IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0099

STATE OF WEST VIRGINIA,

Petitioner,

v.

JOHN THOMAS CAMPBELL,

Respondent.

RESPONDENT'S BRIEF

Appeal from a January 24, 2020, Order
Circuit Court of Greenbrier County
Case No. 12-F-34

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Other Authorities

ASSIGNMENT OF ERROR

The Petitioner contends that the lower Court erred: (1) by not suppressing the statement made by the petitioner on November 29, 2011; (2) by not giving a jury instruction in the charge that dealt with the voluntariness of the statement; (3) the petitioner's trial counsel was ineffective in defending the petitioner before the lower Court; and (4) the cumulative error as mentioned above also requires this Court to set aside the jury verdict in this case.

STATEMENT OF THE CASE

A. Background to this Appeal.

On February 8, 2012, the Petitioner was indicted for a single count of Sexual Abuse by a Parent, Guardian, Custodian, or Person in a Position of Trust to a Child. A.R. 507. The indictment provided:

> More specifically, between [sic] on or about November 15, 2011, at Davis-Stuart School, a therapeutic residential center for adolescents located in Greenbrier County, West Virginia, JOHN THOMAS CAMPBELL, dob: . . . 1985, while employed as a child care worker at Davis-Stuart, subjected a seventeen (17) year old female child, known as S.V., dob: . . . 1994, a juvenile resident of Davis-Stuart under JOHN THOMAS CAMPBELL'S care, custody or control, to sexual intercourse by penetrating the vagina of S.V. with his penis. S.V. was not married to JOHN THOMAS CAMPBELL.

A.R. 507.

The Petitioner was convicted by a petit jury on May 22, 2013. A.R. 376. A resentencing order was entered on January 24, 2020 to allow the Petitioner to appeal his conviction.[1]

B. The Petitioner's interview.

On November 29, 2011, the Petitioner gave an interview to Greenbrier County Sheriff's Corporal R.D. Baker.[2] In the beginning of the interview, Corporal Baker confirmed that the

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[1]A copy of this resentencing order was attached to the Petitioner's Notice of Appeal in this case.

[2]The Petitioner has included a DVD of this interview and a transcription thereof in the Appendix Record in this case. A.R. 1-42.

Petitioner accompanied Corporal Baker voluntarily. A.R. 2. Corporal Baker advised the Petitioner, "You know, you're free to leave any time." A.R. 2. He further advised the Petitioner, "You know you can leave. I'm not going to put you in a head lock and make you stay here or anything like that." A.R. 2. The Petitioner responded, "Uh-huh." A.R. 2. The Petitioner stated he was twenty-six years old and had worked at Davis-Stuart School for about eight months as a child care worker. A.R. 3. The Petitioner admitted that S.V. was a resident at Davis-Stuart School and that S.V. was 17 years old. A.R. 8. After a short break, Corporal Baker again advised the Petitioner that the Petitioner was present with Corporal Baker voluntarily and that the Petitioner could leave at any time. A.R. 16. The Petitioner responded, "Yeah." A.R. 16. Corporal Baker advised the Petitioner that the door was unlocked. A.R. 16. The Petitioner subsequently admitted to having sex with S.V., A.R. 21-22, in the bathroom in the staff office. A.R. 24.

The State filed a motion to determine the admissibility of the interview between Corporal Baker and the Petitioner. A.R. 526. The Petitioner subsequently filed a motion to suppress the Petitioner's statements given in his interview with Corporal Baker. A.R. 533-43. The Petitioner identified in his motion to suppress that "[t]here are two standards to determine the admissibility of a Defendant's statement." A.R. 538. The Petitioner further asserted in his motion, "[t]he first [test] applies in non-custodial situations. In this case, the Defendant's statement must be voluntary under a totality of the circumstances test." A.R. 538. The Petitioner continued that "[t]he second standard applies in custodial situations, ie. [sic] where the Defendant is required to be in the location of the interrogation by agents of the State." A.R. 538. The Petitioner then made clear he was raising a claim as to the second standard only, "[i]n this case, the Court must suppress the Defendant's statement under because [sic] it violates the principles outlined in *Miranda v. Arizona*, 384 U.S., 436, 444 (1966) as the Defendant was in the custody of Deputy Baker." A.R. 538.

On May 20, 2013, the circuit court conducted a hearing on the admissibility of the Petitioner's interview with Corporal Baker. A.R. 97. The sole witness at the hearing was Corporal Baker. A.R. 99.

