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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 18-0498

SCANNED

STATE OF WEST VIRGINIA,

Respondent,

v.

On Appeal from the Circuit Court of Grant County (Case No. 17-MAP-1)

MICHAEL SHANE REXRODE,

Defendant Below, Petitioner.

RESPONDENT'S BRIEF

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3. The circuit court did not abuse its discretion when finding that the victim's attempt to assert her Fifth Amendment privilege against self-incrimination was improper because she was not asked a self-incriminating question. Even if her privilege was infringed, Petitioner cannot claim error for someone else's constitutional right.
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IV. STATEMENT OF THE CASE

Following a jury trial in Magistrate Court of Grant County, Petitioner was convicted of domestic battery of his wife, [redacted] Rexrode (hereinafter referred to as "Mrs. Rexrode" or

"victim"). Petitioner appealed his conviction to the Circuit Court of Grant County. (Appendix Record "AR" at 128). The circuit court denied his appeal. This appeal followed.

A. The Suppression Hearing

After his arrest on April 19, 2017, for domestic battery, Petitioner filed a motion to dismiss the complaint and a motion to suppress evidence found in Petitioner's home. He argued that law enforcement's warrantless entry into the home was unlawful. The Magistrate Court held a suppression hearing on June 27, 2017. (AR 216).

At the suppression hearing, the State called one witness, West Virginia State Police Corporal S.A. Nazelrod ("Cpl. Nazelrod"). (AR 218). On April 19, 2017, West Virginia State Police, Romney Communications ("dispatch") received a call from a third party that "advised that Mrs. Rexrode had reported to [the caller] that a domestic had occurred in which [Mrs. Rexrode] had received a pretty bad injury to her eye." (AR 219).

When Cpl. Nazelrod arrived, Mrs. Rexrode appeared at the door, and he immediately observed that her eye was injured with blood forming in the corner of her eye. (*Id.*). He also observed that Mrs. Rexrode's arm appeared to be bloodied. (AR 219). When Cpl. Nazelrod first arrived on scene, Mrs. Rexrode told him that she hurt her eye on farm equipment earlier that day. (AR 228).

After observing her injuries, Cpl. Nazelrod immediately "went to locate and detain Mr. Rexrode who she said was inside." (*Id.*). Cpl. Nazelrod did not ask for consent to enter. (AR at 228). Cpl. Nazelrod entered the home to ensure the safety for both Mrs. Rexrode and the officers on the scene, testifying "[m]y concern was to get him - - figure out where he was, get them under control, because obviously if he had done that to her he may be a danger to the officers on scene."

(AR 221). Shortly after Cpl. Nazelrod arrived on scene, two other law enforcement officers, Deputy Rohrbaugh and Deputy Crites, arrived. (AR 230).

When Cpl. Nazelrod entered the home, Petitioner was lying in a bed under a bedspread. (AR 220). Cpl. Nazelrod asked Petitioner to show his hands. (AR 231). Nazelrod observed that Petitioner's hand was bloody. (AR 232). Then, Mrs. Rexrode provided a statement to police that Petitioner "jabbed her in the face with his fingers and fist." Her arm was injured when Petitioner "had her on the living room floor holding her down, hitting her in the head." (AR 221). Petitioner was then arrested for domestic battery. (AR 235). At the station, Petitioner told Cpl. Nazelrod that he injured his hand while working on his farming equipment earlier that day. (AR 234). At the suppression hearing, the identity of the third party caller was discussed. The caller was a neighbor and friend of Mrs. Rexrode. (AR at 224). Following the suppression hearing, the magistrate court denied the motion finding that Cpl. Nazelrod acted lawfully. (AR 242).

B. The Trial

A jury trial was held on August, 14, 2017. (AR at 150).[1] The magistrate called fourteen (14) prospective jurors in the jury pool. (AR 154). Before *voir dire* began, Petitioner objected to a prospective juror because she previously worked for the Petitioner. (*Id.*). Then, individual *voir dire* occurred in chambers and was not recorded.[2] (*Id.*). When the transcribed proceedings resumed, Petitioner objected to the State's peremptory strikes. (*Id.*).

The State called Cpl. Nazelrod, who testified that he was dispatched to Petitioner's home for a well-check after dispatch received a call that a "physical altercation" was reported at the

[1] Before the trial began, the magistrate court held a suppression hearing to determine whether Petitioner's statement to Cpl. Nazelrod that he hurt his hand on farm equipment was admissible. The Petitioner does not appeal the magistrate court's denial of this motion. (AR at 152).

[2] The individual *voir dire* does not appear on the record, and the prosecutor states that a prospective juror provided them information "in chambers." (AR 154).

Petitioner's home. (AR 157). The third party called dispatch at approximately 8:00 p.m., and Cpl. Nazelrod arrived at Petitioner's home at approximately 8:30 p.m. (AR 180). Upon arriving to the residence, Cpl. Nazelrod did not hear yelling or observe any physical altercation. (AR 160). Cpl. Nazelrod met with Mrs. Rexrode and observed her eye to be injured. (AR 164). Photographs of Mrs. Rexrode's injuries to her right eye and right arm were admitted into evidence. (AR 158, 125).

Cpl. Nazelrod entered the residence to look for the other individual involved, and he found Petitioner lying in a bed and noticed that his right hand was bloodied. (AR 161). The State introduced a photo that Cpl. Nazelrod took of injuries to Petitioner's right hand. (AR 158, 163, 126). The State also introduced a photo that depicted a broken ceramic figurine in the living room. (AR 158). Mrs. Rexrode provided a statement to law enforcement, but days later, she called Cpl. Nazelrod and changed her story. (AR 158–59). After Petitioner's arrest, Cpl. Nazelrod transported him to the station for processing. (AR 151).

Next, the State called Mrs. Rexrode. When asked whether she was married to the Petitioner, she refused to answer and explained that she was asserting her Fifth Amendment right. (AR 165). After the magistrate directed her to answer the questions, Mrs. Rexrode's attorney, who was present, stated "she is potentially subject to criminal charges here, and she can assert her Fifth Amendment right per the Constitution." (*Id.*). The State informed the magistrate that it did not intend to criminally prosecute Mrs. Rexrode for any crime arising from the events on April 19, 2017, or the trial. (*Id.*). The magistrate then ordered the jury out of the courtroom to take up oral argument on the issue.

