IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON, WEST VIRGINIA

NO. 23-160

STATE OF WEST VIRGINIA

Plaintiff Below, Respondent

v.

Appeal from a final order of the Circuit Court of Cabell County (21-F-209)

NATHAN DOLEN

Defendant Below, Petitioner.

PETITIONER'S BRIEF

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1) The circuit court erred by permitting the introduction of a cell phone tracking expert report because, a) it was not introduced by the preparer in violation of the confrontation clause, and b) it was not disclosed properly and violated the applicable discovery rules

2) The facts taken in the light most favorable to the State do not meet the statutory criteria for a conviction of kidnapping or were incidental to the robbery.

STATEMENT OF THE CASE

On November 22, 2020, Ronald and Orlinda Adkins suffered a horrific and violent home invasion in their Huntington residence. Appendix Record ("A.R.") at 8-10. At approximately 9:30 a.m. on that day Corporal Brett Jarrett of the Cabell County Sheriff's Department was dispatched to the Adkins home after a 911 call was received at dispatch. *Id.* at 282-83. He, along with other officers on the scene observed Mr. and Mrs. Adkins in a bloody and battered state and both were handcuffed. *Id.* at 285; 297. They were both taken to the hospital for treatment.[1] *Id.* at 294.

After investigation Corporal Jarrett received information that a red Ford F-150 was seen leaving the area at times relevant to the robbery. All officers in the area were on the lookout for that red Ford. *Id.* at 303. Shortly after 3:00 p.m. the same day Chief Deputy Adams spotted a red Ford F-150 in the parking lot of a local Speedway store. *Id.* at 568-69. Chief Adams followed the truck down the road and pulled in behind it when it parked in a driveway. *Id.* at 570-71. He approached the occupants of the vehicle, one male and one female. *Id.* at 573. While approaching the vehicle, Chief Adams noticed many items in the bed of the truck which were similar to the items taken from the Adkins' residence. *Id.* at 577.

[1] The Adkins' vehicle was stolen and burned, and items were taken from their home and garage. As these facts are not relevant to this appeal, they will not be cited and discussed except for context.

Both occupants of the truck were arrested and later identified as Wanda Blankenship and the Petitioner, Nathan Dolen. *Id.* at 577-78.

Mr. Dolen was interrogated and told the police that he had received a phone call from a Mr. Jeremy Artrip about a pressure washing job and to meet him that morning. *Id.* at 610-11. Mr. Dolen stated that when he met Mr. Artrip, the latter began loading items into the bed of Mr. Dolen's truck. *Id.* at 611. Mr. Dolen stated to the police that Mr. Artrip had told him that he stole those items from an older couple and that they were hurt. *Id.* at 612. Mr. Dolen then stated that he was the one who called 911 to report the incident. *Id.*

The State did not believe Mr. Dolen's version of events and charged him and Wanda Blankenship in a fifteen (15) count indictment for the events of that morning. *Id.* at 8. Mr. Dolen was charged with one (1) count of entry of a building other than a dwelling, two (2) counts of robbery, two (2) counts of kidnapping, one (1) count of burglary, one (1) count of attempted first degree murder, two (2) counts of malicious assault, one (1) count of use or presentment of a firearm during the commission of a felony, and one (1) count of third degree arson. *Id.*

The case was close and the only direct evidence the State had was the testimony of Wanda Blankenship who had taken a plea deal. *Id.* at 1154. The crime scene was barely processed, and no fingerprints or DNA were recovered belonging to Mr. Dolen. *Id.* at 1175. The victims did not recognize the assailant. However, the crushing blow to the defense case was the expert Powerpoint presentation which showed Mr. Dolen's cell phone allegedly traveling to and from the victim's residence at the appropriate times. *See* Section I, *infra*.

Mr. Dolen proceeded to trial on November 1, 2022. *Id.* at 64. After five (5) days of trial, the jury convicted Mr. Dolen on all counts except for a single malicious assault count. *Id.*

at 64-67. A mercy phase hearing was held at which the jury recommended mercy. *Id.* at 69 (in passing).

The circuit court denied Mr. Dolen's post-trial motions and sentenced him to consecutive terms of two (2) life sentences with mercy, plus a total of forty (40) years for the armed robberies. *Id.* at 69. All other sentences were run concurrently to these sentences. *Id.*

Mr. Dolen now comes to this Court seeking relief from his convictions.

