

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0253

11-0258

NOV 1 2011

STATE OF WEST VIRGINIA,

*Plaintiff Below, Respondent,*

v.

MATTHEW JACOB HUBLEY,

*Defendant Below, Petitioner.*

---

BRIEF IN RESPONSE TO THE PETITIONER'S BRIEF

---

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL

LAURA YOUNG  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
Telephone: 304-558-5830  
State Bar No. 4173  
E-mail: [ljy@wvago.gov](mailto:ljy@wvago.gov)

Counsel for Respondent

---

TABLE OF CONTENTS

Page

I. STATEMENT OF THE CASE ..... 1

II. SUMMARY OF THE ARGUMENT ..... 6

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION ..... 7

IV. ARGUMENT ..... 8

A., B., & C. The Circuit Court did not err in finding the child unavailable to testify. The child testified on direct examination and before the child was deemed unavailable, Petitioner’s trial counsel chose not to cross-examine R.S. The confrontation clause was not violated by the testimony of Ms. Runyon, nor was admission of the child’s statement given to Ms. Runyon a violation of the Rules of Evidence regarding hearsay ..... 8

D. The State did not violate the Petitioner’s due process rights under *Brady* because the record does not support the assertion that the State failed to disclose exculpatory or impeachment evidence ..... 21

1. The record does not support the assertion that the prosecution suppressed evidence concerning “Tony Lewis.” ..... 22

2. The State did not violate the Petitioner’s due process right under *Brady* because the evidence at issue was not material to the outcome of the case in that, according to the mother of the victim, a person named Tony Lewis resided with the victim’s family six months prior to the incident for which the Petitioner was convicted and was not residing with nor in contact with the victim during the time of the underlying offense ..... 25

E. Trooper Kocher’s comment that the Petitioner had been Mirandized, implying an arrest, is not a reviewable issue, and even if reviewable and found to be error, the comment was harmless error beyond a reasonable doubt ..... 26

F. The Circuit Court did not err in denying the Petitioner’s motion for a new trial ..... 28

V. CONCLUSION ..... 31

## TABLE OF AUTHORITIES

CASES	Page
<i>Barnett v. Wolfolk</i> , 149 W. Va. 246, 140 S.E.2d 466 (1965) .....	11
<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) .....	<i>Passim</i>
<i>Commonwealth v. DeOliveira</i> , 849 N.E.2d 218 (Mass. 2006) .....	20
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004) .....	<i>Passim</i>
<i>Davis v. Washington</i> , 547 U.S. 813 (2006) .....	13, 19
<i>Giglio v. United States</i> , 405 U.S. 150 (1972) .....	21, 25
<i>Lagunas v. Texas</i> , 187 S.W.3d 503 (Tex. 2005) .....	19
<i>Michigan v. Bryant</i> , 131 S. Ct. 1143 (2011) .....	<i>Passim</i>
<i>Moore v. Illinois</i> , 408 U.S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706 .....	24
<i>Morgan v. Price</i> , 151 W. Va. 158, 150 S.E.2d 897 (1966) .....	22, 29
<i>Murphy v. Smallridge</i> , 196 W. Va. 35, 468 S.E.2d 167 (1996) .....	11
<i>Skidmore v. Skidmore</i> , 225 W. Va. 235 691 S.E.2d 830 (2010) .....	29
<i>State ex rel. Cooper v. Caperton</i> , 196 W. Va. 208, 470 S.E.2d 162 (1996) .....	8
<i>State ex rel. Hatcher v. McBride</i> , 221 W. Va. 760, 656 S.E.2d 789 (2007) .....	22
<i>State v. Allen</i> , 208 W. Va. 144, 539 S.E.2d 87 (1999) .....	30
<i>State v. Arnold</i> , 933 N.E.2d 775 (Ohio 2010) .....	20
<i>State v. Arroyo</i> , 935 A.2d 975 (Conn. 2007) .....	20
<i>State v. Bobadilla</i> , 709 N.W.2d 243 (Minn. 2006) .....	20
<i>State v. Edward Charles L.</i> , 183 W. Va. 641, 398 S.E.2d 123 (1990) .....	16
<i>State v. Ferguson</i> , 216 W. Va. 420, 607 S.E.2d 526 (2004) .....	17

<i>State v. Garrett</i> , 195 W. Va. 630, 466 S.E.2d 481 (1995) .....	27
<i>State v. Hatfield</i> , 169 W. Va. 191, 286 S.E.2d 402 (1982) .....	21, 25
<i>State v. Honaker</i> , 193 W. Va. 51, 454 S.E.2d 96 (1994) .....	29
<i>State v. Krasky</i> , 736 N.W.2d 636 (Minn. 2007) .....	20
<i>State v. LaRock</i> , 196 W. Va. 294, 470 S.E.2d 613 (1996) .....	9
<i>State v. Mechling</i> , 219 W. Va. 366, 633 S.E.2d 311 (2006) .....	17
<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995) .....	8
<i>State v. Mills</i> , 211 W. Va. 532, 566 S.E.2d 891 (2002) .....	27
<i>State v. Payne</i> , 225 W. Va. 602, 694 S.E.2d 935 (2010) .....	11, 18
<i>State v. Pettrey</i> , 209 W. Va. 449, 549 S.E.2d 323 (2001) .....	17
<i>State v. Scacchetti</i> , 711 N.W.2d 508 (Minn. 2006) .....	20
<i>State v. White</i> , 227 W. Va. 231, 707 S.E.2d 841 (2011) .....	28
<i>State v. Youngblood</i> , 221 W. Va. 206, 650 S.E.2d 119 (2007) .....	21, 22, 25
<i>State v. Tex B. Simmons</i> , No. 35540 (West Virginia Supreme Court, February 11, 2011) .....	10
<i>United States v. Agurs</i> , 427 U.S. 97 (1976) .....	21, 24, 25
<i>United States v. Calverley</i> , 37 F.3d 160, (5th Cir.1994) .....	8
<i>WV Dept. of Health &amp; Human Resources Employees Federal Credit Union v. Tennant</i> , 215 W. Va. 387, 599 S.E.2d 810 (2004) .....	22

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0253

STATE OF WEST VIRGINIA,

*Plaintiff Below, Respondent,*

v.

MATTHEW JACOB HUBLEY,

*Defendant Below, Petitioner.*

---

BRIEF IN RESPONSE TO THE PETITIONER'S BRIEF

---

Comes now the Respondent, the State of West Virginia, by counsel, Laura Young, Assistant Attorney General, and files the within brief in response to the Petitioner's Brief.

I.