After hearing oral argument, the magistrate left the courtroom and consulted with Chief Judge James Courrier[3] about the evidentiary ruling. (AR 167). Upon returning, the magistrate

[3] In the circuit court's order denying the appeal, the court stated that Magistrate Feaster consulted with Chief Judge Courrier.

ruled "I'm going to allow you to question, and I'm going to direct you to answer any question that is not soliciting an answer that would implicate you in a crime. You don't have a Fifth Amendment right if the question does not pertain to a crime. And you are being compelled to testify." (AR 166). Mrs. Rexrode's attorney informed the magistrate court that Mrs. Rexrode did not want to testify because it may expose her to a charge for providing false information to an officer.

Ultimately, Mrs. Rexrode testified and confirmed that she provided a statement to police on the night of the battery that Petitioner "jabbed me in the face with his fingers and fist," and "had me on the living room floor holding me down and hitting me in the head. It caused me to pee on myself." (AR 169). But, Mrs. Rexrode testified that she lied to police when she gave her written statement because she was "pissed off" at the Petitioner for not spending time with her. (*Id.*). At trial, she attempted to provide another explanation for her eye injury and the broken ceramic figurine. She testified that she hurt her eye when she fell over a step and landed on the figurine's hand. (AR 170). When she was exiting the stand, Mrs. Rexrode apologized to Petitioner. (*Id.*).

The State then called Deputy Rohrbaugh ("Dep. Rohrbaugh"), who also responded to Petitioner's home. (*Id.*). He testified that when Mrs. Rexrode first came to the door, she appeared "visibly upset." (*Id.*). Dep. Rohrbaugh also observed the injury to her eye. (AR 170). Dep. Rohrbaugh went outside and spoke with Mrs. Rexrode. (AR 171). Mrs. Rexrode told Dep. Rohrbaugh that, after a verbal argument, Petitioner pinned her on the ground and beat her.[4] (AR 171).

Finally, the Petitioner testified that he injured his right hand on April 19, while working on his farm. (AR 175). When Petitioner returned from work, he testified that his wife became upset and accused him of having a relationship with a female employee. (*Id.*). Petitioner testified that

[4] Petitioner objected to this testimony on hearsay grounds, but the magistrate deemed it admissible under the excited utterance exception. (AR 171). Petitioner does not appeal this ruling.

Mrs. Rexrode was drunk, and he did not want to argue with her so he went to bed around 8:30 p.m. (AR 179). He testified that at the time he went to bed, his wife did not have an injury to either her eye or her arm. (AR 179).

During the State's rebuttal and germane to this appeal, the State mentioned that Mrs. Rexrode was likely afraid of going home. The Petitioner contemporaneously objected to this as improper argument. The jury ultimately convicted Petitioner of domestic battery, and Petitioner was sentenced to ten days in jail. Petitioner appealed the conviction to the circuit court.

C. The Appeal to Circuit Court

Circuit Court Judge Lynn Nelson presided over the appeal. The circuit court held a hearing on January 22, 2018, and heard oral argument from the parties. (AR 244). In his appeal to the circuit court, Petitioner advanced many of the same arguments as in the instant appeal. In addition, he argued that during *voir dire*, the magistrate court showed favor to the State.

By order entered May 24, 2018, the circuit court denied Petitioner's appeal and affirmed the conviction. The circuit court found the following:

1. Law enforcement's entry into Petitioner's home fell under the exigent circumstances exception to the Fourth Amendment. The circuit court found that law enforcement was dispatched to the Petitioner's home after a third party caller told dispatch that there was an altercation at the residence. After arriving on scene, Cpl. Nazelrod observed Mrs. Rexrode's injuries and the location of the other individual involved was unknown. Cpl. Nazelrod's warrantless entry was reasonable to protect "the safety and well-being of the occupants." (AR 204–06). Therefore, because the entry was lawful, the evidence seized from the home was not subject to suppression.

2. The circuit court found Petitioner's complaint that Magistrate Feaster abandoned his role of impartiality and favored the State to be meritless. Further, the circuit court found that the Petitioner failed to make any showing that the magistrate court's actions impacted the jury's decision. (AR at 206).
3. The magistrate court did not err when denying Petitioner's motion to strike a juror who was previously represented by the prosecutor for cause because the client attorney relationship occurred twenty years prior to trial, and the juror told the court that she could be fair. (AR 207).
4. Cpl. Nazelrod's trial testimony regarding the contents of the 911 call was not hearsay because it was not offered for the truth of the matter asserted. (*Id.*).
5. The circuit court found that although Magistrate Feaster contacted Chief Judge Courrier regarding Mrs. Rexrode's assertion of her Fifth Amendment, his conduct did not constitute an abdication of his judicial role or violate the Code of Judicial Conduct. The circuit court reasoned that Chief Judge Courrier was not on the circuit's case load rotation for criminal appeals, thus, Judge Courrier would not have been an appellate judge for the instant appeal. (*Id.*).
6. Mrs. Rexrode could not properly invoke her Fifth Amendment right because the questions posed to her were not incriminating. Rather, her assertion of her Fifth Amendment right was merely "a ruse to protect her abuser." (*Id.*). Further, Petitioner cannot "claim any constitutional error for a constitutional right a witness asserted." (*Id.*).
7. The prosecutor's comments in closing regarding what may happen to the victim if Petitioner was not convicted was supported by Mrs. Rexrode's apology to Petitioner

when she left the courtroom and her "desire to avoid doing anything that would result in his conviction." (AR 208).

8. The Petitioner failed to show that the magistrate court's failure to record *voir dire* amounted to reversible error. (*Id.*).

9. Cumulative error did not exist because there was no error in the trial below. (*Id.*).

This appeal followed.

V. SUMMARY OF ARGUMENT

Although Petitioner asserts numerous errors, none of these errors taken separately or cumulatively require reversal of the jury's verdict that rendered Petitioner guilty of domestic battery. Cpl. Nazelrod's warrantless entry into Petitioner's home was reasonable under both the emergency doctrine and the community caretaking doctrine because after he responded to a domestic violence call, he observed Mrs. Rexrode to be injured and did not know the precise location of Petitioner. His entry into the home was to secure a potentially dangerous individual—not to arrest Petitioner.

