IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-7

STATE OF WEST VIRGINIA,

Respondent,

v.

MONICA HARTWELL,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the December 7, 2022, Order
Circuit Court of Mercer County
Case No. 21-F-242

PATRICK MORRISEY
ATTORNEY GENERAL

MARY BETH NIDAY
ASSISTANT ATTORNEY GENERAL
West Virginia State Bar No. 9092
Office of the Attorney General
1900 Kanawha Blvd. E.
State Capitol, Bldg. 6, Ste. 406
Charleston, WV 25305
Tel: (304) 558-5830
Fax: (304) 558-5833
Email: Mary.b.Niday@wvago.gov

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INTRODUCTION

Respondent, State of West Virginia,[1] responds to Monica Hartwell's ("Petitioner") Brief filed in the above-styled appeal. Petitioner challenges the denial of a motion to suppress her statement to law enforcement that consisted of an answer to a single question asking the location of the firearm used to kill Michael Walker to ensure the safety of the pubic and law enforcement officers at the scene of the crime. The totality of the circumstances surrounding the officer's question do not rise to the level of a custodial interrogation, even though Petitioner was handcuffed at the time of the officer's question as to the location of the murder weapon. The question was simple and succinct and was asked on the Petitioner's porch as she was being escorted to the officer's police cruiser to detain her so he could process the crime scene and interview witnesses. Even if the officer's question constitutes a custodial interrogation, Petitioner's answer is admissible under the public safety exception rule established in *Miranda v. Arizona*, 384 U.S. 436 (1966). Moreover, despite Petitioner's contentions, her statement to the officer was not hearsay. Rather, her statement was admissible as an admission against a party opponent under Rule 801(d)(2)(A) of the West Virginia Rules of Evidence. Petitioner has failed to meet her burden of establishing her entitlement to relief, and this Court should, therefore, affirm the judgment of the Mercer County Circuit Court.

ASSIGNMENT OF ERROR

Petitioner, by counsel, advances a single assignment of error: The trial court erred in denying Petitioner's Motion in Limine/Motion to Suppress seeking to preclude Trooper Weikle

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[1] Respondent's Brief is, in part, substantially the work product of Paul Gerstle, a rising second year law student at Vanderbilt Law School, who interned with the Office of the Attorney General during the summer of 2023. Mr. Gerstle assisted in preparing Respondent's Brief with the advice and supervision of the undersigned counsel and other lawyers in the Attorney General's Appellate Division.

from testifying about asking Petitioner the location of the gun and her response because (1) the Trooper's question constituted a custodial interrogation and Petitioner was not advised of her *Miranda* rights, and (2) the Trooper's testimony constituted impermissible hearsay. (Pet'r's Br. 4.)

STATEMENT OF THE CASE

The facts relevant to this appeal are limited. In October 2021, a Mercer County grand jury indicted Petitioner of Murder in the First Degree of Michael Walker, in violation of West Virginia Code § 61-2-1, in Case Number 21-F-242. (App. 45.) Prior to trial, Petitioner sought to prohibit West Virginia State Trooper S.K. Weikle from testifying that as he escorted Petitioner from her house, the scene of Mr. Walker's murder, to his police cruiser, he asked her "where is the gun." Petitioner responded that it is on the couch. (App. 40–42.) Petitioner argued that Trooper Weikle's testimony constituted inadmissible hearsay. (App. 40.) Petitioner also moved to suppress the statement on the grounds that it was obtained as part of a custodial interrogation and she was not advised of her *Miranda* warning. (App. 41.) Following a hearing on Petitioner's motion, the trial court denied her motion by order entered September 9, 2022. (App. 43–44.)

