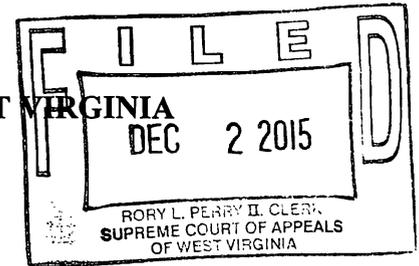


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0087



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

TYQUAN LIVERMON,

Defendant Below, Petitioner.

**BRIEF OF RESPONDENT
STATE OF WEST VIRGINIA**

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STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

TYQUAN LIVERMON,

Defendant Below, Petitioner.

BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

On August 8, 2013, Tyquan Livermon (“Petitioner”) robbed at gunpoint Melissa Coffman and Jason Rencher of their money and some marijuana. During this robbery, Petitioner fired a shot into the wall of Melissa’s apartment, which shot penetrated into Melissa’s neighbor’s apartment thus endangering its occupants. Following the robbery, while fleeing from the scene, Petitioner wantonly endangered the lives of four police officers by shooting at them. The facts and circumstances of these crimes are as follows:

On August 8, 2013, Petitioner, Shabazz Washington, his sister Ashley Washington, and Dana Griffith were living/staying in an apartment in the South Moore Apartment Complex in South Charleston, West Virginia. App. 503-06, 527-28, 539-41, 575-76, 579, 602-04, 623, 624, 625-26. In the evening hours of this same day, Cameron Shaw went to this apartment, arriving there at around 7:30 p.m. App. 503, 505, 506, 524-25, 541, 579, 624. There, Cameron and Shabazz began

playing a video game, after which they drove to get something to eat at the Subway in South Charleston. After Cameron and Shabazz left, Petitioner and Ashley Washington remained at the apartment. App. 506-07, 541, 579, 585, 604, 637. Sometime thereafter, Petitioner announced that he was going to go rob someone and then left the apartment, taking with him a book bag/backpack (“backpack”) and a rifle. App. 579-80, 585-87, 704.

After going to Subway, Shabazz and Cameron walked to T.J. Maxx, also in South Charleston. App. 507, 542, 604, 704. While there, Shabazz got a phone call from Petitioner. During this call, Petitioner informed Shabazz that he was going to rob someone, and asked Shabazz to help him carry out this robbery. App. 508, 542-43. Shabazz declined this “invite” and he and Petitioner then hung up the phone with one another. App. 543. Thereafter, Shabazz and Cameron went back to the apartment and began playing a video game again; also at the apartment at this time was Ashley Washington and Dana Griffith. App. 508-09, 544-45, 587, 604, 637, 704.

On this same evening, August 8, 2013, Melissa Coffman, along with her 2½-year-old son and eight-year-old daughter, were living in an apartment in the South Moore Apartment Complex in South Charleston. App. 378-79. In the evening hours of this same day, at around 8:00 p.m., Melissa returned to her apartment with her two children after having taken her daughter to cheerleading practice. Also at Melissa’s apartment at this time was Jason Rencher, an ex-boyfriend of Melissa’s. App. 379-81. Once home, Melissa put her two children to bed, came downstairs, ordered a pizza and began doing some housework. App. 381. Eventually the pizza arrived and Melissa went to the door to retrieve the same, after which she returned to the living room and sat down on the couch; Jason Rencher was also sitting on the couch at the time. App. 381-82.

At one point, Jason got up from the couch and went into the kitchen. App. 382. Suddenly,

Jason reappeared and fell onto the floor in front of Melissa's feet. *Id.* Melissa then looked up, saw the barrel of a rifle and put her head down, at which point a shot went off. App. 382-83, 388. The perpetrator (Petitioner) then told Melissa to get down on the floor and that if she lifted her head up, she would be shot. App. 383. Melissa, of course, obliged and got down on the floor. *Id.* During this period, the perpetrator repeatedly demanded money, during which time Melissa was screaming, "[m]y two babies are upstairs, please don't do this" and "I don't have any money." *Id.*

With her now on the floor, the perpetrator demanded that Melissa give him the money that she had in her purse. *Id.* Melissa then reached inside of her purse, grabbed some money out of her wallet, and raised the money over her head for the perpetrator to take. *Id.* After grabbing the money, the perpetrator then shouted at Melissa for more money. *Id.* Melissa then told the perpetrator that she had a jug of change in her closet, to which the perpetrator responded that he did not want her fucking change. *Id.* At this point, the perpetrator grabbed Melissa's purse, began going through it, and found some other money that Melissa had in a different part of her wallet; all told, the perpetrator took \$215 from Melissa's purse. App. 383-84, 389.

After retrieving the money from her purse, the perpetrator became angry, told Melissa that she was lying, grabbed and pulled her up off of the floor by her ponytail, put a gun to her head, and forced her into the kitchen. App. 384. In the kitchen, the perpetrator told Melissa to pick up a backpack that was in the kitchen, which backpack Melissa had never seen before. *Id.* During this same time period, Melissa was screaming that she did not understand and for the perpetrator to "[j]ust stop." App. 385. The perpetrator then forced Melissa back into the living room and had her get back down on the floor, at which point he continued demanding more money. *Id.* Melissa responded to these further demands by telling the perpetrator that she did not have any more money

and that she had given him everything she had. App. 385.

Melissa then informed the perpetrator that there was a bag of marijuana on the couch, which the perpetrator took; this marijuana actually belonged to Jason Rencher. The perpetrator also took some marijuana that Melissa had in her purse, as well as some marijuana that she had in her closet. App. 385, 389-91. Melissa also told the perpetrator to go through Jason's pockets and take whatever he wanted and to "just please stop." App. 385, 390. Suddenly, at this point, Melissa's 2½ year-old son came down the stairs and began yelling, "[m]ommy, mommy." App. 385-86. Hearing this, Melissa began pleading for her and her children's lives. Along with these pleas, Melissa repeatedly told the perpetrator that she had given him all of the money that she had and that she did not have any more money. App. 385-87. The perpetrator responded to Melissa's pleas by telling her that "if [she] didn't shut up he would kill [her] in front of [her] kids." App. 387.

At this point, the perpetrator slipped out the back door of Melissa's apartment. *Id.* At this same moment, Melissa heard a knock on her front door; it was the police; the time was approximately 9:30 p.m. App. 387, 432, 439. The police had been dispatched to Melissa's apartment by way of a 911 call from her next-door neighbor, Crystal Gill. Crystal's 911 "came about" by the shot fired by the perpetrator upon first entering Melissa's apartment. This shot actually penetrated Melissa's wall and entered into Crystal's and her brother's, Justin Gill's, apartment in the area behind their couch. At the time, Crystal, Justin, Crystal's children, as well as Crystal's boyfriend (name uncertain), were present in the apartment; Crystal, Justin and Crystal's boyfriend were downstairs; Crystal's children were upstairs asleep. Hearing the shot, and not knowing what caused its sound, Crystal went upstairs to make sure that her children were alright. Afterward, Crystal came back downstairs and began trying to call Melissa, to no avail. Getting no answer,

Crystal walked outside and could hear Melissa begging to be left alone. Crystal could also hear one of Melissa's children hollering, "[I]leave my mommy alone." Hearing all of this, Crystal called 911. Thereafter, the police showed up, talked to Crystal, and then proceeded onto Melissa's apartment. *See generally* App. 408, 409-11, 416-17, 428, 437-38, 445, 446, 459-60, 652.