STATEMENT OF THE CASE

The Grand Jury of Wood County returned an indictment charging the Petitioner with the felony offenses of sexual abuse in the first degree involving R.S., a child under the age of 12. The allegations included touching the child's vaginal area and buttocks. (App. at 3-4.) The indictment contained other counts involving another victim, those counts were apparently severed for trial.

The Petitioner was convicted of one count of first degree sexual abuse. (*Id.* at 20.) His motion for a new trial was denied. (*Id.* at 21.) The Petitioner was sentenced to an indeterminate term of not less than five nor more than twenty five years in the penitentiary. The penitentiary sentence was based, at least in part, upon the Petitioner's failure to have a psychiatric evaluation and treatment plan in place prior to disposition. (*Id.* at 15.)

There was a hearing prior to trial to resolve several issues. During that hearing, Petitioner's trial counsel clearly states that he is aware of the existence of an individual named "Tony" who is a relative of the child's who lives in Missouri. (*Id.* at 42.) Additionally, Petitioner's trial counsel clearly states his knowledge that there is a "Matt" (the Petitioner) and a separate individual named Tony. (*Id.*) The prosecutor stated that he had disclosed the evidence that he had to Petitioner's trial counsel about "this Tony person." (*Id.* at 43.) As one of the issues on appeal is an allegation that Petitioner's trial counsel was blindsided by the withholding of exculpatory evidence regarding the existence of "Tony", it is important to note that both the prosecuting attorney and Petitioner's trial counsel had exactly the same knowledge about "Tony", according to the above-cited pre-trial hearing. Petitioner's trial counsel refers specifically to "Tony" who lives in Missouri as being the "Tony" that the child says committed the offense. (*Id.* at 56.) Further, Petitioner's trial counsel also references his knowledge of Tony when discussing Dr. Phillips' report. (*Id.* at 58.) As the issue, apparently of the Petitioner being *Mirandized* also is raised as error, it is important to note that Petitioner's trial counsel, in his opening statement says "Matt was Mirandized". (*Id.* at 57.)

The first witness at trial was the child's mother, Emily S. She noted that her daughter, the victim R. S. was 8 at the time of trial. (*Id.* at 64.) She testified that while living at a trailer in Waverly with her boyfriend, two separate individuals stayed with her family. Tony Lewis stayed there in June and July of 2008, and Matthew Hublely stayed there for two and a half days in January, 2009. (*Id.* at 65.) Mr. Hublely worked at Hardee's with the boyfriend. (*Id.* 66.) The Petitioner had the opportunity to be alone with R. S. (*Id.* at 70, 75.)

At some time after the occasions when the Petitioner was alone with the children, R.S. told her mother "The guy is in the living room won't stop touching me." That person was Matthew

Hubley. (*Id.* at 78.) R.S. indicated that the person “tickled her down there” and made a motion toward her vagina with her fingers. (*Id.* at 79.) Following a report to the police, Ms. S. took her daughter to Camden-Clark Hospital. That facility referred her to Charleston. (*Id.* at 83.)

The mother testified that she never heard her daughter refer to the Petitioner by his proper name, but that she called him “Tony.” (*Id.* at 90.) On re-direct examination, the mother states that she, the mother used the name “Matt” when reporting to the police, and that her daughter did not refer to the Petitioner by his proper name. (*Id.* at 101.)

R.S. testified. In the Appendix, her testimony covers from page 107 to 138. All of that examination is direct testimony. On page 138, Petitioner’s trial counsel affirmatively states that he has no questions for her. The gist of her testimony having any relevance to the issues at trial is that she indicated that someone touched her where her bathing suit covers (*Id.* at 120) and further demonstrated with a drawing where she was touched. (*Id.* at 124.) She affirmed that she was touched one time on her private part. (*Id.* at 125.) She did not specify any individual as having been the one who touched her private part. She did specify that it was a boy who touched her. (*Id.* at 130.)

Maureen Runyon testified that she was a social worker at Women and Children’s Hospital. (*Id.* at 139.) She stated that she interviewed children to ensure that the child received whatever services, counseling, or medical care needed. (*Id.* at 140.) Following a recitation of her qualifications, she was recognized by the Court as an expert witness. (*Id.* at 144.) She stated that the purpose of an evaluation at the Child Advocacy Center was not for law enforcement purposes. (*Id.* at 148.) The purpose of her interview was to minimize the number of times any particular child

is questioned, and the interview is routinely used by the physicians in determining the way the physical examination and treatment should proceed. (*Id.* at 150.)

In wrestling with the issue of the admissibility of the child's statements to Ms. Runyon, the court opined that the victim had not identified the Petitioner. (*Id.* at 153.) The specific objections to her testimony were the Confrontation Clause and hearsay. (*Id.* at 154.) The prosecuting attorney did not agree that the child was "unavailable" but proffered argument that the statements to Ms. Runyon were admissible whether or not she had testified. (*Id.* at 154-164.) Petitioner's trial counsel, despite the fact that he voluntarily waived cross examination of the child argued that she was "unavailable." (*Id.* at 169.) The trial court agreed with Petitioner's trial counsel. Further testimony was taken on the issue of what, if anything, the child would have—or did—understand about the purpose of her visit to the Child Advocacy Center.

Ms. Runyon stated that when a child comes to the center, they register and a medical chart is filled out. (*Id.* at 173.) Before the interview, the child is examined in the Children's Medicine Center by a medical assistant who gets weight, height and blood pressure. (*Id.* at 174.) Temperature is also taken and documented in the chart. (*Id.* at 175.) The medical assistant is dressed in scrubs. (*Id.* at 176.) Emily S. testified that she told her child they were going to a doctor in Charleston to make sure she was okay. (*Id.* at 181.) The court found that the child had been told she was going to see a doctor and that she needed to tell the truth for the purpose of diagnosis and treatment. Therefore, her motive in making the statement was consistent with the purpose of promoting diagnosis and treatment.. The interview was non-testimonial. (*Id.* at 191-192.)

Ms. Runyon thereupon testified about the actual interview. R.S. disclosed that someone had inappropriate contact with her. (*Id.* at 198.) R.S. stated that "This guy one time we were in the car

and my mommy told him to sit with us, and he touched me right there,” and pointed to her vagina. The child added that he touched her butt and touched in the private. The child stated that she called this person “Tony” but that his real name wasn’t “Tony”. She added that the person who touched her worked with her daddy at Hardee’s. (*Id.* at 199.) She added that it happened in the car. (*Id.* at 200.) The child stated that the touching happened on more than one occasion, and that “Tony” touched with his hand, gesturing with her hand towards her pants. (*Id.* at 201.) She also added that “Tony” stayed at her house for a few days. (*Id.* at 206.) The child was then referred to the Center’s pediatrician for a physical examination. Ms. Runyon testified that the doctor uses the interview to determine what kind of tests to order. (*Id.* at 208.) On cross-examination, Ms. Runyon again testified that the purpose of the evaluation was not for legal purposes. (*Id.* at 216.) Further, she repeated that the purpose of the interview was not for court. (*Id.* at 220.) Ms. Runyon stated that the child did not appear to be confused and was clear and consistent with her information. (*Id.* at 226.) She testified that of the 1500 interviews she had done, more of those involved cases that did not go to court than did. (*Id.* at 236-37.) The purpose of the interview was for accurate medical treatment and therapy. (*Id.* at 237.) Dr. Phillips testified that there were no physical findings upon her examination of the child, and that the diagnosis of abuse was made upon looking at the child in total, her statements, medical examination and evaluation. (*Id.* at 245.)

