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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Adam Derek Bowers,
Petitioner Below, Petitioner

vs.) No. 20-0625 (Harrison County 18-C-193-2)

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

MEMORANDUM DECISION

Petitioner Adam Derek Bowers, by counsel David Mirhoseini, appeals the August 5, 2020, order of the Circuit Court of Harrison County denying, in part, his petition for a writ of habeas corpus. Respondent Donnie Ames, Superintendent, Mt. Olive Correctional Complex, by counsel Patrick Morrisey and William E. Longwell, filed a response in support of the circuit court's order. Petitioner filed a reply.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure.

In the early morning hours of November 30, 2001, Ms. L.L. ("the victim"),[1] an eighty-three-year-old widow who lived alone in Clarksburg, West Virginia, was awakened to find a man standing beside her bed demanding money. *Buffey v. Ballard*, 236 W. Va. 509, 511, 782 S.E.2d 204, 206 (2015). The victim was then held at knifepoint and sexually assaulted both vaginally and orally. *Id.* Following the physical assault, $9.00 was taken from the victim. *Id.*

In December of 2001, Joseph Buffey was arrested for three non-violent breaking and entering offenses in Clarksburg. *Id.* at 512, 782 S.E.2d at 207. Police questioned Mr. Buffey for about nine hours, and during that time, Mr. Buffey told police that he had broken into "[t]his old

[1] Consistent with our long-standing practice in cases with sensitive facts, we use initials where necessary to protect the identities of those involved in this case. *See In re K.H.*, 235 W. Va. 254, 773 S.E.2d 20 (2015); *In re Jeffrey R.L.*, 190 W. Va. 24, 435 S.E.2d 162 (1993); *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990).

lady's house"; however, he gave police details about the break-in that were inconsistent with the victim's account. *Id.* Mr. Buffey was indicted for the robbery and sexual assault of the victim. *Id.*

In 2002, DNA testing of seminal fluid collected from the victim and her home was completed. *Id.* at 513, 782 S.E.2d at 208. The testing showed that Mr. Buffey was excluded as either the primary or secondary donor of the seminal fluid. *Id.* The DNA results were not provided to Mr. Buffey, and despite Mr. Buffey's counsel's inquiries concerning the same, counsel was informed that the DNA testing was not complete. *Id.* Thereafter, Mr. Buffey accepted a time-limited plea offer and entered a guilty plea to two counts of sexual assault of the victim and one count of robbery of the victim. *Id.* at 514, 782 S.E.2d at 209.

Mr. Buffey filed his first habeas petition in 2002. *Id.* The petition was ultimately denied in 2004, and this Court refused the appeal. *Id.* at 514-15, 782 S.E.2d at 209-10. In 2010, Mr. Buffey filed a motion for post-conviction DNA testing. *Id.* at 515, 782 S.E.2d at 210. The motion was granted, and a detailed DNA profile was developed using the seminal fluid collected during the investigation of the victim's assault. *Id.* Mr. Buffey was again excluded as either the primary or secondary source of the sperm, and in 2012, the circuit court authorized a search of the CODIS database[2] to determine whether the primary sperm source could be identified. *Id.* Petitioner was identified as the primary sperm source. *Id.* At the time the victim was assaulted, petitioner was sixteen years old and lived a few blocks from the victim. *Id.*

Mr. Buffey filed a second habeas petition which was denied by the circuit court. *Id.* This Court reversed that decision, finding that "the State's failure to disclose favorable DNA results obtained six weeks prior to [Mr. Buffey]'s plea hearing violated [his] due process rights, to his prejudice." *Id.* at 526, 782 S.E.2d at 221.

In 2014, a grand jury returned an indictment against petitioner charging him with four crimes associated with the attack on the victim. Counts One and Two of the indictment charged petitioner with first-degree sexual assault in violation of West Virginia Code § 61-8B-3.[3] Count Three charged petitioner with burglary in violation of West Virginia Code § 61-3-11(a). Finally, Count Four charged petitioner with first-degree robbery in violation of West Virginia Code § 61-2-12.[4] Notably, Counts One, Two, and Four alleged that petitioner threatened the victim with a knife during the commission of the crimes.

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[2] "CODIS is an acronym for Combined DNA Index System, an FBI database system containing DNA profiles contributed by federal, state, and local participating forensic laboratories." *Buffey*, 236 W. Va. at 515 n.15, 782 S.E.2d at 210 n.15.

[3] West Virginia Code § 61-8B-3(a) (2000) provides, in relevant part, that "[a] person is guilty of sexual assault in the first degree when: [] The person engages in sexual intercourse or sexual intrusion with another person and, in so doing: . . . Employs a deadly weapon in the commission of the act[.]"

[4] West Virginia Code § 61-2-12(a) provides, in relevant part, that "[a]ny person who commits or attempts to commit robbery by: . . . us[ing] the threat of deadly force by the presenting of a . . . deadly weapon, is guilty of robbery in the first degree[.]"

Before petitioner's trial, the State filed a notice of intent to use statements constituting excited utterances. Through the notice, the State indicated its intent to elicit testimony from the victim's adult son about what the victim told him immediately following the attack. The notice stated that the victim was eighty-three years old at the time of the attack and that "[a]lthough [the victim's son] was at the time a Clarksburg Police Officer, the victim did not call her son to initiate an investigation but rather called her son because she was traumatized and he was the closest family member." The notice asserted that the victim's statements to her son were admissible as excited utterances under Rule 803(2) of the West Virginia Rules of Evidence.

The State also filed a notice of intent to use statements constituting statements for medical treatment and diagnosis. According to the notice, following the assault, the victim went to United Hospital Center for a sexual assault examination and for medical treatment for injuries she received during the sexual assault. The notice indicated that the examination was conducted by a Sexual Assault Nurse Examiner ("SANE nurse") and that during the examination, the SANE nurse obtained a statement from the victim for purposes of treatment and diagnosis. The notice stated that the victim's statement was made for the purpose of medical diagnosis and treatment directly after the assault and that the statement was admissible as an exception to the hearsay rule under Rule 803(4) of the West Virginia Rules of Evidence.

