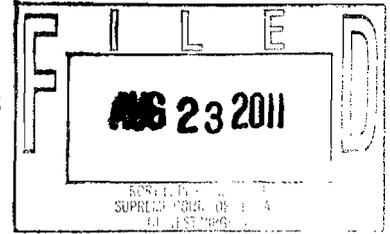


**In the Supreme Court of Appeals
of
West Virginia**



DOCKET NO. 11-0561

STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent

vs.

Appeal from a final order of
Case No. 10-F-14
Webster County Circuit Court

JULIA SURBAUGH, Defendant Below,
Petitioner.

Respondent's Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	I
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	1
A. Introduction.....	1
B. Character.....	1
C. Incident on August 6, 2009.....	2
D. Appellant’s Statements.....	4
ARGUMENT.....	8
I. THE LOWER COURT DID NOT ERR IN ADMITTING STATEMENTS OF THE VICTIM DURING THE TRIAL OF THIS MATTER.....	8
II. THE LOWER COURT DID NOT ERR IN ADMITTING THE PORTION OF THE “THIRD STATEMENT” OF APPELLANT.....	12
III. THE LOWER COURT DID NOT ERR IN REFUSING INSTRUCTIONS BASED UPON STATE V. HARDEN.....	20
IV. THE LOWER COURT DID NOT ERR IN REFUSING TO GIVE A GOOD CHARACTER INSTRUCTION.....	22
CONCLUSION.....	22

TABLE OF AUTHORITIES

Cases

<i>Brewer v. Williams</i> , 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977).....	19
<i>Crawford v. Washington</i> , 541 U.S. 36, 124 S.Ct. 1354 (2000).....	8
<i>Davis v. Washington</i> , 547 U. S. 813 (2006).....	9
<i>Edwards v. Arizona</i> , 101 S.Ct. 1880, 1883-84, 68 L.Ed.2d 378, 385 (1981).....	12
<i>Hammon v. Indiana</i> , 547 U.S. 813 (2006).....	9
<i>Michigan v. Bryant</i> , 131 S. Ct. 1143 (2011).....	8, 9
<i>State v. Barrow</i> , 359 S.E.2d 844,178 W.Va. 406(1987).....	13
<i>State v. Bolling</i> , 162 W.Va. 103, 246 S.E.2d 631 (1978).....	22
<i>State v. Bradshaw</i> , 193 W.Va. 519, 457 S.E.2d 456 (1995).....	13
<i>State v. Gravelly</i> , 171 W.Va. 428, 299 S.E.2d 375 (1982).....	14
<i>State v. Guthrie</i> , 173 W.Va. 290, 315 S.E.2d 397 (1984).....	15
<i>State v. Harden</i> , 223 W.Va.796, 679 S.E.2d 628 (2009).....	20, 21
<i>State v. Johnson</i> , 219 W.Va. 697, 639 S.E.2d 789 (2006).....	13, 14
<i>State v. Lacy</i> , 196 W.Va. 104, 468 S.E.2d 719 (1996).....	13
<i>State v. Milburn</i> , 204 W.Va. 203, 511 S.E.2d 828 (1998).....	15
<i>State v. Murray</i> , 180 W.Va. 41, 375 S.E.2d 405 (1988).....	22
<i>State v. Neary</i> , 179 W.Va. 115, 365 S.E.2d 395 (1987).....	22
<i>State v. Persinger</i> , 286 S.E.2d 261, 169 W.Va. 121 (1982).....	12, 15
<i>State v. Williams</i> , 171 W.Va. 556, 301 S.E.2d 187 (1983).....	19
<i>State v. Wyatt</i> , 198 W.Va. 530, 482 S.E.2d 147 (1996).....	22

Statutes

W.Va.Code, 62-1-5 [1965].....	14
W.Va. Code, 62-1-6 [1965].....	14

Rules

West Virginia Rules of Evidence, Rule 803(2).....	11
West Virginia Rules of Evidence, Rule 804(b)(5).....	11

Treatises

C.H. Whitebread, <i>Constitutional Criminal Procedure</i> 164, (1978).....	19
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STATEMENT OF THE CASE

A. *Introduction.* Appellant, Julia Surbaugh, is a college educated woman. The victim was her husband, Michael Surbaugh. On August 6, 2009, Michael Surbaugh died from multiple gunshot wounds to the head. Appellant was arrested on August 12, 2009 for the first degree murder of Michael Surbaugh. On May 20, 2010, appellant was convicted of first degree murder without a recommendation of mercy and sentenced to life in prison, without mercy.

B. *Character.* Appellant asserts that she was of a peaceful and non-violent nature and that Michael Surbaugh was an admitted methamphetamine addict. The evidence at trial showed that the Surbaughs frequently engaged in mutual verbal arguments, without any physical violence.

Michael Surbaugh did engage in an extramarital affair with Janet Morton for an extended period of time prior to his death. Appellant had known of and tolerated this affair since 2008. (*Trial Transcript, Page 770, Line 9*) Further, there was absolutely no evidence that Michael Surbaugh was an admitted methamphetamine addict. In fact, appellant testified at trial that Michael Surbaugh sincerely wanted to help his girlfriend, Janet Morton, with her methamphetamine addiction and appellant had invited Mrs. Morton to visit during a family camping trip in 2009 to help further this goal. (*Trial Transcript, Page 769, Line 9*)

Michael Surbaugh lost his teaching job in Webster County because he was caught with marijuana on school property, with his final check being paid to him in August 2009. During the summer of 2009 Mr. Surbaugh began counseling with Michael Morrello to address alcohol and marital issues. Julia Surbaugh attended a counseling session with the victim on July 16, 2009. During this session the Surbaughs discussed separation and Julia Surbaugh indicated that she wanted a divorce.