SUMMARY OF ARGUMENT

This case was very close on the merits. However, the State introduced an expert report taken from the cellular telephone data purportedly obtained from Mr. Dolen's phone, processed by the use of proprietary software, and did not call the expert who prepared the report or used the software, but allowed another witness to introduce it through his testimony.

This is a classic violation of the confrontation clause line of cases requiring an expert who actually prepares a report introduced into evidence or conducts analysis to appear and be subject to cross examination. *See, e.g.*, *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). This error was terribly damaging as the PowerPoint presentation prepared by the expert was very inculpatory. In addition, the State failed to turn over this report to the Defendant prior to trial in violation of the applicable discovery rules.

Second and finally, construing the facts in the light most favorable to the State, there was not a kidnapping. If Mr. Dolen is guilty[2], then he is certainly guilty of everything else he was charged with *except* kidnapping. The two victims testified at trial, and they described the assailant as beating them, attempting to shoot Mr. Adkins, and then handcuffing them while they were lying on the floor. The assailant then immediately left. At no time did he

[2] A fact which he continues to deny.

"transport" them, hold them for "ransom, reward, or concession," or meet any of the statutory requirements to support a conviction for kidnapping. W.Va. Code §61-2-14A.

For this reason, Mr. Dolen's kidnapping convictions should be set aside.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner believes that argument under Rule 20 is important as this case is an excellent vehicle for development in the area of the law regarding confrontation of expert witnesses. He further believes that Rule 19 would be appropriate for argument regarding the discovery violation and the concurrent kidnapping charges.

For these reasons, he believes a memorandum decision would not be proper.

ARGUMENT

Standard of Review

This Court reviews questions of law under a *de novo* standard. *See, e.g., State v. Lilly*, 461 S.E.2d 101 (W.Va. 1995). The remedy for a discovery violation is entrusted to the circuit court and is reviewed for an abuse of discretion. *State ex rel. Rusen v. Hill*, 454 S.E.2d 427, 434 (W.Va. 1994).

I. *The circuit court erred by permitting the introduction of a cell phone tracking expert report because, a) it was not introduced by the preparer in violation of the confrontation clause, and b) it was not disclosed properly and violated the applicable discovery rules.*

Given the important nature of what is alternatively called a PowerPoint presentation or an expert report (included on the enclosed jump drive noted in the Appendix Record and included by separate mailing) a lengthy review of the introduction of that evidence is necessary.

In the middle of the trial the defense was presented with a PowerPoint presentation that the State intended to submit into evidence. A.R. at 1102. Defense counsel objected as he claimed that he had not been provided with this presentation until lunch on a Friday during trial and moved to exclude it. *Id.* The lower court inquired about the PowerPoint:

> THE COURT: Well, that's the first I've heard of it. What is it?
>
> MRS. PLYMALE [prosecutor]: The Fusion Center created it and Eddie Pritchard is the only one qualified in that jurisdiction, well, that I know, that's why he's using the information. But he still has the data from AT&T. That's where that came from. It's just basically a collaboration of all of it.
>
> THE COURT: Is it his report?
>
> MRS. PLYMALE: No. It was just created for – just basically put all the information together. But the information is in the AT&T records, which they have known, which they have.
>
> MR. MIKE FRAZIER [defense counsel]: Yeah. We have records, but it's just a bunch of numbers. And that's a whole different thing than having this guy say that the number associated with Nathan Dolen used cell service providing coverage in the direction of the [victim's residence] November 22nd. I mean, that may be buried somewhere in the data and maybe he can testify to that from looking at the data, but I think that's a whole different story than putting on a PowerPoint showing the jury.

Id. at 1102-03. The lower court deferred ruling on the objection until it could hold a hearing outside the presence of the jury. *Id.* at 1106. Trial counsel then filed a written motion to exclude the expert report. *Id.* at 23. The lower court held a hearing on the following Monday regarding the motion. *Id.* at 1251.

Trial counsel stated that although he had received bulk raw data regarding Mr. Dolen's phone, the intended exhibit was created by having an expert collate that data and place it into an interactive time and map form for presentation to the jury. He stated that the expert and the presentation should have been disclosed far sooner than the previous Friday to give him time to hire an expert himself. *Id.* at 1251-53.

The State responded that it "actually had a conversation with [trial counsel] about the fact that the information that is created by the Fusion Center *cannot be testified to by the person who created it because he does not have the qualifications* in order to make the – *to put forth before the [c]ourt*. That's why we were going to call Eddie Pritchard." *Id.* at 1254. (emphasis added). The State claimed that it had notes stating that it had this conversation with trial counsel on July 29th, some four months prior to trial. *Id.* at 1254-55.