At trial, Trooper Weikle testified that he arrived at the scene along with two other State Troopers, who were advised by a neighbor, Craig Young, that Petitioner had shot Mr. Walker. (App. 206.) Trooper Weikle then proceeded toward Petitioner's house to locate her. (App. 206.) When Petitioner exited her house, Trooper Weikle detained her in handcuffs "and maintained security on her." (App. 207.) Because officers had not yet secured the firearm used to kill Mr. Walker, Trooper Weikle asked Petitioner the location of the gun. (App. 207.) Petitioner's counsel objected to Trooper Weikle's response on hearsay grounds. (App. 207.) The objection was overruled and Trooper Weikle testified that Petitioner said the weapon was on the couch. (App. 208, 212.) The gun was in fact found in plain view on the couch in the living room immediately

inside the front door. (App. 212, 215.) Trooper Weikle then escorted Petitioner to his police cruiser where she was detained while he processed the scene and spoke to witnesses. (App. 209.)

Following a two-day trial, the jury convicted Petitioner of Second Degree Murder. (App. 455.) By order entered December 7, 2022, the trial court sentenced Petitioner to a determinate term of imprisonment of 40 years. (*See* Notice of Appeal, 2.) Petitioner appeals from that order.

SUMMARY OF THE ARGUMENT

Petitioner's claim fails. First, Trooper Weikle was not required to *Mirandize* Petitioner prior to asking the location of the gun used to kill Mr. Walker because he was not conducting a custodial interrogation. Trooper Weikle's on-the-scene question of Petitioner was a focused inquiry that was part of common law enforcement procedure to secure the scene. Officers were on the scene but Trooper Weikle was unaware of the location of the gun and he asked a simple, short question not designed to elicit any incriminating response from Petitioner. The question was asked on Petitioner's porch as Trooper Weikle detained her and was escorting her to his police cruiser so that he could process the crime scene. Trooper Weikle did not coerce Petitioner in answering the question, which she readily did. Assuming arguendo that Trooper Weikle did conduct a custodial interrogation, the public safety exception to the *Miranda* rule is applicable. The trial court properly admitted Petitioner's statement to Trooper Weikle at trial.

Second, Petitioner's statement was not hearsay. Rather, the trial court properly found Petitioner's statement admissible by a party opponent pursuant to Rule 801(d)(2)(A) of the West Virginia Rules of Evidence.

Respondent, therefore, requests that this Court affirm the conviction and sentence of the Circuit Court of Mercer County.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent asserts that oral argument is unnecessary and that this case is suitable for disposition by memorandum decision because the record is fully developed and the arguments of both parties are adequately presented in the briefs. W.Va. R. App. P. 18(a)(3) and (4).

STANDARD OF REVIEW

"The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." *State v. Henson*, 239 W.Va. 898, 909, 806 S.E.2d 822, 833 (2017). "[L]egal conclusions made with regard to suppression determinations are reviewed *de novo*." *State v. Farley*, 238 W.Va. 596, 606, 797 S.E.2d 573, 584 (2017). The trial court's "factual findings are reviewed for clear error." Syl. Pt. 1, in part, *State v. Deem*, 243 W.Va. 671, 849 S.E.2d 918 (2020) (quoting Syl. Pt. 1, *State v. Lacy*, 196 W.Va. 104, 468 S.E.2d 719 (1996)). All facts should be construed in the light most favorable to the prevailing party and "particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues." *Id.*; *See also*, Syl. Pt. 1, *State v. Simmons*, 239 W.Va. 515, 801 S.E.2d 530 (2017) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of statute, we apply a *de novo* standard of review.").

ARGUMENT

A. Trooper Weikle was not conducting a custodial interrogation when he asked Petitioner where the gun was located, but even if he was, his question falls firmly within the public safety exception to the *Miranda* warning requirement.

Petitioner contends she was subjected to custodial interrogation when Trooper Weikle questioned her regarding the location of the gun while she was handcuffed and escorted from her home. (Pet'r's Br. 9–10.) She asserts that "a reasonable person in the Petitioner's position, would have considered their freedom of action curtailed to a degree associated with a formal arrest," and

the court should have suppressed her statement that the gun was on the couch because she was not advised of her *Miranda* warnings. (Pet'r's Br. 10.)

