Appellate Procedure, this Court specifically noted that "[b]riefs with arguments that do not contain a citation to legal authority to support the argument presented and do not 'contain appropriate and specific citations to the record on appeal . . . .' as required by rule 10(c)(7)" are not in compliance with this Court's rules. *Id.*

Further, this Court has made clear that "'[a] skeletal "argument," really nothing more than an assertion, does not preserve a claim . . . Judges are not like pigs, hunting for truffles buried in briefs.'" *State, Dep't of Health v. Robert Morris N.*, 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995) (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)). Indeed, "[a]lthough we liberally construe briefs in determining issues presented for review, . . . [issues] mentioned only in passing but [which] are not supported with pertinent authority, are not considered on appeal." *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996).

Here, petitioner failed to provide a standard of review, citation to applicable law, or citation to the record for two claims. Specifically, petitioner claims his expert witness's testimony was

[4]Specifically, on direct appeal, petitioner argued that several e-mails admitted during trial violated Rule 404(b). Subsequently, in his habeas petition, petitioner raised Rule 404(b) violations relating to the admission of the testimony of two juvenile witnesses, evidence of which he did not complain during his direct appeal process.

uncontradicted, but fails to provide any argument or analysis as to the significance of his statement. Further, petitioner fails to demonstrate that the prosecutor made inappropriate comments as contemplated by *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995).[5] Although petitioner claims that the State "repeatedly referred to the photographs of the alleged minors as 'pornography,'" he fails to cite to a single instance in the record and, therefore, fails to demonstrate that the alleged remarks were extensive or whether they had the tendency to mislead the jury. Accordingly, we decline to address these arguments on appeal.

Third, petitioner attempts to raise a new issue before this Court that was not raised before the habeas court below. Specifically, petitioner takes issue with the sufficiency of the evidence presented for Count 5 of the indictment. Petitioner's habeas petition lacks any language asserting this claim, and petitioner cites to no portion of the record demonstrating that he alerted the habeas court to this claim at the omnibus hearing. We have previously held that "'[o]ur general rule is that nonjurisdictional questions . . . raised for the first time on appeal, will not be considered.' *Shaffer v. Acme Limestone Co., Inc.*, 206 W.Va. 333, 349 n. 20, 524 S.E.2d 688, 704 n. 20 (1999)." *Noble v. W. Va. Dep't of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009). Accordingly, we decline to address this issue on appeal.

Having dispensed with the above-mentioned arguments, we now turn to petitioner's remaining claims that we will address on the merits. Petitioner argues that he was denied the opportunity to cross-examine certain witnesses. First, petitioner claims that he was prohibited from cross-examining the victim and another juvenile witness regarding whether juvenile petitions had been filed against them. According to petitioner, the testimony of these witnesses would have been impacted by the filing of any juvenile petitions, and cross-examination regarding any such petition would have aided the jury in making a credibility determination. Second, petitioner states he was also prohibited from cross-examining the arresting officer regarding errors in the documentation prepared by the officer and "assumptions" the officer made during the investigation. Petitioner similarly claims that the testimony he would have elicited on cross-examination from the officer would have aided the jury in making a credibility determination.

We have explained that "the Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' This right is secured for defendants in state as well as federal criminal proceedings under *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923[] (1965)." *Davis v. Alaska*, 415 U.S. 308, 315 (1974).

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[5]Syllabus Point 4 of *Sugg* provides as follows:

> Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

193 W. Va. at 393, 456 S.E.2d at 474.

Indeed, "[t]he fundamental right to confront one's accusers . . . contemplates the opportunity of meaningful cross-examination . . . guaranteed by Article III, Section 14 of the West Virginia Constitution." *State v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975). Pursuant to a defendant's right to confront witnesses, "[a] defendant on trial has the right to be accorded a full and fair opportunity to fully examine and cross-examine the witnesses." Syl. Pt. 1, *State v. Crockett*, 164 W. Va. 435, 265 S.E.2d 268 (1979). This Court has provided general guidelines for cross-examination of a witness:

> "Several basic rules exist as to cross-examination of a witness. The first is that the scope of cross-examination is coextensive with, and limited by, the material evidence given on direct examination. The second is that a witness may also be cross-examined about matters affecting his credibility. The term "credibility" includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness' character. The third rule is that the trial judge has discretion as to the extent of cross-examination." Syllabus Point 4, *State v. Richey*, 171 W.Va. 342, 298 S.E.2d 879 (1982).