On or about November 29, 2011, Corporal Baker received a call from the CYC advising him that the CYC was going to conduct an interview with S.V. regarding sexual abuse against her by one of the childcare workers at Davis-Stuart School. A.R. 101-02. This interview with S.V. revealed the Petitioner as a potential suspect. A.R. 102. Corporal Baker went to Davis-Stuart School where he met with the Petitioner. A.R. 102-03. Corporal Baker told the Petitioner he needed to speak to him about some issues and asked if the Petitioner would accompany him to the Sheriff's Department in Corporal Baker's unmarked police vehicle. A.R. 103. The Petitioner agreed and, when traveling with Corporal Baker, the Petitioner was in the front passenger seat of the unmarked police car. A.R. 103. For some reason, the pair went to the Lewisburg Police Station rather than the Sheriff's Department. A.R. 104. During the trip, Corporal Baker did not have any substantive discussions with the Petitioner, did not threaten or coerce the Petitioner, nor did Corporal Baker make any promises to the Petitioner to get him to travel with Corporal Baker. A.R. 104. The interview at the Police Department lasted roughly 45 minutes. A.R. 105. The door to the interview room was unlocked. A.R. 106. After the interview, Corporal Baker transported the Petitioner back to Davis-Stuart School. A.R. 106. The Petitioner was never placed in handcuffs. A.R. 107. Corporal Baker testified the Petitioner rode freely with him both in going to and returning from the interview. A.R. 107.

The circuit court ruled the interview admissible:

> THE COURT: Well, the Court can only go on the evidence that's adduced at this hearing, and the evidence is that [the Petitioner] was picked up. He was approached while at work, and he was asked if he would come and talk with [Corporal Baker].

> He rode in the front seat, probably five or six miles from Davis Stewart [sic] to the Lewisburg Police Department, was taken into a room, which I guess is the interrogation room. It's a small room it appears. There's no window. There is a door there.
>
> He was seated off to the kind of catty-cornered, at the corner of the desk, and that interview took place 45 minutes, and I would have to, I guess conceivably those circumstances could amount to a custodial-type situation of coercive-type interrogation, but there's been no testimony as to his level of sophistication, his intelligence, his demeanor, the impact it had on him or any of that.
>
> For me to conclude that what it – it was custodial or he was coerced, I can't based [sic] on the testimony so the preponderance at this point is that it was not custodial. A preponderance is that it was voluntarily given at this point, and so it may be admitted into evidence at trial.

A.R. 127-28.

C. The Trial Testimony

At trial, the State called Mark Spangler, the Executive Director of Davis-Stuart School. A.R. 198-99. Davis-Stuart School is a residential treatment home for boys and girls ages twelve to eighteen, who have been abused or neglected or otherwise taken out of their homes until permanency is reestablished either by return to the original homes or by placement in foster or adoptive homes. A.R. 200.

The Petitioner worked for Davis-Stuart School as a child care worker. A.R. 206. A child care worker at Davis-Stuart School works day to day with the children providing them appropriate supervision. A.R. 207. Child care workers are also to provide for the children's safety. A.R. 207. Child care workers are tasked with the care and control of the juvenile residents. A.R. 214-215.

Mr. Spangler was familiar with S.V. who was a resident of Davis-Stuart School in the autumn of 2011. A.R. 201. S.V. was assigned to a cottage that the Petitioner was temporarily assigned to supervise. A.R. 210, 216. It was the Petitioner's responsibility to supervise the safety and well-being of the children in the cottage to which the Petitioner was assigned. A.R. 217.

Approximately ten or eleven days after the alleged incident between the Petitioner and S.V., S.V. was having difficulties at night with her menstruation. A.R. 235-36. When asked if she had sexual activity in recent weeks, S.V. answered in the affirmative. A.R. 236. S.V. identified that the sex had occurred with the Petitioner and had taken place at Davis-Stuart School. A.R. 236.

The State also called S.V. to testify at trial. A.R. 254. S.V. was seventeen years old in the middle of November of 2011. A.R. 255. S.V. knew the Petitioner. A.R. 257. When S.V. first met the Petitioner, it was in the capacity of his job. A.R. 258, 261. On November 15, 2011, the Petitioner and S.V. had sex in the bathroom of the staff office. A.R. 261, 263. S.V. testified that the Petitioner inserted his penis into her vagina. A.R. 264. The Petitioner ejaculated in S.V. A.R. 264. S.V. testified that the sexual intercourse between her and the Petitioner occurred in November of 2011, on Davis-Stuart School property, while she was a resident and the Petitioner was a child care worker at Davis-Stuart School. A.R. 267-68.

The State concluded its case with Corporal Baker. A.R. 284. Corporal Baker became aware of the Petitioner's sexual intercourse with S.V. as a result of a Child and Youth Advocacy Center interview with S.V. A.R. 285. Corporal Baker went to the Davis-Stuart School and asked if the Petitioner would accompany him to the Lewisburg Police Department to speak with him. A.R. 287. It was relayed to the Petitioner from the very onset that this was a voluntary interview. A.R. 287. The Petitioner rode in the front of Corporal Baker's cruiser. A.R. 288. Corporal Baker advised the Petitioner was not under arrest. A.R. 288. Corporal Baker further advised the Petitioner he was free to leave at any time. A.R. 288. The interview lasted forty-five minutes. A.R. 291. Prior to playing the interview for the jury, the circuit court advised it:

> . . . Ladies and gentleman of the jury, we conducted a hearing prior to this trial regarding this interview process, and as a consequence of that, I have ruled that you may observe and see this, and that ruling only relates to its admissibility during this trial.