Trooper Kocher testified, consistently with the Petitioner’s trial counsel opening statement that the Petitioner had been Mirandized. (*Id.* at 247.) Trooper Kocher was unable to ever locate a “Tony” who worked at Hardee’s. (*Id.* at 250.)

The Petitioner testified at trial and denied the allegations. He was unable to proffer any genuine reason why R. S. would have an issue with him. (*Id.* at 270.)

As referenced earlier in this statement of facts, the Petitioner was convicted and sentenced to the penitentiary. This appeal ensued.

## II.

### SUMMARY OF THE ARGUMENT

The error, if any, in the trial court determining that the child was “unavailable” for testimony was harmless. Petitioner’s trial counsel actually urged the trial court to find the child “unavailable” although the record is replete that the child actually did testify and that Petitioner’s trial counsel *chose* not to cross examine her. That was a strategically sound decision as the child had not implicated the Petitioner as the person who touched her inappropriately. However, the issue of her “unavailability” is not material to the issue of whether her statements to Maureen Runyon were admissible.

Those statements were admissible, both in view of the strictures of the Confrontation Clause and the Rules of Evidence regarding hearsay. The trial court determined that the statement was not testimonial as the motive of the child in making the statement was not for the purpose of being used at trial. Further, the statement was made in the course of a treatment scheme at the Child Advocacy Center in which the child’s statement is used for the purpose of determining medical diagnosis and treatment. Ms. Runyon testified that the statement was for the purpose of ensuring proper treatment, including proper medical testing, examinations, treatment and counseling. Dr. Phillips testified that the statement was germane to her diagnosis of abuse. Therefore, as the statement was not testimonial in nature, and was a statement in furtherance of medical diagnosis and treatment, it was properly admitted at trial.

The State did not withhold exculpatory evidence. Although Petitioner's brief asserts that the information about "Tony" was withheld, a fair reading of the record indicates that Petitioner's trial counsel knew of the existence of an actual Tony before trial, had his investigator locate Tony (in Missouri) and extensively cross-examined Emily S., Ms. Runyon, and Dr. Phillips about "Tony." No information was presented to the jury that the Petitioner was arrested. Petitioner's trial counsel made reference in opening statement to his client being Mirandized. All persons who are arrested are not Mirandized, and all persons who are Mirandized are not necessarily arrested. The fleeting reference by Trooper Kocher to the Petitioner being "mirandized" was not error, and if error, was harmless beyond a reasonable doubt.

The trial court did not abuse its discretion by refusing to grant a new trial. Although the motion for new trial is not included in the record, the Petitioner's brief states that the grounds were essentially those proffered in this appeal. Each of those contentions is argued in this Response brief, and each is without merit. Therefore, the motion for a new trial was properly denied.

### **III.**

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

This matter is appropriate for a memorandum decision. Further, the dispositive issues have been conclusively decided. The issues on appeal are fully developed by the appendix and the briefs, and the decisional process would not be aided by oral argument.

#### IV.

#### ARGUMENT

**A., B., & C.** The Circuit Court did not err in finding the child unavailable to testify. The child testified on direct examination and before the child was deemed unavailable, Petitioner's trial counsel chose not to cross-examine R.S. The confrontation clause was not violated by the testimony of Ms. Runyon, nor was admission of the child's statement given to Ms. Runyon a violation of the Rules of Evidence regarding hearsay.

The Petitioner's brief states on, pages 5 and 6, that the Court determined that cross examination of the child would not be beneficial and ruled her "unavailable." However, on page 162 of the Appendix, trial counsel explicitly argues that the child is unavailable. Having argued and acquiesced in the court finding the child unavailable, appellate counsel cannot now argue that the ruling of the court was error. This Honorable Court cogently noted in *State v. Miller*, 194 W. Va. 3, 17, 459 S.E.2d 114, 128 (1995), that "the failure of a litigant to assert a right in the trial court likely will result in a procedural bar to an appeal of that issue."

"One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result' in the imposition of a procedural bar to an appeal of that issue." *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128, quoting *United States v. Calverley*, 37 F.3d 160, 162 (5th Cir.1994) (en banc), cert. denied, 513 U.S. 1196, 115 S.Ct. 1266, 131 L.Ed.2d 145 (1995). Our cases consistently have demonstrated that, in general, the law ministers to the vigilant, not to those who sleep on their rights. Recently, we stated in *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996): "The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace." (Citation omitted). When a litigant deems himself or herself aggrieved by what he or she considers to be an important occurrence in the course of a trial or an erroneous ruling by a trial court, he or she ordinarily must object then and there or forfeit any right to complain at a later time. The pedigree for this rule is of ancient vintage, and it is premised on the notion that calling an error to the trial court's attention affords an opportunity to correct the problem before irreparable harm occurs. There is also an equally salutary justification for the raise or waive rule: It

prevents a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error (or even worse, planting an error and nurturing the seed as a guarantee against a bad result). In the end, the contemporaneous objection requirement serves an important purpose in promoting the balanced and orderly functioning of our adversarial system of justice.

*State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996).

*LaRock* continues that the justification for the “raise or waive” rule is to allow the trial court to correct the problem before harm, and that it prevents a party from tactically refraining from objecting and assigning error (or planting error) if there is an unfavorable result. Having failed to raise the issue at trial, it has been waived for purposes of appeal.

Of note, the trial transcript revealed that the child, while not particularly forthcoming in her testimony, did testify—at length. In fact, her testimony constitutes more than thirty pages of the record. R. S. stated that an individual had touched her where her bathing suit covered her (App. at 120.), and further pointed to an anatomical drawing and stated that someone touched her private area. (*Id.* at 125.) She did not definitively identify the Petitioner on trial as the person who had touched her, and her testimony, while lengthy did consist of a great many failures to respond, and failure to audibly respond. However, at the conclusion of the direct testimony, and before the Court addressed the availability issue, Petitioner’s trial counsel stated “I have no questions.” (App. at 138.) At the time trial counsel voluntarily chose to forego cross examination, the child was available to testify, and had testified for a substantial amount of time. The issue of “unavailability” arose only in context of the admissibility of the child’s statements to Maureen Runyon. The child’s mother had already testified, and she had testified, without objection, that the victim told her “That man in there keeps touching me” and when asked further where he touched her, the child made a tickling motion with her fingers toward her vaginal area. The mother identified that man as the Petitioner. (*Id.* at 78-79.)

