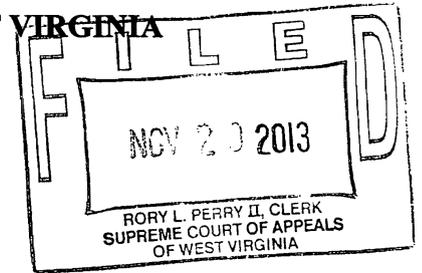

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0769



STATE OF WEST VIRGINIA,
Plaintiff below,
Respondent,

v.

DAVID M. COREY,
Defendant below,
Petitioner.

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

David Corey is appealing his April 26, 2013 conviction for the first-degree murder of his brother Danny. After a three-day trial, a jury found that Corey—depressed and jealous—murdered his brother by shooting him through an open window. The facts introduced at trial are as follows.

At around 8 p.m. on January 8, 2012, Danny Corey was upstairs in his mother’s home in Romney, West Virginia. Ten-year-old Hannah Corey (David’s daughter) was downstairs with her bedridden aunt when she heard a gunshot. She ran upstairs to find her uncle Danny non-responsive with blood coming out of his back. (App. C-155; App. D-20.)¹ Hannah first called her grandmother, who was making rounds as a nurse; she instructed Hannah to call 911. (App. D-20.) First responders arrived and transported Danny Corey to the hospital, where he was later declared dead. (App. C-126.)

Authorities eliminated suicide as a cause of Danny’s death. (App. C-115.) No gun was found near Danny Corey’s body. (App. C-115 to -16.) And the trajectory of the .30 caliber ammunition round that killed Danny—which passed through his ribs, lung, heart, the other lung, and out underneath his arm (App. D-259 to -60)— came from outside of the house, through an open window and mesh screen. (App. C-116, C-118 to -22.)²

Police came to learn more about David and Danny’s strained relationship, suggesting that David had a motive to commit fratricide. David was depressed over the lack of a home and job; he and Danny fought over who would inherit their mother’s home; and David was angry that

¹ References herein to “App. _” refer to the documents contained in Volume One of the Appendix. References with a letter preceding the page number refer to the “Transcript Volume” of the Appendix.

² The State’s ballistics expert could not identify whether the round was a .30-06 round or a .30-30 round because the recovered bullet was so badly damaged. (App. D-225.)

Daniel would smoke marijuana in front of David's daughter, Hannah. (App. D-64 to -65.) David was also insecure in his relationship with his girlfriend, Kathy Stonebreaker, and he believed that Danny had romantic feelings for her. (App. D-72 to -73.) In fact, the day before Daniel was murdered, David pulled out a pistol in front of a friend and "said he was going to shoot his girlfriend, his girlfriend's boyfriend, and his brother Dan." (App. E-30.) And just a couple of months prior to the murder, David threatened Danny, "I'm going to kill you, mother fucker." (App. D-99.)

David also possessed the physical tools to commit this murder. David had kept a gun in his mother's backyard, (App. D-70), and he had bragged about his skills as a "sniper," (App. D-65 to -67). A search warrant uncovered a box of .30-06 ammunition buried under a brush pile in David Corey's yard. (App. D-136 to -42.) Corey denied the ammunition was his, but the nearby discovery of a tin box containing collector knives that undoubtedly belonged to Corey undermined his denial. (*Id.*; App. C-166 to -70.) And after the shooting, a gunshot residue test revealed that residue on David's hand and face. (App. D-206.)

This evidence led authorities to charge David with Danny's death. On February 14, 2012, David Corey was arrested for murder, and he was indicted on a single charge of first-degree murder on September 5, 2012. (App. 14-15.) Pertinent to this appeal, on October 19, 2012, the Circuit Court ordered that no witness should reference David Corey's criminal conviction history during their trial testimony. (App. 23.) Trial was initially set for November 13, 2012, (App. 18), but it was subsequently continued until December 13, 2012 (App. 25). Ten days prior to that revised trial date, on December 3, 2012, the State moved for another continuance because the Prosecuting Attorney had recently had surgery and, as a result, would be unable to go to trial in December. (App. 49-51.) The Circuit Court granted the continuance, finding good cause, both in

the Prosecutor's medical condition, and noting that "due to a recent injury, it may be necessary for the Judge to undergo surgery in the next several weeks." (App. 58.)

Corey's case went to trial on April 24, 2013. On April 26, 2013, the jury returned a guilty verdict without recommending mercy. (App. 186-87.) On June 4, 2013, Corey was sentenced to life in prison without parole. (App. 149-51.) This appeal followed.

