

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Jordan J. Goard,
Petitioner Below, Petitioner

vs.) **No. 21-0370** (Fayette County 19-C-105)

Donnie Ames, Superintendent,
Mt. Olive Correctional Complex,
Respondent Below, Respondent

MEMORANDUM DECISION

Petitioner Jordan J. Goard, by counsel Graham B. Platz, appeals the Circuit Court of Fayette County’s April 12, 2021, order denying his petition for a writ of habeas corpus seeking relief on the following grounds: ineffective assistance of counsel, cumulative error, and insufficiency of the evidence to support his conspiracy conviction. Respondent State of West Virginia, by counsel Patrick Morrissey and Andrea Nease Proper, filed a response. Petitioner filed a reply.

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 2017, petitioner was indicted for one count of conspiracy to commit a felony, one count of first-degree robbery, and one count of grand larceny, but the grand larceny charge was later dismissed. These charges stemmed from a controlled drug buy from petitioner initiated by a confidential informant (“CI”) at an apartment complex. The police outfitted the CI with a purse containing a camera to record the transaction and provided money for the buy. Following the CI’s purchase of what was purported to be cocaine, the CI left the apartment complex and started through the parking lot. Petitioner, believing the CI to be wearing a wire, followed her and then accosted her. When she tried to get away, petitioner picked her up; carried her back toward the apartments; and, according to the CI’s testimony at trial, “slammed [her] down on the curb and then tried to jerk the purse off.” Robert Lee, who was later indicted for his involvement in this crime and tried together with petitioner, approached petitioner and the CI and asked what was going on. Petitioner informed Mr. Lee that the CI was wearing a wire, at which point, according to the CI, Mr. Lee pointed a handgun at her and instructed her to give petitioner the purse or he

would shoot her. Petitioner struck the back of the CI's head, which caused the CI to stop resisting and enabled petitioner to jerk the purse loose from her body. The altercation was captured by the apartment complex's surveillance cameras. Both petitioner and Mr. Lee were convicted of conspiracy and first-degree robbery, but the jury did not make a finding that Mr. Lee used a firearm in committing the robbery. This Court affirmed petitioner's and Mr. Lee's convictions and sentences in, respectively, *State v. Goard*, No. 17-0712, 2018 WL 3005955 (W. Va. June 15, 2018)(memorandum decision), and *State v. Lee*, No. 18-0045, 2019 WL 1224640 (W. Va. Mar. 15, 2019)(memorandum decision).

Petitioner, acting as a self-represented litigant, filed a petition for a writ of habeas corpus in July of 2019. With the assistance of later-appointed counsel, petitioner filed an amended habeas petition asserting nine grounds for relief. Petitioner continues to pursue only three of the those asserted grounds on appeal to this Court: ineffective assistance of trial counsel, cumulative error in counsel's representation, and insufficiency of the evidence to support his conspiracy conviction.

Petitioner's ineffective assistance of counsel claim was predicated on trial counsel's failure to object to the introduction of what was described as a "white powdery substance," failure to request a jury instruction that the taking of the CI's/police's property was merely incidental to the commission of another crime, and failure to object to allegedly prejudicial statements during the State's closing and rebuttal arguments.¹ Regarding the "white powdery substance," which was found inside Mr. Lee's home, petitioner noted that Mr. Lee was separately indicted on drug possession charges, which were severed from the codefendants' joint trial. Petitioner argued that the State introduced the evidence, however, "in the hopes that the jury would assume that it was indeed the cocaine sold to [the CI] thereby showing that the co[]defendants were indeed working in concert." Petitioner further argued that no evidence was admitted that even tended to show that the cocaine found in Mr. Lee's apartment was that alleged to have been sold to the CI, so counsel was ineffective for failing to object to the introduction of this evidence.

In asserting that counsel was ineffective for failing to request a jury instruction that the taking of the property was incidental to the commission of another principal crime, such as destruction of property, petitioner argued that it "is logical to infer" that he took the property to destroy it in order to suppress disclosure of what was contained on the camera.