The primary prosecutor claimed that she had a discussion with the secondary prosecutor telling him to provide this information to the defense by April 1. *Id.* at 1256. She further claimed that all of the disclosure to the defense was done verbally. *Id.*

Defense counsel claimed that he did not recall the conversation:

> THE COURT: Do you recall that conversation?
>
> MR. MIKE FRAZIER: I do not. I do not recall anything – talk about the Fusion Center. I am certain that we did not about there being an expert report. I would have jumped on that.
>
> I'm not saying we haven't had a number of conversations, and she may have mentioned something about this witness. All I can tell you is we – Dru [secondary defense counsel] and I went back through it over the weekend. We do not have anything that has Eddie Pritchard's CV on it, and we don't have anything – and we went through all of the flash drives that have been sent to us. We don't have anything that has this report on it.

Id. at 1256-57. The secondary prosecutor stated that he provided it to trial counsel on May 25th. *Id.* at 1257. He claimed that it was too big to attach to an email, that he had placed the presentation along with the expert CV on a thumb drive and placed it in trial counsel's mailbox in the Cabell County Circuit Clerk's office. *Id.* at 1258.

Trial counsel again stated that he had received the raw phone data and had also received a witness list stating "Eddie Pritchard, Huntington Police Department" with his own handwritten note stating "phone stuff" next to Mr. Pritchard's name. *Id.* With the court now

ready to rule in favor of the State because the defense was indeed provided with the raw data and the name of the witness, secondary defense counsel articulated his objection:

> MR. DRU FRAZIER: Just briefly, your Honor.
>
> We're not objecting to the raw data. We're objecting to their – Mr. Pritchard's interpretation of the data. I mean, that's akin to if this was a car wreck, them providing us with black box information and then having their expert do their reconstruction. We needed to know how he interpreted the data to know if we needed to hire an expert to know if Mr. Pritchard would agree with us, agree with the State. We have no way to get an expert. I mean, that's the reason the State or the plaintiff has to provide their expert first so the defense or the defendant in a civil case can decide whether they need an expert. We didn't know if Mr. Pritchard would agree with us, agree with the State. It's his interpretation that they want to put on before the jury, and that's what we object to. It's clearly a violation, a highly prejudicial violation.

Id. at 1259-60. The lower court then stated that it had four very respected members of the bar telling it two different stories and that it was in a tough position. *Id.* at 1260. It stated that it did not believe that anyone was lying. *Id.* at 1260-61. The lower court then once again began to rule against the defense by stating that it had the raw data and an expert disclosure when trial counsel interposed:

> MR. MIKE FRAZIER: Judge, if I might. He wasn't designated as an expert witness. He was just designated as a witness. I just assume he's the guy that took the phone off Nathan, you know. We had no reason to believe that he was going to be called as an expert witness.
>
> MRS. PLYMALE: Well, if he had looked through the actual report, you would have known that the person who actually took the phone off the defendant was not Eddie Pritchard. Eddie Pritchard worked for the Huntington Police Department. We did provide a CV and we did have this specific conversation about these records.
>
> The AT&T records that we are talking about ---
>
> MR. MIKE FRAZIER: You did not --- you never talked to me about there being an expert witness in this case.
>
> MRS. PLYMALE: Can I?
>
> MR. MIKE FRAZIER: I expressly deny that.

Id. at 1261-62. The parties continued to spar over whether Mr. Pritchard's CV had been disclosed and whether the raw data was a sufficient substitute. *Id.* at 1262-65.

The lower court then ruled the evidence to be admissible and gave the defense time to look at the report. *Id.* at 1266. It stated again that the defense had time to have the raw data and hire their own expert. *Id.* at 1267. The defense objected further stating correctly that it was not its burden to disprove the State's case. *Id.* Trial counsel moved to stay the proceedings to hire an expert. *Id.* at 1268.

After more vigorous debate, the lower court stood firm on its ruling that the expert testimony and the PowerPoint presentation would be admissible and did not permit a continuance of the trial. *Id.* at 1273.

With the jury back in the box, Lt. Eddie Pritchard took the witness chair. *Id.* at 1317. Lt. Pritchard stated that he was the supervisor of the crime analyst unit in the Huntington Police Department. *Id.* at 1319. He stated that:

> The crime analyst unit, we compile data and assist detectives in their investigations of crimes that have been committed, which will include, a lot of times, cell phones, downloading cell phones and the call detail records associated with any of the cell phones that happened to be collected, or a cell number that has been identified that an investigator deems of interest in the case. We'll process those call detail records and assist the detectives in understanding those.