In addition to the two notices, the State filed a motion to preclude reference to and admission of the guilty pleas of Joseph Buffey. The State argued that Mr. Buffey's guilty pleas were irrelevant to the issue of whether petitioner was also a perpetrator of the offenses and that "the fact that Mr. Buffey pled guilty to said offenses does not make it any more or less likely that the [petitioner] was a perpetrator in the commission of said offenses," particularly in light of the DNA evidence linking petitioner to the sexual assault. Accordingly, the State sought to preclude petitioner from referencing, introducing, or otherwise using Mr. Buffey's guilty pleas in petitioner's trial.

Following a pretrial hearing in which the State's notices and motion were addressed, the trial court entered an order finding that petitioner's counsel "advised this [c]ourt that they did not contest the State's Motion to Admit Statements Made for Purposes of Medical Treatment and Diagnosis," and the court ordered that the State's "Motion . . . be granted." The trial court found that petitioner's counsel "did oppose the State's Motion to Admit Excited Utterances and the State's Motion to Preclude Reference To and Admission of Guilty Plea by Joseph Buffey." The trial court concluded that the description of the attack made by the victim to her son directly following the assault constituted excited utterances and that the statements were non-testimonial. The trial court ordered that the State's "Motion to Admit Excited Utterances be granted." The trial court ordered further briefing on the issue concerning Mr. Buffey's guilty plea and involvement in the crime.

In a subsequent order, the trial court ordered that evidence arising from Mr. Buffey's criminal proceeding be excluded from petitioner's trial. In so ruling, the trial court reasoned that "the probative value of such evidence would unquestionably be substantially outweighed by the danger of unfair prejudice or bias in favor of [petitioner]" and that "[i]f such evidence were to be

admitted, it would unnecessarily confuse the issues and ultimately be quite likely to mislead the jury."

Petitioner's case proceeded to a jury trial on May 26, 2015. During the trial, the State presented the testimony of eight witnesses including the victim's son; a detective with the Clarksburg Police Department who was the lead investigator of the victim's assault; the SANE nurse who obtained the victim's statement at United Hospital Center; and an expert witness in DNA analysis. The victim did not testify.[5]

The victim's son testified that on the morning of November 30, 2001, he received a phone call from the victim between six and six-thirty in the morning. He testified that the victim was "almost hysterical" and that the first thing she said to him was, "They raped me." The victim's son further testified that he then drove to the victim's house and that the victim was "absolutely babbling," saying, "they robbed me, they raped me," "they kept a flashlight in my eyes," and "they tied me up." He elaborated:

> My best recollection of what she told me was they took her downstairs and walked behind her with the light and told her "Don't ever turn around. Don't look." And they took her down and wanted to know how much money she had, or something to that effect. There was very little cash in her purse, which she offered them. And then they took her back upstairs where they sexually assaulted her.

The victim's son testified that after speaking with his mother, he reported the incident to the police.

The lead investigator testified that after arriving at the victim's home, the victim "briefly described to [him] what had happened to her," and he advised the victim that "she needed to go to the hospital to have a sex crime kit performed on her." On cross-examination, the lead investigator further testified as to the initial interview he conducted of the victim, stating, "[S]he would tell me that she was awakened from sleep and that she -- an individual at knife point robbed her. I believe the amount of money was nine dollars and then ordered her upstairs and sexually assaulted her in her bedroom." The lead investigator then testified that he took a more in-depth tape-recorded statement from the victim at the hospital. Petitioner's trial counsel questioned the investigating officer as follows:

> Q. In [the victim]'s description, did she mention that this person had a weapon?
> A. She did at some point in her statement.
> Q. Okay. What kind of weapon?
> A. It was a knife.
> . . . .
> Q. . . .[A]t any point in time during the course of your investigation was a knife recovered that was similar to that described by [the victim]?

[5] "At the time of petitioner's trial, the victim was ninety-seven years old and suffered from advanced dementia." *State v. Bowers*, No. 15-1017, 2017 WL 823990, at *2 n.4 (W. Va. Mar. 2, 2017) (memorandum decision).

A. Yes, sir, there were.
Q. Okay. Was that recovered from Mr. Bowers?
A. No, sir, it was not.

The knife recovered during the investigation was not presented as evidence during petitioner's trial.

The SANE nurse testified as to her professional responsibilities and her encounter with the victim. She explained that when she first makes contact with a victim of a sexual assault, she "introduce[s] [herself] and establish[es] some kind of rapport and take[s] down their story for -- and then examine[s] them to be able to care for them, whatever their needs are." She affirmed that she provides more specialized care for individuals who have been sexually assaulted and that "[T]hey call in a SANE nurse so she can do one-on-one care for that patient versus the duties of an ER nurse."

The SANE nurse testified that she examined the victim, and she read the following statement the victim gave her concerning the assault:

> He tied me up. First he tied my hands behind my back then he tied my -- I'm not sure if that's feet or not. But -- and shoved me down on the bed. This was after he raped me. He had glasses on, a white handkerchief on his face, and a cap backwards.
>
> . . . .
>
> He had navy blue boxers -- boxer shorts on. Blue jeans. He was white. He told me he got in the side door. He robbed me first. I thought -- I thought he was going to kill me. I thought, oh, my God, that kid was going to kill me for nine dollars. I had a -- he had a knife he kept saying do what I say and you won't get hurt. He kept sticking his thing in my mouth. He made me get down on the floor on my knees.
>
> . . . .
>
> He made me put my face in a pillow and did it to me from behind. Oh, my God, I'm so thankful to be alive.
>
> . . . .
>
> He never did reach a climax, or at least I don't think he did. Every time I would move he would say, put that pillow up. He wanted that thing over my eyes so I couldn't see. Why would a young guy want to do something like this? Why would he want to mess with an old lady? . . . He kept showing me the knife. He kept -- and kept thinking, oh, my God, he's going to kill me. I kept saying, please don't kill me. . . . He counted the money after he raped me and said all I got out of this was nine dollars. . . . [H]e was mad because he couldn't get it all in my mouth. I kept patient -- I kept thinking this was the end. He had a short-sleeved shirt on. I saw glasses on his face when he was leaving[.]