The mother had testified that the Petitioner stayed with the family for a few days in January, (*Id.* at 65,) and that the Petitioner worked with her boyfriend at Hardee's and needed a place to stay. (*Id.* at 65- 66.) She stated unequivocally that on at least two occasions the Petitioner was alone with her children. (*Id.* at 70, 73.)

The Petitioner states that the State had the victim declared unavailable because she would not give the answers requested. (Pet'r's Br. at 6.) That assertion is not based upon the record. The State, at trial, did not request the child be found unavailable, and in fact argued that her statements to Ms. Runyon were admissible whether she was "available" to testify or not. The Petitioner voluntarily chose not to cross examine the victim because, quite frankly, the child's testimony, although clear that someone had touched her in the vaginal area did not implicate the Petitioner as that someone. The court did not limit the cross examination of the child victim. The Petitioner chose not to cross examine the child.

This case is directly analagous in many respects to the memorandum decision of this Court in *State v. Tex B. Simmons*, No. 35540 (West Virginia Supreme Court, February 11, 2011.) (Memorandum Decision.)

In *Simmons*, the victim was abused when she was four. The child told her mother that "Tex put his pee pee in my mouth and peed and kept it there until I swallowed." (*Simmons*, Memorandum decision at 2.) The child was taken for an evaluation by a forensic nurse, to whom the child made incriminating statements. The trial occurred more than two and one half years after the incident. The victim was called to the stand and testified, was cross examined, and underwent re-direct and re-cross. The sum total of her testimony was that she could not remember the incident in question. The trial court found her to be unavailable as a witness, and allowed the child's statements to her

mother and the nurse (as well as a police officer) to be admitted. (*Id.* at 3.) On appeal, Simmons argued that the finding of the trial Court that the child was “unavailable” was mistaken and that her statements should not have been admitted. This Honorable Court found that “regardless of whether the lower court’s determination that the child was ‘unavailable’ was correct, we determine that the complained-of testimony was properly admitted.” (*Id.* at 3-4.) The opinion notes that the Supreme Court may affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court. (Footnote 5 of *Simmons*, citing Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965). Additionally, that footnote cites *Murphy v. Smallridge*, 196 W. Va. 35, 468 S.E.2d 167 (1996) as standing for the proposition that the appellate court is not limited to the grounds relied upon by the circuit, but may affirm a decision on any independently sufficient ground that has adequate support.)

Mr. Simmons relied on *Crawford v. Washington*, 541 U.S. 36 (2004), as requiring exclusion of the child’s statements. The Court found that reliance misplaced, as it found the child was in fact available to testify. In the instant case, the Petitioner, at trial, chose not to question the witness. He was aware that the State intended to call Ms. Runyon as a witness, and further aware that the child had made statements to the mother about the Petitioner touching her which were admitted into evidence without objection.

The Court in *Simmons* found that the child was available for cross examination, even though the trial court had termed her “unavailable.” Further, the *Simmons* court noted that the statements to the forensic nurse were admissible under the aegis of *State v. Payne*, 225 W. Va. 602, 694 S.E.2d 935 (2010). That decision stated that statements made to a professional in the course of a medical

examination are admissible if the declarant's motive in making the statement was consistent with promoting treatment, and the content was relied upon for treatment. Such testimony is admissible if the evidence was gathered for a dual purpose, that is forensic and medical. The statements in *Simmons* were relied upon by the nurse to determine the treatment direction for this child.

As the statements to the mother were not objected to, their admission is not before the court, nor does the Petitioner proffer those as being plain error. However, he does assign as error the admission of Ms. Runyon's testimony both as inadmissible hearsay and violative of the Confrontation Clause. The Petitioner asserts that the statement in question is testimonial within the dictates of *Crawford v. Washington*, 541 U.S. 36 (2004), and that its admission violated his right to confront and cross-examine his accusers. The Respondent responds that the statement in question was not testimonial and that its admission was not error.

The Petitioner rests his argument upon the dictates of *Crawford, supra*. In that matter, a statement was taken from the Defendant's wife regarding an assault the defendant committed upon another person. At trial, the wife did not testify because of the state marital privilege, and her tape recorded statement was played for the jury. The United States Supreme Court determined that the use of the wife's out-of-court statement violated the Confrontation Clause as contained in the Sixth Amendment. The Court noted that not all hearsay implicates the Sixth Amendment's concerns. The *Crawford* Court was concerned with what it termed "testimonial" statements, noting at page 51 that: "an accuser who makes a formal statement to government officers bears testimony . . ." Further, the *Crawford* Court noted that some statements are testimonial *per se: ex parte* in-court testimony or its functional equivalents, prior testimony obtained without the opportunity to cross-examine, or similar pretrial statements that **declarants** (emphasis added) would reasonably expect to be used

prosecutorially. *Crawford* defined statements taken by police officers in the course of interrogations as testimonial. Further at page 68, the Court stated that it would not define, comprehensively, “testimonial.” The Court did state that “testimonial” means at a minimum, prior testimony at a preliminary hearing, before a grand jury, or at a formal trial, and to police interrogations, where the witness is unavailable at trial and there was no prior opportunity for cross-examination.

The United States Supreme Court has had the opportunity to further look at certain out-of-court statements and determine whether those statements were “testimonial” and therefore violated the Confrontation Clause. *Davis v. Washington*, 547 U.S. 813 (2006), dealt with the admissibility of a 911 call in which the victim, who did not testify at trial, described an assault and identified the defendant as her assailant. Again, the *Davis* Court did not attempt to classify all statements as testimonial or non-testimonial. In *Davis*, at page 822, the Court states that “[s]tatements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” The Court noted in footnote 1 of its opinion that “in the final analysis it is the declarant’s statements, not the interrogator’s questions that must be evaluated for a violation of the right to confrontation.” The Court determined that a 911 call, and at least the initial interrogation conducted in connection with that call is to describe current circumstances requiring police assistance, to meet an emergency. Therefore, it was not error to admit the 911 recording, even though police questioning was involved and the declarant did not testify at trial.