SUMMARY OF ARGUMENT

Corey's claims in this direct appeal lack merit and must be rejected. *First*, the affidavit that formed the foundation of the January 10, 2012 search warrant, which uncovered a bag of .30-06 ammunition in Corey's backyard, was valid. Although the affidavit contained potential hearsay from Corey's girlfriend, Kathy Stonebreaker, her statements were made against her boyfriend's penal interest and were otherwise reliable. The affidavit provided sufficient information for the magistrate to conclude that there was probable cause that David Corey committed this crime, and it withstands appellate scrutiny.

Second, the trial court did not abuse its discretion in allowing the State to explain to jury that a tin box of collector knives, which undoubtedly belonged to David Corey, was buried near a bag of .30-06 ammunition, which Corey denied owning. The knives were not introduced to show that Corey had a propensity for violence, or that he killed his brother with a knife. Rather, the knives were relevant to show Corey's ownership of the .30-06 ammunition, the type of ammunition that may have killed Danny. The probativity of the evidence outweighed its prejudice, and the trial court did not abuse its discretion by allowing it to be admitted.

Third, the continuance of the trial to a subsequent court term did not violate Corey's speedy trial rights. The State sought the continuance because the Prosecuting Attorney was undergoing medical surgery. This reason constituted good cause, and the Circuit Court did not abuse its "sound discretion" by granting the continuance.

Fourth, the trial court did not abuse its discretion in not declaring a mistrial when Corey's sister-in-law revealed David Corey's status as a felon to the jury. The State stopped its questioning as soon as the statement was made; the prosecutor told the court that he had not intended to induce that testimony; and the defense requested, and the court gave, a limiting instruction to the jury that Ms. Corey's statement should be disregarded. Because the court gave

a limiting instruction, there was no manifest necessity for a mistrial, and this issue is immune from review on appeal.

For these reasons, Corey's claims on appeal must be denied, and his conviction must be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary in this case. The briefs and records on appeal adequately present the facts and legal arguments. Oral argument would not significantly aid the decisional process, and a memorandum decision affirming Corey's murder conviction would appropriately dispose of this appeal.

ARGUMENT

I. The Search Warrant Was Valid on Its Face.

A. A Search Warrant Affidavit Is Valid So Long As It Justifies a Finding of Probable Cause.

This Court reviews the validity of a search warrant under a *de novo* standard. Syl. pt. 2, *State v. Lacy*, 196 W. Va. 104, 468 S.E.2d 719 (1996). “To obtain a warrant, the police are required only to show enough evidence to convince the judge (or magistrate) that the police have reason to believe that probable cause exists.” *State v. Thomas*, 187 W. Va. 686, 694, 421 S.E.2d 227, 235 (1992). It is settled that “the validity of an affidavit for a search warrant is to be judged by the totality of the information contained in it. Under this rule, a conclusory affidavit is not acceptable nor is an affidavit based on hearsay acceptable unless there is a substantial basis for crediting the hearsay set out in the affidavit which can include the corroborative efforts of police officers.” *State v. Adkins*, 176 W. Va. 613, 346 S.E.2d 762 (1986). Finally, “[r]eviewing courts should grant magistrates deference when reviewing warrants for probable cause.” *Thomas*, *supra*, at Syl. pt. 5, in part.

B. The Search Warrant Affidavit Here Was Sufficient for a Probable Cause Finding.

Corey cannot sustain a claim that his conviction must be overturned based on an allegedly invalid search warrant. His sole complaint regarding the search warrant is that its accompanying affidavit contained hearsay. (Pet’r’s Br. 8-10.) But the fact that a search warrant affidavit is based on hearsay is not fatal to the validity of the warrant. Indeed, this Court has even upheld the validity of search warrants obtained based on hearsay provided by an unnamed informant. *State v. White*, 167 W. Va. 374, 280 S.E.2d 114 (1981). All that is required is that the search warrant affidavit must support a finding of probable cause for the search. *Thomas*, 187 W. Va. at 694, 421 S.E.2d at 235.