Id. at 1319-20. Through Lt. Pritchard, the State, over defense objection entered Exhibit 222 which was the AT&T subscriber information for the phone to be analyzed. *Id.* at 1320; 1593. The State then introduced Exhibit 223, the raw data discussed above. *Id.* at 1324; 1600 (over 109 pages of raw data). Over objections, 224 and 225 were admitted which purported to authenticate the raw data. *Id.* at 1328; 1709; 1720.

At this point the State then introduced the disputed PowerPoint expert presentation. When identifying it, Lt. Pritchard states that "226 is a flash drive that has a PowerPoint presentation on it. And attached to it is the print off that PowerPoint presentation *was prepared by the West Virginia Fusion Center*." *Id.* at 1331. (emphasis added). The defense renewed its earlier objection. *Id.* at 1332.

Lt. Pritchard outlined the devastating presentation in detail and, with each substantive word, cemented Mr. Dolen's fate. *Id.* at 1332-52.

More importantly, during his testimony he stated:

> And on this, this [the PowerPoint presentation] was for – the Fusion Center had – was presented the call detail records, and *this is the report that they have presented.*
>
> So the analysis was performed [by the Fusion Center] on the call detail records….

Id. at 1333 (emphasis added). When describing the PowerPoint, Lt. Pritchard testified:

> Q. Okay. Again, again, this is consistent with what the call detail records that you have in front of you as well as your look into the specific areas?
>
> A. Yes. I plotted them myself on Google Maps to verify the accuracy of the Fusion Center's work here, and I also loaded these call detail records into our program, which is called PenLink, where it has a mapping function to it also, and it came back with the same results as the program that the Fusion Center used to make this PowerPoint.
>
> Q. Okay. And this is sort of backing up what you are seeing through these call detail records?
>
> A. Yes, it is It was all done with the call detail records right here.

Id. at 1347-48. On cross examination, Lt. Pritchard again admitted that he did not prepare the PowerPoint presentation. *Id.* at 1353. When asked when he provided the PowerPoint presentation to the State, he replied "I didn't. I received it from the State." *Id.* at

1355. He said that he had the presentation from the Fusion Center for a "[m]onth, two months. I've had it a couple of months." *Id.*

When questioned about the presentation, Lt. Pritchard testified for the Fusion Center:

> Q. Okay. So the fact that AT&T doesn't use the azimuth, does that mean that the photograph or the PowerPoint we saw is not accurate?
>
> A. They were giving the degrees of how the 360 degrees works. And yes, the Fusion Center used azimuth as an example.
>
> Through my training in reviewing of AT&T's record keys, them specifically, they don't use the azimuth part of it. The azimuth explanation of this PowerPoint *was to help educate the judge, jury, attorneys* in the 360 degree usage of the sectors and the angle at which the phone is communicating with that sector."

Id. at 1356 (emphasis added). After this lengthy factual introduction, Mr. Dolen will now finally turn to the substance of his argument: that this PowerPoint presentation should not have been admitted both because a) it violates the confrontation clause, and b) it was not provided in a timely manner through discovery.

A. Confrontation Clause

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. Amend. VI; *see also* W.Va. CONST. Art. III §14.

For nearly twenty years, the United States Supreme Court has dispensed with the judicially created fiction that so long as testimony is reliable that a right to confrontation is forfeited. *Crawford v. Washington*, 541 U.S. 36 (2004). The clause means exactly what it says—that when a person gives evidence against a criminal defendant, he or she must appear in court and suffer through the "crucible" of cross examination. *Id.*

This protection is not limited to fact witnesses. Experts who testify as to drug quantities must appear in court. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). In

addition, laboratory technicians who conduct blood alcohol analysis are subject to the same constitutional safeguards. *Bullcoming v. New Mexico*, 564 U.S. 647 (2011).

This Court has recognized this line of cases and held that it uses the "primary purpose analysis" to determine if expert testimony is covered by the confrontation clause:

> Under the Confrontation Clause contained within the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution, a testimonial statement is, generally, a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

State v. Kennedy, 735 S.E.2d 905, 915 (W.Va. 2012) (internal citations omitted) (holding that an autopsy report is testimonial).