> You may consider what is contained in this statement only if you conclude or believe by a preponderance of the evidence, which is a preponderance of the evidence as opposed to proof beyond a reasonable doubt. Preponderance mean more likely than not. So, in other words, 50.0001 percent in favor as opposed to 49.999 percent against, that you must find by a preponderance of the evidence that such statement was freely and voluntarily made without threat or coercion or promise of reward.
>
> Then, if you do not believe the State has met its burden of proof, it is your duty to disregard such statement entirely.
>
> So in determining that, you may consider the circumstances under which it was made, the defendant's frame of mind and any and all other circumstances.
>
> You may attach whatever weight to the statement you deem advisable based upon these considerations of all the circumstances.
>
> So I tell you that just as a rule, if you will, in determining how you consider this statement.

A.R. 295-96. The interview was then played for the jury. A.R. 296. With the end of Corporal Baker's testimony, the State rested. A.R. 317. The Petitioner did not call any witnesses. A.R. 343.

D. The Jury Instructions.

The Defendant offered two instructions in this case which the circuit court refused to give. The first of these instructions was the Petitioner's Proposed Jury Instruction No. 1 which provided:

> You are instructed that, the burden is upon the State to prove by a preponderance of the evidence that any statements made by the Defendant were made voluntarily, and pursuant to the knowing and intelligent waiver of his fifth amendment right against self incrimination. If you find the State has failed to meet this burden you must not consider the statement in your deliberations. *State v. Bradshaw*, 193 W. Va. 519, 457 S.E.2d 456 (1995).

A.R. 616. The second of these instructions was the Petitioner's Proposed Jury Instruction No. 3 which provided:

> You are instructed that there is a legal presumption against the waiver of ones [sic] right against self incrimination as set forth in *Miranda v. Arizona*, to overcome this the State must prove by at least a preponderance of the evidence that the Defendant, John Campbell, made a knowing and voluntary waiver of his rights

> pursuant to *Miranda v. Arizona* to remain silent and not make a statement to Deputy Baker in this case. If you find that he did not so waive his rights, you must not consider any part of any statements made by him during your deliberations. *Brewer v. William*, 430 U.S. 387 (1977), *U.S. v. Grant*, 545 F.2d 942 (4th Cir.), cert. denied, 432 U.S. 908 (1977).

A.R. 618.

The circuit court rejected the Petitioner's Proposed Jury Instruction No. 1 because it had already found that the statement was non-custodial and because it would otherwise be covered by the Court's instructions to the jury. A.R. 327. The circuit court rejected the Petitioner's Proposed Jury Instruction No, 3 for the same reasons it rejected the Petitioner's Proposed Jury Instruction No. 1. A.R. 327. During its instructions to the jury, the circuit court instructed, in pertinent part:

> The Court instructs the jury that under the law of this State, the "confession" or "statement" offered into evidence by the State may be considered by the jury in determining the guilt or innocence of the [Petitioner] of the crime charged in this case, only if the jury believes that the State has proven by a preponderance of the evidence that such statement was freely and voluntarily made without threat or coercion or a promise of reward, and that if you do not believe that the State has met this burden of proof, it is your duty to disregard such statement entirely.

A.R. 353-54. The jury convicted the Petitioner on the sole count of the Indictment. A.R. 376.

The Petitioner was resentenced to allow the Petitioner to appeal.

SUMMARY OF ARGUMENT

The Petitioner first claims that his confession given to Corporal Baker should be suppressed. It is unclear if the Petitioner is asserting this claim based on an alleged *Miranda* violation or on the basis that the Petitioner's confession was involuntary under the Fourteenth Amendment's Due Process Clause. In either event, the Petitioner loses. First, because the Petitioner was not in custody when interviewed by Corporal Baker, Corporal Baker had no obligation to advise the Petitioner of his *Miranda* rights or to secure the Petitioner's waiver of these rights. Second, if the Petitioner is claiming his confession was constitutionally involuntary,

Corporal Baker did not engage in any coercive police activity which is a necessary predicate for a successful claim of an involuntary confession.

The Petitioner also asserts instructional error relating to his confession. Because the circuit court properly instructed the jury as to how to address the Petitioner's confession to Corporal Baker, the Petitioner was not entitled to have the jury read his two proposed instructions. The Petitioner's instructional error claim rests on the belief that the jury was entitled to be informed of the legal basis for an instruction, a claim that is foreclosed by this Court's precedent. Further, the Petitioner's Proposed Jury Instruction No. 3 is legally erroneous and, therefore, was properly rejected by the circuit court.

The Petitioner additionally raises an ineffective assistance of counsel claim. Because this is a direct appeal, such a claim is not cognizable.

Finally, the Petitioner invokes cumulative error. Because there were no errors in this case, the cumulative error doctrine is inapplicable.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. This case is suitable for memorandum decision.

ARGUMENT

A. The circuit court did not err in allowing the State to play for the jury the Petitioner's November 29, 2011 interview with Corporal Baker.