Interpreted in a “commonsense and realistic fashion,” *White*, 167 W. Va. at 379, 280 S.E.2d at 118, the January 10, 2012 search warrant affidavit justified the magistrate’s finding of probable cause. (*See* App. 55 (“[T]he Court FINDS that the affidavit contains sufficient corroborating statements for a finding of probable cause.”).) The search warrant affidavit begins with a summary of Danny Corey’s death. It explains that Corey was shot through the side, and that police suspected the shot came from outside of the home, through an open window. (App. 174-75.) The affidavit describes the environment outside of the window where the shooter would have set up. (*Id.*) The affidavit then goes on to describe information provided by Kathy Stonebraker that suggests that David Corey was the shooter. Kathy Stonebraker’s statements to police are completely consistent with the theory that Danny Corey was shot from a distance outside. Stonebraker provided information to police that she had personal knowledge that there was animosity between Daniel and David Corey; that she had personally witnessed David Corey “acting crazy and very mad”; that she had seen David with a pistol and that “he keeps a lot of ammunition in his house” along with a scope; that David had bragged about being a “a really good sniper” and that he likes to “look with binoculars”; and that David hides a gun outside the home where Daniel Corey was shot. (*Id.*) Her statement to police thus identified a suspect with (1) a motive and (2) the means and ability to carry out the murder.

There was nothing conclusory about the January 10, 2012 search warrant affidavit. Although portions of the affidavit were based on hearsay—what Kathy Stonebraker had heard from David Corey—there is nothing unreliable or conclusory about the information in the affidavit. If anything, Stonebraker’s relationship with David Corey buttresses the reliability of her statements because they are against her boyfriend’s penal interest. Moreover, the Search Warrant Affidavit identified the specific classes of items that police believed would be seized.

Sufficient information was thus provided to the magistrate to determine that there was probable cause for a search, and the Search Warrant was therefore valid.

II. The Trial Court Properly Allowed the State to Introduce Evidence of Knives Discovered on Corey's Property to Show His Ownership of Ammunition that Was Also Found There.

A. The Circuit Court's Ruling on the Admissibility of this Evidence Is Reviewed for an Abuse of Discretion.

Two standards of review generally apply to a challenge to the admissibility of evidence in the trial court. First, the circuit court's interpretation of the West Virginia Rules of Evidence is reviewed *de novo*. Second, if the circuit court applies the correct legal standard, its ruling on the admissibility of evidence is reviewed for an abuse of discretion. *State v. Sutphin*, 195 W. Va. 551, 561, 466 S.E.2d 402, 411 (1995).

B. Corey's Knives Were Not Introduced to Prove that He Killed His Brother with Them, but Rather, to Show that He Owned Ammunition that Was Found Alongside the Box of Knives that Were Buried in His Yard.

Corey's claim that the tin box of knives first found buried with the ammunition, then in his car, and then in his mother's house, is without merit, as this evidence was relevant to show that Corey owned the bag of .30-06 ammunition that was buried next to the knives in his backyard. Of course, the State does not contend that Daniel Corey was "shot with a knife." (Pet'r's Br. 6, 10.) The State does contend, however, that Daniel Corey was shot with a .30 caliber round of ammunition, the same ammunition that was found buried in David Corey's backyard. The tin box of knives was found buried two to six feet from the box of ammunition and then later found in the back seat of Corey's vehicle. (App C-179 to -80.) That Corey would have buried a box of collector knives—which were undoubtedly his—suggests that the buried ammunition also belonged to Corey.

The knives were clearly relevant. They were found in a tin box, two to six feet from where police found the bag of twelve rounds of .30-06 ammunition. (App. C-167 to -71.) Romney Police Chief Donnie See testified that the tin box contained five “collector’s knives of wildlife.” (App. C-170.) He explained that the tin box was significant because it “was lying close to the ammo that we obtained with the search warrant at Mr. Corey’s residence.” (*Id.*) Police did not take the tin box at that time. (App. C-171.)

After Corey was arrested on February 14, 2012, police obtained and executed a second search warrant and searched Corey’s vehicle. (App. C-173 to -74.) They found several items in the car that were relevant to their investigation, including a rifle scope, a letter from Corey to his girlfriend Kathy Stonebreaker, and the tin box of collector knives. (App. C-175, C-179 to -80.) The knives were not confiscated by police at this time either. (*Id.*) It was not until a third search warrant was executed that police seized Corey’s tin box of collector knives from David Corey’s mother’s house. (App. C-179.) This was the same box that was found buried in the back of Corey’s car and in his backyard during previous searches. (App. C-180.)

From the beginning of trial, Corey denied that the ammunition was his. The defense explained its theory during opening statements: “What the defense is going to be about is simply this. It wasn’t David Corey.” (App. C-84.) The knives evidence was intended simply to rebut Corey’s denial. Prior to trial, the State explained to the court the relevance of the tin box of knives that police found buried in Corey’s yard:

[A] box of 30-06 ammunition just doesn’t happen to be buried back behind someone’s house and that they do not know about it. The Defendant on numerous jail recordings talks to his mom and says, “I don’t know anything about that stuff in the backyard. I don’t know where the – about 30-06 ammunition.” But the box of knives were – we don’t even have to call it the box of knives. We can refer to it as the tin box because I think Judge Parsons’ ruling was, is that anything that dealt with knives had a propensity of violent activities and that the Court wanted to suppress it under that theory. But the tin box that’s a couple feet away is now in

the Defendant's vehicle and now – when he's arrested for the murder and now make it back to his house.