Janet Morton and Michael Surbaugh attended a counseling session with Mr. Morrello on

July 27, 2009. Mr. Surbaugh indicated that he and Mrs. Morton were going on a “mini” vacation and that he had made a decision to leave the appellant and move in with Mrs. Morton. The “mini” vacation was to start on August 6, 2009. Appellant testified that she knew of the planned trip and assisted Michael Surbaugh in packing for the trip.

C. Incident on August 6, 2009. On the morning of August 6, 2009 at approximately 7:30 a.m., Leon Adamy, who lived just across the street from the Surbaughs, was leaving his residence when he heard three shots in rapid succession with each shot followed by a groan. The sounds came from the open window of the Surbaughs’ bedroom. Mr. Adamy did not hear any sounds consistent with a struggle or verbal argument. (Trial Transcript, Page 208, Line 21 through Page 210, Line 6)

Shortly after the shots appellant engaged in four telephone calls both to and from 9-1-1. In the first brief call to 9-1-1 she stated that Michael Surbaugh was trying to shoot himself and then she hung up. (Vol I, AR 139) After dispatching law enforcement to an attempted suicide in progress, the 9-1-1 operator called back to the residence. Julia Surbaugh answered and stated “Mike shot himself” before once again hanging up the telephone. (Vol I, AR 140) Again, the 9-1-1 operator called back to the residence. The appellant again answered and advised the dispatcher that Michael Surbaugh had shot himself. During this call the victim can be overheard making various statements. Once again the appellant hung up mid-call. (Vol I, AR 149) On the fourth call, Ann Wilson, a neighbor of the Surbaughs, answered the telephone and relayed information from Julia Surbaugh to the operator. During this telephone call appellant claimed that Michael Surbaugh tried to shoot her and, after the gun accidentally discharged and struck him during the ensuing struggle, he then shot himself in the head. (Vol I, AR 141)

Deputy Vandevender, who had been dispatched to an attempted suicide (Trial Transcript,

Page 402, Line 21) and was the first to arrive on scene discovered Mr. Surbaugh sitting in front of the house talking on a cellular telephone and bleeding from the face and head. Initially, Deputy Vandevender thought that the cellular telephone was a gun that Michael Surbaugh was holding to his head. (Trial Transcript, Page 404, Lines 19 - 22)

After discovering that the victim was holding a telephone and not a gun, Deputy Vandevender approached the victim and asked him what had happened. The victim told Deputy Vandevender that appellant had shot him and that he thought that the gun was somewhere in the house. Deputy Vandevender went into the house but was unable to locate the gun. (Trial Transcript, Page 405, Line 10 through Page 406, Line 9)

Ann Wilson and Debra White, neighbors of the Surbaughs, along with appellant, who was covered in blood, were also present at the residence. Other officers and medical personnel arrived to assist with the incident. Wilson and White had previously told dispatchers that they did not know the location of the gun. (Vol. I, AR 141)

Appellant claimed that Michael Surbaugh had tried to kill her and, failing that, had shot himself. Mr. Surbaugh indicated to officers and EMS that appellant had shot him. (Trial Transcript, Page 330, Line 17, through Page 331, Line 10) Mr. Surbaugh was immediately taken to Webster County Memorial Hospital for further treatment. At this point the firearm used in the incident had not been located.

While other officers continued the investigation at the Surbaugh home, Deputy David Vandevender went to the hospital and, after gaining permission of the doctors to speak with the victim, he spoke with Michael Surbaugh to attempt to learn more about what had happened. Deputy Vandevender recorded this conversation. Michael Surbaugh told Deputy Vandevender that he had been asleep in bed. He felt like he got hit with a bat twice. Deputy Vandevender

asked where the gun was and the victim said that, upon getting up out of bed he discovered the appellant with a gun, which he then took from her. He did not give a further location of the gun. A complete transcript of the recorded statement is contained in the appendix record. (Vol I, AR 151)

Up to this point, Michael Surbaugh had made various verbal statements to officers and EMS which are adequately summarized in appellant's brief. Thereafter, Michael Surbaugh was transferred by ambulance to another location to meet the HealthNet helicopter. As he was being transferred onto the helicopter Mr. Surbaugh died from his injuries.

In the interim, officers, with the appellant's permission, searched the Surbaugh home. Investigators found large amounts of blood in the bed and bedroom and a trail of blood leading from the bedroom to the bathroom and out the front door of the residence to the location where the victim was discovered. Appellant told the officers that Michael Surbaugh still had the gun when he walked toward the living room and left the residence. (Trial Transcript, Page 592, Line 6) The officers also eventually found the gun in a laundry hamper near the front door. (Trial Transcript, Page 588, Line 3) During the search of the bedroom officers discovered a broken water glass on the night stand near the bed and pieces of a bullet lying in the floor near the night stand.