The two officers that were initially dispatched to the scene and showed up at Melissa's apartment included Nicholas Harden and Jeremy Thompson, both of the South Charleston Police Department. App. 432, 433, 437, 438, 459-60. During the initial moments of knocking on Melissa's door, Officers Harden and Thompson observed the perpetrator fleeing the scene carrying a rifle and a backpack. App. 438-39, 447, 461. Seeing this, Officers Harden and Thompson "gave chase" after the perpetrator. During this chase, Officers Harden and Thompson were as close as 15 feet to the perpetrator. App. 440, 447-48, 457, 462, 470-71, 472, 473, 475-76, 480, 493, 496-97. At one point during the chase, Officers Harden and Thompson heard multiple gunshots, which they believed to be rifle fire. These shots were very close, i.e., as close as 15 feet away; Officer Thompson even observed muzzle flashes from this gunfire. Believing that they were being shot at and not having any adequate cover, Officers Harden and Thompson halted their chase of the perpetrator and retreated back to Melissa's apartment building. During this retreat, Officers Harden and Thompson heard more shots being fired. At no time during this incident did Officers Harden or Thompson fire any shots at the perpetrator. App. 440, 441-42, 452, 457, 458, 462, 463-64, 480-83.

Just prior to these second round of shots being fired, other South Charleston police officers had arrived on the scene. These officers included Officers Steve Miller and Danny Pauley. App. 484-85, 492-93. Upon exiting their vehicles, Officers Miller and Pauley saw the perpetrator fleeing the scene; Officers Miller and Pauley were as close as 25 to 30 feet from the perpetrator at the time.

App. 486-87, 490, 493. During this same time period, as with Officers Harden and Thompson, Officers Miller and Pauley heard multiple gunshots (second round of shots) being fired. Again, these shots were very close, such that Officers Miller and Pauley saw muzzle flashes; at the time of the shots, Officers Miller and Pauley were approximately 40 yards away. Hearing these shots, Officers Miller and Pauley retreated back to their vehicle. As with Officers Harden and Thompson, Officers Miller and Pauley did not shoot at the perpetrator during this incident. App. 486-89, 490-91, 493-95, 497-98.

All of this gunfire was also heard by Shabazz Washington, Ashley Washington, Dana Griffith and Cameron Shaw, who were still at Shabazz's and Ashley's apartment. App. 509-10, 545, 588, 626-27. Minutes after this gunfire, Petitioner showed up at Shabazz's and Ashley's apartment. Out of breath at the time, Petitioner came inside the apartment and sat down on the couch. At the time, Petitioner was wearing a pair of gray sweatpants and a sweatshirt with a hood on it. Petitioner was also carrying a gun at the time— an SKS assault rifle. App. 510-11, 513, 518-20, 525, 537, 546-48, 550, 522, 589, 628-29, 637-38. Petitioner was also in possession of around \$700 and some marijuana, which he admitted that he got from the people (Melissa Coffman and Jason Rencher) that he robbed. App. 514-15, 537, 548, 551, 589-90, 610-11. When asked about whether he heard the gunfire shortly before his arrival at the apartment, Petitioner responded affirmatively and informed that is why he had been running. Petitioner further stated that the police had yelled and shot at him, and that he began shooting back at them. App. 512-13, 516. Petitioner also informed that he dropped his backpack during this incident. App. 516.

Approximately 20 minutes later, Petitioner changed his clothes, putting on a pair of flip-flops, a pair of shorts, with no shirt. Thereafter, Petitioner left the apartment. App. 551-52, 590-91,

644. During this same period of time, Officer Thompson observed an individual in the area of the victim's, Melissa Coffman's, apartment building; this individual was wearing some shorts and no shirt. App. 465-66, 469-70, 473, 474, 479-80. Given what had just occurred, Officer Thompson ordered the individual to show his hands. Officer Thompson then patted the individual down to make sure that he did not have any weapons, asked him some questions, and then told the individual to get out of the area; the person stopped by Officer Thompson was Petitioner. App. 466-67, 480, 640. After being released, Petitioner returned to Shabazz and Ashley Washington's apartment, where he remained for the rest of the night. App. 552, 591-92, 632.

Upon the scene being secured by the arrival of other officers, the police then conducted a full search of the area for the perpetrator, as well as any other evidence from the incident; this search failed to apprehend and arrest the perpetrator on the night of the robbery, August 8, 2013. App. 444, 451-52, 468, 682-83, 776, 778-79. However, the police did find and gather seven shell casings found at the scene; the caliber of these shells were 7.62 millimeter, which shells are used in a semiautomatic rifle. App. 650, 652-54, 684, 755, 777-78. *See also* App. 80-82. The police also recovered a backpack that had been dropped by the perpetrator in the area of where the shooting occurred. Within the backpack, the police found a cell phone, which cell phone contained information leading the police to the perpetrator's location—the apartment where Shabazz Washington, Ashley Washington and Petitioner were living/staying at the time, all of whom immediately became suspects. App. 468-69 477-78, 652-55, 683-88. *See also generally* App. 23-25.

The next day, on August 9, 2013, a search warrant for Shabazz and Ashley Washington's apartment was obtained by the police (Detective A. R. Gordon of the South Charleston Police Department). Thereafter, a team of police officers executed this search warrant at approximately

6:00 p.m. to 6:30 p.m. Once inside the apartment, the police (Detective Charles Cook of the South Charleston Police Department) found Petitioner in an upstairs bedroom. At the time that the police entered the bedroom, Petitioner was in the process of throwing some money (\$553) and a bag of marijuana underneath the bed. Seeing this, the police immediately ordered Petitioner to show his hands and to get on the floor, after which Petitioner was taken into custody; the time was approximately 6:30 p.m.

In another bedroom (in the closet) from which Petitioner was found, the police found an SKS semiautomatic assault rifle, which rifle smelled as if it had been recently fired. In fact, the seven shell casings found by the police during their initial search of the crime scene were later determined to have been fired by this rifle. Additionally, this rifle was equipped with a “banana clip,” which is a “high capacity magazine” for the rifle. At the time that it was found, the rifle had one round of ammunition (a 7.62 millimeter, 39 caliber round) in the clip. An exact type of round was also found on the dresser in this same bedroom. During a second search of Shabazz and Ashley Washington’s apartment (on August 17, 2013), the police also obtained a pair of gray sweatpants; these were the same gray sweatpants that Petitioner was wearing on the night of the robbery.¹ These gray

¹ In this regard, prior to the robbery, Petitioner left Shabazz and Ashley Washington’s apartment wearing a gray pair of sweat pants. App. 587, 644. Immediately following the robbery, Petitioner showed back up at Shabazz’s and Ashley’s apartment still wearing these same gray sweatpants. App. 548, 550. It should also be noted that Melissa Coffman never clearly saw the perpetrator’s face when she was robbed, as she kept her head ducked down most of the time and the perpetrator was wearing a hood/mask. App. 388. However, Melissa did notice that the perpetrator was wearing a gray article of clothing. App. 386, 389. Additionally, prior to the robbery, Melissa’s next-door neighbor, Justin Gill, saw a man, for a period of 1½ to 1¾ hours, walking up and down the street (Colonial Park Drive in South Charleston) on which Melissa’s and Justin’s apartments were located. This man too was wearing gray clothing, i.e., gray sweatpants and a gray sweatshirt. As with Melissa, Justin could not clearly see this man’s face, as he was wearing a hood. See generally App. 378, 406, 415, 417-20, 424-26.

sweatpants were later found to have gunshot residue on them. *See generally* App. 474-77, 481-83, 655-64, 666-67, 669, 675-77, 689-90, 700-01, 706, 710, 711, 716, 749, 759-60, 791-92, 834-37, 842, 843, 854-56, 858. *See also generally* App. 23, 25-35, 38-40, 43-44, 58-60, 61-62, 69-70, 82-84, 95-96.