Syl. Pt. 1, *State v. Barnett*, 226 W. Va. 422, 701 S.E.2d 460 (2010).

Here, petitioner was not denied the right to meaningfully cross-examine the witnesses. The habeas court found that the State indicated that there were no juvenile petitions filed against either witness. The habeas court noted that while petitioner's counsel testified at the omnibus hearing that she believed there had been petitions filed against S.M. and the other juvenile, the information had been provided to her by third parties. Petitioner failed to have either juvenile or the third-party testify regarding the alleged petitions at the omnibus hearing. Further, in its response brief to petitioner's habeas petition, the State denied that either witness had ever had a juvenile petition filed against them. It stated, "[t]here were no petitions, no adjudications, no cases period." Accordingly, we find no error in the habeas court's determination that petitioner's argument is without merit given that the information petitioner desired to elicit during cross-examination did not exist.

We likewise find no merit in petitioner's argument that he was denied the meaningful opportunity to challenge the arresting officer on cross-examination. First, petitioner claims he was denied the opportunity to impeach the officer's credibility by eliciting errors in his investigation on cross-examination. Second, petitioner wanted to "impeach the arresting officer on the ground that the assumptions he had made during the investigation were inappropriate." Third, petitioner wanted to demonstrate that the officer lied to petitioner's mother. And finally, petitioner desired to cross-examine the arresting officer about his opinion of the victim's credibility. Here, the habeas court found that petitioner's cross-examination of the officer was "lengthy and aggressive." The habeas court noted that petitioner was able to establish that several errors occurred in the investigation, including incorrect dates, as well as the fact that petitioner was arrested prior to the forensic evaluation of certain electronic devices, and that evidence was left in the officer's car for over a year. Further, while petitioner claims that he wanted to cross-examine the officer regarding "inappropriate assumptions," petitioner's citation to the record pinpoints only the officer's direct examination, and, moreover, petitioner provides no information as to what "assumptions" the officer made. Additionally, contrary to petitioner's argument, he was able to elicit the information

he sought regarding the officer’s alleged lies despite the fact that petitioner was denied the opportunity to cross-examine the officer regarding a conversation he had with petitioner’s mother. During a sidebar, petitioner’s counsel stated that she wanted to demonstrate that the officer told petitioner’s mother that more than twenty young girls were coming forward with accusations against petitioner. The trial court deemed the conversation with the mother as irrelevant. Nevertheless, petitioner’s counsel was permitted to question the officer as follows:

[Petitioner’s counsel:]	Do you agree with your previous testimony that you and [Superintendent] George spoke about additional women or young girls?
. . . .	
	“Numerous young girls.” Did you have that conversation with Superintendent –
[Officer:]	I stand by that. I believe we did. I don’t recall the nature of it exactly.
[Petitioner’s counsel:]	And when was that?
[Officer:]	I couldn’t begin to tell you.
[Petitioner’s counsel:]	Did any other numerous young girls come forward?
[Officer:]	Not to my knowledge, no.

As such, petitioner was able to elicit that the officer had a conversation with his superior officer wherein he indicated that additional girls were coming forward with accusations but did not. Lastly, the habeas court found that no error occurred when the trial court denied petitioner the opportunity to cross-examine the officer regarding his opinion as to the victim’s credibility. As noted by the habeas court, the credibility of a witness is within the exclusive province of the jury. *See* Syl. Pt. 2, *State v. Martin*, 224 W. Va. 577, 687 S.E.2d 360 (2009) (“‘The jury is the trier of the facts and in performing that duty it is the sole judge as to the weight of the evidence and the credibility of the witnesses.’ Syl. Pt. 2, *State v. Bailey*, 151 W.Va. 796, 155 S.E.2d 850 (1967).”). Accordingly, we find that petitioner is entitled to no relief in this regard.

Petitioner also sets forth arguments regarding the State’s alleged failure to introduce elements of the crimes with which he was charged. Specifically, petitioner claims that the State offered no evidence that the individuals depicted in the pictures presented in relation to Counts 6-16, attempted possession of material depicting a minor engaged in sexually explicit conduct, were, in fact, minors. Petitioner contends that the effect of the State’s failure or inability to present a necessary element of the charged offenses was to prejudice the jury so that they would be more likely to convict him on the other counts contained in the indictment. While petitioner concedes that he was acquitted of Counts 6-16, he claims that the jury was “improperly exposed to prejudicial information.”