At the time of trial, Petitioner and his wife reconciled, and Petitioner orchestrated a plan for Mrs. Rexrode to plead the Fifth Amendment to avoid testifying against her husband. This plan was unsuccessful because a witness cannot make a blanket assertion of their privilege against self-incrimination. This privilege is properly invoked only when their testimony would in fact incriminate them. Mrs. Rexrode's attempt to invoke this privilege occurred after being asked a non-incriminating question: "Are you married to the defendant?" (AR 165). Petitioner's argument that he was unfairly prejudiced because Mrs. Rexrode's credibility was diminished when ordered to testify after attempting to invoke her Fifth Amendment right fails because a non-party witness must invoke this privilege in front of a jury. *See State v. Herbert*, 234 W.Va. 576, 584, 767 S.E.2d

471, 479. This Court developed this procedure, in part, to avoid the instant scenario when a witness is merely uncooperative. *Id.* at 585, 480. Even if her Fifth Amendment right was infringed, Petitioner cannot claim error based upon someone else's constitutional right.

Petitioner contends that the magistrate violated the Code of Judicial Conduct and abdicated his judicial role by consulting with a circuit judge, Chief Judge Courrier, on this evidentiary matter. But, the magistrate's conduct did not violate the rule because he is expressly allowed to consult with another judge that does not have appellate jurisdiction. *See* W.Va. Code of Judicial Conduct R. 2.9. Here, Judge Courrier did not hear this case on appeal: Judge Nelson did, and according to the circuit court's order, Judge Courrier was not in rotation to hear criminal appeals. (AR 207).

Petitioner's claim that the magistrate's evidentiary ruling, and the circuit court's finding that Cpl. Nazelrod's testimony that he was responding to a "physical altercation" was not hearsay fails because his statement was not introduced to prove the matter asserted. Instead, it was introduced to explain the officer's conduct as to why he initially responded to the residence.

Next, Petitioner argues that the prosecutor's remarks in closing that Mrs. Rexrode may be afraid to go home was prejudicial. But, these remarks were isolated, supported by the evidence, and did not result in "manifest injustice." *State v. Sugg*, 193 W. Va. 388, 393, 456 S.E.2d 469, 474 (1995).

Likewise, Petitioner fails to show prejudice for two alleged procedural defects. First, he argues that the magistrate court's failure to record individual *voir dire* demands a new trial. However, when a small portion of the magistrate court trial is not recorded, a new trial is only necessary when the petitioner demonstrates prejudice from the missing transcript. *See State v. Bolling*, 162 W.Va. 103, 115, 246 S.E.2d 631, 638 (1978). Here, Petitioner's allegations fail to demonstrate any error, much less prejudice. Second, Petitioner claims that his conviction should

be overturned because the circuit court did not issue its order denying this appeal within the statutory time period of ninety (90) days. *See* W.Va. Code §50-5-13(c)(6). But, because this claim does not rise to constitutional error, it fails without a showing of prejudice. *See State v. Atkins*, 163 W.Va. 502, 510, 261 S.E.2d 55, 60 (1979). Petitioner fails to demonstrate any prejudice.

VI. STATEMENT REGARDING ORAL ARGUMENT

The issues raised in Petitioner's assignments of error are covered by settled law. Oral argument is not necessary to resolve the question, as the facts are straightforward and the legal arguments are adequately presented in the parties' briefs. In the event this Court finds that this case warrants oral argument, Respondents asserts that argument under W.Va. R. App. P. 19 is appropriate given that the assignments of error "involve the application of settled law."

VII. ARGUMENT

When reviewing the circuit court's decision of an appeal from a trial in magistrate court, this Court applies a three pronged standard of review. *See State v. Chanze*, 221 W.Va. 257, 259, 565 S.E.2d 379, 381 (2002). This Court reviews questions of law and statutory interpretation *de novo*. *See id.* (quoting Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995)). Further, this court's "review of the final order and ultimate disposition by the circuit court is under an abuse of discretion standard, and we review the underlying factual findings of the circuit court using a clearly erroneous standard. *See id.* (citing Syllabus Point 1, *Burnside v. Burnside,* 194 W.Va. 263, 460 S.E.2d 264 (1995)).

A. Cpl. Nazelrod's entry into the Petitioner's home was reasonable under both the emergency doctrine and the community caretaker doctrine.

Cpl. Nazelrod's initial entry into Petitioner's home was not to effectuate an arrest, but to ensure the immediate safety of a victim of domestic violence and officers on scene. Cpl.

Nazelrod's conduct falls under both the emergency and community caretaker doctrines that are well-established exceptions to the Fourth Amendment.

1. **The circuit court did not abuse its discretion when finding that Cpl. Nazelrod's entry into Petitioner's home was justified under the emergency doctrine after he observed Mrs. Rexrode's eye injury that was consistent with the third party call to dispatch that Mrs. Rexrode's eye was injured during a domestic dispute.**

The circuit court upheld Cpl. Nazelrod's entry into Petitioner's home under the emergency doctrine. Petitioner claims that the circuit court's application of the emergency doctrine is incorrect because he contends that Cpl. Nazelrod entered the Petitioner's home with the intent to arrest Petitioner.

When reviewing a court's ruling on a motion to suppress, this Court uses a two tiered standard. *See State v. Lilly*, 194 W. Va. 595, 600, 461 S.E.2d 101,106 (1995). The circuit court's findings of fact are reviewed under the "clearly erroneous standard." *Id.* "Under the clearly erroneous standard, a circuit court's decision ordinarily will be affirmed unless it is unsupported by substantial evidence; based on an erroneous interpretation of applicable law; or, in light of the entire record, this Court is left with a firm and definite conviction that a mistake has been made." *Id.* The Court will "construe all facts in the light most favorable to the prosecution." *Id.* The Court reviews "'*de novo*' questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action." *Id.*

The emergency doctrine is a well-established exception to the general rule that law enforcement officers must obtain a warrant before entering a home to seize a person. *See State v. Cecil*, 173 W.Va. 27, 32, 311 S.E.2d 144, 149 (1983); *see also State v. Lacy*, 196 W.Va. 104, 113, 468 S.E.2d 719, 728 (1996). The *Cecil* Court held that the emergency doctrine permits a limited entry of an area when "1) there is an immediate need for their assistance in the protection of human life, (2) the search or entry by the officers is motivated by an emergency, rather than by an intent

to arrest or secure evidence, and (3) there is a reasonable connection between the emergency and the area in question." *Cecil*, at 32, 149 (finding that emergency doctrine permitted officers to enter residence to locate an injured or deceased child after receiving timely information that child was located in residence).