So the State is trying to show that these knives were – not so much the knives, but the box of 30-06 ammunition that is in close proximity to the knives just didn't happen to be dropped off. The Defendant took this ammunition and went outside and hid this ammunition and probably any other thing that he found in the house that was relevant prior to law enforcement coming out and doing the search.

(App. A-36.) And during opening statements, the Prosecuting Attorney explained the significance of the knives to the jury: "It's kind of hard to make an argument that you don't know about the 30-06 ammunition that is buried in your backyard when something else that belongs to you is buried right beside it." (App. C-80.) In fact, one police officer testified that the knives were new and not damaged, (App. D-140)—clearly the State was not trying to imply that David Corey had used them to kill Daniel Corey.

The introduction of the found box of knives did not confuse the jury. The fact that these items were knives was beside the point—what was important was that a personal item belonging to Corey was found within feet of buried ammunition that was similar to the ammunition used to kill his brother. This evidence thus suggested—contrary to Corey's protest—that the ammunition was his.

III. The Circuit Court Did Not Violate Corey's Right to a Speedy Trial.

A. The Decision Whether to Grant a Continuance Lies within the Sound Discretion of the Trial Court.

The West Virginia Constitution mandates that a defendant must be tried "without unreasonable delay." W. Va. Const. art. III, § 13. A defendant is statutorily entitled to be tried within the same term of court during which he is indicted. But the defendant's trial may be continued until the next term of court for good cause. W. Va. Code § 62-3-1. Whether there was

in fact good cause for a circuit court to grant a continuance lies within “the sound discretion of the trial court.” *State ex rel. Shorter v. Hey*, 170 W. Va. 249, 255, 294 S.E.2d 51, 57 (1981).

B. Good Cause Existed for the Circuit Court to Continue Corey’s Trial into the Next Term of Court.

The Circuit Court did not abuse its discretion in continuing Corey’s trial until the following term of court, as there was good cause for the continuance. On December 3, 2012, the Prosecuting Attorney moved to continue the trial so that he could properly recover from a recent surgery. (App. 50.) He explained to the court that he did not anticipate recovering for four to six weeks, and that his doctors advised him that further diagnostic testing might be needed. (*Id.*) The prosecutor stated that he was simply physically unable to go through with the trial as scheduled. (*Id.*) The trial judge properly found that this was good cause for a continuance. (App. 58.) Indeed, the trial judge noted that he too was looking at the prospect of surgery during that time. (*Id.*) This certainly constituted good cause for a continuance, and Corey’s claim of error must be rejected.

Corey’s arguments to the contrary are unpersuasive. Even if the Prosecuting Attorney “attended 15 hearings” two days before this trial was to begin and made appearances in this case, that does not mean that the Prosecuting Attorney’s health prevented him from properly preparing for trial. Generally, prosecuting a trial takes much more preparation and stamina than attending hearings. And the fact that the assistant prosecutor might have been capable to conduct the trial is irrelevant. As the Circuit Court observed, “although the Assistant Hampshire County Prosecuting Attorney has considerable experience in representing the State of West Virginia in Magistrate Court, . . . the Court does not believe he has ever tried a felony or a murder case,” and found that the assistant prosecutor was “not familiar with this case and would not be in a position to represent the State of West Virginia at the trial of this matter as currently scheduled.” (App.

58.) Additionally, which lawyer was to represent the State was not for the Defendant to decide. The Prosecuting Attorney was elected by the people of Hampshire County, and he is entitled to staff his cases as he sees fit. If the Prosecuting Attorney determines that he should be the one to try the case, it is not for a defendant to argue otherwise. Furthermore, Corey identifies no prejudice that resulted from the continuance. Therefore, this claim must be rejected.

IV. Corey Was Not Entitled to a Mistrial Because His Sister-in-Law Mentioned His Status as a Felon During Her Testimony.

A. A Mistrial Is Only Appropriate in Cases of Manifest Necessity.

A mistrial is only appropriate in cases of manifest necessity. And a circuit court is entitled to great deference in determining whether such manifest necessity exists. W. Va. Code § 62-3-7. Additionally, when the trial court has given a curative instruction regarding the alleged error, no reversible error shall lie. Syl. pt. 18, *State v. Hamric*, 151 W. Va. 1, 151 S.E.2d 252 (1966) (“Ordinarily where objections to questions or evidence by a party are sustained by the trial court during the trial and the jury instructed not to consider such matter, it will not constitute reversible error.”).