Petitioner claimed that the State's closing and rebuttal arguments were improper because the prosecutor argued facts not in evidence, asserted his personal opinion as to petitioner's guilt, and asserted his personal opinions as to the credibility of both the State's and petitioner's witnesses. Petitioner's trial counsel was, therefore, ineffective for failing to object to the arguments. Petitioner also argued that the cumulative effect of trial counsel's alleged errors deprived him of his right to competent representation.

With respect to his claim that the evidence was insufficient to support his conspiracy conviction, petitioner argued specifically that the evidence failed to show a common plan,

¹ Petitioner argued other ways in which trial counsel was purportedly ineffective, but he has abandoned those claims on appeal, so they are not recounted here.

agreement, or overt act. He further claimed that the State's conspiracy case was "impermissibly enhanced" by the prosecutor's improper closing arguments.

The parties appeared for an omnibus evidentiary hearing on October 8, 2020, at which petitioner's trial counsel testified. Petitioner's trial counsel was questioned regarding the introduction of the "white powdery substance." Highlighting the CI's trial testimony that during their altercation petitioner took back the cocaine he allegedly sold her, testimony that officers arrived on the scene shortly after the altercation, and testimony that petitioner was not present at the scene when officers arrived, petitioner asked how it could be that the "white powdery substance" recovered from Mr. Lee's home could be the same as that allegedly sold to the CI. Trial counsel agreed that it was "within the realm of possibility" that the white powdery substance recovered from Mr. Lee's home was not the same as the substance petitioner allegedly sold to the CI. But regarding any prejudicial impact, trial counsel explained, "Based upon my theory of the case, I thought—first of all just from a res gestae stand point [sic] that evidence simply was what it was and our theory was that A – this was not [petitioner] on the video or B – if it was [petitioner] he did not have the requisite intent to commit robbery."

Regarding the jury instruction issue, trial counsel testified that "[i]t is certainly possible" that requesting a jury instruction that the taking was merely incidental to another principal crime could have been beneficial to petitioner. As to whether trial counsel's theory of the case would have changed had counsel been aware of that law, trial counsel maintained that

what was most compelling to me and also in recollecting my conversations with [petitioner], he was focused on impeaching the credibility of the CI—the fact that there were not really any eyewitnesses and that there were some potential discrepancies in what was seen in the video versus what the CI testified to.

Trial counsel was "not entirely sure that had that case [describing a taking that is incidental to another crime] been presented to me it would've changed the principal direction of where I went with theory."

The comments made by the State during closing that petitioner challenged in his habeas petition included insinuations that petitioner and Mr. Lee were part of a larger criminal conspiracy. The prosecutor referred to one individual as a "boss" who was seen on the apartment complex's security footage driving up to petitioner and Mr. Lee in a black car. Trial counsel testified that he did not believe that line of argument was highly prejudicial because "it was such a speculative rather flimsy assertion on his part and I think frankly in so many instances not objecting is more than (inaudible) factually than raising the issue and having a juror focus on . . . that more." Trial counsel also said,

I believe it was proper for [the prosecutor] to make that argument that the jury could infer from what they saw on the video that there was an additional person there, but again my theory at that point by the time we were at closing was that simply just was not [petitioner] on the video. So for those reasons I chose not to lodge an objection as to this boss representation.

Petitioner also pointed to the prosecutor's remark, "What are we going to do? Condone this behavior. Get hoodwinked? Or do something? It's time to do something." Trial counsel disagreed that the remark was improper in view of the closing as a whole and in light of the court's instructions to the jury regarding the applicable burden of proof and on what it could permissibly consider in reaching its verdict. And trial counsel disagreed that the prosecutor offered his personal opinion as to the credibility of defense witnesses.

The habeas court concluded that petitioner was not entitled to relief on any of the grounds asserted. In addressing petitioner's claim that counsel was ineffective for failing to object to various statements made by the State during its closing argument, the court observed that "while the prosecutor's various inferences [regarding the presence of a 'boss' on the scene and larger criminal conspiracy] may have pushed the limit of acceptable deduction, they did not exceed what could be reasonably deduced and argued therefrom." The court pointedly concluded that "the prosecutor did not assume and argue facts not in evidence."