After *Cecil*, this Court applied the emergency doctrine to permit officers to enter into the home of an armed robbery suspect. *See State v. Farley*, 230 W.Va. 193, 737 S.E.2d 90 (2012). In *Farley*, police responded to a report of an attempted armed robbery of a convenient store. *Id.* at 195, 92. After witnesses described the suspect's vehicle, officers found the vehicle, and the owner of the vehicle implicated the defendant. *Id.* Then, officers performed a "knock and announce" at the defendant's home. *Id.* After hearing "rapid footsteps as if someone was running through the house," officers entered defendant's home. *Id.* This Court upheld the entry, reasoning that officers reasonably believed that the defendant may be armed and inside the residence. Therefore, officer safety concerns permitted the warrantless entry. *Id.* at 200, 97.

In *State v. Bookheimer*, this Court, in a 3-2 opinion, held that an anonymous tip standing alone is insufficient to justify the warrantless entry into a home under the emergency circumstances doctrine. 221 W.Va. 720, 727, 656 S.E.2d 471, 478 (2007). After receiving an anonymous call of a domestic disturbance involving gunshots and yelling, two officers arrived at the residence. *Id.* at 724, 475. A female, the owner of the residence, was outside and spoke with police. She denied that any domestic disturbance occurred, and there was no evidence of injury. *Id.* She also told officers that their presence was unwanted and asked them to leave. *Id.* After she told officers that the defendant was inside the residence, officers entered her home. *Id.* Once inside, they found evidence of methamphetamine manufacturing in plain view, and the defendant was detained and ultimately arrested. *Id.* This Court held that the emergency doctrine did not permit officers to

enter the residence because "neither resident . . . indicated a need for protection from the police." *Id.* at 727, 478. However, the majority expressly noted that "had facts been present to suggest a possible domestic dispute, including injury or the presence of firearms, the resulting decision by this Court may have been different." *Id.* at n. 9.

The instance case presents the exact situation that the *Bookheimer* Court foreshadowed the emergency doctrine to apply. Here, Mrs. Rexrode's eye was visibly injured when officers arrived on scene. Although the call came from a third party, the caller's information was detailed and informed dispatch that Mrs. Rexrode suffered an eye injury. (AR 219). Unlike in *Bookheimer*, where officers did not obtain any independent information to verify the tip, here, Cpl. Nazelrod immediately observed Mrs. Rexrode's eye injury which corroborated the caller's information. *See Bookheimer*, 729, 480 (reasoning that a "police officer may rely upon an anonymous call if subsequent police work or other facts support its reliability.") Moreover, the caller reported that Mrs. Rexrode relayed this information directly to the caller, which increased its reliability. (AR 219). In fact, at the suppression hearing, the Petitioner identified the name of the third party caller as Mrs. Rexrode's neighbor and friend. (AR 223).

Here, all three factors in *Cecil* are present. First, the officers acted immediately and not on stale information. (AR 219). After receiving the call, officers promptly arrived on scene and witnessed Mrs. Rexrode's injuries. Officers immediately entered the home to secure the other individual involved in the dispute. Second, Cpl. Nazelrod's entry into the home was not motivated to secure an arrest. At the time Cpl. Nazelrod arrived on scene, Mrs. Rexrode told him that Petitioner was inside the residence, but Petitioner's exact location was unknown. He entered the home to ensure the safety for both Mrs. Rexrode and the officers on the scene, testifying "[m]y concern was to get him - - figure out where he was, get them under control, because obviously if

he had done that to her he may be a danger to the officers on scene." (AR 221). Further, Cpl. Nazelrod testified that law enforcement's standard practice is to treat all domestics as emergencies. (AR 222). Third, the scope of Cpl Nazelrod's entry into the residence was directly related to the domestic dispute. He did not carry out a general search of the home. Rather, his sole mission was to find and secure the other person involved in the dispute.

Therefore, when viewing all the evidence in the light most favorable to the State, *see State v. Lilly*, 194 W. Va. at 600, 461 S.E.2d at 106, the circuit court properly found the entry into Petitioner's home was reasonable under the emergency doctrine.

2. Cpl. Nazelrod's entry into the Petitioner's home was also permitted under the community caretaker doctrine because he entered the home to ensure the safety of Mrs. Rexrode from Petitioner, whose whereabouts were unknown.

Alternatively, as advanced by the State below, Cpl. Nazelrod's entry into the home was permitted because he entered pursuant to a community caretaker investigation.[5] The "'community caretaker doctrine' is a widely recognized exception to the general warrant requirement of the Fourth Amendment . . .." Syllabus Point 6, *Ullom v. Miller*, 227 W.Va. 1, 705 S.E.2d 111 (2010). The community caretaker doctrine requires that the State establish:

> (1) given the totality of the circumstances, a reasonable and prudent police officer would have perceived a need to promptly act in the proper discharge of his or her community caretaker duties; (2) community caretaking must be the objectively reasonable, independent and substantial justification for the intrusion; (3) the police officer's action must be apart from the intent to arrest, or the detection, investigation, or acquisition of criminal evidence; and (4) the police officer must be able to articulate specific facts that, taken with rational inferences, reasonably warrant the intrusion.

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[5] Pursuant to Syllabus Point 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965), "[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment."

See id. at syl. pt. 7 (holding that officer may do roadside safety check of vehicles); *see also United States v. Johnson*, 410 F.3d 137, 146 (4th Cir. 2005) (denying suppression under the community caretaker doctrine when officer, who responded to a vehicle crash, looked into glove box and found a firearm).

Petitioner argues that the community caretaker doctrine is not applicable because this Court has yet to apply it to a search of a home. However, other courts permit officers to enter a person's home without a warrant pursuant to their community caretaking function. *See State v. Horngren*, 238 Wis.2d 347, 352, 617 N.W.2d 508, 511 (Wis. Ct. App. 2000)(upholding warrantless entry when responding to a suicide threat).

Here, each element under *Ullom* is met. Cpl. Nazelrod's articulated his reason for entering the home without a warrant. As explained above, Cpl. Nazelrod responded to a domestic violence scene, observed serious injuries to Mrs. Rexrode, and was unaware of Petitioner's exact location. He did not enter the home to arrest Petitioner, but to protect the safety of Mrs. Rexrode and other officers. Cpl. Nazelrod's entry into the home was reasonable under both the emergency doctrine and pursuant to his community caretaking duties.