Trooper Weikle's question about the location of the murder weapon was not a "custodial interrogation." (App. 207.) Though Petitioner was in custody, she was not subjected to "interrogation" within the meaning of *Miranda*. *See Rhode Island v. Innis*, 446 U.S. 291, 300 (1980). Even if Petitioner was subjected to a custodial interrogation, her statement about the gun is admissible under the public safety exception to the *Miranda* requirement. *See New York v. Quarles*, 467 U.S. 649, 655 (1984) (establishing a public safety exception to pre-*Miranda* rights questions that are intended to protect both the public and law enforcement). Trooper Weikle's question about the location of the gun was straightforward, limited in scope and length, and was intended to ensure the safety of both the citizens and the officers in the area, not to incriminate Petitioner. (App. 207.)

1. Trooper Weikle was not conducting a custodial interrogation by asking Petitioner where the gun was such that he was required to have informed her of her *Miranda* rights.

The record demonstrates that though Petitioner may have been in Trooper Weikle's custody, she was not interrogated by Trooper Weikle because his single question was non-coercive, short, succinct, and narrowly tailored to secure the crime scene and protect the public and law enforcement officers. In *Miranda v. Arizona*, the United States Supreme Court established that there must be certain "procedural safeguards" that protect individuals against self-incrimination stemming from custodial interrogations. 384 U.S. at 444. In defining custodial interrogation, the Supreme Court referred to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* Yet, the definition laid out in *Miranda* is not cut-and-dried. The Supreme

Court later clarified that "the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation." *Innis*, 446 U.S. at 300. A *Miranda*-conceptualized custodial interrogation, "must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id.*

It is thus well-settled that "[t]wo elements must be present before *Miranda* warnings are required: first, the person must be in custody, and, second, he or she must be interrogated." *Farley,* 238 W.Va. at 607, 797 S.E.2d at 584 (citing *State v. Honaker*, 193 W.Va. 51, 60, 454 S.E.2d 96, 105 (1994)). A custodial interrogation occurs when law enforcement initiates questioning "after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* (citing *Miranda*, 284 U.S. at 444). Determining whether an individual is subjected to a custodial interrogation is an objective analysis based on "whether a reasonable person in the suspect's position would have considered his or her freedom of action curtailed to a degree associated with a formal arrest." *Id.* at Syl. Pt. 3, in part. The analysis "does not depend on the subjective view of either the person interrogated or the officers who conduct the interrogation." *Id.* at 608, 797 S.E.2d at 585.

This Court has held that a trial court must consider certain factors in determining whether a suspect was subjected to a custodial interrogation, including

> the location and length of questioning; the nature of the questioning as it relates to the suspected offense; the number of police officers present; the use or absence of force or physical restraint by the police officers; the suspect's verbal and nonverbal responses to the police officers; and the length of time between the questioning and formal arrest.

Syl. Pt. 2, *State v. Campbell*, 246 W.Va. 230, 868 S.E.2d 444 (2022) (internal citations and quotations omitted); *see also State v. Preece*, 181 W.Va. 633, 641–42, 383 S.E.2d 815, 823–24 (1989), *overruled on other grounds by State v. Guthrie*, 205 W.Va. 326, 518 S.E.2d 83 (1999)

(overruling Syl. Pt. 1 of *Preece* to the extent *Preece* required the *Miranda* special safeguards simply when a suspect was taken into custody). The length of time for questioning can be an important part in determining whether a custodial interrogation existed. *Preece*, 181 W.Va. at 642, 383 S.E.2d at 824. The length of the period of questioning in *Preece* "was apparently brief" and, therefore, factored against a custodial interrogation. *Id.* Similarly, this Court has found that a forty minute and a forty-five minute interview was not "lengthy" for purposes of a custodial interrogation determination. *See State v. Singleton*, 218 W.Va. 180, 186, 624 S.E.2d 527, 533 (2005); *Campbell*, 246 W.Va. at 239, 868 S.E.2d at 453. In contrast, in *State v. Middleton*, evidence of an interrogation that "lasted several hours" weighed in favor of a custodial interrogation environment. 220 W.Va. 89, 96, 640 S.E.2d 152, 159 (2006), *overruled on other grounds by State v. Eilola*, 226 W.Va. 698, 704 S.E.2d 698 (2010). In *Middleton*, however, the Court ultimately concluded that the defendant was not in custody at the time of the interrogation and that there were no more than two officers present at the time of questioning who did not exhibit coercive behaviors. 220 W.Va. at 96–97, 640 S.E.2d at 159–60.