The court further found that "any statements regarding witness credibility, while perhaps not well worded, did not rise to a level constituting prejudicial comments by the prosecutor." The court recounted that, in closing, the State repeated the court's instructions regarding the jury's role in assessing witness credibility, and the court concluded that "the prosecutor did not assert his personal opinion [on each witness's credibility] but rather argued that the jury should evaluate the credibility of each based upon the circumstances surrounding each witness's testimony and also consistent with the video evidence the jury had before it."

The court also found no merit to petitioner's claim that the prosecutor improperly communicated his personal opinion on petitioner's guilt. It concluded that "the prosecutor was referencing evidence that had been presented during trial," and it observed that throughout the State's rebuttal closing argument, the State "expressed to the jury that its decision should be based on a review of the evidence and ascertaining the truth." So, the court found that

while the prosecutor's statements, manner of comparison, and method of drawing inferences from the evidence that was presented during trial could now potentially be viewed, in hindsight, as objectionable, . . . these contested comments and remarks simply do not rise to a level where no reasonably proficient attorney would not have objected to them.

(Footnotes omitted.) The court also pointed to trial counsel's testimony during the omnibus hearing that objecting to the challenged comments "would only have drawn the issue into the focus of the jury."

Although it found that trial counsel was not ineffective for failing to object to the challenged comments during the State's closing, the habeas court nevertheless continued its analysis and concluded that petitioner fell "short of establishing the level of prejudice necessary to constitute a constitutional violation warranting habeas relief."

While perhaps a poor choice of words to characterize the role [of the man identified as a "boss"] in the incident, the role or title given to [the "boss"] by the prosecutor did not otherwise strengthen or diminish the video evidence showing

communication between . . . [p]etitioner and [p]etitioner's co[]defendant, and between . . . [p]etitioner, [p]etitioner's co[]defendant, and [the "boss"], and the . . . actions that occurred following these communications, all supported the jury's finding that . . . [p]etitioner and [petitioner's codefendant, Mr. Lee,] acted in concert during the commission of the robbery.

The court also recounted that it instructed the jury that the opening statements and closing arguments of counsel were not evidence but, rather, counsels' interpretation of what the evidence will be and what the evidence showed. With final regard to petitioner's ineffective assistance of counsel claim predicated on counsel's failure to object to the State's arguments in closing, the court found that it "overwhelmingly determined the comments made by the prosecutor . . . either were not improper comments and/or were not prejudicial to the [p]etitioner. Error, if any, certainly did not rise to a level of significant and consequential." Therefore, the court found no merit to petitioner's claim that the failures to object constituted cumulative error.

The court also found that petitioner's trial counsel was not ineffective for failing to object to the introduction of the "white powdery substance." Mr. Lee's counsel objected to the evidence. The objection was overruled, and the habeas court found that petitioner had not shown that the ruling would have been different had petitioner's counsel objected. The court also determined that the evidence was relevant in light of the conspiracy to commit robbery charge, which was predicated on a narcotics transaction; the CI's testimony; and the video evidence. In addition, testimony from law enforcement officers regarding the context of the search of Mr. Lee's home and the recovery of the substance and chain of custody evidence demonstrated that the evidence was admissible. The court also found that petitioner's trial counsel made a tactical decision not to object because the item was not directly connected to petitioner, and petitioner's trial strategy was to deflect culpability and attack the State's evidence in hopes of convincing the jury that "it was not conclusive as to the identity and involvement of the [p]etitioner."

The court, likewise, found no merit to petitioner's claim that counsel was ineffective for failing to request an instruction allowing the jury to find that petitioner's taking of the police recording equipment was incidental to his completion of the principal crime of destruction of property rather than first-degree robbery. Because the recording device was never recovered, the court found petitioner's argument that the taking was incidental to destruction to be speculative. The court noted, too, that petitioner also took the cocaine sold to the CI and her purse. Further, if petitioner had destroyed the evidence, that "would constitute the permanent deprivation of the owner of the possession and use of the subject recording device." Regarding all of petitioner's claimed instances of ineffectiveness constituting cumulative error, the court observed that its "analysis herein has revealed [that there] were actually no[] errors," so cumulative error had not been shown.