D. Appellant's Statements. In addition to the 9-1-1 calls, Julia Surbaugh gave three recorded statements and various verbal statements to officers. During the first recorded statement, which was taken by Deputy Rick Clayton an hour or so after officers arrived at the scene, she said that she and the victim were lying in bed when he reached for a gun with his left hand. She claimed that the victim attempted to shoot her and, during the struggle, she slapped the gun, which flew backward, discharged and struck Michael Surbaugh in the face. She then claimed

that he took the gun in his left hand, put it to his head, said "I'm not going to let you get me for this bitch" and shot himself. Appellant took the officers into the bedroom and demonstrated how she claimed this occurred.

The second recorded statement was taken on the evening of August 11, 2009 at the Webster County Sheriff's Department by Deputy Vandevender. Appellant had come into the officer requesting to "clear up" some things about her first recorded statement to Deputy Clayton which was made on August 6, 2009. Deputy Vandevender read appellant her Miranda rights and permitted her to listen to her August 6, 2009 statement.

After listening to a portion of the recorded statement, appellant proceeded to make a statement of approximately one and one half hours in length. During the statement she gave a detailed account of her version of the events of August 6. Appellant claimed that the victim attempted to shoot her. She said that, during the struggle, the gun discharged once without striking appellant or victim. She then claimed that the gun discharged and struck the victim in the face, after which he then shot himself in the left side of the head. Appellant specifically stated that the gun was always in the victim's left hand.

During the August 11, 2009 statement appellant also told Deputy Vandevender "My lawyer would prob, well my lawyer has not been retained yet, but he would probably be hanging me by my toenails if he knew I was just telling you guys the truth." After giving the recorded statement and before leaving the Sheriff's office the appellant told Deputy Vandevender that she did not know why she would be arrested but, in the event she were arrested she wanted Dennis and Ann Wilson to take custody of her children.

On the morning of August 12, 2009, Deputy Vandevender, Deputy Clayton and Trooper J. D. Jordan went to the Webster County Prosecutor's Office to discuss the medical examiner's

findings and a possible search warrant for the appellant's residence.¹ Shortly after arriving at the Prosecutor's Office, Deputy Vandevender received a telephone call from the Sheriff's office advising him that Appellant was at the office requesting to speak with him. Deputies Clayton and Vandevender proceeded to the Sheriff's office to speak with appellant.

Trooper Jordan stayed behind and proceeded to work on the affidavit for the search warrant and arrangements for the crime scene team to serve the search warrant. While working on the search warrant Trooper Jordan spoke with the Prosecutor about the possibility of obtaining an arrest warrant for Appellant. Along with the affidavit for search warrant, a criminal complaint was prepared. Trooper Jordan proceeded from the Prosecutor's Office to the Magistrate Court, presented the criminal complaint to the Magistrate and obtained an arrest warrant for the appellant.

In the meantime, after reading the appellant her Miranda rights, Deputies Clayton and Vandevender were taking a recorded statement from her. Near the beginning of the third recorded statement the defendant tells the deputies, "Yeah, go ahead. This is the last time I'll be speaking to you without a lawyer. I know that." Later the appellant says, "I need to get a lawyer." Deputy Clayton responds, "I mean, it's – that's totally up to you Julia. You have every right to do that." The Appellant then re-initiated the conversation by asking various questions and stating that, if she is going to be arrested, she will need to leave to make arrangements for her children.

After obtaining the arrest warrant, Trooper Jordan went to the Webster County Sheriff's

¹ The medical examiner had concluded that the victim had been shot three times, not twice as originally believed. The medical examiner had also concluded that, since one bullet was found at the scene on August 6, 2009 and one bullet was found near the right temple of the victim, a third bullet should be somewhere in the bedroom of the residence. The medical examiner had requested that officers attempt to locate the missing bullet.

Department and entered the room where the deputies were speaking with the appellant. On the recorded statement, Trooper Jordan is noted to enter the room approximately two-thirds of the way through the recorded statement.

Trooper Jordan did not advise the deputies, nor the appellant, that he had obtained the arrest warrant and none of the parties that were in the room when Trooper Jordan entered were aware that he had obtained the arrest warrant. In fact, the deputies testified at a pre-trial hearing that, until she was placed under arrest by Trooper Jordan, they believed the appellant was free to leave, if she so chose, and they would have allowed her to do so.

Shortly after Trooper Jordan entered the room the following exchange took place:

Surbaugh: I need to talk to a lawyer.

Deputy Clayton: Okay. Like I said that, that's...

Surbaugh: I need to go down and get things in place with DHHR.

Clayton: You know, if you need to speak to a lawyer that's, that's your right. You have every right to do that. I just sa., I wanted to let you know where we stood on this. I wanted to let you know where we were at and that's fine. That will conclude this statement.

Surbaugh: Wait....., wait a minute. Wait a minute.

Clayton: Okay

Surbaugh: I thought the third shot had gone into the closet. He pulled the trigger on his head himself after I shot him in the face twice.

The interview continued for approximately four additional minutes and was concluded when the appellant again requested to speak with a lawyer. At the conclusion of the interview Trooper Jordan advised the deputies and the appellant that he had the arrest warrant and placed the appellant under arrest. After her arrest, after being told that she had asked for a lawyer and should be quiet and without any further questioning whatsoever, appellant continued to make various verbal statements to Trooper Jordan, Deputy Clayton, Deputy Vandevender and Sheriff Hamrick about the incident.