The United States Supreme Court again visited the issue of “testimonial” statements in *Michigan v. Bryant*, 131 S. Ct. 1143 (2011). At issue were statements made by a murder victim, obviously unavailable at trial, who, in response to police questioning, identified his assailant in what

is commonly referred to as a dying declaration. Again, despite the involvement of the police in questioning the mortally wounded victim, and the lack of any opportunity for cross-examination, the Court determined the statement to be non-testimonial in character, and therefore, admissible. The analysis in *Bryant* focused on the primary purpose of the questioning as being to meet an ongoing emergency. The Court noted that the relevant inquiry is not the actual purpose of the particular parties but the purpose that reasonable participants would have had. The analysis must focus on the understanding and purpose of a reasonable victim in the actual victim's circumstances. The *Bryant* Court noted that where the primary purpose of questioning is to respond to an ongoing emergency, the purpose is not to create a record for trial, and thus does not fall within the scope of the Confrontation Clause. The Court also noted that there

may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Where no such primary purpose exists, the admissibility of the statement is the concern of state and federal rules of evidence, not the Confrontation Clause.

(*Id.* at 1155.) The primary purpose of the taking of the statement can be determined by an objective analysis of the encounter, including determining the purpose reasonable participants would have had. In footnote 9 of the opinion, the Court notes that many exceptions to the hearsay rules rest on the belief that certain statements are, by their nature made for a purpose other than use in a prosecution, citing specifically Federal Rule of Evidence 803(4), statements for purposes of medical diagnosis or treatment. The Court specifically noted that an ongoing emergency is simply one factor that determines the primary purpose of a police interrogation. The Court noted that both questioners and victims are likely to have mixed motives when statements are taken, and that a resolution to the

question of whether a statement is testimonial rests upon ascertaining the primary purpose of the interrogation.

As regards the child's statement to Maureen Runyon, Ms. Runyon is not an agent of the State. Ms. Runyon is a licensed social worker employed by CAMC. She works at the Child Advocacy Center and evaluates children who are referred to that Center from a variety of sources including, but not limited to, parents, pediatricians, and police. All children, no matter the source of the referral, are treated the same. The purpose of the interview in the instant case was to determine whether the child had been sexually abused or had been subject to inappropriate sexual activity. Ms. Runyon specifically denied that the purpose of obtaining the information was for the purpose of prosecution, but that the interview was performed for evaluation, ongoing recommendations for follow up care and examinations. (App. at 148-51.) She denied that there was a dual purpose to the statement and that her concern was to figure out what happened, if anything to the child and to ensure the child received any necessary care. Further, the child underwent a physical examination following the interview, and Ms. Runyon testified that the doctor determined what the appropriate examination was based upon the interview. Dr. Phillips also testified that she relied upon the interview in determining what kind of examination and tests to perform.

Therefore, looking at the analyses contained in *Crawford*, *Davis*, and *Bryant*, *supra*, the first distinction is that this statement is not the result of police questioning. Ms. Runyon is employed by a hospital and has no connection with any State agency. Ms. Runyon testified definitively that her only purpose in talking to the child was to ensure the child's well being and to determine what had happened so that additional medical evaluations and treatment could be provided, if necessary. Therefore, the primary purpose of the interview was for medical diagnosis and treatment, and not

to produce out-of-court statements to substitute for testimony. Further, the analysis requires one to examine, objectively, the declarant's expectations in making a statement. The declarant was a child. At an *in camera* hearing, the trial court determined that the child had been informed by her parent that she was going to be checked out to see that she was okay, that the statement was taken in a hospital setting, and that prior to the statement, the child was weighed and measured by medical personnel. (App. at 171-89.)

Objectively, this child's purpose in answering—or far more frequently, not answering—the questions propounded to her was not to produce a statement to substitute for trial testimony. One can safely assume that this elementary school age child, no matter her level of sophistication, is completely unaware of the nuances of the criminal justice system, and was not answering questions in the expectation that the statement would be used at trial. Therefore, the statements in question do not violate the Confrontation Clause under the analyses required by the above-cited United States Supreme Court cases.

This Honorable Court has examined the admission of out-of-court statements in cases involving allegations of sexual assault and abuse numerous times. Some of the decisions are pre-*Crawford*, *supra*, and some post-date that decision. Perhaps the leading decision prior to *Crawford* was *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990). Admitted at trial were statements made to the mother and psychologist, years after the alleged abuse. As to the statements to the psychologist, the State contended that the statements were properly admitted under West Virginia Rule of Evidence 803(4), which provides that statements made for the purpose of medical diagnosis or treatment are not excluded by the hearsay rule. The Court in *Edward Charles L.*, noted that in determining admissibility one had to determine the motive behind the statement, and

whether the statements were of such nature that they would be reasonably relied upon for diagnosis and treatment. The Court expanded the West Virginia Rule of Evidence 803(4) exception to include statements made to social workers and counselors, if the motive in making the statement is consistent with promoting treatment, and the content of the statement is reasonably relied upon for treatment, but such testimony is inadmissible if the evidence was gathered strictly for forensic purposes. Syl. Pt. 9, *State v. Pettrey*, 209 W. Va. 449, 549 S.E.2d 323 (2001).

*State v. Ferguson*, 216 W. Va. 420, 607 S.E.2d 526 (2004), was decided by this Honorable Court shortly after the decision in *Crawford, supra*. The statement in *Ferguson* was admitted under the “excited utterance” exception to the hearsay rules. In response to the argument that even if the statements qualified as an excited utterance they were still “testimonial” and their admission violated the Confrontation Clause, the *Ferguson* Court noted at page 423 that it did not perceive that the ban on testimonial hearsay extended to statements to non-official and non-investigatorial witnesses.

*Crawford, supra*, was incorporated into West Virginia law in *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006). Again, at issue were two statements taken by the police from a domestic assault victim well after the assault had ended. The victim did not appear at trial. The *Mechling* Court while disapproving of the statements which were admitted at trial, noted that only testimonial statements are subject to the constraints of the Confrontation Clause, and noted on page 376 that the guidelines adopted in *Davis, supra*, are flexible and inherently fact based. The Court also noted in assessing whether the statement is testimonial, the focus is on the witness’s statement and not the questions. Again, the *Mechling* Court’s decision dealt with formal question and answer interviews conducted by the police with an adult victim.

The Court in *State v. Payne*, 225 W. Va. 602, 694 S.E.2d 935 (2010), ratified the “dual purpose” analysis in determining whether a statement to a forensic nurse was admissible under a traditional hearsay analysis. The Court held that when a child is examined by a forensic nurse, the nurse’s testimony regarding statements made by the child is admissible as an exception to the hearsay rule, if the motive for making the statement was consistent with the purposes of providing treatment, and the statement was relied upon for treatment. Further, such testimony is admissible if the evidence was gathered for a dual medical and forensic purpose. (*Id.* at 609-10, 694 S.E.2d at 942-43.)