The SANE nurse also testified that she observed multiple injuries to the victim, including "a reddened area of her inner labia and like ecchymosis" and a "second degree tear between the anus and the vaginal opening" which required three sutures. The SANE nurse further testified that she

swabbed the victim's inner thigh and genitalia.

The swabs collected by the SANE nurse were ultimately sent to the State's expert witness in DNA analysis. The expert stated that semen was found on a vaginal swab and a cutting from a sheet collected from the victim's bedroom. He asserted that the semen on both objects was produced by the same major male contributor. The expert testified that, by comparing DNA on oral swabs from petitioner to the DNA collected from the vaginal swab and sheet, he was able to conclude, to a reasonable degree of scientific certainty, that the unique genetic profile of the major male contributor of the semen found on the vaginal swab and the sheet cutting belonged to petitioner. On cross-examination, the expert witness was questioned as follows:

> Q. . . . With regard to that fourth vaginal swab, do you recall whether or not you were ever able to ascertain whether there were additional alleles present that belonged to neither [the victim] or [petitioner]?
>
> A. There was one allele. . . .
>
> Yes, from vaginal swab number four, as I mentioned earlier, there was a -- at D5 there was one allele that we -- initially attributed to as coming from unknown male number one [the major male contributor] because we had no information on more than two semen sources at that time. But then when we discovered that -- when we had a broader set of data, we knew then that unknown male number one could not possess the 14 allele that was detected from vaginal swab 14 [sic]. So we amended that in the second report.
>
> . . . .
>
> Q. Okay. So essentially what we're saying is there was an allele present in the sperm fraction that could not have been placed there by [petitioner]?
>
> A. That's correct. And there was some other evidence to a second sperm contributor that was revealed in the Y chromosome testing but it was such a low level we weren't sure that it was an artifact or not. But we did note that particular allele in the first round of testing.
>
> Q. And in questioning whether or not it's an artifact, when you have this other testing which shows that the 14 is also present there, is that, again to diminish any thoughts of it being an artifact?
>
> A. Certainly as I sit here today, it does. So it probably actually is evidence of two semen donors in the Y chromosome testing from the first round of testing. But we simply weren't sure of it at that particular time. So that's why we attributed that 14 allele to unknown male number one --
>
> Q. Okay.
>
> A. -- in the first round of testing.

Petitioner testified on his own behalf and called his mother to testify during his case in chief. Petitioner testified that he did not remember having any personal interactions with the victim and he denied having any involvement in the charged crimes.

Following testimony, the case proceeded to closing arguments, during which counsel for the State argued:

> So your decision as to what happened is easy. I'm sure that [petitioner's trial counsel] is going to say well, there was difference, sometimes [the victim] said he, sometimes she said they. It doesn't make a bit of difference in this case. Mr. Bowers is on trial for committing these acts. No one else. And the State has provided you with evidence that is irrefutable that he's the individual that did this. Were there other people there? Quite possible. But was he there? Without a doubt. Was he sexually assaulting her? Without a doubt. Did he break into her house and rob her? Without a doubt. We know he was there. We know he was doing this.

In petitioner's closing argument, his counsel said:

> Since we couldn't hear from [the victim] herself, because of her poor mental state, we have to look at several objective accounts that conveyed her version to us. Those objective accounts come from the SANE nurse. Those objective accounts come from the medical records that were recorded while the SANE nurse was dealing with [the victim]. Those objective accounts come from [the lead investigator] who says, both here and in his report that he read from, one person.
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> . . . .
>
> Again, despite the fact they want you to accept that despite the fact that it's contrary to the statements of the victim. And despite the fact that it doesn't fit with anything else in this book. Multiple male contributors. It simply doesn't make sense when viewing it in connection with all of the other evidence. And that's what you're charged to do, ladies and gentlemen, is to view all the evidence as a whole. I would submit to you that you should consider the DNA evidence with caution. Something is out of place. Something doesn't fit.

In rebuttal, counsel for the State said:

> [Petitioner's trial counsel], I'm not sure where we're going, it's at one point he's urging you to adopt a single perpetrator theory, at other points he's urging you to adopt a multiple perpetrator theory. I'm not sure which there [sic] it is that he wants you to adopt. But at the end of the day, it doesn't make a bit of difference. I'm not trying four guys or two guys; I'm trying one guy in this trial.

The jury returned a verdict of guilty on each count in the indictment. Petitioner filed a motion for a judgment of acquittal or, alternatively a motion for a new trial, arguing that the State had failed to meet its burden of proof with regard to Counts One, Two, and Four. Specifically, petitioner alleged that the State failed to offer any evidence that a knife was used to perpetrate the crimes charged in those counts. The trial court entered an order denying the motion, finding that evidence was presented showing that the victim advised that the perpetrator of the sexual assaults used a knife during the commission of the assaults and robbery, and petitioner's DNA matched the DNA left by the perpetrator of the crimes. The trial court concluded that this evidence was sufficient for the jury to infer that petitioner used a knife in the commission of the crimes. Petitioner was subsequently sentenced to terms of imprisonment of not less than fifteen nor more than thirty-five years for each of the first-degree sexual assault charges, with those sentences to be served consecutively; to a term of imprisonment of not less than one nor more than fifteen years for

burglary, with that sentence to run concurrently to the sentences for the sexual assault charges; and to a term of imprisonment of forty years for first-degree robbery, with that sentence to be served consecutively to the other counts.