West Virginia Code § 61-8C-3(a) provides that "[a]ny person who, knowingly and willfully, sends or causes to be sent or distributes, exhibits, possesses, electronically accesses with intent to view or displays or transports any material visually portraying a minor engaged in any sexually explicit conduct is guilty of a felony." Further, "[i]n order to constitute the crime of attempt, two requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime." Syl. Pt. 1, *State v. Burd*, 187 W. Va. 415, 419 S.E.2d 676 (1991) (citation omitted).

Here, the habeas court properly found that the age of the individual depicted in the photos was not a necessary element of the counts of *attempted* possession of material depicting a minor engaged in sexually explicit conduct. Rather, the State only needed to prove that petitioner had the specific intent to commit the underlying crime and that he made an overt act towards the commission of that crime. *Id*. The habeas court explained that Counts 6-16 were based upon internet searches conducted by petitioner. The State submitted evidence of petitioner's internet searches with terms such as "tween," "jailbait tumblr," "lolita teen tumblr," "14 year old girl," and "lolita girl." The habeas court further explained that these searches established that petitioner had the intent to possess material depicting a minor engaged in sexually explicit conduct and that the act of searching for these images constituted an overt act towards the commission of the crime. Accordingly, the State was not required to show that the individuals in the photos found were minors; instead, it only had to prove that petitioner intended to possess the images depicting minors and made an overt act to commit that crime.

The habeas court also found no merit in petitioner's claims that admission of the photos prejudiced the jury or made them more likely to convict on the other charges. The habeas court noted that the jury acquitted petitioner of Counts 6-16 and, as such, demonstrated that it was able to assess the merits of each individual charge without any prejudice. Petitioner fails to demonstrate how the habeas court's findings were erroneous, and we find he is entitled to no relief.

Petitioner next argues that the cumulative effect of the errors in his case denied him a fair trial and violated his due process rights. However, we have held that the cumulative error doctrine does not apply where no errors are found. *See State v. Knuckles*, 196 W. Va. 416, 473 S.E.2d 131 (1996). "Cumulative error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors." *Id.* at 426, 473 S.E.2d at 141. Because we find that the circuit court did not err in denying petitioner's petition for a writ of habeas corpus on any of the grounds set forth herein, including ineffective assistance of counsel as discussed more fully below, we find that petitioner's cumulative error assertion is also without merit.

Finally, petitioner alleges that his trial counsel was ineffective. In his brief, petitioner provides an enumerated list of nearly thirty-four instances where his counsel was allegedly ineffective, including, but not limited to, the fact that his counsel was inexperienced, failed to object several times, failed to impeach certain witnesses, and failed to understand the evidence.

In Syllabus Point 5 of *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), we held that

> [i]n the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

"Failure to meet the burden of proof imposed by either part of the *Strickland*/*Miller* test is fatal to a habeas petitioner's claim." *State ex rel. Vernatter v. Warden, W. Va. Penitentiary*, 207 W. Va. 11, 17, 528 S.E.2d 207, 213 (1999) (citing *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 321, 465 S.E.2d 416, 423 (1995)).

Skipping to the second prong of the *Strickland/Miller* test, we find that petitioner's claim of ineffective assistance of counsel fails. In his brief, petitioner provides absolutely no analysis or argument that there is a reasonable probability that, but for trial counsel's alleged errors, the result of the proceedings would have been different. In his sole statement on the second prong, petitioner concludes "there can be no question that but for these errors, and particularly in conjunction with the numerous events denying the Petitioner his Due Process rights, the outcome of the trial would have been different." Petitioner's simple restatement of the second prong, without any further analysis, is insufficient to support his claim of ineffective assistance of counsel, and his failure to meet his burden of proof with regard to this prong is fatal to his entire argument. The habeas court performed a detailed analysis and found that petitioner's trial counsel was not ineffective for any of the reasons set forth herein, and petitioner does not raise any issue with the habeas court's findings. Accordingly, we find that petitioner is entitled to no relief.

For the foregoing reasons, we affirm the circuit court's August 9, 2019, order denying petitioner's petition for a writ of habeas corpus.

Affirmed.

ISSUED: November 4, 2020

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Margaret L. Workman
Justice Elizabeth D. Walker
Justice Evan H. Jenkins
Justice John A. Hutchison