The circuit court declined to suppress the Petitioner's November 29, 2011 interview with Corporal Baker. A.R. 127-28. The circuit court allowed the Petitioner's November 29, 2011 interview to be played for the jury at trial. A.R. 296. The Petitioner takes issue with the circuit

court's ruling. Pet'r Br. at 4.[3] The standard of review governing this Court's analysis of this case is set forth in Syllabus Point 2 of *State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994):

> This Court is constitutionally obligated to give plenary, independent, and de novo review to the ultimate question of whether a particular confession is voluntary and whether the lower court applied the correct legal standard in making its determination. The holdings of prior West Virginia cases suggesting deference in this area continue, but that deference is limited to factual findings as opposed to legal conclusions.

It is not entirely clear what the actual legal basis of the Petitioner's claim is. While he employs the term "voluntary" and "voluntariness," Pet'r Br. at 4, 5, the use of this terminology is not precise because voluntary and voluntariness apply to two separate constitutional claims: (1) the prophylactic rights articulated in *Miranda v. Arizona*, 384 U.S. 436 (1966) protecting the Fifth Amendment right against self-incrimination; and, (2) rights under the Due Process Clause of the Fourteenth Amendment prohibiting the introduction of a confession not given of free will. "The question of the voluntariness of a waiver of *Miranda* rights is separate and differs from the determination of the voluntariness of a confession." *Smith v. Duckworth*, 856 F.2d 909, 911 (7th Cir. 1988). In his motion to suppress, the Petitioner recognized the two standards, but relied solely on the claim he was entitled to *Miranda* warnings. A.R. 538. Therefore, any claim relating to the Due Process Clause is not properly before this Court. *See State v. DeGraw*, 196 W. Va. 261, 272, 470 S.E.2d 215, 226 (1996) (in order to preserve an argument on appeal, a petitioner must object on the same basis below as he contends is error on appeal). In any event, the Petitioner cannot prevail on either theory.

[3]The Petitioner's Brief is not paginated. However, the undersigned counsel will take it that the first page of the Petitioner's Brief begins with his assignments of error and will calculate the pagination of the Petitioner's Brief accordingly.

1. *Because the Petitioner was not in custody when giving his interview to Corporal Baker, the Petitioner had no right to Miranda warnings and Corporal Baker had no obligation to secure a waiver from the Petitioner of the Petitioner's Miranda rights.*

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court "held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence." *Dickerson v. United States*, 530 U.S. 428, 431–32 (2000). To the extent the Petitioner is complaining he was not *Mirandized* before giving his interview, Pet'r Br. at 6, both the United States Supreme Court and this Court have repeatedly made clear that the warnings required by *Miranda* are only triggered by custodial interrogation. The United States Supreme Court has "specifically stressed that it was the *Custodial* nature of the interrogation which triggered the necessity for adherence to the specific requirements of its *Miranda* holding." *Beckwith v. United States*, 425 U.S. 341, 346 (1976) (emphasis added). Hence, "*Miranda* rights are not triggered unless there is custody[.]" *State v. Farley*, 192 W. Va. 247, 255 n.10, 452 S.E.2d 50, 58 n.10 (1994) (citing *State v. George*, 185 W.Va. 539, 408 S.E.2d 291 (1991)). "A suspect who is not in custody does not have *Miranda* rights." *State v. McKenzie*, 197 W.Va. 429, 438, 475 S.E.2d 521, 530 (1996). The Petitioner bears the burden of proving he was in custody for purposes of *Miranda*. *See State v. James*, 225 P.3d 1169, 1172 (Idaho 2010) ("the vast majority of courts that have considered the issue . . . hold that the burden of showing custody rests on the defendant seeking to exclude evidence based on a failure to administer *Miranda* warnings."); *United States v. Artis*, No. 5:10-CR-15-01, 2010 WL 3767723, at *4 (D. Vt. Sept. 16, 2010) ("The weight of authority appears to hold that a defendant bears the burden of establishing that he or she was subjected to custodial interrogation in order to establish a constitutional violation as the basis for suppression of evidence."). The Petitioner failed to carry his burden to show that he was in custody when he spoke with Corporal Baker.

"Whether the individual was 'in custody' is determined by an objective test and asking whether, viewing the totality of the circumstances, a reasonable person in that individual's position would have considered his freedom of action restricted to the degree associated with a formal arrest." *State v. McCracken*, 218 W. Va. 190, 195, 624 S.E.2d 537, 542 (2005) (per curiam). This Court has recognized, "'[t]elling a suspect that he/she is not under arrest and is free to leave usually is sufficient to prevent a finding of custody and will circumvent a finding of de facto arrest.'" *State ex rel. Wade v. Hummel*, ___ W. Va. ___, ___ n.3, 844 S.E.2d 443, 446 n.3 (2020) (quoting *State v. Farley*, 192 W. Va. 247, 255 n.10, 452 S.E.2d 50, 58 n.10 (1994)). In the instant case, Corporal Baker specifically informed the Petitioner at the Lewisburg Police Department before the interview commenced that "You know, you're free to leave any time" and that "You know you can leave. I'm not going to put you into a headlock and make you stay here or anything like that." A.R. 2. The Petitioner responded, "Uh-huh." A.R. 2. Approximately fifteen minutes into the interview, Corporal Baker again reiterated to the Petitioner, ". . . you know you can leave at any time, right?" to which the Petitioner responded, "Yeah." A.R. 16. Consequently, the Petitioner was not in custody and no *Miranda* warnings were required.[4]