On August 9, 2013, after having been arrested, Petitioner was transported to the police station, arriving there at approximately 8:00 p.m. At approximately 9:19 p.m. of this same night, the police (Detective A. R. Gordon) took a statement from Petitioner.² Before taking his statement, Petitioner was fully *Mirandized* (using a Miranda rights form). After acknowledging all of his *Miranda* rights, Petitioner agreed to waive these rights and give a statement. At the time of his statement, Petitioner was under arrest for possession of marijuana. However, by this time, Petitioner was a suspect in the robbery and shooting at the police officers responding to the scene. As a suspect to these crimes, the bulk of the questioning “put to” Petitioner involved these other crimes—not the marijuana possession charge. During this interview, Petitioner denied any involvement in these other crimes. *See generally* App. 717-20, 769, 792. *See also generally* App. 62-67, 69, 72, 100, 113.

At approximately 1:05 a.m. of this same night, August 10, 2013, the police (Detective Ben Paschal of the South Charleston Police Department) took a second statement from Petitioner.³ As with his first statement, Petitioner was again fully *Mirandized* (using a *Miranda* rights form) before

² This statement was audio recorded and lasted approximately 1 hour and 10 minutes. *See generally* App. 720-21. *See also generally* App. 71.

³ This second statement was also audio recorded and lasted approximately 1 hour and 20 minutes. It should also be noted that, between his first and second statements, Petitioner was kept in a holding cell. During this time, Petitioner was not formally charged, photographed or fingerprinted. *See generally* App. 764-65, 792-93. *See also generally* App. 92, 96-97, 105.

this second statement was taken. As with his first statement, after acknowledging all of his *Miranda* rights, Petitioner agreed to waive these rights and give a second statement. Again, at the time of this second statement, Petitioner was still under arrest for possession of marijuana. However, Detective Paschal made it clear to Petitioner what he was being questioned about—the robbery and shooting, not the marijuana possession charge. About an hour into this second interview, at around 2:00 a.m., Detective Paschal actually did inform Petitioner that he was being charged with robbery and wanton endangerment.⁴ Once again, Petitioner denied any involvement in these crimes. *See generally* App. 761-64, 770, 794-97. *See also generally* App. 83-88, 91-92, 98-100, 103-05, 107-08, 110, 115, 117-20.

Towards the end of this second interview, Detective Paschal and Petitioner left the interview room and proceeded to the processing room, where criminal defendants are processed—i.e., photographed, fingerprinted, etc. During this trip, Detective Paschal kept the recording device on. Once inside the processing room, Detective Paschal turned the recorder off. This was done because, during the taking of his recorded statement in the interview room, Petitioner kept staring at the recorder. Seeing this, Detective Paschal asked Petitioner if he wanted to talk with the recorder off, to which Petitioner responded affirmatively. At this point, Detective Paschal switched off the recorder. Once the recorder was turned off, Petitioner stated that he had stolen the gun from a girl's, Breanna's (last name uncertain), father's (name uncertain) closet; this unrecorded statement occurred at approximately 2:30 a.m. *See generally* App. 761-64, 770, 772-74, 793, 798-800, 802, 1060-61. *See also generally* App. 90-93, 111-14.

On October 24, 2013, the Kanawha County Grand Jury returned a 12 count Indictment

⁴ Petitioner was not re-*Mirandized* on these charges. App. 797-98. *See also* App. 110-11.

against Petitioner. This Indictment specifically charged Petitioner with first degree robbery (Count 1), two counts of burglary (Counts 2 and 3), four counts of attempted murder (Counts 4, 5, 6 and 7), and five counts of wanton endangerment (Counts 8, 9, 10, 11 and 12). *See generally* App. 5-9.

On February 6, 2014, Petitioner filed a Motion to suppress the statements that he made to the police after his arrest. *See generally* App. 13-14. On April 17 and 21, 2014, hearings were held on Petitioner's Motion. *See generally* App. 16-74, 76-169. Thereafter, by Order and Amended Order, both dated May 5, 2014, the circuit court ("court") denied Petitioner's Motion. *See generally* App. 189-200.

Petitioner's trial took place on May 9, 2014, and ended with the jury convicting him of first-degree robbery (Count 1) and five counts of wanton endangerment (Counts 8, 9, 10, 11 and 12).⁵ *See generally* App. 981-82, 1093-98.

On July 24, 2014, a sentencing hearing was held in this case. *See generally* App. 1100-17. For his conviction of first degree robbery (Count 1), the court sentenced Petitioner to a determinate term of 10 years in the penitentiary. For his convictions of five counts of wanton endangerment (Counts 8, 9, 10, 11 and 12), the court sentenced Petitioner to five determinate terms of 5 years. The court further ordered that all of Petitioner's sentences run consecutive to one another. *See generally* App. 1116-17, 1119-20, 1122-23. Thereafter, Petitioner brought the current appeal.

II.

SUMMARY OF ARGUMENT

Petitioner gave two recorded statements to the police. At the "tail end" of his second

⁵ Petitioner was acquitted on the burglary counts (Counts 2 and 3) and attempted murder counts (Counts 4, 5, 6 and 7). App. 981, 1093-98.

recorded statement the recording device was turned off at his request, at which point Petitioner gave a third unrecorded statement. During this third unrecorded statement, Petitioner stated that he had stolen a gun out of some girl named Breanna's (last name uncertain) father's (name uncertain) closet. Through the testimony of a police officer, this third unrecorded statement was admitted into evidence during Petitioner's trial.

Bluntly stated, given the "mountain" of evidence presented against himself at trial, the introduction of Petitioner's third unrecorded statement at trial was absolutely harmless, and this is assuming that the court committed error in admitting this statement to begin with, which it did not.

By the time that he gave his third unrecorded statement, which was nothing more than a continuation of his second recorded statement, Petitioner had been fully *Mirandized* twice—once at the beginning of his first recorded statement and once at the beginning of his second recorded statement. Petitioner acknowledged these rights, waived the same, and agreed to give these two recorded statements. At no time during any of his statements (first, second and/or third) did Petitioner indicate to the police that he wished to terminate their questioning of himself. The vast majority of the questioning during these statements concerned the robbery and wanton endangerment incidents—not the possession of marijuana charge that Petitioner was initially arrested on.

As such, Petitioner was fully aware of the consequences of waiving his right to remain silent, as this right pertained to the charges for which Petitioner was ultimately arrested, indicted and convicted—i.e., first-degree robbery and five counts of wanton endangerment. Furthermore, at no time during any of their interviews with him did the police promise, mislead or otherwise insinuate, either directly or indirectly, to Petitioner that anything he said during these interviews would not be used against him, including the third unrecorded interview. Thus, Petitioner's assertion in this

appeal that his *Miranda* rights were violated by the police in taking his third unrecorded statement should not be countenanced by this Court.

Nor should this Court countenance Petitioner's assertion on appeal that his right to be promptly presented to a magistrate was violated in this case, as the police delayed taking him to a magistrate to extract a confession—i.e., third unrecorded statement—from him. In short, the delay that occurred prior to Petitioner's third unrecorded statement was due to the fact that the police were still in the process of fully investigating the underlying crimes in this case, robbery and wanton endangerment, not to extract any "so-called" confession from Petitioner.

Lastly, no cumulative error occurred in this case, as there was no error to begin with.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State does not believe that oral argument is necessary 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." Rev. R.A.P. 18(a)(4). However, it appearing that Petitioner has requested oral argument, *see* Pet'r's Br. 6, and if so ordered by the Court, the State will be there to respond. The State, of course, defers to the discretion and wisdom of the Court on this point, as well as the Court's election to issue a memorandum decision or opinion in this case.

IV.

ARGUMENT

- A. **THE POLICE DID NOT VIOLATE PETITIONER'S *MIRANDA* RIGHTS IN TAKING HIS STATEMENT FOLLOWING HIS ARREST. RATHER, PETITIONER'S STATEMENT WAS VOLUNTARILY, INTELLIGENTLY AND KNOWINGLY MADE. THUS, THE TRIAL COURT DID NOT COMMIT ERROR IN ALLOWING PETITIONER'S STATEMENT TO BE PRESENTED DURING HIS TRIAL.**

1. Standards of Review.

“[A] circuit court’s denial of a motion to suppress evidence will be affirmed [on appeal] unless it is unsupported by substantial evidence, based on an erroneous interpretation of law, or, based on the entire record, it is clear that a mistake has been made.” *State v. Milburn*, 204 W. Va. 203, 210, 511 S.E.2d 828, 835 (1998).