The location and nature of the questioning are also fundamental parts of custodial interrogation determinations. *Preece*, 181 W.Va. at 642, 383 S.E.2d at 824. In *Preece*, an officer's on-the-scene initial questions to an individual in a motor vehicle accident did not violate his *Miranda* rights because they were part of a routine, on-the-scene, investigation: "The *Miranda* safeguards were never intended to apply to the typical, 'on-the-scene' investigation." *Id.* at 638, 383 S.E.2d at 820. This Court reiterated this principle when it affirmed the trial court's denial of the petitioner's motion to suppress his statement to law enforcement at the scene of the accident that he had taken prescribed Xanax. *State v. Carson*, No. 17-0951, 2018 WL 6119790, at *4–5 (W.Va. Supreme Court, Nov. 21, 2018) (memorandum decision).

The type of questioning at issue is also important, and a distinct line must be drawn between accusatory and investigatory questions. *See Damron v. Haines*, 223 W.Va. 135, 142, 672 S.E.2d 271, 278 (2008). In *Damron*, a state fire marshal asked the petitioner a single question of what he was doing inside a building that was set on fire. *Id.* The Court characterized the question as an investigatory one not designed to elicit an incriminating response, despite the petitioner making an inculpatory statement. *Id.* As such, the question did not violate the petitioner's *Miranda* rights. *Id.*

As Petitioner points out, a question that is "designed to elicit an incriminating response" is indicative of a custodial interrogation. (Pet'r's Br. 11.) The most important part of this consideration is whether the officer asking the question knows or should have known that the question would elicit an incriminating response. *Innis*, 446 U.S. at 301–02. In *Innis*, the Supreme Court drew a strict line between "subtle compulsion" and interrogation in ruling against the defendant, noting that "this is not a case where the police carried on a lengthy harangue in the presence of the suspect." *Id.* at 303. *Pennsylvania v. Muniz* provides a compelling example of the type of questions that are not intended to provoke a self-incriminating response. 496 U.S. 582 (1990). In *Muniz*, the Supreme Court found that questions asked during a physical sobriety test that evoked responses were not interrogations under *Miranda*, in large part because "these focused inquiries were necessarily 'attendant to' the police procedure." *Id.* at 603–04.

In the instant case, Trooper Weikle did not conduct a custodial interrogation by asking Petitioner where the gun was located. (App. 207.)[2] After Petitioner walked out of her house and onto the front porch, Trooper Weikle placed her in handcuffs upon hearing from neighbor Young

[2] Petitioner's Brief references the page numbers for the individual transcripts, not the appendix page numbers. For the purposes of this brief, Respondent will reference the Appendix page numbers.

that she had shot Mr. Walker. (App. 207.) At this point, law enforcement officers had not located the weapon nor had they secured the premises. (App. 207.) While Petitioner was indeed in the custody of Trooper Weikle, under *Innis* the "special procedural safeguards" afforded individuals by *Miranda* are only required when the subject is both in custody *and* interrogated. *Innis*, 446 U.S. at 300. And the facts show that Petitioner was not interrogated.

Looking to the *Preece* factors, Trooper Weikle did not engage the suspect in "unreasonably lengthy, intimidating questioning." *Preece*, 181 W.Va. at 641-42, 383 S.E.2d at 823–24. There was not a heated back-and-forth, nor did Trooper Weikle even ask Petitioner multiple questions. (App. 207–09.) Trooper Weikle kept his inquiry short, succinct, and narrowly tailored to the situation at hand and to his duties as a police officer arriving on the scene of a crime. *See Singleton*, 218 W.Va. at 186, 624 S.E.2d at 533; *Campbell*, 246 W.Va. at 239, 868 S.E.2d at 453.