During the course of arraignment and processing the appellant stated the following:

1. To Trooper Jordan while being taken to arraignment: “I want you to know, I didn’t do it because he was leaving me. I did it because he was taking my kids with him.”

2. To Deputy Clayton while awaiting arraignment in Magistrate Court: “Rick, I know I asked for a lawyer, but I wanted you to know I didn’t do it because he was leaving me, I did it because he was taking my kids.”

3. To Deputy Vandevender at the Sheriff’s Office:

Surbaugh: Well, at least my kids are safe.

Vandevender: Dennis and Ann will take care of them.

Surbaugh: No. I mean at least they are safe now.

4. To Sheriff Hamrick, while being processed: “At least they (her children” won’t have to grow up with drug heads.”

ARGUMENT

I. THE LOWER COURT DID NOT ERR IN ADMITTING STATEMENTS OF THE VICTIM DURING THE TRIAL OF THIS MATTER.

Appellant argues that the lower court erred in admitting the statements of the victim and divides the statements into two separate categories. First, the appellant asserts that the recorded statement of the victim which was taken by Deputy Vandevender at the emergency room of Webster County Hospital is a testimonial statement and should have been prohibited under the standards set forth in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2000). Second, Appellant asserts that the remaining oral statements made by the victim should not have been admitted under the hearsay exceptions set forth in the West Virginia Rules of Evidence.

The recent United States Supreme Court case *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), clarified the Court’s holdings in *Crawford*. In *Bryant* the Court considered the admissibility of statements made to responding police officers by a gunshot victim prior to his death. In ruling the statements admissible and upholding the conviction, the Court set forth an objective analysis to consider the primary purpose of the questions and answers in determining the testimonial nature of the statements. The Court reviewed various factors including the

circumstances in which the statements were taken, the existence of an ongoing emergency, the type of weapon involved, the victim's medical condition and the statements and actions of both the officers and the victim in the questioning and answering.

In addressing the issue the Court reiterated the rulings in *Davis v. Washington*, 547 U. S. 813 (2006) and *Hammon v. Indiana*, 547 U.S. 813 (2006) and stated:

“Statements are nontestimonial 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. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis*, 547 U. S., at 822.

The *Bryant* Court further stated:

(1) The primary purpose inquiry is objective. The circumstances in which an encounter occurs—*e.g.*, at or near a crime scene versus at a police station, during an ongoing emergency or afterwards—are clearly matters of objective fact. And the relevant inquiry into the parties' statements and actions is not the subjective or actual purpose of the particular parties, but the purpose that reasonable participants would have had, as ascertained from the parties' statements and actions and the circumstances in which the encounter occurred.

(2) The existence of an “ongoing emergency” at the time of the encounter is among the most important circumstances informing the interrogation's “primary purpose.” See, *e.g.*, *Davis*, 547 U. S., at 828 - 830. An emergency focuses the participants not on “prov[ing] past events potentially relevant to later criminal prosecution,” *id.*, at 822, but on “end[ing] a threatening situation,” *id.*, at 832. The Michigan Supreme Court failed to appreciate that whether an emergency exists and is ongoing is a highly context-dependent inquiry. An assessment of whether an emergency threatening the police and public is ongoing cannot narrowly focus on whether the threat to the first victim has been neutralized because the threat to the first responders and public may continue.

The *Bryant* Court noted that the logic of its analysis was “not unlike that justifying the excited utterance exception in hearsay law. Statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” In short, the determination of the admissibility of the deceased victim's statement is an objective

analysis based upon the facts of the case. The facts in this case are much like the facts in the *Bryant* case.

The responding officers in this case were told by dispatchers that Michael Surbaugh was trying to shoot himself and that the location of the gun was unknown. Upon arriving at the scene, officers discovered Mr. Surbaugh bleeding from gunshot wounds to the head. Officers received conflicting stories from Mr. Surbaugh and the appellant as to the facts of what happened and were also unable to locate the gun prior to the time that Mr. Surbaugh gave each of his verbal statements and the recorded statement. The officers also knew that the Surbaughs had two young children residing in the home.

Although Michael Surbaugh made several statements, they were made in a short period of time after emergency personnel arrived at the scene and took him to the hospital for treatment. He was suffering from serious injuries, i.e. three gunshot wounds to the head. (Trial Transcript Page 296, Line 14) In listening to the recording of the statements made by Mr. Surbaugh at the emergency room it is perfectly obvious that the statement was not a formal interrogation, but rather a hurried questioning lasting approximately one minute and ten seconds while Mr. Surbaugh is being prepared for transport to HealthNet. Deputy Vandevender asked Mr. Surbaugh what happened, who he thought did it and the location of the gun. In fact, at the end of the statement, medical personnel can be overheard asking the deputy "Can you turn it off?" and the emergency room being notified by the hospital operator of an incoming call from the helicopter, "ER, Healthnet 101." (Vol I, AR 153)

Likewise, the verbal statements of the victim were taken in a hurried manner by officers, emergency services responders and medical personnel. For example, in attempting to provide treatment to the victim, Dan Moran, the first paramedic on scene, questioned Mr. Surbaugh about

the nature and cause of his injuries. During this questioning the victim told Mr. Moran that he did not shoot himself and that appellant had shot him. (Trial Transcript Page 297, Line 2 - 18)

Therefore, the circumstances in which the statements were taken were in non-formal settings under hurried and emergent circumstances. Since the location of the firearm was unknown and there was the possibility that the appellant was the gunman and that she had continued access to the weapon, danger to the responding officers and emergency services personnel continued to exist. Further, a danger to the public continued to exist, not the least of which was the possibility that, if the gun was not located, the Surbaughs' young children or other children in the neighborhood may find and have access to it.