“A trial court’s decision regarding the voluntariness of a confession will not be disturbed [on appeal] unless it is plainly wrong or clearly against the weight of the evidence.” Syl. Pt. 7, *State v. Messer*, 223 W. Va. 197, 672 S.E.2d 333 (2008) (citations omitted) (internal quotation marks omitted).

2. General Rule for Determining Voluntariness of Confession: Totality of Circumstances.

“Whether an extrajudicial inculpatory statement is voluntary or the result of coercive police activity is a legal question to be determined from a review of the totality of the circumstances.” Syl. Pt. 4, *State v. Jones*, 220 W. Va. 214, 640 S.E.2d 564 (2006) (quoting Syl. Pt. 2, *State v. Bradshaw*, 193 W. Va. 519, 457 S.E.2d 456 (1995)).

3. In View of the Trial Evidence as a Whole, the Admission of Petitioner’s Unrecorded Statement was Absolutely Harmless.

“[I]t is well settled that, ‘[m]ost errors, including constitutional ones are subject to harmless error analysis.’” *State v. Reed*, 218 W. Va. 586, 590, 625 S.E.2d 348, 352 (2005) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993)). “Errors involving deprivation of constitutional rights will be regarded as harmless . . . if there is no reasonable possibility that the violation contributed to the conviction.” Syl. Pt. 7, *State v. Keesecker*, 222 W. Va. 139, 663 S.E.2d 593 (2008) (quoting Syl. Pt. 20, in part, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974)).

With this “backdrop” in place, Petitioner essentially gave three statements to the police following his arrest, two of which were recorded and one of which was unrecorded. On appeal, Petitioner takes no issue with the admission of his two recorded statements during his trial. Rather, Petitioner complains only about the introduction of his third unrecorded statement. This third unrecorded statement was essentially a continuation of Petitioner’s second recorded statement, as it came right on the “heels” of his second recorded statement. The admission of this unrecorded statement was introduced at trial through the direct examination testimony of Detective Paschal. In its entirety, this testimony is as follows:

Q What did he say after you turned the [recording] device off?

A He said that the girl he mentioned earlier Breanna is the one who he was messing with, he said she was about 13 to 14 years old, and he had stolen the gun from her father’s closet because he was afraid the father was going to use it on him.

Q Now, did you take this to mean the same gun involved that was in the robbery?

MR. SULLIVAN: Objection to speculation.

THE COURT: All right. That’s sustained.

Q Did he say anything else?

A No.

Q Did you inquire as to whether it was the same gun you were talking about?

A Not specifically.

App. 773-74.

Bluntly stated, in view of the rest of the evidence presented at trial, any impact that the above testimony had on the jury’s conviction of Petitioner is absolutely minuscule to the point of being

“microscopic.” More specifically, Petitioner was convicted of first degree robbery and five counts of wanton endangerment. At its barest minimum, as it relates to these crimes, the other evidence, apart from the above testimony, presented at trial shows the following:

1. The robbery and five incidents of wanton endangerment all occurred in the evening hours of August 8, 2013. These crimes all took place in and around the South Moore Apartment Complex in South Charleston, West Virginia.
2. The victims of the robbery included Melissa Coffman and Jason Rencher, both of whom were robbed at gunpoint in Melissa’s apartment; money and marijuana were taken during the robbery.
3. The first incident of wanton endangerment occurred as a result of the perpetrator firing a shot when he first entered Melissa Coffman’s apartment. This shot penetrated one of Melissa’s walls and entered into the apartment next to Melissa’s thus endangering its occupants. These occupants included Crystal Gill, Crystal’s brother Justin Gill, Crystal’s two minor children, as well as Crystal’s boyfriend.
4. The other four incidents of wanton endangerment occurred as the perpetrator was fleeing the robbery scene and began firing multiple shots at four police officers. These four officers included Officers Harden, Thompson, Miller and Pauley.
5. Up to and including the day of the robbery and shooting incidents, August 8, 2013, Petitioner was staying in an apartment at the South Moore Apartment Complex. At the time, Shabazz Washington, Shabazz’s sister Ashley Washington, and Dana Griffith were also living at this same apartment.
6. Prior to the robbery and shooting incidents, Petitioner announced that he was going

to go rob someone and then left the apartment where he was staying, taking with him a rifle. After leaving the apartment, Petitioner phoned Shabazz Washington, who was at another location at the time, and told him (Shabazz) that he (Petitioner) was going to rob someone and would he (Shabazz) help him (Petitioner) carry out this robbery; Shabazz declined this “invite.” Thereafter, the robbery and shooting incidents occurred.

7. Minutes after the robbery, Petitioner showed back up at the apartment where he was staying. At the time of Petitioner’s return to this apartment, Shabazz Washington, Ashley Washington, Dana Griffith, as well as Cameron Shaw, were present; all of these persons heard the gunfire coming from the robbery and shooting incidents.
8. Upon his arrival, Petitioner came inside the apartment and sat down on the couch. Petitioner had with him an assault rifle. Petitioner was also in possession of some money and marijuana, which Petitioner admitted that he got from the people (Melissa Coffman and Jason Rencher) that he robbed. When asked whether he heard the gunfire shortly before his arrival at the apartment, Petitioner responded affirmatively and informed that is why he had been running. Petitioner then stated that the police had yelled and shot at him, and that he began shooting back at them.

Again, it was this evidence, and much-much more, that convicted Petitioner—not his unrecorded statement, as testified to by Detective Paschal. Thus, even assuming that the court erred in admitting Detective Paschal’s testimony, which it did not, the introduction of this testimony does not constitute reversible error, as the testimony’s admission was harmless beyond any reasonable doubt. “Failure to observe a constitutional right constitutes reversible error unless it can be shown

that the error was harmless beyond a reasonable doubt.” Syl. Pt. 3, *Keesecker*, *supra* (quoting Syl. Pt. 5, *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975)).

In an effort to get around all of this, Petitioner attempts to convince this Court that his third unrecorded statement, as testified to by Detective Paschal, amounted to a “confession.”⁶ Pet’r’s Br. 5. As such, as further argued by Petitioner, the fact that there may have been other evidence to support his conviction does not matter. *See generally* Pet’r’s Br. 5, 7-8. The State disagrees.

Certainly, as cited to by Petitioner, *see generally* Pet’r’s Br. 7-8, there is authority that an involuntary confession renders a conviction invalid, despite there being sufficient other evidence to support the conviction apart from the confession. In his quest to convince this Court that this authority applies to the current case, Petitioner argues that, “[a]t trial, [Detective] Paschal was permitted to testify that after he turned off the recorder Livermon [Petitioner] stated that he had stolen the rifle used in the armed robbery.”⁷ Pet’r’s Br. 4.

With no offense intended, Detective Paschal gave no such testimony. At best, Detective Paschal testified that Petitioner had stated that he (Petitioner) had stolen a gun from the father of some girl named Breanna. In fact, when the prosecutor attempted to have Detective Paschal speculate that Petitioner’s statement to him (Detective Paschal) concerned the gun that was used in

⁶ In this regard, Petitioner specifically argues that “[t]he Kanawha County Circuit Court erred by allowing the jury to hear the purported confession Livermon [Petitioner] made off the record following two intensive police interrogations.” Pet’r’s Br. 5.