Therefore, under West Virginia law, statements to a social worker, forensic nurse, play therapist or other medical or mental health professional are admissible at trial if the primary purpose in obtaining the statement is for a medical reason.

Again, the Respondent asserts that the statement of the minor child to Ms. Runyon was not testimonial in nature. The purpose, both primarily, and according to Ms. Runyon, solely, was to evaluate the child and determine what had happened and what further treatment the child needed. That fits the statement squarely into the medical diagnosis and treatment exception to the hearsay rule. Further, the statement is not testimonial because it was not prepared as a substitute for in-court testimony. In examining the motive for the statement, the mother testified that she was told by the staff at Camden-Clark to take the child for an evaluation at Women and Children’s Hospital., as those evaluations were not performed at Camden-Clark. (App. at 83.) Additionally, one must look at the declarant’s motive for making the statement. R.S. was a child at the time the statement was taken. One can only surmise that her motive for talking to Ms. Runyon was because her mother took her to Ms. Runyon, and that she, R.S., had no inkling of prosecution, trial, testimony, Confrontation

Clause or hearsay exceptions. Therefore, the child's motive for making the statement cannot have been for the purpose of providing a testimonial statement in lieu of actual courtroom testimony. Ms. Runyon, again, stated that her sole purpose was to evaluate the child and to see what had happened, and what the child needed in terms of further care. Therefore, the child's statement was not testimonial and did not violate the Confrontation Clause and was properly admitted. The Petitioner argues that the child's motive is immaterial, as is Ms. Runyon's, as whether or not a statement is testimonial depends upon the objective observer. However, *Crawford, Davis, and Bryant, supra*, determine that the declarant's motive in making the statement is a factor in determining whether or not the statement is testimonial. Further, here, an objective observer must conclude that the purpose of the statement to Ms. Runyon was for diagnosis and treatment

Other jurisdictions have examined the question of whether a child's out-of-court statement is testimonial or not. For example, in *Lagunas v. Texas*, 187 S.W.3d 503 (Tex. 2005), a four-year-old was not available to testify at trial. Her statement to a police officer was admitted, as an excited utterance, even though the statement was made after the event had concluded. The Texas court concluded, based on the child's demeanor, that she was still under the influence of the event, and therefore, her statements in response to police questioning were an excited utterance. The defendant further objected that his rights under the Confrontation Clause were violated by the admission of that statement. The Texas court noted that state and lower federal courts continue to struggle with what is or is not testimonial, particularly statements taken by police officers. The court

noted that because the witness was only four, that is a factor strongly suggesting that her statements were non-testimonial, but the Court considered other circumstances in this law enforcement statement, finding it admissible.

Other jurisdictions which have examined the issue of whether a child victim's out-of-court statements to a forensic nurse, social worker, or other similarly situated health professionals are testimonial include Connecticut, Minnesota (repeatedly), and Ohio. Each of those cases, *State v. Arroyo*, 935 A.2d 975 (Conn. 2007); *State v. Krasky*, 736 N.W.2d 636 (Minn. 2007); *State v. Scacchetti*, 711 N.W.2d 508 (Minn. 2006); *State v. Bobadilla*, 709 N.W.2d 243 (Minn. 2006), *State v. Arnold*, 933 N.E.2d 775 (Ohio 2010); and *Commonwealth v. DeOliveira*, 849 N.E.2d 218 (Mass. 2006), analyzes statements made by minor victims to physicians, nurses, a forensic interviewer, and interviewers at a child advocacy center and finds each to be non-testimonial and therefore admission of those statements did not violate the Confrontation Clause. Those decisions note that the majority of jurisdictions find that statements made by child sexual abuse victims for the purpose of medical diagnosis and treatment are not testimonial and do not implicate the Confrontation Clause even if subsequently used by the state in a prosecution.

Therefore, to reiterate, R.S.'s statements to Maureen Runyon were properly admitted under West Virginia Rule of Evidence 803(4) as an exception to the hearsay rule for statements for the purpose of medical diagnosis and treatment. Ms. Runyon's sole purpose was to evaluate the child to determine what had happened and to recommend further treatment. The child lacked the age and sophistication to make the statement with an eye to substituting that statement for in court testimony. The admission of the statement, as it was non-testimonial is not a violation of the Petitioner's right confront his accuser.

**D. The State did not violate the Petitioner's due process rights under *Brady* because the record does not support the assertion that the State failed to disclose exculpatory or impeachment evidence.**

The United States Supreme Court explained in *Brady v. Maryland* that State suppression of evidence favorable to the defendant and material to the outcome of the case is a violation of a defendant's federal due process rights. See *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972). The Court later held that the federal due process requirement is not as broad as statutory or other discovery rules; the Constitution only requires the disclosure of exculpatory or impeachment evidence favorable to the defendant and material to the case. *United States v. Agurs*, 427 U.S. 97, 104 (1976). In *Agurs*, the Court explained that "implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." (*Id.*) The State has an affirmative duty to disclose such material.

This Court similarly interprets the West Virginia Constitution as requiring the State to disclose exculpatory or impeachment evidence that is favorable to the defendant and material to the outcome of the case. See Syl. Pt. 4, *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982) (exculpatory evidence must be provided under W. Va. due process); *State v. Youngblood*, 221 W. Va. 206, 50 S.E.2d 119 (2007) (the Court discusses history of both federal *Brady* violations and state violations; impeachment evidence is included in the state due process requirement). A due process violation under *Brady* and *Hatfield* requires three elements:

There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial.

Syl. Pt. 2, *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007). The Petitioner fails to meet the burden of proving these three elements.

**1. The record does not support the assertion that the prosecution suppressed evidence concerning “Tony Lewis.”**

Under state and federal due process requirements, the State must not intentionally nor inadvertently suppress evidence that is favorable to the defendant and material to the outcome of the case. Syl. Pt. 2, *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007). However, the State does not violate a defendant’s due process rights if the State timely discloses such evidence or if the State suppresses evidence which is non-favorable, or immaterial evidence.

The burden is on the Petitioner to prove an error occurred such that he deserves relief. This Court has held that:

“An appellant must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment. Syllabus Point 5, *Morgan v. Price*, 151 W. Va. 158, 150 S.E.2d 897 (1966).” Syllabus Point 2, *WV Dept. of Health & Human Resources Employees Federal Credit Union v. Tennant*, 215 W. Va. 387, 599 S.E.2d 810 (2004).

Syl. Pt. 7, *State ex rel. Hatcher v. McBride*, 221 W. Va. 760, 656 S.E.2d 789 (2007).