In addition, the victim's statements are admissible under both the excited utterance exception in Rule 803(2) and general hearsay exceptions of Rule 804(b)(5) of the West Virginia Rules of Evidence. From the third 9-1-1 call where Mr. Surbaugh can be overheard saying "The gun didn't go off Julie" (Vol I, AR 49) to the final recorded statement he made to Deputy Vandevender, the victim consistently maintained that he did not shoot himself. In many of the statements he maintained that appellant shot him. The veracity of these statements was later confirmed by appellant in her third recorded statement to the officers. Further, the statements were all made near in time to the victim being shot in the head and, based upon all of the testimony of responding officers, paramedics and medical personnel he was still laboring under the stress of the events. Therefore, he did not have time to contrive answers in an effort to illegitimately incriminate the appellant for the purpose of having her prosecuted.

This proposition is further supported by the victim's answers to Deputy Vandevender during the recorded statement. Deputy Vandevender asked, "Who do you think done it?" and the victim responded, "I don't know." Later, after the victim told Deputy Vandevender that he had

taken a gun away from the Appellant, Deputy Vandevender asked, “So you think Julia done this?”, to which Mr. Surbaugh responded, “I don’t know.” If Mr. Surbaugh were lying in an effort to falsely incriminate the appellant this was the perfect opportunity for him to do so.

In appellant’s brief counsel argues that the victim’s statements are unreliable and should not have been admitted in light of uncontested blood spatter evidence rendered by Dr. Daniel Spitz. The jury heard that evidence. The jury also heard the cross-examination of Dr. Spitz regarding investigative procedures and conclusions reached in the book which he helped co-author versus the inconsistent factual conclusions which he was highly paid to reach in this case. Based upon the verdict, the jury clearly resolved these inconsistencies in favor of the State and this Court should not invade the providence of the jury in resolving this factual issue.

Based upon all of the relevant facts in this case, the statements of Mr. Surbaugh were not testimonial in nature and were properly admitted at trial pursuant to the standards set forth in *Crawford* and *Bryant*. Further, the Court did not err in determining that the statements were also admissible under the cited hearsay exceptions.

II. THE LOWER COURT DID NOT ERR IN ADMITTING THE PORTION OF THE “THIRD STATEMENT” OF APPELLANT.

Appellant argues that the lower Court erred in admitting the final portion of appellant’s third recorded statement to officers, which was taken after Trooper Jordan entered the room with an arrest warrant for the appellant. *State v. Persinger*, 286 S.E.2d 261, 169 W.Va. 121 (1982) citing *Edwards v. Arizona*, 101 S.Ct. 1880, 1883-84, 68 L.Ed.2d 378, 385 (1981) sets forth a totality of the circumstances test, including various factors to be considered by the Court in determining the voluntariness and admissibility of the confession. *Persinger* states:

The interior quoted language from *Edwards* is often referred to as the totality of the circumstances surrounding the confession. Thus the voluntariness of a confession is an inquiry that must be gauged by the totality of the circumstances

under which it was given including the background, experience and conduct of the accused. See *Fare v. Michael C.*, 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979); *Clewis v. Texas*, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967); *Fikes v. Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957)

State v. Bradshaw, 193 W.Va. 519, 457 S.E.2d 456 (1995) this Court stated, "In examining the totality of the circumstances, a court must consider a myriad of factors, including the defendant's age, intelligence, background and experience with the criminal justice system, the purpose and flagrancy of any police misconduct, and the length of the interview."

This Court further set forth the standard of review of the trial court's decision in syllabus point two of *State v. Johnson*, 219 W.Va. 697, 639 S.E.2d 789 (2006) which states:

When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error." Syl. Pt. 1, *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996).

Appellant further argues that her sixth amendment right to counsel attached when Trooper Jordan walked into the Sheriff's Department with an arrest warrant for her. Counsel urges that the Trooper should have stopped the deputies from continuing to take a statement and advised the defendant of her sixth amendment right to counsel.

In *State v. Barrow*, 359 S.E.2d 844, 178 W.Va. 406(1987), syllabus points 1 and 2, this Court stated:

1. If police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid because it was taken in violation of the defendant's Sixth Amendment right to counsel.

2. "An adversary judicial criminal proceeding is instituted against a defendant where the defendant after his arrest is taken before a magistrate pursuant to W.Va.Code, 62-1-5 [1965], and is, inter alia, informed pursuant to W.Va. Code, 62-1-6 [1965], of the complaint against him and of his right to counsel."

Syllabus Point 1, in part, *State v. Gravely*, 171 W.Va. 428, 299 S.E.2d 375 (1982).