Finally, regarding petitioner's challenge to the sufficiency of the evidence to support his conspiracy conviction, the court outlined the CI's testimony and the video evidence corroborating that testimony, "particularly as to communication, contact, and confederation between the [p]etitioner and his co[]defendant during the robbery and following the robbery." The court found that the video evidence "showed various moments that a rational juror could have reasonably determined was proof of communication and direction during a common scheme or plan between

the [p]etitioner and his co[]defendant” and, along with the CI’s testimony, “was more than sufficient to sustain [p]etitioner’s convictions.”

It is from the court’s April 12, 2021, order denying him habeas relief that petitioner now appeals.

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).

Petitioner assigns as error the court’s denial of habeas relief on the grounds of ineffective assistance of counsel, cumulative error, and insufficiency of the evidence to sustain his conspiracy conviction. Each of these assignments will be addressed in turn. Regarding his ineffective assistance of counsel claim, petitioner maintains that trial counsel was ineffective for three reasons, each of which will likewise be addressed in turn, but we begin by setting forth the test petitioner must satisfy to succeed on his claims of ineffective assistance:

In 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.

Syl. Pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). And

[i]n reviewing counsel’s performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel’s strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at hand.

Id. at 6-7, 459 S.E.2d at 117-18, Syl. Pt. 6. We have also said that “there is a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel’s performance must be highly deferential.” *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 320, 465 S.E.2d 416, 422 (1995). Therefore, “this Court will not view counsel’s conduct through the lens of hindsight”; rather, “an attorney’s actions must be examined according to what was known and reasonable at the time the attorney made his or her choices.” *Id.*

Petitioner first argues that trial counsel was ineffective for failing to object to the prosecutor’s closing and rebuttal arguments because the prosecutor “misled the jury with

impermissible inferences” in referring to the man seen on the surveillance footage as a “boss,” in arguing that the surveillance footage depicted petitioner following the “boss’s” order, and in implying that a drug-related criminal enterprise existed. Petitioner also asserts that the prosecutor appealed to a sense of community and then maligned petitioner’s counsel, asking the jurors if they “trust the two guys that are being paid to get these guys off.” Petitioner argues further that the prosecutor bolstered the CI’s testimony by informing them that she was not “in some terrible trouble” but, instead, worked as a CI for money, and the prosecutor did not “think working for money is an egregious terrible thing.” The prosecutor then outlined “some things that made me doubt [the] credibility” of a defense witness.

While a prosecutor may “prosecute vigorously,” he or she must “deal[] fairly with the accused.” Syl. Pt. 2, in part, *State v. Critzer*, 167 W. Va. 655, 280 S.E.2d 288 (1981) (citation omitted). A prosecutor may not “become a partisan, intent only on conviction. And, it is a flagrant abuse of his position to refer, in his argument to the jury, to material facts outside the record, or not fairly deducible therefrom.” *Id.* at 655, 280 S.E.2d at 289, Syl. Pt. 2, in part. It is also “improper for a prosecutor in this State to ‘(A)ssert his personal opinion as to the justness of a cause, as to the credibility of a witness . . . or as to the guilt or innocence of the accused.’” *Id.* at 655, 280 S.E.2d at 289, Syl. Pt. 3 (citation omitted). Without running afoul of these pronouncements, though, “[a] prosecutor may argue all reasonable inferences from the evidence in the record” so long as he or she does not “intentionally . . . misstate the evidence or mislead the jury as to the inferences it may draw.” Syl. Pt. 7, in part, *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988).

We find no error in the habeas court’s conclusion that the prosecutor’s remarks related to the “boss” seen on the security footage were reasonable inferences that could permissibly be argued from the surveillance camera footage. Petitioner, Mr. Lee, and the “boss” are seen communicating, and petitioner is seen, as the court found, “chang[ing] the course of conduct” in response to the communication. It cannot be said that the prosecutor misstated the evidence or misled the jury as to the inferences it could draw.

Regarding the comments as to petitioner’s and other witnesses’ credibility, we also find that the habeas court did not err in denying relief. We have noted that “*Critzer* does not prohibit comment by the prosecutor on the credibility of witnesses, but only the assertion of a personal opinion. It has been stated that the purpose of the *Critzer* rule is to prevent the use of the prosecutor’s *status* as a means to bolster witness credibility.” *England*, 180 W. Va. at 351, 376 S.E.2d at 557. Although “[c]redibility is to be determined solely by the triers, . . . an advocate may point to the fact that circumstances or independent witnesses give support to one witness or cast doubt on another. The prohibition pertains to the advocate’s personally endorsing, vouching for, or giving an opinion.” *Id.* (citation omitted). As the habeas court observed, this is exactly what the prosecutor did. The prosecutor did not assert his personal opinion but, rather, outlined the supportive or damaging aspects of the witnesses’ testimony.