In *Kennedy*, the State introduced the testimony of a doctor who observed another doctor's autopsy report. This Court found that when the first doctor acted "as a 'transmitter' for the second doctor's opinion, "such testimony is precisely the type of 'surrogate' testimony that is violative of the Confrontation Clause…." *Id.* at 920-21. However, what the first doctor observed, and his conclusions drawn *from sources other than the autopsy report*, were outside the scope of the Clause and admissible. *Id.* at 921. ("they are mentioned nowhere in the autopsy report itself.").

The error in this case is manifest. The disputed PowerPoint expert presentation was prepared by an expert who did not testify at trial. A.R. at 1331; 1347; 1353; 1355; 1356. The report was testimonial as it was prepared for the purposes of being used at trial and any expert would have known with certainty that such presentation would be used at a later trial. *Kennedy*, 735 S.E.2d at 915; A.R. at Jump Drive (the title page of the presentation declares that it contains "Law Enforcement Sensitive information and should be used For Office Use

Only."). Lt. Pritchard stated that the report was prepared to "help educate the judge, jury, [and] attorneys." A.R. at 1356.

Although under *Kennedy*, Lt. Pritchard could have viewed the expert report and testified as to his own opinions from sources outside the expert report (such as his plotting of the cell data with his own software) the introduction and display of the report was improper and violated Mr. Dolen's constitutional right to confront the expert who prepared the report. *Id.*

The Petitioner, while not using the word "confrontation," objected twice to Lt. Pritchard not being "the proper witness" to introduce AT&T data. A.R. at 1321; 1324. The introduction of this expert report was clear error under the confrontation clause, was not harmless beyond a reasonable doubt and Mr. Dolen should be granted a new trial.

B. Discovery Violation

Earlier in the trial a Lt. Compton was testifying regarding items that he collected from the crime scene. *Id.* at 980. Trial counsel objected that he was not provided with a report that the State was attempting to introduce. *Id.* The lower court engaged in a colloquy with the State:

> THE COURT: Is there any filings showing that this was provided?
>
> MR. SHOUB: I can go through my emails.
>
> MRS. PLYMALE: Well, I mean ---
>
> THE COURT: I mean, that's what I'll have to see to see if they were provided. That's what – I'm always telling both sides to provide a documented filing of what was handed over in discovery because that's the only way I can verify things have been turned over.

Id. at 980-81. After more conversation, the court stated:

> THE COURT: Okay. Well, I mean, I'm only going to allow it in if there's evidence that it was submitted to them. They're saying they never received it, so I'll need some verification that you-all did provide it in discovery. I mean, I can't allow the defendant to be ambushed by an expert. I'm not saying it wasn't provided, but I just need --- shouldn't be that difficult to find –
>
> MRS. PLYMALE: I don't think it should.
>
> THE COURT: --an email with a date.
>
> MRS. PLYMALE: I believe it would have been on a disk or a thumb drive of some sort because it wouldn't have been able to be – everything was scanned.
>
> MR. MIKE FRAZIER: We've got numerous things that's dripped over the --- but -----

Id. at 982-83. After excusing the jury, the parties further debated whether the State had provided the defense with Lt. Compton's report in pretrial discovery:

> THE COURT: So are there any pleadings that were filed documenting what was turned over in discovery over the course of the case?
>
> Can either side answer that?
>
> MR. SHOUB: I don't believe there were any filed in the actual case, your Honor, in the clerk's office.
>
> MR. MIKE FRAZIER: We got some via email, some things via flash drive, some things via disks. I'm not accusing them of sandbagging us, but we, honestly, have not seen these.
>
> I don't know if it's in---
>
> THE COURT: It's a good chance for me to reiterate again for the record. I've said it many times. Whenever discovery is handed over by either party, it should be documented in a filing with the [c]ourt. You don't have to file all the discovery. The file doesn't need all the pleadings, but it should be documented what was turned over.

Id. at 984. After more discussion, the lower court ruled:

> THE COURT: I will allow – I will allow that [the physical evidence collected at the scene.] But as far as reports, if there – I mean as officers of the Court, they're saying they never received these documents **and you-all don't have any evidence to show that they were provided to them, then I'm not going to allow those documents in.** You can question him.

Id. at 987 (emphasis added). The lower court's ruling earlier in the case was a reasonable and proper exercise of judicial discretion. It imposed a duty on any proponent of evidence to prove that it was turned over to the other side. A contrary ruling would permit a corrupt prosecutor[3] to continually fail to turn over discovery to the defense but feign ignorance and claim that it was turned over. The lower court's ruling laid down a specific and proper rule of the case to apply when the words of officers of the court were in conflict.