Further, the location of the questioning shows that there was no custodial interrogation environment. *Preece*, 181 W.Va. at 642, 383 S.E.2d at 823. Trooper Weikle's question to Petitioner was asked in an effort to secure the crime scene. (App. 207.) In fact, the other officers were still searching the house when he asked Petitioner the question. (App. 207.) Trooper Weikle was the only one to ask a question, and there is no evidence that he was coercive or intimidating in doing so. (App. 207.)

Petitioner was not being interrogated when placed into handcuffs by Trooper Weikle. (App. 207.) There is a distinct difference between an individual being in custody and being interrogated. *See Damron*, 223 W.Va. at 142, 672 S.E.2d at 278. While Petitioner's freedom of movement was curtailed to a degree when she was placed in handcuffs, the environment surrounding Trooper Weikle's question did not exhibit any pressure or coercion that may be present at a station house interrogation. (App. 207.) Petitioner freely answered the question. (App. 207–08.)

Additionally, Officer Weikle asked a simple, investigatory question, necessary to ensure the safety of both himself, his fellow officers, and the public. (App. 207.) A question from a police officer about the location of a weapon is even more related to public safety than a question, like the one in *Damron*, about why an individual is in a building. 223 W.Va. at 142, 672 S.E.2d at 278. There is no indication that Trooper Weikle was intending to elicit any kind of incriminating response from Petitioner when he asked her for the location of the gun. (App. 207.) Pursuant to *Muniz*, Trooper Weikle was asking Petitioner a "focused inquiry" that is a common part of police procedure. *Muniz*, 496 U.S. at 603–04. When officers detain a suspect in a crime that they know involved a gun, it is common practice for them to ascertain the location of said gun to ensure it is secure. If officers were not allowed to inquire as to the location of a weapon for fear of its inadmissibility in a court of law, they would risk putting themselves in immediate danger. Whether the gun is on the suspect or not, it could be in a position to harm someone. If Trooper Weikle had not inquired as to the location of the gun, he would have risked his life and the lives of his fellow officers. No trooper should be put in that position simply for fear of violating a suspect's *Miranda* rights.

Trooper Weikle, therefore, was not conducting a custodial interrogation due to the short nature of his question, the lack of an interrogation environment, and because his question was part of the initial on-scene investigation.

2. Even if Trooper Weikle was conducting a custodial interrogation, his question to Petitioner was squarely within the bounds of the public safety exception.

Petitioner was not entitled to a Miranda warning when Trooper Weikle asked her about the location of the gun, because the "threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *New York v. Quarles*. 467 U.S. at 655. In *Quarles*, the Supreme Court was confronted with the issue of whether a

suspect's responses to police questioning about the location of a gun he had allegedly been carrying were permissible in a court of law, despite the fact that he had not been read his *Miranda* rights. *Id.* at 651–52. The Court ruled that there exists a public safety exception to the *Miranda* warning requirement, whereby an officer can ask questions that are necessary to secure the safety of the public and his fellow officers. *Id.* at 655. Rather than put officers in an "untenable position" by forcing them to decide whether asking questions that will be inadmissible is necessary, the Court decided to recognize this exception. *Id.* at 657–58. A vital consideration in the Court's ruling was that the suspect's statements were not "compelled by police conduct which overcame his will to resist." *Id.* at 654.