Petitioner appealed his conviction to this Court. On appeal, petitioner argued that "the [trial] court erred in precluding petitioner from admitting or referencing the guilty plea entered by, particular conduct of, and court proceedings relating to Joseph Buffey," and that "the [trial] court erred in denying petitioner's motion for judgment of acquittal or, alternatively, motion for a new trial." *State v. Bowers*, No. 15-1017, 2017 WL 823990, at *1 (W. Va. Mar. 2, 2017) (memorandum decision).

In deciding the issue concerning references to the Buffey proceeding, the Court said, "[A]ll that the Buffey materials could possibly establish is that there was complicity between petitioner and Mr. Buffey in committing the crimes, not that Mr. Buffey was the sole perpetrator to the exclusion of petitioner." *Id.* at *5. The Court found that "[b]ecause the DNA evidence against petitioner inextricably links him to the crimes charged, the Buffey materials are not inconsistent with petitioner's guilt." *Id.* The Court concluded that the trial court did not abuse its discretion in determining that the Buffey materials were inadmissible at petitioner's trial.

On the issue of the refusal of petitioner's motion for judgment of acquittal or a new trial, petitioner argued on appeal that the State failed to establish a link between petitioner and the knife used during the commission of the crimes sufficient to convict him of the sexual assault charges and the robbery charge in Counts One, Two, and Four of the indictment. The Court found:

> Evidence presented during petitioner's trial shows that the victim told her son and others that a knife was used during the commission of the crimes. According to the State, the victim described a knife being used during the perpetration of the sexual assaults and the robbery. The State also presented DNA evidence that linked petitioner to the crimes charged, as the DNA evidence came from vaginal swabs taken from the victim as well as bedding removed from the victim's bedroom where the sexual assaults occurred.

Id. at *6. The Court concluded that the evidence presented at petitioner's trial was sufficient for the jury to find that petitioner was guilty of the charged crimes beyond a reasonable doubt. Ultimately, the Court affirmed petitioner's convictions. *Id.*

On August 6, 2018, petitioner filed a pro se petition for a writ of habeas corpus ("pro se petition"), setting forth four grounds for relief, including that he received ineffective assistance of his trial and appellate counsel.[6] Thereafter, the habeas court appointed counsel to represent petitioner, giving leave for petitioner to file an amended habeas petition through his appointed counsel.

[6] Petitioner was represented by the same two attorneys through his trial and his direct appeal.

On May 1, 2019, petitioner's appointed habeas counsel filed an amended petition for post-conviction writ of habeas corpus ("first amended petition"). On November 8, 2019, petitioner's counsel filed a second amended petition for post-conviction writ of habeas corpus ("second amended petition") supplanting and superseding the first amended petition. In addition to other grounds for relief asserted in the second amended petition, the second amended petition alleged that petitioner's trial and appellate counsel were ineffective by, among other things, adopting a strategy during closing arguments, post-trial motions, and appeal that did not address a one perpetrator versus a multiple perpetrator theory; by failing to call the victim to testify or establish that the victim was incompetent or unavailable to testify; and by permitting the SANE nurse, the victim's son, and the investigating officer to testify at trial as to statements made by the victim. The second amended petition also alleged that prosecutorial misconduct denied petitioner of his right to a fair trial; that the admission of testimonial hearsay at petitioner's trial violated his right to confront the victim; that the evidence presented at trial was insufficient to support petitioner's convictions as to Counts One, Two, and Four of the indictment; and that his sentence was illegal.

The habeas court held an omnibus hearing on January 10, 2020. The parties presented numerous exhibits, and the habeas court heard testimony from one of the two attorneys that represented petitioner at trial and on direct appeal: Christopher Wilson. Mr. Wilson testified that the victim was in her nineties when petitioner was indicted and that he understood the victim would not testify at petitioner's trial because she was not competent to testify, noting that "[a]t some point there was a discussion about her mental condition and that she did suffer from dementia." He testified that he relied on the representations of the State and the victim's son concerning the victim's mental condition and that he did not obtain medical records addressing the victim's mental condition, nor did he interview or depose the victim prior to trial. Mr. Wilson also testified that he did not object to the admission of the victim's hospital records, stating that he believed "they fell within the exception to the hearsay rule for medical records" and that he did not complete a *Crawford*[7] analysis of the records. He further testified that he had hired his own DNA expert but that the expert's findings were not helpful to petitioner, which is why he did not have that expert testify. Finally, he answered affirmatively when asked, "[D]o you believe if [the victim] would've gotten on the stand to testify that she may have created more of a problem with the jury, them finding sympathy for her?" Mr. Wilson explained, "I think juries tend, in my experience, they tend to be more sympathetic towards children victims and elderly victims[.]"

Following the omnibus hearing, counsel for both parties submitted proposed findings of fact and conclusions of law. The habeas court entered a forty-four page final order on August 5, 2020, denying petitioner's pro se petition, the first amended petition, and the second amended petition on all grounds relevant to this appeal.[8]

Regarding petitioner's claim of ineffective assistance of trial counsel, the habeas court

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[7] *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004).

[8] The habeas court granted, in part, the relief requested by petitioner concerning his claim that he had received an illegal sentence and set a resentencing hearing in the underlying criminal matter.

found that petitioner had been represented by experienced criminal law attorneys and that petitioner had not shown that any of the alleged trial deficiencies were not his counsel's "reasonable decisions as to the best way to represent" petitioner. The habeas court concluded that petitioner had failed to satisfy either prong of the *Strickland/Miller*[9] test for establishing ineffective assistance of counsel, "having unsuccessfully shown that the acts or omissions of counsel were the result of his trial counsel's deficient professional judgment" or that even if counsel's performance was deficient, in the absence of such deficiency, the outcome of his trial would have been different.