However, for reasons not apparent from the record as to why it was reversing its earlier rule, it allowed the expert/PowerPoint report to come in despite the State not having the type of written evidence it required earlier. *Id.* at 1267. The court seemed to be operating under the mistaken belief that because the defense had the raw cell phone data, that was just as good as the expert report. *Id.* This is clearly not the case.

The Court can observe the raw data beginning at page 1600 of the Appendix Record and continuing through page 1708. *Id.* It is one hundred eight (108) pages of cryptic numbers and symbols—certainly nothing that a layperson can comprehend which is why the State alleged that the Fusion Center technician "does not have the qualifications" to introduce the evidence. *Id.* at 1254. Secondary defense counsel was correct in analogizing this information to a civil plaintiff in an auto wreck case turning over the car's black box, and then presenting expert testimony about the data from the black box without disclosing the expert. *Id.* at 1259-60.

This is clearly material which requires an expert to interpret, and the name of the expert and the report were both requested by the defense and required to be turned over prior to trial. *Id.* at 14; W.Va. R. of Crim. Pro. 16 (a) (1) (D); W.Va. R. of Crim. Pro. 16 (a) (1) (D).

[3] This is not to suggest in any way that the Cabell County Prosecuting Attorney is corrupt.

Contrary to the lower court's view, the defense is not required to believe that the State will violate the expert disclosure rules and anticipatorily hire its own expert. A.R. at 1267.

Although courts are given wide discretion in admitting evidence and policing discovery violations, it constitutes an abuse of discretion for a lower court to view raw data as the equivalent of expert testimony and to disregard without any reason its *own rules in the very same case* when it rules on an additional piece of evidence.

For this additional reason the lower court erred by admitting the PowerPoint presentation/expert report, the evidence was not harmless beyond a reasonable doubt, and Mr. Dolen should be granted a new trial.

II. *The facts taken in the light most favorable to the State do not meet the statutory criteria for a conviction of kidnapping or were incidental to the robbery.*

A person commits kidnapping in West Virginia when he:

> a) unlawfully takes custody of, conceals, confines, transports, or restrains another person against his or her will by means of force, threat of force, duress, fraud, deceit, inveiglement, misrepresentation, or enticement **with the intent to**:
>
> (1) Hold another person for ransom, reward, or concession;
>
> (2) Inflict bodily injury;
>
> (3) Terrorize the victim or another person; or
>
> (4) Use another person as a shield or hostage…

W.Va. Code §61-2-14A (emphasis added). This Court has previously clipped the wings of prosecutors when they tried to extend a previous version of this broad statute past its plain terms. *State v. Woodrum*, 843 S.E.2d 767 (W.Va. 2020). The Court has further recognized how broad the scope of this provision is and applies limitations on it:

> In interpreting and applying a generally worded kidnapping statute, such as W.Va. Code, 61-2-14a, in a situation where another offense was committed, some reasonable limitations on the broad scope of kidnapping must be developed. The general rule is that a kidnapping has not been committed when it is incidental to another crime. In deciding whether the acts that technically

> constitute kidnapping were incidental to another crime, courts examine the length of time the victim was held or moved, the distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm.
>
> *State v. Miller*, Syl. Pt. 2, 336 S.E.2d 910 (W.Va. 1985).

"Courts as well as commentators eventually recognized that kidnapping technically could be committed by the slightest degree of forcible movement or detention. Thus, these statutes made it possible for a person charged with committing a robbery or a sexual assault to additionally be charged with kidnapping, even though the kidnapping was entirely incidental to the ultimate crime." *Id.* at 914-15.

In *Miller*, the Court held that when Mr. Miller enticed a sexual assault victim into his car by false pretenses, drove her to a secluded area and sexually assaulted her, this transportation and confinement was sufficiently distant from the sexual assault to constitute kidnapping. *Id.*; *See also State v. Farmer*, 445 S.E.2d 759 (W.Va. 1994) (driving a victim to a remote area to murder him is also kidnapping); *State v. Fortner*, 387 S.E.2d 812 (W.Va. 1989) (forcing a woman into a car, driving her three to four miles and sexually assaulting her is also kidnapping); *State v. Weaver*, 382 S.E.2d 327 (W.Va. 1989) (detaining a woman for an hour, sexually assaulting her, and dragging her 150 yards to hid her in the bushes is also kidnapping).