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[4]Furthermore, the Petitioner implies that being driven to the police station in the front passenger seat of Corporal Baker's unmarked police car was custody. Pet'r Br. at 5. These facts do not set out a claim of custody. "The fact that the Defendant was transported to the interview in an unmarked police vehicle, with a police officer in the vehicle, does not weigh, by itself, in favor of a finding of custody." *United States v. Lindgren*, No. CRIM.0836JMR/RLE, 2008 WL 2704219, at *11 (D. Minn. July 3, 2008). "A suspect does not enter police custody just because an officer drives that suspect in the officer's vehicle to the station for questioning." *State v. Soto*, No. 1 CA-CR 11-0634, 2012 WL 3806144, at *5 (Ariz. Ct. App. Sept. 4, 2012). *See, e.g., State v. Daughtry*, 459 S.E.2d 747, 754 (N.C. 1995) (defendant not in custody who voluntarily accompanied officer, riding in front passenger seat of unmarked police car); *State v. Navarro*, 34 P.3d 971, 973, 976 (Ariz. Ct. App. 2001) (suspect was not in custody when he voluntarily accompanied officer to the station in front seat of unmarked police car); *State v. Darnell*, 905 S.W.2d 953, 959 (Tenn. Crim. Ct. App. 1995) (defendant was not in custody when he voluntarily rode with detective to the police station in the front seat of an unmarked car and was never handcuffed).

The Petitioner, however, attempts to rely upon a psychological report prepared post-trial by Michael Sheridan, M.A. Pet'r Br. at 6. In this report, Mr. Sheridan admits that he (i.e., Mr. Sheridan) understood the Petitioner was not entitled to be read the *Miranda* warnings. A.R. 476. Nevertheless, Mr. Sheridan posits that the Petitioner did not waive his rights knowingly and voluntarily. A.R. 476. But, as the Petitioner was not in custody, he was not entitled to *Miranda* warnings and, consequently, Corporal Baker was not obligated to obtain a waiver of the *Miranda* rights from the Petitioner. *See, e.g., United States v. Sosa*, No. 1:15-CR-20170-KMM, 2015 WL 6751062, at *1 (S.D. Fla. Nov. 5, 2015) ("Because Sosa was never in custody for purposes of *Miranda*, government agents had no duty to secure a knowing and voluntary waiver of his *Miranda* rights before questioning him."); *United States v. Nguyen*, 313 F. Supp. 2d 579, 588 (E.D. Va. 2004) (citations omitted) ("Because Nguyen was not in custody, the interrogating officers were not obligated to apprise Nguyen of his *Miranda* rights. Nor, of course, did they need to obtain a waiver of these rights."); *State v. Castillo*, 140 A.3d 301, 309 (Conn. Ct. App. 2016) ("Because we conclude that the defendant was not 'in custody' when he gave his statements, and, therefore, not subjected to custodial interrogation by the police, *Miranda* warnings were not constitutionally required at that time, nor was it necessary for the police to obtain a valid waiver prior to questioning the defendant."), *aff'd*, 186 A.3d 672 (Conn. 2018); *Cooper v. State*, 877 A.2d 1095, 1108 (Md. Spec. Ct. App. 2005) (emphasis deleted) ("Without the presence of both custody and interrogation,

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The cases that the Petitioner relies on are not to the contrary. For example, the Petitioner's reliance on *People v. Altieri*, 355 N.Y.S.2d 722 (Crim. Ct. 1974), is not persuasive as the court in that case found that "the officer directed the defendant to drive his car to the 78th Precinct[.]" *Id.* at 723. Here, the Petitioner voluntarily accompanied Corporal Baker to the police department. A.R. 2. The remaining cases the Petitioner cites are facially distinguishable since the Petitioner's car was not impounded nor his keys seized, nor was he ever locked in a car or the police station. A.R. 16. Finally, a 45 minute interview does not weigh in favor of custody. *See, e.g., United States v. Peck*, 17 F. Supp. 3d 1345, 1361 (N.D. Ga. 2014) (detailing courts that have found questioning exceeding one hour does not constitute custody for *Miranda* purposes).

the police are not bound to deliver *Miranda* warnings and obtain a proper waiver of the rights to silence and counsel before questioning a suspect."); *McIntosh v. State*, 829 N.E.2d 531, 540 (Ind. Ct. App. 2005) ("Because she was not in custody, the police were not required to obtain a voluntary waiver of her *Miranda* rights."). In the absence of the right to the warnings detailing one's rights under *Miranda*, the Petitioner's ability to intelligently and knowingly waive those rights is of no moment. "Because [the Petitioner] was not in custody, the police were not obligated to administer the *Miranda* warnings. Because they were under no obligation to do so, it follows that they were under no obligation to obtain a waiver of those rights from h[im]. Therefore it is immaterial whether h[is] waiver of h[is] constitutional rights was knowing, intelligent or voluntary[.]" *Commonwealth v. Walton*, No. CP46CR000046592015, 2016 WL 3014810, at *5 (Pa. Ct. Common Pleas Jan. 22, 2016).