B. The circuit court properly found that Petitioner was not denied a fair trial as a result of Mrs. Rexrode's testimony.

Petitioner argues that the magistrate court erred by precluding Mrs. Rexrode from invoking her Fifth Amendment right to avoid self-incrimination. However, this argument fails for many reasons. First, Mrs. Rexrode did not properly invoke this privilege because she was not asked a potentially incriminating question. Second, even if Mrs. Rexrode's right was infringed, Petitioner cannot claim prejudice. Mrs. Rexrode's privilege against self-incrimination belongs to Mrs. Rexrode—not the Petitioner. Third, Petitioner fails to show how the court's decision denied him a fair trial or showed partiality towards the State. Because Petitioner's allegations do not

involve his constitutional right, "this Court will not reverse the judgement "unless the error is prejudicial to the defendant." *State v. Atkins*, 163 W.Va. 502, 510, 261 S.E.2d 55, 60.

Mrs. Rexrode did not want to testify against her husband at trial. Because Petitioner was not protected by either the the marital or spousal privilege, the Petitioner and Mrs. Rexrode concocted another way for Mrs. Rexrode to avoid testifying.[6] Therefore, Mrs. Rexrode attempted to invoke her Fifth Amendment right to self-incrimination, arguing that she did not want to open herself up to criminal prosecution for giving a false statement to law enforcement on the night of Petitioner's arrest, despite assurances from the prosecutor that no prosecution would result.

Witness testimony is essential to any case. "Among the necessary and most important of the powers of the States as well as the Federal Government to assure the effective functioning of government in an ordered society is the broad power to compel residents to testify in court . . .." *Kastigar v. United States*, 406 U.S. 441, 446 (1972). But, this power is limited by the Fifth Amendment of the United States Constitution which states that "[n]o person shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend, V. This right is also codified in the West Virginia Constitution. *See* W.Va. Const. art III, § 5.

The Fifth Amendment privilege protects a witness from "being forced to give testimony which may later be used to convict them in a criminal proceeding." *Lefkowitz v. Cunningham*, 431 U.S. 805 (1977). A "witness may 'refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant.'" *Id.* (internal citations omitted).

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[6] Spousal privilege does not apply because the crime was committed against Mrs. Rexrode. *See* Syllabus Point 11, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995). Marital confidence privilege does not apply because Mrs. Rexrode's statements to police were not confidential. *See id.* at syl. pt. 9.

In order to invoke the privilege, the compelled testimony must be self-incriminating. *See Hoffman v. United States*, 341 U.S. 479, 486 (1951); *see also* Syllabus Point 2, *State v. Herbert*, 234 W.Va. 576, 767 S.E.2d 471 (2014) (holding that a witness can only invoke "the constitutional privilege against self-incrimination" when "a witness is asked a potentially incriminating question."). A witness cannot make a blanket assertion of this privilege. *See Herbert*, at 584, 479; *see also Hoffman*, at 486 (holding that a "witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified."). The witness must "take the stand, be sworn to testify, and assert the privilege in response to each allegedly incriminating question as it is asked." *Id.* The trial court may grant the witness immunity so that the witness can give truthful testimony without fear of a subsequent criminal prosecution. *See State v. Whitt*, 220 W.Va. 685, 694, 649 S.E.2d 258, 267 (2007) (citing W.Va. Code § 57-5-2).

1. **Mrs. Rexrode's attempt to invoke her privilege to a non-incriminating question was improper.**

Mrs. Rexrode's claim of privilege was an attempt to protect her abuser. At trial, when Mrs. Rexrode was asked by the prosecutor if she was married to Petitioner, she stated "I assert my Fifth Amendment right." (AR 165). Her privilege was not infringed when the State asked her if she was married to Petitioner because it is inconceivable that she "reasonably believe[d]" this evidence could lead to criminal prosecution or other sanctions. *Katisgar v. United States*, 406 U.S. 441, 447 (1972) (holding that compelling testimony was proper after witness granted immunity). The magistrate correctly found that this was not a potentially incriminating question.

Then, the prosecutor informed the court that he previously informed Mrs. Rexrode's attorney that the State would not prosecute Mrs. Rexrode for conduct as a result of this incident.

The jury was then excused. After a recess where Magistrate Feaster called the Chief Judge, Magistrate Feaster directed Mrs. Rexrode to "answer any question that is not soliciting an answer that would implicate you in a crime. You don't have the Fifth Amendment right if the question does not pertain to a crime. And you are being compelled to testify." (AR 166). Contrary to Petitioner, Magistrate Feaster did not threaten Mrs. Rexrode with contempt. This notion of contempt was solely invented by Petitioner and Mrs. Rexrode's attorney. (AR 168). Ultimately, in her testimony, Mrs. Rexrode confirmed the substance of her statement to police on the night of the battery, but she testified that this statement was false: "I said that [Petitioner] did it because I was pissed off at him." (AR 170).

2. Even if her Fifth Amendment right was infringed, the circuit court properly held that Petitioner cannot seek protection from a privilege that does not belong to him.

Here, even if the magistrate erred by directing Mrs. Rexrode to testify regarding the statements she made to Cpl. Nazelrod, it was Mrs. Rexrode's Fifth Amendment right—not the Petitioner's right—that was infringed. Because it was Mrs. Rexrode's constitutional right at issue, the Petitioner's attempt to claim error is misplaced.

The defendant receives no remedy from the violation of a witness's Fifth Amendment right. If the State compels testimony that is in violation of the Fifth Amendment, the witness's remedy is that this compelled testimony cannot be the basis for a criminal prosecution against her. *See Lefkowitz v. Cunningham*, 431 U.S. 805 (1977) (holding that "when a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution.").

3. **Petitioner was not prejudiced when the magistrate court directed Mrs. Rexrode, a non-party witness, to answer non-incriminating questions.**

Petitioner also argues that he was denied a fair trial when Mrs. Rexrode testified after asserting her Fifth Amendment privilege in front of the jury. He claims that "it is difficult to imagine a more devastating attack on a witness's credibility than being forced to testify after expressing an indication that doing so would incriminate yourself." Pet'r's Br. 22. But, this argument fails to acknowledge that Mrs. Rexrode's mere declaration of a privilege does not "establish the hazard of incrimination. It is for the court to say whether [her] silence is justified." *Herbert*, at 585, 480 (quoting *Anthony Ray Mc.*, 200 W.Va. 312, 323, 489 S.E.2d 289, 300 (1997)).