We observe, too, that petitioner’s trial counsel testified at the omnibus hearing that, first, he believed the prosecutor’s remarks to be fair inferences from the evidence, and, second, he chose not to object to the “flimsy” connection the prosecutor tried to make so as to avoid drawing attention to it. We decline to second guess this strategic decision. *See Miller*, 194 W. Va. at 6, 459 S.E.2d at 117, Syl. Pt. 6, in part.

In further arguing that he received ineffective assistance of counsel, petitioner asserts that counsel should have objected to the admission of the “white powdery substance” found in Mr. Lee’s apartment.² Petitioner argues that the State introduced this evidence to support its conspiracy charge, hoping the jury would believe that the substance recovered from the apartment was the same sold to the CI. But, petitioner argues, the CI testified that petitioner took the substance from her, the police did not search the CI to see if she was still in possession of it, and the video footage does not clearly show petitioner taking the substance. So, introduction of the evidence “allowed the jury to speculate as to the identity and probative value of the white powdery substance,” and it defeated the purpose of severing Mr. Lee’s drug charges.

First, as the habeas court noted, Mr. Lee objected to the evidence, and that objection was overruled. Petitioner failed to explain how the ruling would have been different had he been the one to object. Moreover, petitioner’s theory at trial was that it was not him who was depicted on the surveillance footage. Petitioner attempted to discredit the CI’s credibility; he argued that the CI was a drug user, that she kept the cocaine, and that she lied to law enforcement about it having been stolen. Because the cocaine was found in Mr. Lee’s apartment, and because Mr. Lee informed law enforcement that it belonged to him, petitioner was able to disclaim culpability by arguing that there was “[n]ot a single bit of actual physical evidence that ties [him] to this whole situation.” Because the white powdery substance was not connected to petitioner, it was not outside the broad range of acceptable conduct not to object to its admission. And because this Court does not engage in hindsight or second guess strategic decisions, petitioner cannot demonstrate ineffective assistance on this ground when counsel highlighted the claimed lack of connection to further his theory at trial.

We also find that even if petitioner’s trial counsel’s performance fell below an objective standard of reasonableness in failing to object to the challenged remarks and evidence, there is no reasonable probability that the result of petitioner’s trial would have been different had those objections been made. The CI testified to informing the police that she could purchase cocaine from petitioner in a controlled buy; that the police wanted her to proceed with the controlled buy from petitioner, providing her with money and outfitting her with a purse containing a camera; that she, in fact, purchased cocaine from petitioner; that, following the drug buy, petitioner attempted to take her purse; that petitioner picked her up and eventually “slammed” her down on the ground, still attempting to take her purse; that Mr. Lee appeared on the scene and petitioner informed him that the CI was “wearing a wire”; that Mr. Lee demanded that she give petitioner the purse or he would shoot her; and that she then “gave up fighting” with petitioner and he “jerked” the purse from her. Much of this altercation was recorded by the apartment complex’s surveillance cameras, and the CI narrated that footage as it was played for the jury. Shante Maddox, Mr. Lee’s sister-in-law, also observed the altercation. She identified petitioner as the man who “beat up” the CI, and she heard him inform Mr. Lee that the CI “has a wire on” and had something that belonged to him. Several law enforcement officers testified, including Chief Rod Perdue of the Fayette County

² Petitioner also argues that trial counsel should have requested a limiting instruction, but he did not make that claim below. “Our law is clear in holding that, as a general rule, we will not pass upon an issue raised for the first time on appeal,” so we decline to consider this issue now. *State v. Hughes*, 225 W. Va. 218, 230, 691 S.E.2d 813, 825 (2010) (citation omitted).