In the absence of the obligation to provide *Miranda* warnings, the only question becomes whether the confession itself was otherwise voluntary. *See United States v. Baird*, 851 F.2d 376, 382 (D.C. Cir. 1988) ("Having concluded that Baird was not in custody (and hence not subject to a custodial interrogation. . .), we now decide whether he had been subjected to coercive conduct that caused him to make an involuntary confession."). And the Petitioner's confession in this case was clearly voluntary.

2. *The Petitioner's statements in his interview with Corporal Baker were constitutionally voluntary.*

To the extent the Petitioner is claiming that his statements made at the interview with Corporal Baker were involuntary under the Due Process Clause of the Fourteenth Amendment, he also cannot prevail. The test of voluntariness of a confession is whether, under the totality of the circumstances, law enforcement officers have overborne the will of the accused. *Haynes v. Washington*, 373 U.S. 503, 513-14 (1963). Thus, "[a] confession that has been found to be

involuntary in the sense that it was not the product of the freewill of the defendant cannot be used by the State for any purpose at trial." Syl. Pt. 2, *State v. Goff*, 169 W. Va. 778, 289 S.E.2d 473 (1982). A "necessary predicate" to finding a confession involuntary is that the confession was produced through "coercive police activity." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). "Absent an allegation of coercive police tactics to obtain the statement . . . the confession will not be deemed involuntary." *Singleton v. Thigpen*, 847 F.2d 668, 671 (11th Cir. 1988); *see also United States v. Blake*, 481 F. App'x 961, 962 (5th Cir. 2012) ("Thus, in the absence of evidence of official coercion, a defendant will have not established that his confession was involuntary."); *United States v. Kime*, 99 F.3d 870, 880 (8th Cir. 1996) ("A confession may not be found involuntary absent some type of coercive activity on the part of law enforcement officials."); *Bae v. Peters*, 950 F.2d 469, 475 (7th Cir. 1991) ("Absent improper police coercion, a defendant's mental state does not render a confession involuntary under the due process clause.").

In the instant case, the Petitioner has produced no evidence that Corporal Baker engaged in any coercive police activity. Indeed, even Mr. Sheridan's report reflects that "there is no evidence that the interview was 'so coercive that the [Petitioner's] will was overborne[,]'" A.R. 476, and that the Petitioner "was not subjected to undue coercion[.]" A.R. 477.[5]

[5]For this reason, the Petitioner's reliance on Syllabus Point 1 of *State v. Hamrick*, 160 W. Va. 673, 236 S.E.2d 247 (1977) ("Confessions elicited by law enforcement authorities from persons suspected of crimes who because of mental condition cannot knowledgeably and intelligently waive their right to counsel are inadmissible."), Pet' Br. at 5-6, is misplaced. In *State v. Honaker*, 193 W. Va. 51, 61 n.14, 454 S.E.2d 96, 106 n.14 (1994), this Court observed that "in *Hamrick* this Court implicitly suggested that the police took advantage of the defendant's mental deficiencies." In the instant case, there is no evidence that Corporal Baker took advantage of the Petitioner. Indeed, as Mr. Sheridan's report provides, "I am aware of no evidence that the police could have known [the Petitioner's] level of intellectual functioning, much less that they took undue advantage thereof." A.R. 477. Mr. Sheridan's report is also fatal to any claim that the Petitioner's mental status affected the custody calculus. *See Hannon v. State*, 84 P.3d 320, 339 (Wyo. 2004)

The Petitioner has not shown coercive conduct on the part of Corporal Baker. As such, the circuit court did not err in refusing to suppress the statements made by the Petitioner to Corporal Baker. The judgment of the circuit court should be affirmed.

B. The circuit court did not err in refusing to give the Petitioner's Proposed Jury Instructions Nos. 1 and 3.

In Syllabus Point 4 of *State v. Vance*, 162 W. Va. 467, 250 S.E.2d 146 (1978), this Court stated, "[w]e adopt the 'Massachusetts' or 'humane' rule whereby the jury can consider the voluntariness of the confession, and we approve of an instruction telling the jury to disregard the confession unless it finds that the State has proved by a preponderance of the evidence it was made voluntarily." The Petitioner offered two instructions in this case claiming they fit under the Massachusetts rule. The first of these instructions was the Petitioner's Proposed Jury Instruction No. 1 which provided:

> You are instructed that, the burden is upon the State to prove by a preponderance of the evidence that any statements made by the Defendant were made voluntarily, and pursuant to the knowing and intelligent waiver of his fifth amendment right against self incrimination. If you find the State has failed to meet this burden you must not consider the statement in your deliberations. *State v. Bradshaw*, 193 W. Va. 519, 457 S.E.2d 456 (1995).