Petitioner fails to demonstrate how this constitutes reversible error. This Court requires that a non-party witness be called to the stand, sworn to testify, and assert the privilege to every self-incriminating question, in part, to avoid the exact situation at issue here, where a uncooperative witness seeks to avoid testifying. *Id.* (explaining that it adopted this procedure, in part, to prevent "an uncooperative witness to defy a trial court's authority."). Because Mrs. Rexrode was required to invoke this in front of the jury, it is inevitable that the jury would see her testify after her unsuccessful attempt to assert the privilege.

Petitioner's argument that the magistrate's ruling demonstrated a bias to the State is equally baseless. As discussed above, the court decides whether a witness is entitled to the Fifth Amendment privilege. Here, consistent with well-settled law, the magistrate properly ruled that Mrs. Rexrode could not invoke this privilege to a question that posed no risk of self-incrimination.

C. The circuit court properly held that Magistrate Feaster's consultation with the Chief Judge did not constitute reversible error.

Relatedly, Petitioner claims that he was denied a fair trial and an impartial judge when the magistrate consulted with a circuit court judge on the evidentiary ruling regarding Mrs. Rexrode's assertion of her Fifth Amendment right to avoid self-incrimination.

The West Virginia Code of Judicial Conduct Rule 2.9 (which mirrors the 2007 Model Rules) states that "**a judge may consult . . . with other judges**, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility to personally decide the matter." (emphasis added). Petitioner argues that Magistrate Feaster violated Comment 5 to Rule 2.9 because as a circuit judge, Chief Judge Courrier maintains appellate jurisdiction. Comment 5 to Rule 2.9 states "[a] judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter."

Here, Magistrate Feaster's consultation with Chief Judge Courrier did not violate this rule of judicial conduct. Under Rule 2.9, Magistrate Feaster is expressly permitted to consult with another judge. Judge Courrier could not have heard the case on appeal, and did not hear the case on appeal. The circuit court found that Judge Courrier was not in rotation to hear criminal appeals. Petitioner's argument is based solely on a theoretical or hypothetical possibility that, under the circumstances, could not have occurred.

Petitioner claims his right to a fair trial and impartial tribunal was infringed by Magistrate Feaster's consultation with Chief Judge Courrier, but he fails to set forth any facts to demonstrate prejudice or legal authority to support is claim. For instance, he relies on *State v. Thompson*, 220 W.Va. 398, 647 S.E.2d 834 (2007). But, in *Thompson*, the trial court engaged in extended

examination of at least six witnesses, including the defendant, his wife, and mother. This Court found that the "judge's conduct in questioning witnesses or making comments evidences a lack of impartiality and neutrality." *Id.* at 410, 846. Here, Petitioner cites a single incident where the trial court consulted with another judge on an evidentiary ruling, and most of the discussion on this evidentiary ruling was outside the presence of the jurors. Accordingly, the circuit court did not abuse its discretion when denying this assignment of error.

D. The prosecutor's remarks in closing were not unfairly prejudicial or result in injustice.

Next, Petitioner argues that the State's remarks in closing resulted in reversible error. Specifically, Petitioner complains of two isolated remarks that the State made during its rebuttal. In rebuttal, when discussing Petitioner's dubious claim that he never saw the victim's injuries before going to bed merely minutes before the police arrived, the State said "[d]o any of you doubt that she is afraid about going home . . what do you reckon might happen to her if she goes home now." (AR 187). Petitioner objected on the basis of improper argument.

"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." *State v. Sugg*, 193 W. Va. 388, 393, 456 S.E.2d 469, 474 (1995) (finding prosecutor's closing was proper when it suggested a plausible inference from the evidence). To constitute reversible error the comments must "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (quoting *Donnelly v. DeChristopforo*, 416 U.S. 637, 643 (1974).

For instance, this Court found reversible error when the prosecutor called the defendant a "psychopath" with a "diseased criminal mind" and told the jury that the defendant should not be "released to slaughter women and children." *State v. Moss*, 180 W.Va. 363, 368, 376 S.E.2d

569,574 (1988). But, in *State v. Petrice*, 183 W.Va. 695, 702, 398 S.E.2d 521, 528 (1990), although this Court found that it was improper for the State to tell the jury that the defendant lied to them, it was insufficient to warrant a new trial.

This Court examines the prosecutor's comments using four factors:

> (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.

Sugg, at syl. pt. 6.

First, here, as the circuit court found, the State's comment about that Mrs. Rexrode may be afraid to go home was supported by the evidence. Mrs. Rexrode apologized to Petitioner while exiting the stand, and she testified that "I've been scared this whole time because of the mess I've made." (AR 170). Further, she testified "[i]t's not only ruined my life, I haven't been home. I'm sorry." (*Id.*). Second, the prosecutor's comments were isolated. Petitioner points to two comments in the entire closing and rebuttal that he alleges were improper.

Third, the evidence supported the verdict. The jury saw pictures of Mrs. Rexrode's eye injury that was visibly apparent to both officers when they arrived at the residence, and heard Dep. Rohrbaugh's testimony that Mrs. Rexrode was "visibly upset" when they arrived at her home. (AR 171). During both Mrs. Rexrode and Dep. Rohrbaugh's testimony, the jury heard Mrs. Rexrode's statement that implicated her husband and explained how the ceramic figurine was broken. The jury also saw pictures of the injuries sustained to Petitioner's hand. (AR 158).

The jury also weighed the credibility of the witnesses. Ultimately, Mrs. Rexrode gave three different stories about her injury. Her reluctance to testify against her husband was apparent, as she stated she was scared and also apologized to him. (AR 168–70). Petitioner testified that he

did not see his wife's eye injury but fell asleep just minutes before police arrived. Therefore, the jury properly inferred that his story was factually impossible and not credible. Finally, there is no evidence that the prosecutor deliberately made such comments to divert the jury's attention from the evidence presented. Therefore, the circuit court's denial of this claim was not an abuse of discretion.

E. The court's failure to record the *voir dire* was not reversible error.

Petitioner alleges that the magistrate court's failure to record *voir dire* amounts to reversible error. However, Petitioner fails to mention that certain portions of jury selection were recorded. (AR 153). Petitioner's preliminary objections to the jury pool were discussed prior to individual voir dire. (AR 153). It appears that *voir dire* of individual jurors was conducted in chambers and off the record.[7] Then, the record resumed, *at the request of counsel*, when the Petitioner moved to strike a juror for cause.[8] (AR 154).