⁷ Elsewhere in his brief, Petitioner makes similar claims as to the testimony of Detective Paschal: “Once [Detective] Paschal had turned off the recorder, he stated [testified] that Livermon [Petitioner] told him that he had stolen the gun that had been used in the commission of the crimes.” Pet’r’s Br. 3. “[Detective] Paschal testified that Livermon [Petitioner] then stated that he had stolen the SKS rifle.” Pet’r’s Br. 17.

the robbery, he (the prosecutor) was “stopped cold” by way of defense counsel’s objection, which objection was sustained by the court. Furthermore, there was plenty of other evidence, apart from Petitioner’s unrecorded statement to Detective Paschal, linking Petitioner to the rifle that was used to carry out the robbery and shooting incidents. Specifically, before these incidents occurred (on August 8, 2013), Petitioner announced that he was going to rob someone and then left the apartment where he was staying, taking with him a rifle. Following these incidents, Petitioner returned to the same apartment carrying an assault rifle. The next day (on August 9, 2013) the police raided the same apartment, during which raid an SKS assault rifle was found; Petitioner was in the apartment at the time of the raid. Finally, shells collected from the crime scene were analyzed and determined to come from this same rifle.

4. Responses to Petitioner’s Assertions.

As this Court knows well, under *Miranda v. Arizona*, 384 U.S. 436, 479 (1966), a criminal defendant

must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

This Court is also well aware that a criminal defendant can waive his *Miranda* rights, as long as his waiver is voluntarily, intelligently and knowingly made. In this “vein,” the United States Supreme Court has set forth the following inquiry for determining whether a criminal defendant’s waiver of his *Miranda* rights has been voluntarily, intelligently and knowingly made:

Miranda holds that “[t]he defendant may waive effectuation” of the rights conveyed in the warnings “provided the waiver is made voluntarily, knowingly and intelligently.” The inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver

must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the “totality of the circumstances surrounding the interrogation” reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Moran v. Burbine, 475 U.S. 412, 421 (1986) (citations omitted).

With these guiding principles in mind, Petitioner asserts in this appeal that his unrecorded statement to the police (Detective Paschal) following his arrest should not have been admitted at his trial, as this unrecorded statement was taken in violation of his *Miranda* rights. In making this assertion, from a number of different “angles,” Petitioner essentially argues that his unrecorded statement was not voluntarily, intelligently and knowingly made. These arguments will now be addressed.

a. At no Time did Petitioner Indicate to the Police That he Wished to Terminate Their Questioning of Himself.

Unquestionably, Petitioner was twice fully *Mirandized* by the police in this case. More specifically, Petitioner was advised of his *Miranda* rights before each of his two recorded statements. In both instances, the police utilized a *Miranda* rights form. This form contained all of the usual *Miranda* warnings—i.e., that he (Petitioner) had the right to remain silent, that anything he said could be used against him, that he had a right to an attorney, and that, if he could not afford an attorney, one would be appointed to him. Even Petitioner admits that the form used by the police “had the traditional *Miranda* rights listed[.]” Pet’r’s Br. 10. Finally, it is also unquestionable that, in both instances, Petitioner acknowledged all of his *Miranda* rights, after which he agreed to waive these rights and give both statements.

Despite all of this, Petitioner asserts on appeal that he did not validly waive his *Miranda*

rights before giving his unrecorded statement to Detective Paschal, during which unrecorded statement Petitioner informed that he had stolen the gun from a girl's, Breanna's (last name uncertain), father's (name uncertain) closet. In asserting such, Petitioner argues that neither Detective Paschal, or the *Miranda* rights form used by Detective Paschal, informed him that he had a right to terminate questioning at any time. In arguing that such must be done, Petitioner further argues that the right to terminate questioning is an important tenet of *Miranda*. See generally Pet'r's Br. 5, 9-10. For the reasons detailed below, the State disagrees.

First of all, the State admits that Detective Paschal, nor the *Miranda* form used by himself, did not inform Petitioner that he could terminate questioning at any time. Detective Paschal testified as much during the suppression hearing.⁸ See generally App. 108-09. The State also admits that the right to terminate questioning is an important tenet of *Miranda*. However, it is an equally important tenet of *Miranda* that a defendant must assert his right to terminate further interrogation by the police, and the defendant's assertion of such must be clear. "To assert the *Miranda* right to terminate police interrogation, the words or conduct must be explicitly clear that the suspect wishes to terminate all questioning and not merely a desire not to comment on or answer a particular question." Syl. Pt. 6, *State v. Bradshaw*, 193 W. Va. 519, 457 S.E.2d 456 (1995) (quoting Syl. Pt. 5, *State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994)).

Here, at no time did Petitioner indicate to Detective Paschal that he (Petitioner) wished to

⁸ It should be noted, however, that the preinterview portion of this *Miranda* rights form contained language informing Petitioner of his right to "refuse to answer any questions." App. 762. It should also be noted that during Detective Gordon's interview of himself, Petitioner asked "if he wanted a lawyer what would happen[.]" Detective Gordon immediately told Petitioner "that it was his right" to have a lawyer, and that "if he wanted a lawyer, that he could have a lawyer and [the police] wouldn't be questioning him any further." App. 71.

stop talking to him (Detective Paschal). Nowhere is this more evident than Detective Paschal's testimony during the suppression hearing:

Q Did Mr. Livermon [Petitioner] ever tell you he wanted to stop talking to you?

A No.

Q Was he ever hesitant?

A No.

App. 117-18.

In short, given the totality of the circumstances, Petitioner's assertion that he did not validly waive his *Miranda* rights, as he was not informed, during his statement to Detective Paschal, that he had a right to terminate Detective Paschal's questioning of himself should not be countenanced by this Court.

b. Petitioner was Fully Aware of the Consequences of Waiving his Right to Remain Silent.

In *State v. Goff*, this Court made the following findings:

Some courts have indicated that in determining whether there has been a voluntary waiver of *Miranda* rights under the totality rule one factor may be whether the defendant was ever advised initially of the nature of the charge against him. Other courts have reached an opposite conclusion that there is no necessity of informing the defendant of the nature of the charge prior to giving the *Miranda* warnings. We believe that some information should be given to the defendant as to the nature of the charge in order that he can determine whether to intelligently and voluntarily exercise or waive his *Miranda* rights.

169 W. Va. 778, 784 n.8, 289 S.E.2d 473, 477 n.8 (1982) (citations omitted).

With these findings in place, Petitioner asserts on appeal that he did not validly waive his *Miranda* rights before giving his unrecorded statement to Detective Paschal, as he was not aware of the consequences of waiving his right to remain silent. As his basis for this assertion, Petitioner

argues he did not know the nature of the charges against him at the time that he waived his *Miranda* rights. This is so, further argues Petitioner, because the officers taking his statements (Detectives Gordon and Paschal) informed him that he was under arrest for possession of marijuana, rather than robbery and wanton endangerment. As part of this argument, Petitioner further points out that the *Miranda* forms that he signed waiving his rights only listed that he was being charged with possession of marijuana. Petitioner goes on to argue that, once he was charged with robbery and wanton endangerment, he was not re-*Mirandized*. Given all of this, as also argued by himself, at the time that he waived his *Miranda* rights, Petitioner was only under the impression that his statements could be used against him in connection with the marijuana charge. *See generally* Pet'r's Br. 5, 11-12.

Quite frankly, and again with no offense intended, the State believes these arguments to be a little disingenuous. To begin with, the State admits that Petitioner was not re-*Mirandized* once he was charged with robbery and wanton endangerment. Again, Detective Paschal testified as much during the suppression hearing and Petitioner's trial. *See generally* App. 110-11, 797-98. However, by the time that he was informed that he was being charged with robbery and wanton endangerment, Petitioner had been fully *Mirandized* twice—once at the start of his first recorded statement, and again at the start of his second recorded statement. Additionally, it was not as if Petitioner's third unrecorded statement (wherein he told Detective Paschal about stealing a gun from some girl's, Breanna's, father) came well after his second recorded statement. Rather, Petitioner's unrecorded third statement was really nothing more than a continuation of his second recorded statement, as the third statement came right on the "heels" of the second statement.