In *Yost v. Terry*, this Court applied the public safety exception. *Yost*, No. 17-0728, 2018 WL 4913832 (W.Va. Supreme Court, Oct. 10, 2018) (memorandum decision). Yost argued that his trial counsel had been ineffective because they did not move to suppress the gun that he had used during a succession of crimes. *Id.* at *5. This Court recognized the applicability of the public safety exception established in *Quarles*, noting that the officers' questions about the location of the gun were necessary for public safety. *Id.* Further, the *Yost* decision reiterated that the "prototypical example" for the application of the public safety exception is a missing weapon. *Id.* at *6. This Court further noted the habeas court's findings that the officers' questions were reasonable, particularly in light of the gun being loaded and in an accessible position. *Id.*

Indeed, the public safety exception should be applied "only where there is 'an objectively reasonable need to protect the police or the public from any immediate danger associated with [a] weapon.'" *United States v. Mobley*, 40 F.3d 688, 693 (4th Cir. 1994) (quoting *Quarles*, 467 U.S. at 659 n.8). In *Mobley*, the Fourth Circuit Court of Appeals determined that the *Quarles* ruling did not apply because of a plethora of extenuating circumstances: the apartment had already been

secured by way of a full FBI sweep, the suspect was the sole individual present, and the suspect was the only resident of the apartment. *Id.* Conversely, the Fourth Circuit did apply the public safety exception in *United States v. Young* because the premises had not been fully secured and the officer's questions were solely limited to the presence of weapons. *Young*, 58 F. App'x 980, 981 (4th Cir. 2003).

Trooper Weikle's question to Petitioner about the location of the gun falls squarely within the public safety exception. Trooper Weikle, while securing Petitioner, asked her one narrow question about where the weapon was located. (App. 207–08.) Trooper Weikle was in a position comparable to that of the officer in *Quarles*; he was in the process of securing a suspect, of which he had reason to believe had recently held a weapon. *See Quarles*, 467 U.S. at 652; (App. 206–08.) And like Petitioner here, the suspect in *Quarles* was also in handcuffs when he had been questioned. *Id.* at 652; (App. 207.) Placing the officer in a position whereby he would have to decide whether to ask the suspect if they had a weapon for fear of rendering that statement inadmissible would have put him in an "untenable position." *Quarles*, 467 U.S. at 657–58. This was the exact scenario the Supreme Court was attempting to avoid by establishing the public safety exception in *Quarles*. *Id.* at 655. Notably, Petitioner's statement was not coerced by police conduct, as Petitioner freely answered Trooper Weikle's question without repeated questioning or the presence of multiple officers. *See id.* at 654 (noting the importance that a suspect's statements not be "compelled by police conduct which overcame his will to resist").

This case is the "prototypical example" of where the public safety exception should apply: a weapon is missing and the arriving officers know little about what has occurred. *Yost*, 2018 WL 4913832, at *6. Trooper Weikle's question was reasonable in light of the circumstances and was narrowly tailored, solely asking for the location of the weapon. (App. 207.) Officers noted the

deceased laying on the steps of the house, so it was reasonable to assume that there was a gun. (App. 206.) There was a reasonable suspicion that the gun could be loaded and perhaps even in an accessible position. In fact, Trooper Shifflett testified that the gun was laying out in plain view on the couch. (App. 215.)

The current case differs from *Mobley*. In *Mobley*, the Fourth Circuit noted that certain facts specific to the case allowed the public safety exception to not apply: the apartment had already been secured, the suspect was the sole individual present, and the suspect was the only resident of the apartment. 40 F.3d at 693. In the current case, Petitioner was not the sole individual present, nor was she the sole resident of the house, with both the deceased and Brian Smith living in the building. (App. 206–208, 254.) In addition, Trooper Weikle testified that, unlike in *Mobley*, they had yet to fully secure the house. *Mobley*, 40 F.3d at 693 ("the FBI already had made a security sweep of his premises"); (App. 207.) Trooper Weikle stated that while he was handcuffing Petitioner, the other officers had entered the residence to see if there were other suspects or victims, and to attempt to secure the weapon for officer safety. (App. 207.) *Young* is more factually similar to the instant case, because the premises were not yet secure and Trooper Weikle's question was only about the presence of weapons, which was necessary to secure officer safety. *Young*, 58 F. App'x at 981.