In *Johnson*, 291 W. Va. 697, 703 this Court considered the admissibility of the confession of defendant after he had been arrested upon a warrant issued upon a criminal complaint. The Court stated:

West Virginia Code § 62-1-5(a)(1) directs 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 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." Rule 5(a) of the West Virginia Rules of Criminal Procedure reiterates this principle. *Johnson* was arrested at approximately 5:20 p.m. on June 26 and was presented before a magistrate at some time before 8:00 p.m. that same evening. The "delay," then, was no more than two hours and forty minutes. It should also be noted that between 5:20 p.m. and 6:41 p.m., the police were questioning *Johnson's* accomplice, Allen Myers.

We have held that "[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). However, in *DeWeese*, we specifically found that the facts in that case clearly established that the defendant, who was held for fifteen hours before being presented to a magistrate, was not promptly taken before a magistrate because the police wanted to obtain a statement from him. In the instant case, *Johnson* has produced no evidence that the delay in his presentment was for the purpose of obtaining a statement, and we can find no evidence of such a motive either.

For the first hour and twenty-one minutes that he was held, the detectives were interviewing *Johnson's* accomplice. *Johnson* was then Mirandized and interviewed between 6:43 p.m. and 7:00 p.m. There was no shake-down. *Johnson* was not harangued or otherwise coerced into making a statement. He was read his rights and then allowed to speak in narrative with very little interruption or questioning from the detective. Moreover, the statement that *Johnson* gave to police was in no way a confession. To the contrary, *Johnson* maintained his innocence throughout the interview. He did repeatedly refer to his "jacket," a slang term for criminal record, but that did not in any way incriminate him in the Marathon robbery. " ' "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." Syllabus Point 6, *State v. Persinger*, 169 W.Va. 121, 286 S.E.2d 261 (1982), as amended.' Syllabus Point 1, *State v. Guthrie*, 173 W.Va. 290, 315 S.E.2d 397 (1984)." Syl. Pt. 8, *State v. Milburn*, 204 W.Va. 203, 511 S.E.2d 828 (1998). Such was not the case here, so, showing deference to the trial court, we find no error in

the court's admission of Johnson's statement to police.

The facts and circumstances leading up to the obtaining of the arrest warrant and the appellant's confession during her third statement are undisputed. Prior to August 12, 2009, the appellant had given various oral statements and two recorded statements to investigators. Prior to the second recorded statement given by the appellant on the evening of August 11, 2009, she was read her Miranda rights and waived the same. Also, during that statement she told the deputy, "My lawyer would prob..., well my lawyer has not been retained yet, but he would probably be hanging me by my toenails if he knew I was just telling you guys the truth."

On the morning of August 12, 2009 investigators met at the Prosecutor's office to discuss the preliminary findings of the medical examiner. Officers were discussing obtaining a search warrant for the Surbaugh residence in an effort to find a missing third bullet. It was determined that Deputy Clayton was going to apply for a search warrant and Trooper Jordan was going to coordinate the use of the State Police Crime Scene team in executing the warrant. During the meetings discussions turned to the possibility of the arrest of the appellant. However, those discussions were immediately interrupted by a telephone call from the Sheriff's office to advise the deputies that the Appellant had unexpectedly appeared at the Sheriff's office asking to speak with them.

Deputy Clayton and Deputy Vandevender left Trooper Jordan at the Prosecutor's office to assist in preparing the affidavit for the application for the search warrant and proceeded to their office to meet with the appellant. At the time that the deputies left the Prosecutor's office they knew that the Prosecutor had advised that there was probably enough to arrest the appellant, but that there were still some issues that needed taken care of before deciding to make an arrest. However, there had been no talk of immediately obtaining an arrest warrant and the discussions

were interrupted by the aforementioned telephone call from the Sheriff's office. (Pre-trial Hearing Transcript, Page 144, Lines 9 - 24 and Page 145, Lines 1 - 13) Upon leaving the Prosecutor's office the deputies did not know that in reviewing all of the facts for the search warrant affidavit a decision would be for Trooper Jordan to obtain an arrest warrant while the deputies were meeting with the appellant. In fact, Deputy Clayton testified that he would have let appellant leave his office if she chose to do so. (Pre-Trial Hearing Transcript, Page 147, Lines 20 - 24)

The deputies arrived at their office and met with the appellant. Deputy Clayton advised the appellant, in writing, of her Miranda rights and she waived the same.² Deputy Clayton then turned on a recorder and placed a heading upon the recording. Appellant then began her statement without any questioning from the deputies. After the deputies began asking questions about what the appellant was telling them she stated, "Yeah go ahead this is the last time I'll be speaking to you without a lawyer I know that." (Vol I, AR 88)

Deputy Clayton then confronted the appellant with inconsistencies between her statements and the preliminary findings of the medical examiner. Deputy Clayton told the appellant, "Well, now like I said there are sev..., several major inconsistencies. The shots to the side of the face are of a distance greater than eighteen inches and there's no way he could have done those himself. There's no way." (Vol I, AR 188). He also told the appellant, "And there's, there's other inconsistencies, he was actually shot three times and that's ___ there were only three rounds fired." (Vol I, AR 189)

After being confronted with the inconsistencies the following exchange took place:

² This was the second time within less than eighteen hours that investigators had advised Appellant of her Miranda rights.