Furthermore, and more to the point, although he was only under arrest for possession of

marijuana at the time of his statements (two recorded statements and one unrecorded statement), both Detectives Gordon and Paschal made it clear to Petitioner what he was being questioned about—the robbery and shooting incidents. The record bears this out.

More specifically, during Petitioner’s suppression hearing, Detective Gordon testified as follows:

Q Now, let’s talk about the statement itself. Obviously, at this point even though Mr. Livermon [Petitioner] was under arrest for marijuana possession, you suspected him of further crimes, correct?

A That is correct.

Q Did you ask him about the robbery and shooting that had happened at the apartments there at Southmoor [sic]?

A Yes, I did.

App. 65.

During Petitioner’s trial, Detective Gordon gave the following testimony:

Q Was he [Petitioner] under arrest at that point?

A Yes, he was.

Q For what?

A Possession of marijuana.

. . . .

Q . . . Now, at that point you already suspected him of the robbery, the burglary, and the shooting at the other officers?

A At that point, we had . . . two statements that had stated Mr. Livermon was involved. So he was suspected, yes.

Q That was where the bulk of your questions went?

A That’s correct.

App. 720.

Detective Gordon's testimony on this point is "right in line" with that of Detective Paschal.

Specifically, during Petitioner's suppression hearing, Detective Paschal testified as follows:

Q Detective, based on this consent that you got from Mr. Livermon [Petitioner], did you then begin to question him?

A Yes.

....

Q Was the defendant under arrest at this point?

A Yes.

Q For what charge?

A At that time the marijuana charge.

Q Did you immediately explain to him you suspected him of [this] further crime?

A Yes.

Q Being the shooting and the robbery?

A Correct.

App. 87-88.

Q Were you clear with your questioning from the beginning of the interview about going into these incidents of the burglary and the wanton endangerment, those charges?

A Yeah. We basically just talked about that.

App. 117.

Anyone looking at all of this testimony as a whole would come to the same conclusion. That is, the interviews conducted by Detectives Gordon (first interview) and Paschal (second interview)

centered on questioning Petitioner about the robbery and wanton endangerment incidents, not the possession of marijuana charge that Petitioner was actually under arrest for at the time of these interviews. Thus, contrary to his contentions in this appeal, Petitioner knew full well the nature of the allegations for which he was being questioned about. Notably, on appeal, even Petitioner admits that the interviews conducted by Detectives Gordon and Paschal involved him being “questioned extensively regarding the robbery and wanton endangerment” incidents. Pet’r’s Br. 15.⁹

In short, given the totality of the circumstances, Petitioner’s assertion that he did not validly waive his *Miranda* rights before giving his unrecorded statement to Detective Paschal, as he was not aware of the consequences of waiving his right to remain silent due to his not knowing the nature of the charges against him, should not be countenanced by this Court.

c. The Police did not Mislead Petitioner Into Making an Unrecorded Inculpatory Statement by Suggesting That it Would not be Used Against him. Thus, This Unrecorded Statement was Properly Introduced Into Evidence.

As noted above, at the “tail end” of his second recorded statement, Detective Paschal noticed that Petitioner kept staring at his (Detective Paschal’s) recording device. Observing this, Detective Paschal asked Petitioner if he wished to talk with the recorder off—Petitioner responded affirmatively. Following this exchange, Detective Paschal switched off the recorder. Once the recorder was turned off, Petitioner stated that he had stolen the gun from a girl’s, Breanna’s (last name uncertain), father’s (name uncertain) closet.

The pertinent exchange between Petitioner and Detective Paschal during Petitioner’s second

⁹ At page 27 of his brief, Petitioner again admits that the interviews conducted by Detectives Gordon and Paschal “revolved almost entirely around the robbery and wanton endangerment.”

recorded statement occurred as follows:

Q. If you want to talk will keep talking. (Inaudible) I still got that thing [recorder] going, I don't want you to (inaudible)

....

Q. I'm going to turn this thing [recorder] off. You don't have anything you want to say anymore do you?

A. Oh yeah.

Q. You got anything there. You got a video now. Is there anything else that you want to tell me right now that's (inaudible) What do you want to tell me?

A. Um—

Q. This is my boss Chief Detective Graley anything you tell me I'm going to tell him. So if there's something new you want to tell me now, tell me or I'll just turn it off. Are we done?

....

Q. I think we're about done, he said he had something new to add but he's not saying so I'm turning it off. Man if you have something new to say now let's get it out let's get it done.

A. (Inaudible)

....

Q. If somebody uses your gun and does something (inaudible) it is what it is. I think I'm going off record here unless you got something to tell me. Tell me about it now and we'll talk about it. I know you keep looking at it [recorder] because you don't want to do it on record. Is that what you want me to do you want me to turn it off?

A. I mean no, you probably, I mean yeah you can turn it off if you want to.

Q. Are you going to tell me something? Do we turn this off?

A. Yeah.

App. 1060-61.

On appeal, Petitioner asserts that the above exchange amounted to Detective Paschal misleading him (Petitioner) into making an inculpatory statement by suggesting that any such statement would be off the record. In support of this assertion, Petitioner additionally argues that Detective Paschal purposely turned off the recording device to induce him (Petitioner) into making a further incriminating admission. Due to Detective Paschal's statements to himself, as well as his action of turning the recorder off, Petitioner further argues that it was his belief that any statement he made, once the recorder was turned off, would not be used against him. Based on all of this, Petitioner goes on to argue that his unrecorded statement to Detective Paschal was not voluntarily, intelligently and knowingly made and, thus, should not have been admitted at his trial. *See generally* Pet'r's Br. 5, 12-22. The State disagrees.

The law on this issue is pretty straightforward. It simply asks whether, under the totality of the circumstances, the representations, or misrepresentations as the case may be, of the police officer to the defendant rendered the defendant's confession involuntary. "Representations or promises made to a defendant by one in authority do not necessarily invalidate a subsequent confession. In determining voluntariness of a confession, the trial court must assess the totality of all the surrounding circumstances. No one factor is determinative." Syl. Pt. 11, *Keesecker, supra* (quoting Syl. Pt. 7, in part, *State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994)). "Misrepresentations made to a defendant or other deceptive practices by police officers will not necessarily invalidate a confession unless they are shown to have affected its voluntariness or reliability." Syl. Pt. 5, *Jones, supra* (quoting Syl. Pt. 6, *State v. Worley*, 179 W. Va. 403, 369 S.E.2d 706 (1988)).

Here, the State admits that Detective Paschal certainly wanted Petitioner to keep talking—hence Detective Paschal's questions to Petitioner as to whether he (Petitioner) wanted him (Detective

Paschal) to turn the recording device off, as well as Detective Paschal's action of actually turning the recorder off. To deny such would be disingenuous on the part of the State, as Detective Paschal testified as much at Petitioner's trial. *See generally* App. 800. However, as evidenced by their exchange, Detective Paschal's questions to Petitioner as to whether he (Petitioner) wanted him (Detective Paschal) to turn the recorder off, as well as the act of doing the same, were brought on by Petitioner. That is, Petitioner kept staring at the recorder as if he wanted it turned off, which brought about Detective Paschal's questions to Petitioner as to whether he (Petitioner) wanted the recorder turned off. When Petitioner indicated that he did indeed want the recorder turned off, Detective Paschal obliged by turning off the same. In other words, Detective Paschal did not just "out of the blue" begin asking Petitioner whether he (Petitioner) wanted the recorder turned off, and then turn the recorder off to extract an incriminating statement from Petitioner. Instead, Detective Paschal was acting upon what he was seeing and hearing from Petitioner at the time.

"Bottom line"—at no time did Detective Paschal promise Petitioner, nor intend to foment any hope in Petitioner's mind, that any statement he made after the recorder was turned off would not be used against him."¹⁰ "Ultimately, this issue boils down to whether or not the incriminating

¹⁰ This is further evidenced by Detective Paschal's trial testimony:

Q Okay. And by "want me to turn it [the recorder] off", didn't you mean to end the interview, make this statement finally over?