Regarding petitioner's claim of prosecutorial misconduct, the habeas court found that the claim "centers on the prosecutor stating that the parties start on a level playing field, that [the victim] was an 83-year-old woman[,] and that the crime was 'heinous.'" The habeas court concluded that the prosecutor's remarks did not prejudice petitioner, did not subject petitioner to manifest injustice, and "were not deliberately placed before the jury to divert any attention to extraneous matters." The habeas court noted that the trial court instructed the jury as to the burden of proof, and the habeas court further concluded that the weight of the evidence presented at petitioner's trial "clearly established the guilt of the accused."

Regarding petitioner's claim that he was denied his right to confront the victim, the habeas court said:

> Having fully addressed related matters and prior rulings in underlying criminal proceedings as to [the victim]'s statements in its findings and conclusions on [p]etitioner's other grounds and assignments of error herein *supra*, this [c]ourt deems those findings and conclusions sufficiently dispositive for now finding and concluding this ground and assignment of error for habeas relief to be moot . . . and without merit.

Finally, regarding petitioner's claim that the evidence presented at trial was insufficient to support his convictions on Counts One, Two, and Four of the indictment, the habeas court found that the issue had already been addressed in *Bowers* and that the Court had determined that the evidence presented at petitioner's trial was sufficient for the jury to conclude that petitioner was guilty of the crimes in those three counts beyond a reasonable doubt. Consequently, the habeas court concluded that the claim was without merit.

Petitioner now appeals the habeas court's August 5, 2020, order, asserting four assignments of error through which he alleges violations of his constitutional rights to confrontation, effective assistance of counsel, and a fair trial. Petitioner also argues that the evidence presented at his trial was insufficient to support the jury's verdict. We have held:

> "In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review." Syl. Pt. 1, *Mathena v. Haines*, 219 W.Va.

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

417, 633 S.E.2d 771 (2006).

Syl. Pt. 1, *Anstey v. Ballard*, 237 W. Va. 411, 787 S.E.2d 864 (2016).

At the outset, we observe that

> Any person convicted of a crime and incarcerated under sentence of imprisonment therefor who contends that there was such a denial or infringement of his or her rights as to render the conviction or sentence void under the Constitution of the United States or the Constitution of this state, or both, . . . or that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common law or any statutory provision of this state, may, without paying a filing fee, file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or other relief, if and only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived . . . .

W. Va. Code § 53-4A-1(a), in part. Accordingly, "'[a] habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed.' Syllabus Point 4 of *State ex rel. McMannis v. Mohn,* 163 W.Va. 129, 254 S.E.2d 805 (1979) Cert. Denied, 464 U.S. 831, 104 S.Ct. 110, 78 L.Ed.2d 112 (1983)." Syl. Pt. 3, *Hatcher v. McBride*, 221 W. Va. 5, 650 S.E.2d 104 (2006).

We begin our analysis of petitioner's assignments of error by addressing petitioner's claim that he was denied his Sixth Amendment right to confront and cross-examine the victim. Petitioner takes issue with the victim's statements as presented through the testimony of the investigating officer and through the SANE nurse. He argues that the victim's statements to the investigating officer were testimonial hearsay because they were made "after the emergency had passed to aid the [investigating officer] in his investigation." Petitioner further contends that the victim's statement to the SANE nurse was testimonial hearsay because "a witness in the victim's position under the circumstances would reasonably expect that her statement[] given at the hospital could be used in a later prosecution of the crimes that were being investigated." Petitioner cites to our decision in *State v. Payne*, 225 W. Va. 602, 694 S.E.2d 935 (2010), in support of this argument, representing that we concluded in *Payne* that "[i]f the child victim in that case had not testified at trial, then her hearsay statements to the [nurse] as testified to by the [nurse] would have been testimonial."

Petitioner argues that "[h]ad the court suppressed the[] testimonial hearsay statements before trial as it should have done," the remaining evidence presented at petitioner's trial would have been insufficient to convict him of the charges in Counts One, Two, and Four of the indictment because these crimes required that petitioner have used a deadly weapon in the commission of the crimes and because no evidence would have been admitted establishing that a knife—a deadly weapon—was used during the commission of the crimes. He further argues that without the testimony of the investigating officer and the SANE nurse, who testified that the victim

alleged she was attacked by only one individual, the jury could not have found, beyond a reasonable doubt, that only one individual was responsible for the attack or that petitioner was the assailant who wielded the knife. Petitioner asserts that if his "convictions as to Counts One, Two, and Four are not reversed in favor of a judgment of acquittal by this Court due to insufficient evidence . . . , then [petitioner] is entitled to a new trial."

We have previously explained that a testimonial statement is "a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Syl. Pt. 8, in part, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006). With regard to evidentiary rulings, such as the admission of a witness's statement, we have said, "State court evidentiary rulings respecting the admission of evidence are cognizable in habeas corpus only to the extent they violate specific constitutional provisions or are so egregious as to render the entire trial fundamentally unfair and thereby violate due process under the Fourteenth Amendment." *Hatcher*, 221 W. Va. at 11, 650 S.E.2d at 110. In this instance, we proceed to consider petitioner's claim concerning the testimony of the investigating officer and the SANE nurse because petitioner has claimed the admission of this evidence violated his constitutional right of confrontation. Regarding the right to confrontation as it relates to testimonial statements, we have held:

> Pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.

Mechling, 219 W. Va. at 368, 633 S.E.2d at 313, Syl. Pt. 6; *see also* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]"); W. Va. Const. art. III, § 14 (providing that a criminal defendant is entitled to a jury trial and that "[i]n all such trials, the accused shall be . . . confronted with the witnesses against him"). The "'[f]ailure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.' Syllabus Point 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975)." *Mechling*, 219 W. Va. 368, 633 S.E.2d 313, Syl. Pt. 2.