In conclusion, the public safety exception established in *Quarles* is applicable to the current case because Trooper Weikle asked a narrowly tailored question about the location of a weapon that was a part of his normal police procedure and necessary to secure public safety. 467 U.S. at 655. The trial court did not abuse its discretion in admitting Petitioner's statement as to the location of the gun.

B. Trooper Weikle's testimony as to Petitioner's statement regarding the location was not hearsay. Rather, Petitioner's own statement, in her individual capacity, was offered against her and did not constitute hearsay under Rule 801(d)(2)(A) of the West Virginia Rules of Evidence.

Petitioner further contends that her response to Trooper Weikle's question as to the location of the gun constituted inadmissible hearsay. (Pet'r's Br. 13.) Petitioner argues that her statement was hearsay under Rule 801 of the West Virginia Rules of Evidence because she "did not make the statement regarding the gun while testifying at trial or any hearing" and because "the State was clearly offering [her statement] . . . to prove the matter asserted that the Petitioner committed the crime because she knew the location of the firearm used to murder Michael Walker." (Pet'r's Br. 13.) Petitioner's argument fails because her statement is not considered hearsay under Rule 801(d)(2)(A) of the West Virginia Rules of Evidence.

Hearsay is defined as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted." W. Va. R. Evid. 801(c). A statement is not hearsay, however, "if such statement is offered against a party and is his own statement, in either his individual or representative capacity." *State v. Lambert*, 236 W.Va. 80, 94, 777 S.E.2d 649, 663 (2015) (quoting *State v. Payne*, 225 W.Va. 602, 610–11, 694 S.E.2d 935, 943–44 (2010)); see W.Va. R. Evid. 801(d)(2)(A) ("A statement that meets the following conditions is not hearsay: . . . [t]he statement is offered against an opposing party and . . . was made by the party in an individual or representative capacity," such statement is not hearsay.").

In *Payne*, as the defendant was being escorted from the family home by a law enforcement officer, the defendant told the officer that he should ask the victim's mother about what she allowed the victim to drink on the night in question. *Payne*, 225 W.Va. at 606, 694 S.E.2d at 939. At trial, one of the issues centered on whether the victim was permitted or encouraged to drink alcohol

prior to one instance of sexual abuse by the defendant. *Id.* at 611, 694 S.E.2d at 944. In finding the defendant's statement admissible "as an admission by a party opponent" under Rule 801(d)(2)(A), this Court recognized the purpose behind this Rule as "[a]n additional justification supporting the admissibility of this class of evidence is the fact that it is inherently trustworthy." *Id.* (quoting *State v. Heydinger*, 178 W.Va. 463, 468, 360 S.E.2d 240, 245 (1987)). This theory is based in part on the presumption that "if a person's own statements are offered against him, he cannot be heard to complain that he was denied an opportunity for cross-examination." *Id.* Similarly, in *Lambert*, statements the defendant made to a psychiatrist during a psychiatric interview were properly used for impeachment purposes because the statements were offered against an opposing party under Rule 801(d)(2)(A). *Lambert*, 236 W.Va. at 94–95, 777 S.E.2d at 663–64.

Here, as Petitioner was being escorted from the porch of her house by Trooper Weikle, she told him that the firearm used to kill Mr. Walker was located on the couch. (App. 207.) At trial, the State introduced the testimony of Trooper Weikle who testified that he asked Petitioner where the gun was located and she said on the couch. (App. 207.) Such statement was "permissible as an admission by a party opponent," Petitioner. *See Payne*, 225 W.Va. at 611, 694 S.E.2d at 944. The trial court, therefore, did not abuse its discretion in permitting the testimony at issue. For these reasons Petitioner's argument is without merit.

C. Even if Petitioner's statement was the product of improper custodial interrogation or as impermissible hearsay, the admission of her statement was harmless error.