A.R. 616. The second of these instructions was the Petitioner's Proposed Jury Instruction No. 3 which provided:

> You are instructed that there is a legal presumption against the waiver of ones [sic] right against self incrimination as set forth in *Miranda v. Arizona*, to overcome this the State must prove by at least a preponderance of the evidence that the Defendant, John Campbell, made a knowing and voluntary waiver of his rights pursuant to *Miranda v. Arizona* to remain silent and not make a statement to Deputy Baker in this case. If you find that he did not so waive his rights, you must not consider any part of any statements made by him during your deliberations. *Brewer v. William*, 430 U.S. 387 (1977), *U.S. v. Grant*, 545 F.2d 942 (4th Cir.), cert. denied, 432 U.S. 908 (1977).

A.R. 618.

The circuit court rejected the Petitioner's Proposed Jury Instruction No. 1 because it had already found that the statement was non-custodial and because it would otherwise be covered by the Court's instructions to the jury. A.R. 327. The circuit court rejected the Petitioner's Proposed Jury Instruction No, 3 for the same reasons it rejected the Petitioner's Proposed Jury Instruction No. 1. A.R. 327. The Petitioner contends that the circuit court erred in refusing his Proposed Jury Instructions. Pet'r Br. at 8. As the circuit court did not err in refusing the Petitioner's Proposed Jury Instructions Nos. 1 and 3, the judgment of the circuit court should be affirmed.

The standard of review governing this assignment of error is set forth in Syllabus Point 1 of *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996): "As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*."

As this Court has recognized, "[i]n general, the question on review of the sufficiency of jury instructions is whether the instructions as a whole were sufficient to inform the jury correctly of the particular law and the theory of defense." *State v. Miller*, 197 W. Va. 588, 607, 476 S.E.2d 535, 554 (1996). A defendant "is not entitled to repetitive or redundant instructions covering substantially the same subject matter." *State v. Putnam*, 157 W. Va. 899, 903, 205 S.E.2d 815, 818 (1974). Thus, "[i]t is not reversible error to refuse to give instructions offered by a party that are adequately covered by other instructions given by the court." Syl. Pt. 20, *State v. Hamric*, 151 W. Va. 1, 151 S.E.2d 252 (1966). Because the instruction the circuit court gave to the jury was sufficient, the fact that the circuit court did not give the Petitioner's instructions was not error.

The circuit court instructed the jury in this case:

> The Court instructs the jury that under the law of this State, the "confession" or "statement" offered into evidence by the State may be considered by the jury in determining the guilt or innocence of the [Petitioner] of the crime charged in this case, only if the jury believes that the State has proven by a preponderance of the

> evidence that such statement was freely and voluntarily made without threat or coercion or a promise of reward, and that if you do not believe that the State has met this burden of proof, it is your duty to disregard such statement entirely.

A.R. 353-54. The Petitioner asserts that the circuit court's instruction was incomplete because it did not contain language such as "'his Fifth Amendment right against self-incrimination'" or "'his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 2d 694 (1966), to remain silent and not make a statement." Pet'r Br. at 10. The Petitioner is incorrect.

A somewhat similar claim to the one the Petitioner is making here was rejected by this Court in *State v. Phillips*, 205 W. Va. 673, 520 S.E.2d 670 (1999). Phillips was convicted of disorderly conduct, assault on a police officer, and obstructing a police officer. Phillips's defense was that her conduct was protected under the First Amendment. To that end, she offered a jury instruction providing,"'[t]he Court instructs the jury that under the laws of the State of West Virginia, every person has a First Amendment right to question or challenge the authority of a police officer, provided that fighting words or other opprobrious language is not used.'" *Phillips*, 205 W. Va. at 685 n.13, 520 S.E.2d at 682 n.13. The circuit court declined this instruction, but gave one that provided, "'[t]he Court instructs the jury that merely questioning or remonstrating with an officer whil[e] he is performing his duty does not ordinarily constitute the offense of obstructing an officer.'" *Id.* at 673 n.14, 520 S.E.2d at 682 n.14. Phillips claimed that the lack of reference to the First Amendment in the latter instruction meant the latter instruction was not covered in the previous instruction. *Id.* at 685, 520 S.E.2d at 682 ("Appellant maintains, however, that the issue of her First Amendment rights was not covered at all in any other instruction or the actual charge given to the jury."). In rejecting Phillips's argument, this Court found that the instruction that was given covered what conduct was protected by the First Amendment. The only thing missing between the two instructions was reference to the First Amendment. This Court

considered this of no moment for it concluded that as long as the jury was instructed as to the proper substance of the law, it was not entitled to know the legal basis from which the instruction was derived. *Id.*, 520 S.E.2d at 682. In the instant case, the jury was properly instructed as to whether to consider the Petitioner's statements. A.R. 353-54. The jury, per *Phillips*, was not entitled to know the legal basis for the instruction.