We first consider the victim's statement to the SANE nurse. In *State v. Surbaugh*, 230 W. Va. 212, 737 S.E.2d 240 (2012), we determined that a witness's statement to medical personnel was not testimonial where "in view of the treatment being rendered, the medical personnel needed to understand the mechanism of how [the witness] was injured." *Id.* at 224, 737 S.E.2d at 252. Likewise, in *State v. Bazar*, No. 14-0916, 2015 WL 7628722 (W. Va. Nov. 20, 2015) (memorandum decision), we determined that a statement "given to a nurse in order for the victim to receive treatment" was not testimonial where the "circumstances surrounding the collection of the statement clearly demonstrate[d] that [the nurse] questioned the victim in an attempt to provide the proper medical care." *Id*. at *4. The Supreme Court of the United States has explained that "only *testimonial* statements are excluded by the Confrontation Clause" and that "statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules."

Giles v. California, 554 U.S. 353, 376, 128 S. Ct. 2678, 2693 (2008); *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 n.2, 129 S. Ct. 2527, 2533 n.2 (2009) (stating that "medical reports created for treatment purposes" are not testimonial); *United States v. Peneaux*, 432 F.3d 882, 896 (8th Cir. 2005) ("Where statements are made to a physician seeking to give medical aid in the form of diagnosis or treatment, they are presumptively nontestimonial.").

We disagree with petitioner's contention that the victim's statement, as recounted at trial by the SANE nurse from the victim's medical records, was testimonial. The SANE nurse explained at petitioner's trial that her reason for taking the victim's statement was to permit her to care for the victim. It is undisputed that the victim was physically injured and in need of medical assistance. Indeed, the victim ultimately received three sutures to repair a tear between her anus and vaginal opening. Undoubtedly, the victim's statements to the SANE nurse facilitated her treatment. Finally, at no point did the SANE nurse indicate that the victim expressed a belief that her statement to the SANE nurse would be used at a later trial. Under these circumstances, the victim's statement was not testimonial.

Payne does not, as petitioner contends, support his position. In *Payne*, the defendant was charged with committing numerous sex crimes against a child. 225 W. Va. at 605, 694 S.E.2d at 938. After the crimes were reported to the police, the child underwent an examination and interview by a forensic nurse, and the forensic nurse testified at the defendant's trial as to the statement she received from the child. *Id.* at 606, 694 S.E.2d at 939. The defendant was convicted of the charges against him, and on appeal of that conviction, he argued that the testimony of the forensic nurse concerning the child's statement should have been prohibited because it constituted hearsay. *Id.* at 606-07, 694 S.E.2d at 939-40. The Court determined that the forensic nurse's testimony was admissible under the medical diagnosis or treatment exception to the hearsay rule set forth in Rule 803(4) of the West Virginia Rules of Evidence. *Id.* at 610, 694 S.E.2d at 943. The Court further stated in a footnote:

> The [defendant] also suggests that his right to confrontation was violated by the admission of the testimony of [the forensic nurse]. In rejecting that assertion, we note that both [the child] and the nurse were available witnesses, and the [defendant] availed himself of ample opportunity to question them. In syllabus point six of *State v. Mechling,* 219 W.Va. 366, 633 S.E.2d 311 (2006), this Court explained as follows: "Pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Confrontation Clause contained within the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution bars the admission of a testimonial statement by a witness *who does not appear at trial*, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness." 219 W.Va. at 368, 633 S.E.2d at 313 (emphasis supplied). We find no Confrontation Clause violation in this case.

Payne, 225 W. Va. at 610 n.7, 694 S.E.2d at 943 n.7.

Petitioner misreads and misapplies our footnote in *Payne*. The footnote states only that the nurse's testimony concerning the child's statement could not have violated the defendant's

confrontation right because the child was an available witness. The footnote did not examine whether the child's statement, as testified to by the forensic nurse, was in fact testimonial. As the matter before the Court now involves an instance in which the witness—the victim—did not appear at petitioner's trial, *Payne* is not instructive as to whether petitioner's confrontation right was violated. Rather, as discussed above, petitioner's confrontation right was not violated because the victim's statement to the SANE nurse was not testimonial.[10]

In that the SANE nurse's testimony was properly admitted at petitioner's trial, evidence that the victim was attacked by only one assailant and that a knife was used in the commission of crimes charged in Counts One, Two, and Four was properly admitted at petitioner's trial. Because petitioner's complaint concerning the investigating officer's testimony also centers on the victim's claim that she was attacked by one assailant and that a knife was used in the commission of the crimes, we need not evaluate whether the investigating officer's testimony contained testimonial statements. Even if the investigating officer's testimony violated petitioner's confrontation right, any such error would be harmless beyond a reasonable doubt because testimony concerning a single assailant and the knife was properly admitted through the SANE nurse, whose credibility was not in question at trial. Consequently, we conclude that the habeas court did not abuse its discretion by denying petitioner's request for habeas relief on the basis of the testimony of the investigating officer and the SANE nurse.

Next, we consider petitioner's claim that he was denied his constitutional right to effective assistance of trial and appellate counsel. He argues that his trial counsel was ineffective because counsel

> (a) failed to move before trial to suppress the victim's testimonial hearsay statements to [the investigating officer]; (b) incompetently elicited the victim's testimonial hearsay from [the investigating officer] that was incriminating for [petitioner] – i.e., that a knife was used in the crimes; (c) stipulated to the admissibility of the victim's medical records and failed to object at trial to the admission of the testimonial hearsay statements contained in the victim's medical records; (d) failed to argue in closing summation that [petitioner] was entitled to a verdict of not guilty as to Counts One, Two and Four because, per the jury instructions actually given, the State failed to prove beyond a reasonable doubt that it was [petitioner] himself who had the knife and that it was not the other male assailant the DNA evidence and the State's own expert established was also involved in the crimes who had the knife; and (e) failed to argue in a post-verdict motion for acquittal that, in light of the jury instructions actually given requiring the State to prove [petitioner] guilty as a principle in the first-degree, the State failed to prove beyond a reasonable doubt the necessary element common to Counts One, Two and Four that it was [petitioner] who had the knife and that it was not the other

[10] Petitioner has not argued in this appeal that he is entitled to habeas relief on the ground that the admission of the SANE nurse's testimony constituted inadmissible hearsay which rendered his trial so fundamentally unfair that it violated his right to due process. Therefore, we decline to address that issue.