In this case, the Petitioner argues that the State suppressed exculpatory evidence concerning the identity of “Tony Lewis”—a person who, according to the mother’s testimony, may have resided with the victim’s family for a period of “about a week-and-a-half” six months prior to the underlying sexual offense. (Pet’r’s Br. at 12; App. at 66, 82.) Tony is an important name because the victim—who was six-years-old at the time of the offense—referred to the Petitioner as “Tony” in statements despite the Petitioner being named Matthew. The victim’s mother testified to her

daughter's confusion on the Petitioner's name. (App. at 90-91.) The record indicates that the Petitioner was provided with evidence of "Tony Lewis" prior to trial and, in fact, had an opportunity to investigate Tony's identity prior to trial. Nothing in the record indicates that the State suppressed any evidence concerning this person. The prosecutor even stated on the record during pre-trial discussions of Tony that "I've disclosed the evidence I have to Mr. Powell [the Petitioner's defense counsel]." (App. at 43.)

Prior to trial, the Petitioner was provided with evidence of Tony Lewis. The Petitioner was provided with the victim's statement to Ms. Runyon wherein the victim mentioned "Tony" as a potential perpetrator of sexual abuse, and the Petitioner used this information of a potential perpetrator named Tony in his opening and during cross examination of the State's witnesses. The Petitioner also admits he was provided with Grand Jury testimony of Trooper Kocher wherein Trooper Kocher testified, according to the Petitioner, that no "Tony Lewis" existed. (Pet'r's Br. at 12.)

Moreover, the Petitioner had time prior to trial to investigate Tony's identity, which presumes the Petitioner knew of Tony Lewis prior to trial. The Petitioner argued during pre-trial motions and during trial that "my information from my investigator, Tony is the father or the brother to the child—I'm sorry, brother to the father of the child who lives in Missouri." (App. at 56.) Information concerning Tony Lewis must have been disclosed to the Petitioner prior to trial if he pursued an investigation of that person.

The Petitioner also asserts that Trooper Kocher knew of the existence of Tony, and, therefore, the information known to the police was imputed to the prosecutor who should have disclosed the same. (Pet'r's Br. at 13-14.) However, the State has no duty to investigate every circumstance or

disclose every detail of its investigation to the defendant. In *U.S. v. Agurs*, the United States Supreme Court held:

[T]his Court recently noted that there is “no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.” *Moore v. Illinois*, 408 U.S. 786, 795, 92 S.Ct. 2562, 2568, 33 L.Ed.2d 706. The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish “materiality” in the constitutional sense.

(*Agurs*, 427 U.S. at 109-110.) The United States Supreme Court case of *Moore v. Illinois* is analogous to the case at bar. In *Moore*, a disgruntled bar patron who had been ejected from a bar returned later that evening with a shotgun and shot the bartender. (*Moore v. Illinois*, 408 U.S. 786, 788 (1972).) During the initial police investigation, evidence suggested that a person of interest was someone named “Slick.” (*Id.*) The police searched for “Slick,” but they could not find him, although one witness misidentified Moore as “Slick.” After Moore was convicted, a witness testified as a post-conviction hearing that Moore was not “Slick.” Moore appealed his conviction arguing that the State had a duty to disclose the information they had about “Slick” and the misidentification. (*Id.*) The *Moore* Court held that due process under *Brady* did not require the State to disclose its investigatory reports for every potential lead. (*Id.* at 795-96.)

Similarly, in this case, Trooper Kocher testified that he conducted a search for “Tony,” but he found no such person. (App. at 250.) The State had no duty to investigate every possible lead, no matter how remote, and to disclose every aspect of their investigatory reports. If, *arguendo*, the State suppressed investigation material identifying Tony Lewis, which is not shown from the record, such suppression of immaterial police records was not a due process violation.

Therefore, the record reflects that the State disclosed the evidence it had concerning the person named Tony Lewis. The record does not support the assertion that the State suppressed any such evidence.

2. **The State did not violate the Petitioner's due process right under *Brady* because the evidence at issue was not material to the outcome of the case in that, according to the mother of the victim, a person named Tony Lewis resided with the victim's family six months prior to the incident for which the Petitioner was convicted and was not residing with nor in contact with the victim during the time of the underlying offense.**

The State does not violate a defendant's due process rights by failing to disclose evidence that is immaterial and nonprejudicial to the outcome of the case. See *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154; *Agurs*, 427 U.S. at 104; Syl. Pt. 4, *Hatfield*, 169 W. Va. 191, 286 S.E.2d 402; *Youngblood*, 221 W. Va. 206, 650 S.E.2d 119.

In this case, evidence tending to show the existence or non-existence of a person named Tony Lewis was immaterial to the case. The victim's mother testified that no one named Tony was around the victim during the evening of the sexual abuse. The only people in the car and house at the time of the offense were the victim's mother, the victim, the victim's four-year-old brother, the victim's mother's boyfriend named Nathan (who was not in the house during the time of the abuse), and the Petitioner. A person named Tony had resided with the victim's family for "about a week-and-a-half" six months prior to the underlying sexual offense. (Pet'r's Br. at 12; App. at 66, 82.) Tony is an important name because the victim—who was six-years-old at the time of the offense—referred to the Petitioner as "Tony" in statements despite the Petitioner being named Matthew. The victim's mother testified to her daughter's confusion on the Petitioner's name. (App. at 90-91.)

Therefore, because no one named Tony was even in the house or car during the commission of the underlying offense, evidence of Tony's identity is immaterial to the outcome of the case. Even if the State failed to produce such evidence, no due process violation occurred.

**E. Trooper Kocher's comment that the Petitioner had been Mirandized, implying an arrest, is not a reviewable issue, and even if reviewable and found to be error, the comment was harmless error beyond a reasonable doubt.**

This Honorable Court should not review this issue because the issue was not preserved for appeal and the Petitioner invited the error. If the Court does review this issue, any error is harmless beyond a reasonable doubt.

Despite the Petitioner's opening statement in which he raised being Mirandized in the presence of the jury, the Petitioner now argues the State committed reversible error when Trooper Kocher, a State's witness, subsequently referred to the Petitioner being Mirandized, implying an arrest, during his testimony. (Pet'r's Br. at 17.) The State first notes that in the record before this Court the Petitioner failed to preserve this issue for appeal. After the State's witness referred to the Petitioner being Mirandized, the trial court removed the jury from the courtroom and rebuked the prosecutor for failing to control his witness. The Petitioner failed to object to the Miranda issue, failed to request a curative instruction, and failed to move for a mistrial. The Petitioner did nothing. This Court has long held that failure to preserve an issue waives that issue on appeal:

Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a . . . [forfeiture] of the right to raise the question thereafter in the trial court or in the appellate court.

Syl. Pt. 1, *State v. Garrett*, 195 W. Va. 630, 466 S.E.2d 481 (1995) (citations omitted). Without a timely objection, this Court should not review the issue on appeal.