JS: Where was he shot?³
DC: Right here, here, and here. So I mean, if, if it's ruled a homicide by the Chief Medical Examiner and only two people in the house.⁴
JS: I need to get a lawyer.
DC: I mean, it's that's totally up to you Julia, you have every right to do that um,
JS: Am I being arrested now?
DC: Ah, well I mean it's, it's going to come... I mean I'm not sure...
JS: I have to go down...
DC: ...real Soon.
JS: In place at DHHR.
(Vol I, AR 189)

The appellant then proceeded to re-engage the officers in conversation. Thereafter, Trooper Jordan entered the room where the defendant was being questioned by deputies. Trooper Jordan did not inform the deputies nor the appellant that he had, in fact obtained an arrest warrant for the appellant. Shortly after Trooper Jordan entered the room the following exchange took place:

DC: So how do we want to go with this?
JS: I need to talk to a lawyer.
DC: Okay like I said that's, that's.
JS: I need to go down and get things in place with DHHR.
DC: You know if you need to speak to a lawyer that's, that's your right. You have every right to do that. I just sa, I wanted to let you know where we stood on this. I wanted to let you know where we were at and that's fine. That will conclude this statement.
JS: Wai, wait a minute, wait a minute...
DC: Okay
JS: I thought the third shot had gone into the closet. He pulled the trigger on his head himself after I shot him in the face twice.
(Vol I, AR 191)

Even though the appellant had invoked her right to counsel by stating that she needed to talk to a lawyer, appellant then stopped the deputy from turning off the recorder to conclude the interview and made additional inculpatory statements.

³ JS is the appellant, Julia Surbaugh.

⁴ DC is Deputy Clayton.

In considering the totality of the circumstances, the facts in this case show that:

1. The questioning of the appellant on August 12, 2009 was not unduly lengthy.
2. The appellant is a well educated, intelligent person.
3. The appellant appeared on her own accord at the Sheriff's Department on at least two occasions, including the morning of August 12, 2009, and requested to speak with deputies.
4. The appellant was properly Mirandized prior to her statements on both August 11, 2009 and August 12, 2009 and waived her right to counsel.
5. During the August 12, 2009 statement the appellant repeatedly expressed her knowledge that she was entitled to an attorney.
6. After the appellant indicated she wished to speak with a lawyer she voluntarily recanted that request without further police action or questioning, stopped Deputy Clayton from concluding the August 12, 2009 interview and continued speaking with the deputies.
7. After her arrest, the appellant made oral statements to Trooper Jordan on the way to Magistrate Court and he advised her that she had asked for a lawyer and should be quiet.
8. After her arrest and the subsequent warning by Trooper Jordan, the appellant continued to make unsolicited, spontaneous statements to Deputy Clayton, Deputy Vandevender, Sheriff Hamrick and Corporal Loughridge.
9. The appellant was not restrained or handcuffed at any time prior to or after her arrest by Trooper Jordan.
10. There were no exigent circumstances which would have justified the warrantless arrest of the appellant when the deputies met with her on the morning of August 12, 2009 and Trooper Jordan acted properly in obtaining an arrest warrant for the defendant prior to making the arrest.
11. After Trooper Jordan entered the room with the arrest warrant the appellant was no

longer free to leave. However, that fact was not communicated to the deputies conducting the interview nor to the appellant.

12. By all appearances the defendant wished to speak with the officers and continued to do so, at her own peril, even after her arrest and warnings by the officers that she should remain quiet.

“Where a statement or confession is inadmissible by the State because of a constitutional infirmity in the method by which it was obtained, the reason for its inadmissibility is the belief that illegal police conduct will be discouraged if the prosecutorial enterprise is denied the fruits of the illegal conduct... However, police behavior need not rise to the level of misconduct before constitutional protections may attach. [citing] *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). Furthermore, it is not on the issue of police behavior that the question exclusively turns. As Professor Whitebread points out, "The two categories of factors in the due process cases are (1) the police conduct involved and (2) the characteristics of the accused." [citing] C.H. Whitebread, *Constitutional Criminal Procedure* 164, (1978).” *State v. Williams*, 171 W.Va. 556, 301 S.E.2d 187 (1983) at 171 W.Va. 560.

As in *Johnson* the officers in this case acted properly. They did not unduly delay arresting appellant and presenting her before a Magistrate. They did not “shake down”, harangue or otherwise coerce appellant into making the statement. In fact, the totality of the circumstances show that the appellant, who was well educated and intelligent, was intent on making statements to the police, despite advice from a lawyer which she had apparently consulted, and even after her arrest. Further, since there was no police misconduct, the exclusionary rule should not apply.

III. THE LOWER COURT DID NOT ERR IN REFUSING INSTRUCTIONS BASED UPON STATE V. HARDEN.

In this assignment of error appellant relies upon the case of *State v. Harden*, 223 W.Va.

796, 679 S.E.2d 628 (2009). In *Harden* the appellant relied upon self-defense which essentially amounted to a "battered spouse" defense. In delivering the Court's opinion Justice Ketchum wrote:

It is clear to us that our precedent since *McMillion* provides that the decedent's violent criminal acts and threats of death are relevant to the determination of the subjective reasonableness of the defendant's belief that she was at imminent risk of death or serious bodily injury. This is to say, under the facts of this case, the defendant's subjective belief that death or serious bodily injury was imminent, and that deadly force was necessary to repel that threat, necessarily included the fact that the decedent had, precipitously preceding his death, physically and sexually assaulted the defendant and repeatedly threatened the life of the defendant and the lives of the children.