> male assailant the DNA evidence and the State's own expert established was also involved in the crimes who had the knife.

He argues that his appellate counsel was ineffective because counsel

> (a) failed to argue on appeal that, in light of the jury instructions actually given requiring the State to prove [petitioner] guilty as a principle in the first-degree, the State failed to prove beyond a reasonable doubt the necessary element common to Counts One, Two and Four that it was [petitioner] who had the knife and that it was not the other male assailant the DNA evidence and the State's own expert established was also involved in the crimes who had the knife; and (b) failed to argue on appeal that it was "plain error" for the court to have allowed the admission to evidence of the victim's testimonial hearsay statements memorialized in the hospital records.

We find that petitioner is not entitled to habeas relief on the basis of any of these arguments.

Under our law, a criminal defendant has the right to counsel, and "the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 1449 n.14 (1970)); *see also* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); W. Va. Const. art. III, § 14 (providing that a criminal defendant is entitled to a jury trial and that "[i]n all such trials, the accused . . . shall have the assistance of counsel"). When an individual convicted of a crime alleges that he has received ineffective assistance of counsel, that claim is "to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Miller*, 194 W. Va. at 6, 459 S.E.2d at 117, Syl. Pt. 5. Petitioner must satisfy both prongs of this test, known as the *Strickland/Miller* test, to be entitled to relief. *See id.* However, "[i]n deciding ineffective of assistance claims, a court need not address both prongs of the conjunctive standard of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *State v. Miller,* 194 W.Va. 3, 459 S.E.2d 114 (1995), but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test." Syl. Pt. 5, *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995).

In reviewing counsel's performance under this *Strickland/Miller* test,

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

Miller, 194 W. Va. at 6-7, 459 S.E.2d at 117-18, Syl. Pt. 6, in part. "[A]n attorney's actions must be examined according to what was known and reasonable at the time the attorney made his or her choices." *State ex rel. Daniel*, 195 W. Va. at 317, 465 S.E.2d at 419, Syl. Pt. 4, in part. Our scrutiny of counsel's performance is "highly deferential." *Miller*, 194 W. Va. at 16, 459 S.E.2d at 127 (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065). "[T]here is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential[.]" *State ex rel. Daniel*, 195 W. Va. at 317, 465 S.E.2d at 419, Syl. Pt. 3, in part.

Petitioner's ineffective assistance of counsel claim is largely rooted in his contention that the evidence that the victim was attacked by only one assailant and that a knife was used in the commission of crimes was improperly admitted at petitioner's trial through the testimony of the investigating officer and the SANE nurse. According to petitioner, his trial counsel was ineffective by failing to seek to exclude this evidence. As discussed above, however, the testimony, at least with regard to the SANE nurse, was not testimonial and was admissible evidence at petitioner's trial. Consequently, petitioner's trial counsel was under no obligation to seek the exclusion of this evidence, and by not seeking the exclusion of the evidence, trial counsel was not deficient under an objective standard of reasonableness. Likewise, where petitioner's appellate counsel did not argue that the SANE nurse's testimony should have been excluded and that the evidence was insufficient to establish that petitioner attacked the victim with a knife, petitioner's appellate counsel's performance was not deficient under an objective standard of reasonableness.

Furthermore, in that the evidence that the victim was attacked by only one assailant and that a knife was used in the commission of crimes was properly admitted through the testimony of the SANE nurse, we need not address whether petitioner's trial counsel was deficient under an objective standard of reasonableness by failing to seek exclusion of the investigating officer's testimony. For the reasons discussed above, even if the investigating officer's testimony contained the victim's testimonial statement, any error arising from that testimony would be harmless beyond a reasonable doubt. Accordingly, even if petitioner's counsel should have sought to exclude the investigating officer's testimony, the result of the proceedings would not have been different. Moreover, had petitioner's trial counsel made the arguments to the jury during closing arguments and to the trial court in his post-trial motion for acquittal that petitioner contends should have been made, it is clear that the result of the proceedings would not have been different.

To the extent that petitioner argues that his trial counsel was ineffective by failing to ask the trial court to declare the victim unavailable to testify at trial, we find this argument unpersuasive. Regardless of her availability, evidence concerning the number of assailants and the knife was properly admitted at trial without her testimony. While petitioner suggests that his trial counsel was ineffective by relying on the representations of the State and the victim's son concerning the victim's mental condition at the time of trial, petitioner has come forward with no evidence in this habeas proceeding suggesting that this reliance was unjustified. Additionally, petitioner's trial counsel indicated that, had the victim testified, it may have been more harmful to petitioner's case than helpful considering counsel's experience with juries tending to be more sympathetic toward elderly victims. For these reasons, petitioner's trial counsel acted reasonably under the circumstances, and counsel's representation was not deficient under an objective standard of reasonableness. Therefore, we conclude that the habeas court did not abuse its

discretion by denying petitioner's request for habeas relief on the basis that he received ineffective assistance of counsel.

Now, we consider petitioner's claim that "there was insufficient evidence in the felony case to support the jury's guilty verdicts as to Counts One, Two and Four of the Indictment." Again, through this claim, petitioner asserts that the evidence was insufficient to establish that the victim was attacked by only one assailant and that a knife was used in the commission of crimes.