B. There Was Not Manifest Necessity for a Mistrial.

Corey’s claim that a portion of his former sister-in-law’s testimony so prejudiced him that he was entitled to a mistrial is meritless and must fail. Samantha Corey, the widowed wife of Greg Corey, another deceased brother of David’s, was presented at trial as a defense witness. (App. E-69 to -70.) On cross-examination, the State explored Ms. Corey’s knowledge of the state of the relationship between David and Danny Corey. In particular, the State asked Ms. Corey whether she knew why David no longer lived with his mother and brother. The following colloquy ensued:

Q: Do you know if [David Corey] tried to get on the lease at Valley View Apartments?

A: No, because he is a felon and you're not allowed to be –

[THE STATE]: Your Honor, may we have a quick sidebar?

THE COURT: You may. Mr. Ours?

(Counsel and Defendant at bench side.)

THE COURT: All right, go ahead.

[THE STATE]: There is no way – this is not my witness. I wasn't trying to elicit that.

THE COURT: What's that?

[THE STATE]: I wasn't trying to elicit that answer from her. I don't know if the Court wants to give a cautionary instruction or what, but this isn't my witness. I wasn't trying to elicit that answer from her.

THE COURT: What was her answer?

[DEFENSE COUNSEL #1]: She answered that he was a felon.

THE COURT: She knew he was a felon?

[DEFENSE COUNSEL #1]: She said that, yeah.

[DEFENSE COUNSEL #2]: Wasn't she his witness yesterday? He should have instructed her.

THE COURT: I didn't hear any objections.

[DEFENSE COUNSEL #1]: We didn't really have a chance to. As soon as she said it, Mr. James wanted a sidebar, Your Honor.

[THE STATE]: I don't know if the jury heard it or not but I – I have to bring it to the Court's attention as soon as I hear it.

THE COURT: Well, I didn't – I didn't hear her either. I'm having trouble hearing her and I'm this close to her; so I don't know whether the jury heard it or not, and I don't know whether to say anything to them or not about it – worse than if I didn't.

[THE STATE]: I think it's up to defense counsel.

Defense counsel then requested a cautionary instruction, (App. E-91 to -92), and the Circuit

Court instructed the jury as follows:

Ladies and gentlemen of the jury, I need to give you what we call another cautionary instruction. This witness had said something about that the Defendant in this case was a felon. You're not to consider that in any way in deciding this case as to what – that has nothing to do with his innocence or guilt in this case; so you should disregard it, all right?

(App. E-92.)

Corey's claim that Ms. Corey's statement compelled a mistrial must be rejected for two reasons. First, this claim is waived. Defense counsel requested a curative instruction, and the court gave one. While defense counsel expressed a desire to note his objection, the defense did not actually demand a mistrial until the trial was over and Corey had been convicted. (App. B-3); see *State v. Bradford*, 199 W. Va. 338, 348, 484 S.E.2d 221, 231 (1997) (finding waiver when defense counsel waited to move for mistrial until after verdict had been reached).

And second, the curative instruction, offered immediately after Ms. Corey made her statement, remedied any error. *State v. Manhood*, 227 W. Va. 258, 264, 708 S.E.2d 322, 328 (2010) (per curiam) (recognizing that jurors are assumed to follow trial court instruction to disregard inadmissible evidence inadvertently presented to it); *State v. Gwinn*, 169 W. Va. 456, 471, 288 S.E.2d 533, 542 (1982); *Hamric, supra*, at Syl. pt. 18. As the Supreme Court of the United States has explained, it is "normally presume[d] that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be able to follow the court's instructions, and a strong likelihood that the effect of the evidence would be devastating to the defendant." *Greer v. Miller*, 483 U.S. 756, 766 n. 8 (1987) (cited by this Court in *Manhood*). There is nothing that suggests that Ms. Corey's unsolicited statement constituted one of those "extraordinary situations where the objectionable evidence is so prejudicial that an instruction to the jury to disregard it is ineffective, and a mistrial is an appropriate remedy." *Gwinn*, 169 W. Va. at 471, 288 S.E.2d at 542.

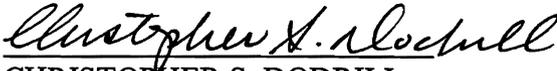
CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Hampshire County, West Virginia, must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christopher S. Dodrill, Assistant Attorney General and counsel for the State of West Virginia, hereby verify that I have served a true copy of "Respondent's Brief" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 20th day of November, 2013, addressed as follows:

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