A I didn't mean to say that it would be something in privy between the two of us.

App. 798.

Q So when you were talking about going off the record, you were telling him statements after that couldn't be used against him in a court of law, weren't

(continued...)

statement ‘was freely and voluntarily made, without . . . some promise or benefit held out to the accused.’” *State v. Middleton*, 220 W. Va. 89, 101, 640 S.E.2d 152, 164 (2006) (quoting *State v. Singleton*, 218 W. Va. 180, 184, 624 S.E.2d 527, 531 (2005)) *overruled on other grounds by State v. Eilola*, 226 W. Va. 698, 704 S.E.2d 698 (2010). ““When the representations of one in authority are calculated to foment hope . . . in the mind of the accused to any material degree, and a confession ensues, it cannot be deemed voluntary.” Syl. Pt. 7, *State v. Persinger*, 169 W. Va. 121, 286 S.E.2d 261 (1982) (quoting Syl., *State v. Parsons*, 108 W. Va. 705, 152 S.E. 745 (1930)).

In sum, given the totality of the circumstances, Petitioner’s assertion that his unrecorded statement to Detective Paschal should have been excluded from evidence at his trial, as Detective Paschal misled him into making this statement by suggesting that it would not be used against him, should not be countenanced by this Court.

B. PETITIONER’S STATEMENT TO THE POLICE WAS NOT OBTAINED IN VIOLATION OF HIS RIGHT TO PROMPT PRESENTMENT. THUS, THE TRIAL COURT DID NOT COMMIT ERROR IN ALLOWING PETITIONER’S STATEMENT TO BE PRESENTED DURING HIS TRIAL.

1. The Law.

The prompt presentment statute, W. Va. Code § 62-1-5(a)(1), provides that

[a]n officer making an arrest under a warrant issued upon a complaint, or any person making an arrest without a warrant for an offense committed in his presence

¹⁰(...continued)
you?

A I don’t know what he took from it. What I was saying—what I thought it meant, I would turn off the recorder. I didn’t—I don’t know what he took from it. What I meant was I would turn the recorder off.

or as otherwise authorized by law, shall take the arrested person without unnecessary delay before a magistrate of the county where the arrest is made.

Furthermore, as this Court has held, “[w]hen a statement is obtained from an accused in violation of the prompt presentment rule, neither the statement nor matters learned directly from the statement may be introduced against the accused at trial.” Syl. Pt. 1, *State v. DeWeese*, 213 W. Va. 339, 582 S.E.2d 786 (2003).

In interpreting and applying the prompt presentment statute, W. Va. Code § 62-1-5(a)(1), as well as its counterpart under the Rules of Criminal Procedure, W. Va. R. Crim. P. 5(a),¹¹ the Court has “laid down” the following rules concerning the triggering of and acceptable delays under these two provisions:

Our prompt presentment rule contained in W. Va. Code, 62-1-5, and Rule 5(a) of the West Virginia Rules of Criminal Procedure, is triggered when an accused is placed under arrest. Furthermore, once a defendant is in police custody with sufficient probable cause to warrant an arrest, the prompt presentment rule is also triggered.

Syl. Pt. 2, *State v. Humphrey*, 177 W. Va. 264, 351 S.E.2d 613 (1986).

Certain delays such as delays in the transportation of a defendant to the police station, completion of booking and administrative procedures, recordation and transcription of a statement, and the transportation of a defendant to the magistrate do not offend the prompt presentment requirement.

State v. Sugg, 193 W. Va. 388, 395-96, 456 S.E.2d 469, 476-77 (1995) (footnote omitted) (citing *State v. Ellsworth J.R.*, 175 W. Va. 64, 70, 331 S.E.2d 503, 508 (1985)).

“Examples of necessary delay might include those required: 1) to carry out reasonable routine administrative procedures such as recording, fingerprinting and

¹¹ West Virginia Rule of Criminal Procedure 5(a) essentially mirrors W. Va. Code § 62-1-5(a)(1). Specifically, W. Va. R. Crim. P. 5(a) provides that “[a]n officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before a magistrate within the county where the arrest is made.”

photographing; 2) to determine whether a charging document should be issued accusing the arrestee of a crime; 3) to verify the commission of the crimes specified in the charging document; 4) to obtain information likely to be a significant aid in averting harm to persons or loss to property of substantial value; 5) to obtain relevant nontestimonial information likely to be significant in discovering the identity or location of other persons who may have been associated with the arrestee in the commission of the offense for which he was apprehended, or in preventing the loss, alteration or destruction of evidence relating to such crime.”

State v. Persinger, 169 W. Va. at 135-36, 286 S.E.2d at 270 (quoting *Johnson v. State*, 384 A.2d 709, 717 (Md. 1978)).

Essentially, the Court looks at the totality of the circumstances of the delay, including the primary purpose of the delay.

The delay in taking a defendant to a magistrate may be a critical factor [in the totality of circumstances making a confession involuntary and hence inadmissible] where it appears that the primary purpose of the delay was to obtain a confession from the defendant.

Syl. Pt. 6, *State v. Johnson*, 219 W. Va. 697, 639 S.E.2d 789 (2006) (citations omitted) (internal quotation marks omitted).

We have recognized that delay in presenting an accused to a magistrate after arrest may render a confession obtained in the interim inadmissible at trial. We have consistently held, however, that such a delay is merely one factor to be considered in evaluating the voluntariness of the confession in light of the totality of the circumstances.

State v. Fortner, 182 W. Va. 345, 351, 387 S.E.2d 812, 818 (1989) (citations omitted).

Lastly, this Court has found that the police may delay taking a defendant before a magistrate where the defendant wishes to make a statement, as long as the police do not purposefully delay the defendant’s presentment to the magistrate in order to encourage him to make a statement.

We wish to make clear that our prior cases do permit delay in bringing a suspect before a magistrate when the suspect wishes to make a statement. . . . However, our cases have never held that the police may purposefully delay taking a suspect before a magistrate in order to encourage the suspect to make a statement.

State v. Deweese, 213 W. Va. at 345 n.10, 582 S.E.2d at 792 n.10 (citation omitted).

2. Because the Crimes for Which Petitioner was Ultimately Charged –i.e., Robbery and Wanton Endangerment–Were Still Being Investigated by the Police, the Delay in Presenting Petitioner to a Magistrate on These Charges did not Violate his Right to Prompt Presentment.

As noted above, the robbery and wanton endangerment incidents took place on August 8, 2013. The next day, August 9, 2013, pursuant to a search warrant, the police raided the apartment where Petitioner was staying; the raid took place between 6:00 p.m. and 6:30 p.m. During this raid, at approximately 6:30 p.m., Petitioner was taken into custody and arrested for possession of marijuana. Thereafter, Petitioner was transported to the police station, arriving there at approximately 8:00 p.m. At approximately 9:19 p.m. of this same night, the police (Detective Gordon) took a recorded statement from Petitioner; this first recorded statement lasted approximately 1 hour and 10 minutes. Thereafter, on this same night, August 10, 2013, Petitioner was placed in a holding cell until 1:05 a.m., at which time the police (Detective Paschal) took another recorded statement from Petitioner; this second recorded statement lasted approximately 1 hour and 20 minutes. Towards the end of this second statement, Detective Paschal and Petitioner left the interview room and proceeded to the processing room. While in the processing room, with Detective Paschal's recording device now turned off, Petitioner gave his third unrecorded statement, wherein he informed that he had stolen a gun from a girl's, Breanna's (last name uncertain), father's (name uncertain) closet. This third unrecorded statement occurred at approximately 2:30 a.m.