Furthermore, the Petitioner's Jury Instruction No. 3 relates to *Miranda* rights. As observed by one leading treatise, the Massachusetts rule should not extend to allowing the jury to address claims under *Miranda*. 3 Wayne R. LaFave, et al., *Criminal Procedure* § 10.5(a) (4th ed. 2015) ("The better view, however, is that the [Massachusetts] rule is inappropriate when the confession has been challenged on *Miranda* grounds rather than under the traditional voluntariness test."). Additionally, even if the Massachusetts rule did extend to *Miranda* claims, the Petitioner's Proposed Jury Instruction No. 3 is still fatally flawed and the circuit court correctly rejected it.

"It has been consistently held in criminal cases that instructions which are confusing, misleading or which incorrectly state the law should not be given." *State v. Butcher*, 165 W. Va. 522, 528, 270 S.E.2d 156, 160 (1980). The Petitioner's Proposed Jury Instruction No. 3 is misleading. The Petitioner's Proposed Jury Instruction No. 3 provides that *Miranda* warnings are required whenever there is interrogation and that the police must obtain waivers of these rights before speaking to an interviewee. But, as shown above, this is simply legally incorrect. The interrogation must be coupled with custody before *Miranda* rights are required to be given and waivers secured. The Petitioner's Proposed Instruction No. 3 omits this critically necessary requirement of custody before *Miranda* rights are required to be given and a waiver thereof obtained. The circuit court properly denied the Petitioner's Proposed Jury Instruction No. 3.

The judgment of the circuit court should be affirmed.

C. The Petitioner's claim of ineffective assistance of counsel is not properly before this Court.

The Petitioner claims that his trial counsel was ineffective. Pet'r Br. at 10. This claim is not currently cognizable before this Court as this case is presently before this Court on a direct appeal. "As an initial matter, we observe that petitioners ineffective assistance of counsel claims are not properly before this Court on a direct appeal." *State v. Brichner*, No. 14-0659, 2015 WL 1236005, at *2 (W. Va. Mar. 16, 2015) (memorandum decision). "Traditionally, ineffective assistance of counsel claims are not cognizable on direct appeal." *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 318 n.1, 465 S.E.2d 416, 420 n.1 (1995). "In past cases, this Court has cautioned that '[i]neffective assistance claims raised on direct appeal are presumptively subject to dismissal.'" *State v. Woodson*, 222 W. Va. 607, 621, 671 S.E.2d 438, 452 (2008) (per curiam) (quoting *State v. Miller*, 197 W.Va. 588, 611, 476 S.E.2d 535, 558 (1996)).

> It is the extremely rare case when this Court will find ineffective assistance of counsel . . . on a direct appeal. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas corpus proceeding before the lower court, and may then appeal if such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim.

Syl. Pt. 10, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992). Moreover, we have explained that

> [t]he very nature of an ineffective assistance of counsel claim demonstrates the inappropriateness of review on direct appeal. To the extent that a defendant relies on strategic and judgment calls of his or her trial counsel to prove an ineffective assistance claim, the defendant is at a decided disadvantage. Lacking an adequate record, an appellate court simply is unable to determine the egregiousness of many of the claimed deficiencies.

State v. Miller, 194 W.Va. 3, 15, 459 S.E.2d 114, 126 (1995). As noted by the Petitioner himself, "a Petition for a Writ of Habeas Corpus is a proper remedy for a lack of the effective assistance of counsel." Pet'r Br. at 11.

This Court should refuse to address the Petitioner's ineffective assistance of counsel claim to allow the Petitioner to develop the claim in a habeas corpus proceeding.

D. There is no cumulative error in this case.

The Petitioner invokes the cumulative error doctrine. Pet'r Br. at 15. Under the cumulative error doctrine,

> Where 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.

Syl. Pt. 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972). "[T]he cumulative error doctrine necessitates reversal only in rare instances" and "'the possibility of cumulative error is often acknowledged but practically never found persuasive.'" *United States v. Delgado*, 672 F.3d 320, 344 (5th Cir. 2012) (quoting *Derden v. McNeel*, 978 F.2d 1453, 1456 (5th Cir.1992) (en banc)); *see also State v. Herron*, 461 S.W.3d 890, 910 (Tenn. 2015) ("Reversals for cumulative error are rare."); *Vick v. State*, 863 S.W.2d 820, 825 (Ark. 1993) ("We have entertained an argument of cumulative error in rare and egregious cases."). Where, as in the present case, there is no error at all, the cumulative error doctrine is inapplicable. *See, e.g., State v. Trail*, 236 W. Va. 167, 188 n.31, 778 S.E.2d 616, 637 n.31 (2015) ("Ms. Trail's final assignment alleges cumulative error. Because we have found no errors, this assignment need not be addressed."); *State v. Knuckles*, 196 W. Va. 416, 426, 473 S.E.2d 131, 141 (1996) (". . . because we find that there is no error in this case, the cumulative error doctrine has no application.").

The judgment of the circuit court should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Greenbrier County, West Virginia, should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,

Respondent,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0099

STATE OF WEST VIRGINIA,

Petitioner,

v.

JOHN THOMAS CAMPBELL,

Respondent.

CERTIFICATE OF SERVICE

I, Scott E. Johnson, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, November 30, 2020, and addressed as follows:

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