Even if this Court were to conclude that Petitioner's statement was the product of improper custodial interrogation, the admission of her statement at trial was harmless error because the gun was in plain view and neighbors testified that Petitioner shot and killed Mr. Walker. In *Damron*, this Court acknowledged that the "[f]ailure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." 223 W.Va.

at 143, 672 S.E.2d at 279 (citation omitted). Here, Trooper Shiflett testified that the firearm was observed in plain view on the couch in Petitioner's living room which was located just inside the front door, and that anyone who walked past would have seen the gun. (App. 212.); *See also*, *United States v. Patane*, 542 U.S. 630, 639-41 (2004) (finding that the admission of non-testimonial physical fruits did not run afoul of precluding an accused's coerced self-incriminating statements). The murder weapon would have been admitted in the absence of Petitioner's statement and, therefore, the admission of her statement was harmless.

Moreover, the record demonstrates that in addition to the circumstantial evidence of Petitioner's statement, several neighbors testified that Petitioner shot and killed Mr. Walker. Teressa Horne testified that prior to the shooting, Petitioner told her that Mr. Walker had "spreaded demons" from three different counties and that "the neighborhood would be back to normal. . . . I know the Bible and I know the Lord's word, you can believe that." (App. 286.) Petitioner then entered her house and not long thereafter—less than one or two minutes later—Ms. Horne heard the gunshot. (App. 288–89.)

Mr. Young also heard Petitioner's statements regarding Mr. Walker spreading demons and testified that Petitioner further said "I'm sorry, you all have to deal with this. The neighborhood will be back to normal soon." (App. 344.) Mr. Young witnessed Petitioner walk into her house and approximately thirty seconds later, he heard the gunshot. (App. 345.) Afterward, Mr. Young observed Brian Smith, who lived with Petitioner and Mr. Walker, screaming that Petitioner shot Mr. Walker. (App. 345–46.)

Finally, Mr. Smith, Petitioner's ex-husband, testified that he lived with Petitioner and Mr. Walker. (App. 253–54.) Mr. Smith also testified that on the day of the murder, he observed Petitioner and Mr. Walker sitting on the front porch talking. (App. 259–60.) He went to the back

corner of the house to get some sun when he saw the front door open and heard the gunshot. (App. 262–63.) Petitioner was the only person in the house. (App. 263.) Mr. Smith asked Petitioner "what did you do," as he could see Mr. Walker's body lying on the steps. (App. 264.) Mr. Smith took off running and heard the front door slam hard. (App. 264.)

Based on the testimony of Mr. Smith, Mr. Young, and Ms. Horne, the jury could have found, even in the absence of Petitioner's statement that the gun was on the couch, that Petitioner killed Mr. Walker beyond a reasonable doubt. Any error in admitting Petitioner's statement, therefore, was harmless.

CONCLUSION

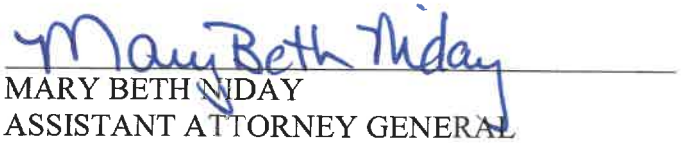
For the foregoing reasons, Respondent respectfully requests that this Court affirm Petitioner's conviction.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Respondent,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



MARY BETH NIDAY
ASSISTANT ATTORNEY GENERAL
W.Va. State Bar # 9092
Office of the Attorney General – Appellate Division
1900 Kanawha Blvd. East
State Capitol
Building 6, Suite 406
Charleston, WV 25305
Telephone: (304) 558-5830
Fax: (304) 558-5833
Email: Mary.B.Niday@wvago.gov

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-7

STATE OF WEST VIRGINIA,

Respondent,

v.

MONICA HARTWELL,

Petitioner.

CERTIFICATE OF SERVICE

I, Mary Beth Niday, do hereby certify that on the 14th day of August, 2023, I served a true and accurate copy of the foregoing **Respondent's Brief** upon the below-listed individuals via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure.

Ryan J. Flanigan, Esq.
The Flanigan Law Office
1407 East Main Street
Princeton, WV 24740

Mary Beth Niday (State Bar No. 9092)
Assistant Attorney General