Sheriff's Department, who oversaw the controlled buy and provided the CI with the money and camera-outfitted purse used in the buy, and Sergeant Richard Stephenson of the West Virginia State Police, who testified that he found the purse worn by the CI, but not the recording equipment, discarded in a nearby dumpster. Against this evidence, it cannot be said that counsel's claimed deficiencies in representation affected the outcome of petitioner's trial.

In his last claim of ineffective assistance of counsel, petitioner argues that counsel should have requested an instruction that his conduct in taking the recording equipment was incidental to the commission of another principal crime, such as destruction of property.³ He argues that when property is taken only in furtherance of a principal crime, an intent to permanently deprive the owner of the property is not present. *See State v. Plumley*, 179 W. Va. 356, 368 S.E.2d 726 (1988). Petitioner acknowledges that the jury was instructed on the necessary element of permanent deprivation, but he argues that the instruction should have included reference to an incidental taking that could mitigate intent. He maintains that he "could have destroyed the equipment to avoid prosecution for a separate crime or even out of anger because he was being surveilled, not with the intent to deprive the [police] of [their] recording device."

"Instructions must be based upon the evidence and an instruction which is not supported by evidence should not be given." Syl. Pt. 4, *State v. Collins*, 154 W. Va. 771, 180 S.E.2d 54 (1971); *see also State v. LaRock*, 196 W. Va. 294, 308, 470 S.E.2d 613, 627 (1996) ("The law is clear that an instruction should be given only when it addresses an issue reasonably raised by the evidence.") (citation omitted). The habeas court did not err in concluding that counsel was not ineffective for failing to request an instruction that the taking was incidental to another crime because petitioner's theories about what he "could have" done to the property do not make up for the fact that there was no evidence to support such an instruction. The recording equipment was never found, damaged or otherwise, and the evidence was that petitioner forcibly took the purse and camera, thereby permanently depriving the police of their equipment.

Furthermore, *Plumley*—the case on which petitioner relies in arguing for this instruction—does not offer the support he claims it does. In *Plumley*, the defendant attempted to escape from jail, and in doing so, he tied and gagged an officer and "removed" the officer's keys and radio. 179 W. Va. at 357, 368 S.E.2d at 727. The Court stated that

[w]here a taking of property is merely incidental to the commission of another crime the actor's need and desire for the property taken are incidental and cease to exist when the principal crime is perfected. Under such circumstances the intent to deprive the owner permanently of his property would not be present. Instead, the actor would seek to deprive the owner of the property only temporarily to assist in the completion of the principal crime. Because of this circumstance, the Court believes that the real question in a potential incidental robbery situation is whether the actor had requisite *animus furandi*, or intent to deprive the owner permanently of property, at the time of the taking of the property.

³ Petitioner also argues on appeal that the taking could have been incidental to the principal crime of "drug distribution." This claim was not raised before the habeas court, so we decline to address it here. *See Hughes*, 225 W. Va. at 230, 691 S.E.2d at 825 (citation omitted).

Id. at 358, 368 S.E.2d at 728. Stating further that “it was appropriate that the jury determine whether the defendant acted only in a manner incidental to the commission of the other crime or whether he acted with *animus furandi*,” and observing that the jury was not “clearly and fully instructed . . . on the fact that *animus furandi* or the intent to deprive the owner permanently of his property, is an essential element of the crime of robbery,” the Court reversed the defendant’s aggravated robbery conviction and directed that, upon any retrial, the jury be “fully instructed on the law relating to the *animus furandi* necessary to support a robbery conviction.” *Id.* at 359, 368 S.E.2d at 729. In contrast to *Plumley*, the jury here was fully instructed on the intent necessary to support first-degree robbery. We therefore find that the habeas court did not err in concluding that petitioner’s attempts to analogize *Plumley* to the facts here were “tenuous at best,” that the “clear objective of the robbery [here] was to permanently deprive the [police] of [their] recording device,” and that counsel’s failure to request the jury instruction now advocated for did not constitute ineffective assistance.

Petitioner’s second assignment of error claims that the instances of ineffective assistance of counsel described above amount to cumulative error. Petitioner points to the habeas court’s findings that the prosecutor used a “poor choice of words,” made inferences that “pushed the limits,” and employed phrasing that was “not well worded” in asserting that the prosecutor’s improper arguments, which drew no objection from petitioner’s counsel, significantly contributed to his conviction.