In this matter, Mr. Dolen's actions, if he is guilty, were certainly despicable but either: 1) did not meet the statutory definition of kidnapping, or 2) were incidental to the robbery.

A. The allegations at trial do not establish the statutory elements of kidnapping.

Taking the testimony in the light most favorable to the State, the entirety of the evidence of what happened inside the house was observed by the officers arriving on the scene and the testimony of Mr. and Mrs. Adkins.

As noted above, the officers found the Adkins' battered and handcuffed. A.R. at 285; 297. Mr. Adkins testified to his harrowing ordeal that morning. *Id.* at 427. He testified that when he awoke a man was standing over him and hit him in the head with a rifle many times. *Id.* at 457. He could not identify the assailant. *Id.* Mr. Adkins grabbed the barrel of the rifle with such force that the sight of the rifle off and it embedded in his hand. *Id.* at 458. He gave no further testimony regarding the assault.

Mrs. Orlinda Adkins testified to her recollection of the events of that day. *Id.* at 475. She awoke to a "big" person standing in at the foot of her bed saying that she was being robbed. *Id.* at 476. She slept in a room down the hall from her husband. *Id.* at 478. She did not recognize the assailant as he was wearing a black mask. *Id.* at 479. She then "got up, he came around through there, well, at me, and then he grabbed my arms and, you know, he held me. I was pounding on his chest like that." *Id.* The assailant then hit Mrs. Adkins with a gun, knocking her out and her hand hit the lamp by her bed. *Id.* at 479-80.

When she regained consciousness, she "hobbled down the hallway" to her husband's bedroom. *Id.* at 482. When she got to Mr. Adkins' bedroom, she saw him and the assailant "tussling over a gun." *Id.* at 485. When they were done "tussling back and forth" her husband fell to the floor and knocked a lamp off of a table. *Id.* at 486. She went to where her husband fell and put his head in her lap. *Id.* at 487.

She observed the assailant leave the room a few times and go through her husband's dresser to look for items to steal. *Id.* at 489. The assailant told her that she reminded him of his grandmother and Mrs. Adkins told the assailant that his grandmother would not want him doing this. *Id.* at 490. The assailant stated that he was trying to get money to feed his kids. *Id.* at 490-91.

The assailant then handcuffed Mr. and Mrs. Adkins individually and then handcuffed each to the other. *Id.* at 493. He told Mrs. Adkins while he was handcuffing her that he would call for help. *Id.* at 494. The assailant said that within twelve minutes he would call for help, that she was not to call anyone or else he would come back and shoot her. *Id.* The assailant then left. *Id.*

This evidence, again taken in the light most favorable to the State, does not establish the elements of kidnapping. Undoubtedly, the assailant "unlawfully….restrain[ed] [the Adkins'] against [their] will by means of force…." W.Va. Code §61-2-14A. However, in addition, the State must also prove that this restraint was done with the intent to achieve one of the four enumerated subparts of the statute. *Id.*

It is beyond argument, that although the assailant inflicted bodily injury, this was not the intent of the restraint (as it occurred prior), nor is there any evidence that it was done to terrorize the Adkins' or to use them as a shield or hostage. *Id.* Likewise, no ransom or reward was demanded. The only question is whether the assailant restrained the Adkins' for "concession." *Id.*; *see also* A.R. at 46 (instructing the jury that it must find that there was an intent to hold for "any ransom, reward or concession").

In his oral Rule 29 motion, trial counsel argued that the statutory factors for kidnapping were not met. A.R. at 1176-77. He reasserted this oral motion in his written post-trial motion. *Id.* at 62. The State's response was:

> As far as kidnapping is concerned on – both individuals were restrained by handcuffs that were retrieved from the garage, based on their own—based on their own—based on the testimony of both victims, and that each of them were told not to in any way get help from (sic) themselves and if they did that they would then be killed, and, as a result, that would be a concession that they had to not receive treatment nor in any way feel like they could go forward or leave at that time due to the fact that they were threatened with their life.

Id. at 1371. The lower court denied the defense motion with a cursory "there is sufficient evidence that a jury – or substantial evidence that a jury might find the defendant guilty beyond a reasonable doubt." *Id.* at 1373.