We have previously said that "[e]xcept in extraordinary circumstances, on a petition for habeas corpus, an appellate court is not entitled to review the sufficiency of the evidence. *Riffle v. King,* 302 F.Supp. 992 (N.D.W.Va. 1969), and *Young v. Boles,* 343 F.2d 136 (4th Cir. 1965). That question is an appropriate one for review on appeal." *Cannellas v. McKenzie*, 160 W. Va. 431, 436, 236 S.E.2d 327, 331 (1977); *see also McBride v. Lavigne*, 230 W. Va. 291, 300 n.26, 737 S.E.2d 560, 569 n.26 (2012) ("The issue of whether there was sufficient evidence to convict is still primarily a matter to be resolved on *direct appeal and not* during a habeas corpus proceeding.").

Having determined that the admission of the evidence concerning the number of assailants and the knife through the SANE nurse and petitioner's medical records did not violate petitioner's confrontation right and having determined that the evidence was not admitted as a result of the ineffective assistance of petitioner's trial counsel, we find that no extraordinary circumstances exist that would warrant consideration of the sufficiency of the evidence in this habeas action. *Cf. Shoop v. Ballard*, No. 13-1313, 2014 WL 6607475, at *4 (W. Va. Nov. 21, 2014) (memorandum decision) (finding that where "petitioner did not receive ineffective assistance of counsel sufficient to justify reversal of the circuit court's order denying his petition for habeas corpus relief," the case did "not fall within the extraordinary circumstances where this Court will review a sufficiency of evidence claim in a habeas corpus proceeding"). Therefore, we conclude that the circuit court did not abuse its discretion by denying petitioner's request for habeas relief on the basis that the evidence admitted at his trial was insufficient to support his convictions.

Petitioner's final claim on appeal is that he was denied a fair trial due to "highly prejudicial" prosecutorial misconduct. Specifically, petitioner contends that the prosecutor engaged in misconduct when,

> even though the prosecutor knew he would not be calling the victim to testify at trial, in an abandonment of his quasi-judicial role to ensure fairness, the prosecutor never sought the trial court's ruling as to whether the victim's hearsay statements memorialized in the medical records were admissible per *Crawford* and the Confrontation Clause of the Sixth Amendment.

Petitioner states that the prosecutor "compounded his impropriety by having all the medical records "pre-admitted" into evidence and then having the SANE [nurse] read all of the victim[']s testimonial hearsay verbatim from the medical records as he published those records to the jury." Petitioner avers that the prosecutor also engaged in prosecutorial misconduct by

> inflam[ing] the passions of the jury with his repeated insistence that the crime was "heinous," his repeating the fact that the victim was 83 years old, and his plea for

> understanding that it had taken "14 years of hard work" to get to the trial of [petitioner], while he misle[d] and misrepresent[ed] to the jury that, even though there may very well have been another male involved in the crimes, the jury's decision to convict [petitioner] [was] an "easy" one, because "it doesn't make a bit of difference in this case" if another man was involved, because only [petitioner] [was] on trial and "we know he was there."

Petitioner argues that the prosecutor continued his misconduct

> by misrepresenting to the [trial] court in [the State's response to petitioner's motion for judgment of acquittal] that, even if [petitioner] was not the assailant with the knife, "he would be guilty of the substantive offenses as a principle in the second degree," when the prosecutor knew the jury instructions did not give the jury that option.

"[A]llegations of prosecutorial misconduct are based on notions of due process." *State v. Guthrie*, 194 W. Va. 657, 677 n.25, 461 S.E.2d 163, 183 n.25 (1995); *see also* U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"); W. Va. Const. art. 3, § 10 ("No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.").

> In determining whether a statement made or evidence introduced by the prosecution represents an instance of misconduct, we first look at the statement or evidence in isolation and decide if it is improper. If it is, we then evaluate whether the improper statement or evidence rendered the trial unfair. Several factors are relevant to this evaluation, among them are: (1) The nature and seriousness of the misconduct; (2) the extent to which the statement or evidence was invited by the defense; (3) whether the statement or evidence was isolated or extensive; (4) the extent to which any prejudice was ameliorated by jury instructions; (5) the defense's opportunity to counter the prejudice; (6) whether the statement or evidence was deliberately placed before the jury to divert attention to irrelevant and improper matters; and (7) the sufficiency of the evidence supporting the conviction.

Guthrie, 194 W. Va. at 677 n.25, 461 S.E.2d at 183 n.25; *see also* Syl. Pt. 6, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995) ("Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters."). We have held that "[a] judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." *Sugg*, 193 W. Va. at 393, 456 S.E.2d at 474, Syl. Pt. 5.

Pursuant to our law governing prosecutorial misconduct, we must first determine whether the complained-of acts constituted misconduct. We find that none do. As we have already

explained above, the victim's medical records and the SANE nurse's testimony concerning those records did not contain testimonial statements. Thus, the prosecutor's introduction of this evidence at trial did not constitute misconduct. Regarding the prosecutor's characterization of this case as "heinous" and the prosecutor's repeated assertions that the victim was eighty-three years old and that the case took fourteen years of work before it was ready for trial, we find no prosecutorial misconduct. These statements were all true and uncontested by petitioner, and the repetition of these statements—simple facts of the case—would not have inflamed the passions of the jury such that the jury would have been unable to fairly decide the matter. Regarding the prosecutor's statement that the possibility that another individual was involved in the crime was of no moment, we find no prosecutorial misconduct. The evidence showing that petitioner's DNA was found inside the victim, that petitioner was the primary source of the sperm found inside the victim, that the victim told the SANE nurse she was assaulted by only one individual, and that the individual who assaulted her wielded a knife all supports a conclusion that petitioner committed the crimes at issue, not a second individual. For this reason, the State's response to petitioner's motion for judgment of acquittal on the issue of the involvement of a second individual in the crimes is irrelevant.

In that we have determined that none of the complained-of acts amounts to prosecutorial misconduct, we need not proceed to an analysis of whether the complained-of acts rendered the trial unfair. We therefore conclude that the circuit court did not abuse its discretion by denying petitioner's request for habeas relief on the basis of prosecutorial misconduct.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: January 12, 2022

CONCURRED IN BY:

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