We therefore hold that where a defendant has asserted a plea of self-defense, evidence showing that the decedent had previously abused or threatened the life of the defendant is relevant evidence of the defendant's state of mind at the time deadly force was used.

The facts in *Harden* are substantially different that the facts in the instant case. In *Harden* the Court noted that:

The evidence adduced at the defendant's trial showed that the decedent, while drinking heavily (with a blood alcohol count ultimately reaching 0.22% at the time of his death) subjected the defendant to a several-hour-long period of physical and emotional violence. This violence included the decedent brutally beating the defendant with the butt and barrel of a shotgun, brutally beating the defendant with his fists, and sexually assaulting the defendant. An emergency room physician at Cabell Huntington Hospital, who examined the defendant on the morning of the shooting, testified that the defendant "had contusions of both orbital areas, the right upper arm, a puncture wound with a foreign body of the right forearm, contusions of her chest, left facial cheek, the left upper lip" and that "X-rays done at the time demonstrated a nasal fracture."

In addition to the physical violence summarized above, the evidence adduced at trial also showed that the decedent repeatedly threatened to kill the defendant and the defendant's nine-year-old son B.H., ten-year-old daughter A.H., and ten-year-old B.K. (a friend of A.H.'s who had been invited for a "sleep over"). This evidence included testimony from two of the children. B.H. testified to seeing and hearing the decedent say to the defendant "I am going to go get the gun and shoot you" and that the decedent did, in fact, go to a back room in the defendant's home and get a shotgun, and returned to the room with the gun where the decedent subsequently struck the defendant with the butt of the gun in the

shoulders and arms while she was seated in a recliner. In addition to B.H.'s testimony, B.K. also testified that she was frightened by what she could hear from her bedroom and had difficulty falling asleep, and that after finally falling asleep, she was awakened by more sounds of fighting, at one point over-hearing the defendant say to the decedent that "she didn't want to get killed with her two kids."

It is conceded by the State that the defendant suffered a "night of domestic terror."

In the instant case the record is wholly devoid of any such violence. In fact, the appellant testified that the victim was not physically violent with her. (Trial Transcript Page 855, Line 3) The worst the appellant could say about the decedent was that he would pinch her on the arm, get loud and throw things. (Trial Transcript Page 854, Lines 9 - 22) This is substantially different than the facts which this Court found warranted the requested instruction in the *Harden* case.

The Court gave a requested self-defense instruction, but refused the requested *Harden* instruction. Further, in instructing the jury on self-defense the Court stated, "The reasonableness of Julia Ann Surbaugh's belief depend upon all the circumstances, including any past actions or conduct of Michael Surbaugh as it may have been known by or directed towards Julia Ann Surbaugh. You may also consider in determination of the reasonableness of Julia Ann Surbaugh's belief, the general reputation of Michael Surbaugh as is known by Julia Ann Surbaugh at the time of the claim of self defense." Based upon the facts, as testified to by appellant, the Court properly instructed the jury.

IV. THE LOWER COURT DID NOT ERR IN REFUSING TO GIVE A GOOD CHARACTER INSTRUCTION

"Instructions in a criminal case which are confusing, misleading or incorrectly state the law should not be given." Syllabus point 4, *State v. Wyatt*, 198 W.Va. 530, 482 S.E.2d 147 (1996) citing Syllabus Point 3, *State v. Bolling*, 162 W.Va. 103, 246 S.E.2d 631 (1978). Syllabus Point 4, *State v. Neary*, 179 W.Va. 115, 365 S.E.2d 395 (1987). Syllabus point 9, *State v. Murray*,

180 W.Va. 41, 375 S.E.2d 405 (1988).

In this case appellant offered Defendant's Proposed Instruction No. 10 which stated:

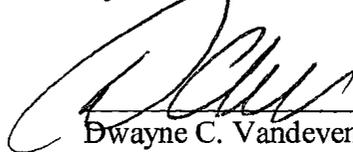
The [defendant] Julia Surbaugh has introduced evidence of her good character. Good character is a circumstance to be considered by the jury with all other facts and circumstances in the case *on the question of guilt or innocence of Julia Surbaugh, and can, alone, give rise to a reasonable doubt of her guilt on your part*; but if you believe Julia Surbaugh is guilty beyond a reasonable doubt, her good character cannot be taken into consideration to mitigate, justify or excuse the commission of the crime. (Emphasis added)

No case law or legal authority was offered to support this instruction. The State believes that this instruction is confusing, misleading and a misstatement of the law. The instruction tells the jury that appellant's good character alone can establish reasonable doubt, thus permitting them to find her not guilty. The Court correctly denied the instruction.

CONCLUSION

The State asserts that the appellant received a fair trial and that this Court should refuse the petition for appeal.

Respectfully submitted,
State of West Virginia
By Counsel,



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CERTIFICATE OF SERVICE

I, Dwayne C. Vandevender, hereby certify that I have, on the 22 day of August, 2011, served true and accurate copies of the foregoing Respondent's Brief upon counsel for the Appellant, by United States Mail, proper postage affixed and addressed at follows:

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