Moreover, the Petitioner opened the door to the fact that the Petitioner was Mirandized. In his opening statement, while discussing the factual scenario chronologically, the Petitioner stated:

Matt is not arrested. They didn't have enough to arrest him on that evidence. The child was taken to Dr. Delzotto at Camden-Clark. Dr. Delzotto said, "There's negative findings of any kind of penetration or intrusion. There's no injury here." Matt was Mirandized and he said, "I never touched this girl. Never touched her."

(App. at 57.) A party cannot appeal an error invited by that party. In Syl. Pt. 7 of *State v. Mills*, this Court held that "A judgment will not be reversed for any error in the record introduced by or invited by the party asking for the reversal." Syl. Pt. 7, *State v. Mills*, 211 W. Va. 532, 566 S.E.2d 891 (2002). In this case, the Petitioner invited any error arising out of this comment by referring to the Petitioner's Miranda warning and arrest in the opening statements.

Even if this Court does review this issue, any error resulting from the witness' comment is harmless error beyond a reasonable doubt. Error of a nonconstitutional nature is deemed harmless if 1) after removing the inadmissible evidence, the remaining evidence is sufficient to support the conviction beyond a reasonable doubt; and 2) the inadmissible evidence was not prejudicial.

In this case, the officer's fleeting reference that the Petitioner had been Mirandized was harmless. First, removing the fleeting comment, the evidence was sufficient to support the conviction. The testimony of the mother placed the Petitioner at the crime scene and placed the Petitioner alone with the victim, and the statement of the victim stated that she had been sexually abused by the Petitioner when he was the only other adult in the house other than the victim's mother. Second, the fleeting comment was not prejudicial such that it requires reversal. The

Petitioner first mentioned the arrest and Miranda warning in opening statements, and the comment was too brief to cause prejudice.

Therefore, even if this Court reviews this issue, the officer's comment was harmless error beyond a reasonable doubt.

**F. The Circuit Court did not err in denying the Petitioner's motion for a new trial.**

The Petitioner's brief assigns as error the denial of the motion for a new trial. Unfortunately, that motion was not included in the Appendix, so one is forced to rely on the assertions in the Petitioner's brief that the grounds proffered as grounds for a new trial are the same as the issues raised upon appeal. Those issues, in summation are the court's error in determining the child unavailable for testimony, the admission of Ms. Runyon's testimony as violative of the Confrontation Clause and inadmissible hearsay, failure to turn over exculpatory evidence, and unfair comment on the *Miranda* issue.

Each of those allegations of error has been addressed separately in this Respondent's brief. Each of those allegations are without merit. Although the order denying the motion for a new trial is part of the Appendix at page 21, that order states merely "whereas the Court is in receipt of the Defendant's brief in support of the motion, the State's Response to the Defendant's Brief, and the Defendant's response to the State's response; for reasons stated more fully upon the record, the Court denies the Defendant's Motion for a new trial."

Syllabus Point 1 of *State v. White*, 227 W. Va. 231, 707 S.E.2d 841, (2011), states that the standard of review of a circuit court's ruling of the denial of a motion for a new trial is entitled to great weight and respect, but will be reversed when it is "clear that the trial court has acted under some misapprehension of the law or the evidence." Further, *White* at 238, 707 S.E.2d at 848 states

that the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error is an abuse of discretion standard. Factual findings are reviewed under a clearly erroneous standard, and questions of law are subject to a *de novo* review.

The factual findings and conclusions of law underlying the denial of the motion of the new trial are not in the record.

“To permit this Court to review an error assigned by an appellant, a record of the assigned error must be submitted for this Court’s consideration.” *Skidmore v. Skidmore*, 225 W. Va. 235 at 247, 691 S.E.2d 830 at 842 (2010). Further, litigants are required to present a record upon which the Court may consider the error:

[a]n appellant must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment.

Syl. pt. 5, *Morgan v. Price*, 151 W. Va. 158, 150 S.E.2d 897 (1966). *Accord State v. Honaker*, 193 W. Va. 51, 56, 454 S.E.2d 96, 101 (1994). (“This Court has held that the responsibility and burden of designating the record is on the parties and that appellate review must be limited to those issues which appear in the record presented to this Court.” (Footnote and citation omitted)). *See also* II Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure* 497-98 (1993) (“The designation of the record is important. A court of record speaks only by its record is the general rule . . . Not only must the significant portion of the record relating to th[e] alleged error be identified, the precise part of the record must be designated. Otherwise, the error will be treated as nonexistent.” (Citations omitted)).

When the alleged error is not apparent from the record designated for appellate consideration, we lack a basis upon which to determine whether error has occurred. “[T]he Supreme Court of Appeals is limited in its authority to resolve assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below *and fairly arising upon the portions of the record designated for appellate review.*”

*Skidmore* at 247, 691 S.E.2d at 842.

The Court will not consider an error which is not properly preserved in the record. *State v. Allen*, 208 W. Va. 144, 539 S.E.2d 87 (1999).

Therefore, there being no specific objection to the findings of fact and conclusions of law upon which the trial court based its denial of the motion for the new trial, there simply is no basis for determining that the denial of the motion was error. Further, each of the allegations of error have been answered in this Respondent's brief, and each is meritless.

V.

### CONCLUSION

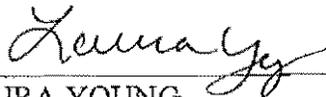
Therefore, for the foregoing reasons, that the Circuit Court did not commit reversible error in any of the particulars alleged by the Petitioner on appeal, the Respondent respectfully requests that the Court affirm the judgment of the Circuit Court of Wood County, sentencing the Petitioner to a term of incarceration following his conviction, after a trial by jury, for the felony offense of first degree sexual abuse.

Respectfully submitted,

STATE OF WEST VIRGINIA  
Plaintiff Below, Respondent

*by counsel,*

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL



---

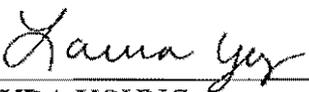
LAURA YOUNG  
ASSISTANT ATTORNEY GENERAL  
812 Quarrier Street, 6th Floor  
Charleston, West Virginia 25301  
Telephone: 304-558-5830  
State Bar No. 4173  
E-mail: [ly@wvago.gov](mailto:ly@wvago.gov)

*Counsel for Respondent*

**CERTIFICATE OF SERVICE**

I, LAURA YOUNG, Assistant Attorney General and counsel for the Respondent herein, do hereby certify that I have served a true copy of the *Brief in Response to the Petitioner's Brief* upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 1st day of November, 2011, addressed as follows:

To: M. Paul Marteney, Esq.  
P.O. Box 157  
St. Marys, WV 26170.

  
\_\_\_\_\_  
LAURA YOUNG