To begin, while in chambers, Petitioner was undoubtedly aware that the proceedings were not being recorded because, after *voir dire*, either the State or Petitioner requested that the recording resume. (AR 154). In the very least, Petitioner should have been aware that transferring the proceedings to chambers would alter the court's recordation of the proceedings. Now, Petitioner claims this error constitutes reversible error. But, this Court does not permit the Petitioner to benefit from "invited error." *State v. Rollins*, 233 W.Va. 715, 728, 760 S.E.2d 529, 542 (2014). The "invited error" doctrine "is a cardinal rule of appellate review applied to a wide range of conduct. . . . Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences." *Id.* (quoting *State v.*

[7] The prosecutor references comments that a prospective juror made "in chambers." (AR 154).
[8] After a break in the transcript, the Court states "We're back on the record at counsel's request." (AR 154). Admittedly, it is unclear whether "counsel" was the prosecutor or Petitioner's counsel.

Crabtree, 198 W.Va. 620, 627, 484 S.E.2d 605, 612 (1996)). Because Petitioner invited this error, he cannot find relief for it on appeal.

Even if this Court declines to apply the invited error doctrine, Petitioner's claim still fails on the merits. Although Petitioner is correct that jury trials in magistrate court are statutorily required to be recorded, *see* W. Va. Code § 50-5-8(e), the magistrate court's failure to fully comply with a procedural rule does not amount to reversible error unless there is prejudice to Petitioner. *See State v. Bolling*, 162 W.Va. 103, 115, 246 S.E.2d 631, 638 (1978) (holding that "the failure to report some part of the proceeding will not alone constitute reversible error. Some identifiable error or prejudice must be shown by the defendant.").

In *State v. Chanze*, 211 W.Va. 257, 565 S.E.2d 379 (2002), this Court remanded a case to magistrate court for a new jury trial when the entire recording was defective and the Petitioner's attorney on appeal was not trial counsel. This Court held that:

> When an electronic record of a magistrate court jury trial in a criminal case is so defective that no record or virtually no record is available from which to prepare an appeal or to conduct appellate review, the criminal defendant is entitled to obtain meaningful review of the magistrate court proceeding by informing the circuit court of the faulty record and reconstructing the record or, if reconstruction is impossible, receiving a new trial by jury in magistrate court.

Chanze, at syl. pt. 2.

Unlike *Chanze*, where the defendant was entitled to a new trial because the **entire recording was defective**, here the only unavailable recording was individual *voir dire*. Because the record is otherwise complete, this Court can conduct a meaningful review of Petitioner's claimed errors.

Petitioner alleges that three errors occurred during *voir dire* that demonstrate that the magistrate favored the State and resulted in reversible error: 1) the magistrate showed bias when commenting that several of the panel members were from Maysville, the same town as defendant;

2) the magistrate was partial towards the State when he expressed displeasure that the State did not strike a juror that previously disclosed he was falsely accused of domestic violence; and 3) the magistrate did not strike a juror who was previously represented by the prosecutor. Each of these errors can be reviewed from the record before this Court.

Petitioner's first claim was captured on the record. The record reflects the parties' conversation regarding the large amount of panel members that were from the same town as the Petitioner. When discussing a prospective juror before individual voir dire, the magistrate court stated: "[H]aving viewing the jury pool, I had some concerns . . . I'm from [Maysville], Mr. Rexrode is from [Maysville], and [a prospective juror] is from [Maysville]." [9] (AR 154). The prosecutor then noted that nine (9) prospective jurors are from Maysville. Nothing about this dialogue indicates that the magistrate favored the State. Rather, it indicates that the magistrate thoughtfully considered the likelihood that members of a small community may know each other.

Petitioner's second claim that the magistrate favored the State regarding potential juror Woody Stewart fails because Mr. Stewart was ultimately struck from the jury panel and Petitioner does not identify how he suffered prejudice. This Court holds that:

> A trial court's failure to remove a biased juror from a jury panel . . . does not violate a criminal defendant's right to a trial by an impartial jury if the defendant removes the juror with a peremptory strike. In order to obtain a new trial for having used a peremptory strike to remove a biased juror from a jury panel, a criminal defendant must show prejudice.

Syllabus Point 3, *State v. Sutherland*, 231 W.Va. 410, 745 S.E.2d 448 (2013) (overruling Syllabus point 8 of *State v. Phillips*, 194 W.Va. 569, 461 S.E.2d 75 (1995)). Further, an "appellate court[] will not find reversible error based on the trial court's refusal to remove that juror for cause unless

[9] It appears that the record incorrectly states Maidsville, and it should reflect Maysville.

the resulting jury was not fair and impartial." *State v. Rollins*, 233 W.Va. 715, 729, 760 S.E.2d 529, 543 (2014) (internal quotations and citations omitted).

During *voir dire*, Woody Stewart disclosed that he believed that he was previously wrongly accused of domestic violence. (AR 132, 154). The State did not move to strike him for cause, but struck him using a peremptory strike. (AR 132, 154, 193). Then, Petitioner objected to the State's peremptory strike of panel member Woody Stewart. (AR 154). He argued that the State's strike was based on gender.

> Mr. Moore [defense counsel]:Okay, in exercising its peremptory strikes, the State of West Virginia struck Eric Kimble and Woody Stewart, both of whom are males. Therefore, we are making an objection . . . that the State is using its peremptory strikes to strike male jurors from this potential jury pool.
>
> [The prosecutor]: [T]he first strike that I made had to do with the man that in chambers told the four of us that he had a prejudice against the offense of domestic battery because he had been falsely charged in the State of Maryland, and indicated that he had a problem with even being a juror in this case.

(AR at 154). The court denied this motion.

The State struck Mr. Stewart from the jury panel with a peremptory strike. On appeal, the State explained it reasoning for not moving the court to strike for cause. Specifically, the prosecutor did not move to remove any jurors for cause because he was concerned that ten jurors would be left before peremptory strikes, thus, resulting in another trial. (AR 193). Again, Petitioner fails to demonstrate any prejudice.

Petitioner also argues that the magistrate court's failure to strike a potential juror, who was previously a client of the prosecutor, for cause unfairly favored the State. Importantly, this person did not sit on the jury. (AR 135). Petitioner struck her using a peremptory strike. Even assuming *arguendo* that the magistrate should have removed this juror for cause, Petitioner must also establish prejudice, which he fails to do. *See Sutherland*, at syl. pt. 3 (holding that trial court's

failure to strike potential juror for cause did not constitute reversible error without a showing of prejudice.).

Because only a portion of the record is unavailable, this Court should follow its holding in *Bolling*,that requires the Petitioner to identify prejudice before this Court will find reversible error. *See* 162 W.Va. at 115, 246 S.E.2d at 638.