Although we found no error in trial counsel’s performance—and “[c]umulative error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors,” *State v. Knuckles*, 196 W. Va. 416, 426, 473 S.E.2d 131, 141 (1996)—even assuming for the sake of argument that errors occurred, “the cumulative error doctrine is applicable only when ‘numerous’ errors have been found.” *State v. Tyler G.*, 236 W. Va. 152, 165, 778 S.E.2d 601, 614 (2015) (citation omitted). In *Tyler G.*, the Court found that two errors were not numerous, *id.*, and in *State v. Brown*, the Court found that four errors were not numerous. 210 W. Va. 14, 29, 552 S.E.2d 390, 405 (2001). Any errors here were not numerous. Further, where errors “are insignificant or inconsequential, the case should not be reversed under the doctrine.” *Tyler G.*, 236 W. Va. at 165, 778 S.E.2d at 614 (citation omitted). As set forth above, the evidence against petitioner was not as weak as he makes it out to be, and when any potential errors are viewed in the context of the entire trial and evidence presented, we cannot say that petitioner was deprived of a fair trial.

In his final assignment of error, petitioner claims that there was insufficient evidence to support his conspiracy conviction. Petitioner asserts that the State “was unable to show that there was some agreement between” him and Mr. Lee. According to petitioner, the habeas court found evidence of an agreement and overt act in the CI’s testimony that petitioner and Mr. Lee communicated about the presence of a wire and Mr. Lee’s subsequent act in pulling out a gun and pointing it at the CI. But, petitioner asserts, the jury made no finding of a gun, “which negates the alleged overt act,” and he claims that mentioning to a bystander that someone is wearing a wire does not create a meeting of the minds. Petitioner contends that the State’s narration of the silent surveillance footage should not have been allowed to create evidence of a common scheme or goal, and without that allegedly impermissible argument, there was no other evidence that petitioner

sought the assistance of Mr. Lee. “[H]e could have simply been explaining the reason for the scuffle,” petitioner says.

Our oft-repeated standard is a difficult one to satisfy:

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.

Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). “[T]he relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” *Id.* at 663, 461 S.E.2d at 169, Syl. Pt. 1, in part.

“In order for the State to prove a conspiracy under *W.Va.Code*, 61-10-31(1), it must show that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy.”⁴ Syl. Pt. 4, *State v. Less*, 170 W. Va. 259, 294 S.E.2d 62 (1981). To address petitioner’s assertion that the State failed to show “some agreement between” petitioner and Mr. Lee, we point to *Less*: “The agreement may be inferred from the words and actions of the conspirators, or other circumstantial evidence, and the State is not required to show the formalities of an agreement.” *Id.* at 265, 294 S.E.2d at 67 (emphasis added) (citations omitted). The evidence, when viewed in the light most favorable to the State and crediting all inferences and credibility assessments in the State’s favor, was sufficient to support petitioner’s conspiracy to commit robbery conviction. The CI testified that petitioner was attempting to wrest the CI’s purse from her, that Mr. Lee approached the two and asked what was going on, that petitioner informed Mr. Lee that the CI was wearing a wire, that Mr. Lee demanded that the CI give petitioner the purse, that the CI stopped resisting, and that petitioner succeeded in taking the purse and its contents. Mr. Lee’s demand that the CI give petitioner the purse constitutes an overt act, and the surveillance footage largely corroborated the CI’s testimony. The habeas court did not err in denying relief on this ground.

For the foregoing reasons, we affirm.

⁴ Under West Virginia Code § 61-10-31, “[i]t shall be unlawful for two or more persons to conspire (1) to commit any offense against the State . . . if . . . one or more of such persons does any act to effect the object of the conspiracy.” And, “[a]ny person who commits or attempts to commit robbery by . . . [c]ommitting violence to the person, including, but not limited to, . . . by striking or beating; or . . . uses the threat of deadly force by the presenting of a firearm or other deadly weapon, is guilty of robbery in the first degree.” W. Va. Code § 61-2-12(a)(1).

Affirmed.

ISSUED: May 26, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice William R. Wooton

NOT PARTICIPATING:

Justice C. Haley Bunn