With this factual background in place, Petitioner asserts on appeal that, in taking his unrecorded statement, the police violated his right to be promptly presented to a magistrate and, thus, his unrecorded statement should have been excluded from evidence at his trial. In making this

assertion, Petitioner points out the following factors: (1) he was transported to the police station before 8:00 p.m.; (2) by 9:00 p.m., and prior to his first recorded statement, Detective Gordon had statements from two individuals implicating him in the robbery and wanton endangerment; (3) his first recorded statement (taken by Detective Gordon) began at 9:19 p.m. (on August 9, 2013) and lasted approximately 70 minutes, during which time there was a magistrate on duty; (4) there was a delay of approximately 2½ hours, during which time he was detained in a holding cell, between the time that his first recorded statement ended and the time that his second recorded statement (taken by Detective Paschal) began at 1:00 a.m. (on August 10, 2013); (5) Petitioner was never processed or fingerprinted prior to giving his second recorded statement; and (6) he finally gave his inculpatory unrecorded statement at 2:30 a.m. Based on these factors, Petitioner essentially argues that the police deliberately delayed presenting him to a magistrate, on the charges of robbery and wanton endangerment, to extract a confession from himself. *See generally* Pet'r's Br. 5-6, 22-29. The State disagrees.

First of all, in the State's view, his unrecorded statement can hardly be characterized, as Petitioner does in this case, a confession. All the "man" said, as testified to by Detective Paschal at trial, was that he (Petitioner) had stolen a gun from some girl named Breanna's Dad—and nothing more. Additionally, this Court has "reject[ed] any view which would directly or indirectly suggest that it is improper for police to persuade a suspect to confess", and further stated that "there is nothing in our laws to the contrary" and that the "[p]olice are permitted in this context to take legal advantage of the vulnerability of particular criminal suspects." *State v. Farley*, 192 W. Va. 247, 259 n.18, 452 S.E.2d 50, 62 n.18 (1994). Furthermore, and more to the point, the delay that occurred prior to Petitioner's unrecorded statement was not for the primary purpose of extracting any such

statement from Petitioner. Rather, this delay was occasioned by the police trying to investigate and “get their minds around” what had occurred the previous day (on August 8, 2013) when the underlying crimes (robbery and wanton endangerment) took place.

More specifically, when they raided/searched the apartment (at approximately 6:00 p.m. to 6:30 p.m. on August 9, 2013), the police had to secure the scene for safety purposes, as well as to locate, gather and secure the evidence found at the scene. This evidence included the money and marijuana that was taken during the robbery, which money and marijuana Petitioner was in the process of throwing under a bed at the time of the raid, the rifle (SKS assault rifle) used in the robbery and shooting incidents, ammunition for this rifle, etc. On top of this, the police had to speak to everyone that was in the apartment at the time that the raid/search was carried out, including Petitioner, Ashley Washington, as well as a female juvenile named Autumn (last name uncertain). During the course of the raid/search, Ashley and Shabazz Washington’s father, Kevin Washington, showed up and was also spoken to by the police.¹² *See generally* App. 25-35, 38-41, 43-44, 46-47, 50, 67-69, 82-83, 96, 476-77, 481-83, 595, 599-600, 607, 655-64, 666-67, 669, 675-77, 690, 709-10, 753, 758-60, 791-92. All of this, of course, takes time.

From the time that Petitioner arrived at the police station (at approximately 8:00 p.m. on August 9, 2013) to the time that he gave his unrecorded statement (at approximately 2:30 a.m. on August 10, 2013), the case was still very much under investigation by the police. This investigation, of course, included the police interviewing Petitioner twice (respectfully at 9:19 p.m. and 1:05 a.m. of this same night). However, the police’s interviews did not stop with Petitioner. In fact, during this same general time period, in order to conduct a full and proper investigation—i.e., determine the

¹² Notably, Dana Griffith also showed up during the search of the apartment. App. 633.

circumstances of and persons involved in the robbery and wanton endangerment—the police brought in and interviewed numerous other persons. These persons included Cameron Shaw, Shabazz Washington and Ashley Washington.¹³ In addition to interviewing these persons, again in order to fully and properly investigate, the police obtained search warrants for carrying out DNA and/or gunshot residue (“GSR”) testing on Shabazz Washington and Ashley Washington. *See generally* App. 65-67, 70-72, 83-88, 92-94, 96, 111-13, 122, 520-21, 554-57, 600, 691, 701-02, 705-06, 743-45, 749-50, 760-61, 793. Again, all of this takes time.

As for Petitioner’s complaint concerning the 2½ hour delay between his first and second statements, during which time he was kept in a holding cell, the police (Detective Paschal) were occupied during this period of time obtaining DNA/GSR search warrants for Petitioner. Once these warrants were obtained, the same were served upon Petitioner and his second statement began. *See generally* App. 793, 796. These points are bore out by the trial testimony of Detective Paschal:

Q And then at one o’clock is when you got him and you started your interview?

A Correct.

Q And everybody— and by everybody, I am talking about especially Ashley Washington, Shabazz Washington, and Dana Griffith, had already said that Tyquan [Petitioner] had the rifle and made statements about Tyquan by one o’clock in the morning. Right?

A I had left—I am not sure because I had left to obtain search warrants. I was in magistrate court from about the time of the end of the first interview to the time I got back. When I got back I served him. I am not sure the sequence there who talked to who when.

App. 793-94.

¹³ The record is not exactly clear on this point, but it also appears that Dana Griffith was also brought in and questioned by the police during this same general time period. *See generally* App. 633.

As for Petitioner's complaint that, by 9:00 p.m., Detective Gordon already had two statements from other individuals implicating him (Petitioner) in the robbery and wanton endangerment, and thus he (Petitioner) could have been charged and taken to a magistrate at that point, Detective Gordon summed this matter up nicely during the suppression hearing:

Q And why wasn't he [Petitioner] being charged with the robbery and the wanton endangerment at the time you interviewed him?

A Based on statements that I had already obtained, I wanted to verify those statements independently to give Mr. Livermon the benefit and to see how much information can be verified through different witnesses. I hadn't spoken to everybody I wanted to speak to at that point.

App. 71-72.

"All in all," the reason for the delay in presenting him to a magistrate was not, as Petitioner insists on appeal, to extract a confession from himself. Rather, this delay is directly attributable to the case being actively investigated by the police. Thus, Petitioner's assertion that his unrecorded statement should not have been admitted during his trial, as his right to be promptly presented to a magistrate was violated in this case, should not be countenanced by this Court.

C. NO ERROR, "LET ALONE" CUMULATIVE ERROR, OCCURRED DURING PETITIONER'S TRIAL THAT WOULD REQUIRE A REVERSAL OF HIS CONVICTION AND SENTENCE.

Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.

Syl. Pt. 5, *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972).

On appeal, Petitioner lastly asserts that the combined errors that occurred during his trial require a reversal of his conviction and sentence. This is so, further argues Petitioner, because his unrecorded statement should never have been introduced at his trial, as his *Miranda* and prompt

presentment rights were violated in taking this statement. *See generally* Pet'r's Br. 6, 30.

As they have been fully addressed above, these matters will not be belabored here other than to say that no error occurred in this case to begin with, "let alone" cumulative error. As such, Petitioner's unrecorded statement was correctly admitted into evidence during his trial.

V.

CONCLUSION

Petitioner's conviction should be affirmed.

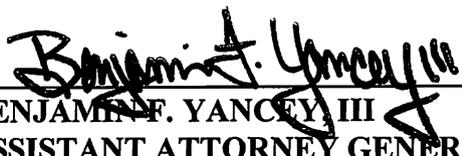
Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0087

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

TYQUAN LIVERMON,

Dēfendant Below, Petitioner.

CERTIFICATE OF SERVICE

I, Benjamin F. Yancey, III, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *Brief of Respondent State of West Virginia* upon Petitioner's counsel by depositing said copy in the United States mail, with first-class postage prepaid, on this 2nd day of December, 2015, addressed as follows:

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