The State's argument is utterly unsupportable. It mistakes the common ordinary definition of "concession." For example, Merriam-Webster defines "concession," in relevant part, as "something done or agreed to usually grudgingly in order to reach an agreement or improve a situation."[4]

In case the Court believes this language is ambiguous, "[t]he intent of the legislature when a statute is found to be ambiguous may be gathered from statutes relating to the same subject matter—statutes i*n pari materia*." *State v. Epperly*, 65 S.E.2d 488, 491 (W.Va. 1951). The misdemeanor charge of unlawful restraint is where a person restrains another with physical force but "without the intent to obtain any *other* concession *or advantage*…." W.Va. Code §61-2-14G (emphasis added).

What the assailant indisputably did in this case did was to restrain the Adkins' so that they could not call the police until he had left the scene. The Adkins did not "concede" anything nor did anyone else. Indeed, they were prevented from calling the police due to the illegal restraint placed upon them, but nobody gave a concession. The State simply misapplied the definition of concession. The remainder of their argument simply restates that Mr. and Mrs. Adkins were unlawfully restrained.

To accept the State's argument, one would have to assign a law school class an entire semester to think of any restraint that would be the misdemeanor offense and not kidnapping punishable by life in prison. Surely, it is not common that one unlawfully restrains another for

[4] https://www.merriam-webster.com/dictionary/concession (Retrieved August 15, 2023).

no purpose whatsoever. Under the State's argument, the purpose for the restraint would act as its own concession. If a wife grabs her husband's arm on the way out the door and tells him to take out the garbage, it would seem that under the State's argument she has kidnapped him.

Common speech confirms this sensible reading. For example, taken from the first Google search: "There were several good reasons for holding to a no-concessions policy: 'The release of prisoners, the most common terrorist demand, would subvert the criminal justice system."[5] It is clear that the term "concession" in a kidnapping statute is akin to the example above, that by restraining someone, generally another person *somewhere else* accedes to the kidnappers demands by taking independent action. However, in limited cases it would seem that the person kidnapped could give a concession (e.g., "I will let you go when you say you are sorry."), but what the assailant gained here was simply not a concession by common English or under any unique way of speaking that counsel could uncover.

The word "advantage," present in the unlawful restraint statute, but absent from the kidnapping statute describes perfectly what the assailant gained in this situation. W.Va. Code §61-2-14G. He gained an advantage by permitting his escape from the home. With this interpretation, the two statutes are in harmony, and it refrains from butchering the English language.

What the assailant did in this case was textbook misdemeanor unlawful restraint. He used force to restrain Mr. and Mrs. Adkins but did so without gaining any *other* concession or advantage—one not implicit in the restraint itself.

For this reason the lower court erred in upholding the two kidnapping counts.

[5] https://www.rand.org/content/dam/rand/pubs/perspectives/PE200/PE277/RAND_PE277.pdf, p iv. (Retrieved August 15, 2023)

B) The kidnapping was incidental to the robbery.

An additional reason exists to reverse Mr. Dolen's kidnapping convictions. They were both part and parcel of his robbery of Mr. and Mrs. Adkins and done to effectuate his escape. As noted above, "courts examine the length of time the victim was held or moved, the distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm." *Miller* at Syl. Pt. 2.

Turning to the first factor, the victims were held for a short amount of time, only enough to permit the assailant to escape. If Mr. Dolen is guilty, he nearly immediately called 911 so that they would be freed. The first factor weighs heavily in his favor.

The second factor is fully on Mr. Dolen's side. The victims were not transported *at all*, let alone a great distance.

Likewise, the third factor is in Mr. Dolen's favor. The victims were inside their own home, presumably in a climate-controlled environment with the police on their way.

The fourth factor is somewhat vague in that any detention marginally increases the risk of harm to a person as they are unable to seek medical attention or leave the place of confinement if there is danger. The *Miller* test must surely mean some *substantial* increase in the risk of harm lest this exception swallow the entire rule.

Analyzing the facts in this case, Mr. and Mrs. Adkins were not placed in any substantial increased risk of harm by being handcuffed than they were without the handcuffs. The assailant had left, the police were on their way, and they were in their own climate-controlled home.

All four *Miller* factors favor Mr. Dolen. Should the Court believe that the statutory definition of kidnapping has been met, it was nonetheless simply incidental to the robbery and should not stand alongside those convictions.

For this reason, the Court should reverse the two kidnapping convictions.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court reverse the convictions and remand this matter to the Circuit Court of Cabell County with instructions to grant Mr. Dolen a new trial. Alternatively, he requests that this Court reverse and remand with instructions to dismiss the kidnapping convictions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have caused a copy of this "Petitioner's Brief" to served upon all parties by the Supreme Court efiling system on this 15th day of August, 2023.

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