F. Neither court abused its discretion when finding that Cpl. Nazelrod's testimony regarding the nature of call was not hearsay.

Petitioner argues that Cpl. Nazelrod's statement to the jury that "dispatch advised it was reported that there had been a physical altercation at the Rexrode" constituted impermissible hearsay and resulted in reversible error. (AR 157). [10]

To begin, a trial court's "rulings on the admissibility of evidence" is within its "sound discretion and should not be disturbed unless there has been an abuse of discretion." Syllabus Point 1, *State v. Phelps*, 197 W. Va. 713, 478 S.E.2d 563, 565 (1996). To constitute hearsay, the statement must be offered to "prove the truth of the matter asserted." W.Va. R. Evid. 801(c)(2). As explained by this Court, "[o]ut-of-court statements made by someone other than the declarant while testifying are not admissible unless [] the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action." Syllabus Point 1, *State v. Maynard*, 183 W.Va. 1, 4, 393 S.E.2d 221 (1990).

This Court addressed factually similar statements in *Maynard* and *Phelps* and held that testimony that "'explain[s] previous conduct' by the officers in carrying out their investigations" is not hearsay. *Phelps*, at 572. For instance, in *Maynard*, this Court conducted a double hearsay

[10] At the trial, Petitioner also objected on the basis of the Confrontation Clause. However, on this appeal, he does not assert error under the Confrontation Clause.

analysis where an anonymous caller implicated the defendant in robbery. *Id.* at 4, 224. Based on the anonymous call, a detective told the officer to include a picture of the defendant in the photo lineup. *Id.* This Court held that the statement of the anonymous caller and the statement of the detective to the officer were not hearsay. It reasoned that the officer's testimony was "necessary to show the motive or reasonableness of the police officer's actions when including the defendant's photograph" in the lineup. *Id.* Therefore, it was not introduced for the truth of the matter asserted, but to show why the defendant's photograph was included in the lineup.[11] *See also State v. Phelps*, 197 W.Va. 713, 478 S.E.2d 563, 571 (1996) (holding that officer's testimony regarding how law enforcement learned of defendant's location was not hearsay but it was offered to "'explain previous conduct' by the officers in carrying out their investigations.").

Here, like in *Maynard* and *Phelps*, Cpl. Nazelrod's testimony regarding the nature of the call was not for the truth of the matter asserted. Rather, it explained Cpl. Nazelrod's motive and conduct for why he was dispatched to Petitioner's home in the first place.

If this Court were to find Cpl. Nazelrod's testimony to be hearsay, its admission was harmless. This Court holds:

> Where improper evidence of a non-constitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must be made to determine whether the error had any prejudicial effect on the jury.'

Phelps, 197 W. Va. 713, 478 S.E.2d 563, 572 (quoting Syllabus Point 6, *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987)).

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[11] The Court then found that officer's testimony was barred because it was irrelevant under W.Va. R. Evid. 401, but found that this error did not constitute reversible error. *State v. Maynard*, 183 W.Va. 1, 6, 393 S.E.2d 221, 226 (1990).

Even if this Court excludes Cpl. Nazelrod's statement, the jury heard ample testimony of the Petitioner's guilt. First, the jury saw pictures of Mrs. Rexrode's injuries to her eye and arm, and the jury saw the injuries on Petitioner's hand. Second, Dep. Rohrbaugh testified to the reason for going to Petitioner's house. The prosecutor asked, "[o]n the evening of April the 19th of this year, did you go to [Maysville], the home of the defendant, with regard to an investigation of a domestic battery?" Dep. Rohrbaugh replied, "I did."[12] (AR 171). Mrs. Rexrode told Dep. Rohrbaugh of the battery. Dep. Rohrbaugh testified that Mrs. Rexrode advised him that there was a physical altercation, and Petitioner "had her on the ground, more or less beating her."[13] (*Id.*). Third, Mrs. Rexrode testified and confirmed the contents of her statement to police.

G. The Defendant was not prejudiced by the circuit court's failure to render a decision within ninety (90) days.

Again, when "a nonconstitutional error has been asserted," this Court will not reverse the judgement "unless the error is prejudicial to the defendant." *See State v. Atkins*, 163 W.Va. 502, 510, 261 S.E.2d 55, 60. (citations omitted). Petitioner fails to show how the circuit court's delay in issuing its order denying Petitioner's appeal prejudiced him in any way.

On November 1, 2017, Petitioner filed with the circuit court the trial record. (AR 144). The circuit court held oral argument on January 22, 2018. The circuit court issued its written order denying the appeal on May 24, 2018. (AR 204). Then, by order entered June 1, 2018, the circuit court stayed the execution of Petitioner's ten day jail sentence until this Court renders its decision in the instant appeal.

Here, Petitioner sets forth no showing of prejudice. Petitioner's jail sentence has been stayed until this Court issues a ruling. Regardless of the imposed deadline on the circuit court, no

[12] The Petitioner did not object.
[13] Petitioner objected to this testimony on hearsay grounds, but the court allowed permitted it an excited utterance exception. Petitioner does not appeal the court's ruling.

such deadline is imposed on this Court. Therefore, Petitioner cannot claim prejudice based upon this pending litigation because it would still be subject to litigation before this Court.

H. No Cumulative Error Exists.

As detailed above, Petitioner is not entitled to relief based on the cumulative error doctrine. *See State v. Peterson*, 239 W.Va. 21, 36, 799 S.E.2d 98, 113 (2017). Only when "the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.'" Syllabus Point 12 *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995) (finding error when prosecutor failed to disclose defendant's oral statements before cross-examination and prosecutor's statements in closing were inflammatory). None of the errors alleged by the Petitioner require reversal either standing alone or in any combination.

VIII. CONCLUSION

For the foregoing reasons, the Respondent respectfully asks this Court to deny the petitioner's appeal and affirm his conviction and sentence for domestic battery.

Respectfully submitted,

STATE OF WEST VIRGINIA

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 18-0498

STATE OF WEST VIRGINIA,

Respondent,

v.

On Appeal from the Circuit Court of Grant County (Case No. 17-MAP-1)

MICHAEL SHANE REXRODE,

Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

I, Elizabeth Davis Grant, counsel for the Respondent, do hereby certify that I caused a true copy of the foregoing Respondent's Brief to be served on all parties and the Court by depositing the same in the U.S. Mail, postage-prepaid, first-class, to each on the 12th day of October, 2018.

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