IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-160

STATE OF WEST VIRGINIA,

Respondent,

v.

NATHAN DOLEN,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the March 15, 2023, Order
Circuit Court of Cabell County
Case No. 21-F-209

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INTRODUCTION

Respondent State of West Virginia responds to Nathan Dolen's ("Petitioner") Brief filed in the above-styled appeal. Petitioner's Confrontation Clause claim must fail because his right to confront his accuser was not violated when a witness for the State utilized a PowerPoint presentation during his testimony. The individual who prepared the PowerPoint presentation in question was not an expert, and Petitioner cross-examined the expert who used the PowerPoint presentation to aide his testimony. There was no discovery violation here, and, if there was, the court properly allowed the PowerPoint to be used as evidence because there was no surprise or prejudice to Petitioner. Finally, the evidence was sufficient to sustain Petitioner's kidnapping convictions and the kidnapping charges were not incidental to the robbery. As Petitioner has failed to demonstrate the existence of reversible error, the circuit court's order should be affirmed.

ASSIGNMENTS OF ERROR

Petitioner argues two assignments of error: 1.) the circuit court erred in permitting the introduction of a cell phone tracking expert report based on a violation of the confrontation clause and failure to properly disclose the evidence, and 2.) the State presented insufficient evidence to sustain the kidnapping conviction. Pet'r's Br. 2.

STATEMENT OF THE CASE

Petitioner was indicted on the following counts: entry of a building other than a dwelling; two counts of grand larceny; burglary; two counts of first degree robbery; attempted first degree murder; two counts of malicious assault; two counts of kidnapping; use or presentation of a firearm during the commission of a felony; and, third degree arson. App. 8-10.

A. **Trial**

Trial began on November 1, 2022. App. 71. Corporal Brett Jarrett testified that on November 22, 2020, he responded to the victims' home and when he entered he saw a male and a female being tended to by Sergeant Cremeans. App. 282-83, 291. EMS arrived and began treating the victims then transported them to the hospital. App. 292. Cpl. Jarrett then got a call about a vehicle fire and went to that location where he found a pickup truck fully engulfed in flames. App. 299. Cpl. Jarrett returned to the original scene and left again because officers received information that there was a red Ford F150 seen in the area of the fire and was a "vehicle of interest." App. 302-03. Officers began searching for the vehicle, and located it at a Speedway convenience store. App. 303-04. Officers found Petitioner with the vehicle. App. 305.

Chad Ward of Cabell County EMS testified that he treated both victims and removed handcuffs from Mr. Adkins. App. 370-71. Mr. Adkins had a Glasgow Coma Scale rating of eight, meaning that he had an altered level of consciousness. App. 377.

Tyler Harvey-Sumpter of Cabell County 911 testified regarding calls to 911 on the date in question. App. 381-82. The first two calls were from Mrs. Adkins. App. 387. The call indicated the perpetrator had on black and white or red and black pants. App. 405. The assailant was wearing a mask. App. 406.

Another call came in from someone "who said they were involved." App. 389. The system gives a location of where the call is coming from, and that call pinged from a tower on the left fork of Cooper Ridge Road. App. 390-91. The phone number that the call originated from had a history with 911 and was associated with a man by the name of Ronnie Adkins. App. 392.

In another call made to 911, no one spoke but the system was able to ping the call to the left fork of Cooper Ridge Road. App. 397-99. Through AT&T records, Cabell County 911 tracked

the location of the phone through cell- phone pings. App. 399-02. Ward tracked the pings, and provided officers with live updates as to the location of each ping. App. 400. Cabell County 911 also tracked a separate call regarding the vehicle fire. App. 402-04. That call was from Michael Bailey, and Harvey-Sumpter noted that the pings of the traced phone were in the same area where the vehicle fire was located. App. 408-09.

Dr. Errington Thompson, director of trauma and emergency medicine doctor, testified that Mr. Adkins was admitted on November 22, 2020 and was discharged to a skilled nursing facility on December 3, 2020, where he spent fifteen days. App. 412, 416-17. Mr. Adkins was treated for a head injury, a scalp laceration, a nasal bone fracture, and traumatic brain injury from a subdural hematoma. App. 420, 422-23.

Ronald Adkins testified he kept many items kept in his garage prior to this incident including numerous tools. App. 437-451. Mr. Adkins also kept a show truck in his garage that he had repaired. App. 451-52. Several guns were also in the garage. App. 453. Mr. Adkins kept three pairs of handcuffs hanging on a pegboard in his garage. App. 435. In addition, Mr. Adkins identified the security system and cameras he had on his home. App. 464-68.

As to the event in question, Mr. Adkins remembered waking up to someone standing over his bed with a rifle pointed at him. App. 457. The assailant then hit him with the rifle several times. App. 457. The assailant was wearing a mask preventing Mr. Adkins from identifying him. App. 458. Mr. Adkins tried to fight him off until he lost consciousness. App. 458, 462.

Orlinda Adkins testified that she was seventy-six years old when the robbery occurred. App. 475. She recalled hearing a door slam and someone with a mask enter her bedroom, then hit her on the head with a gun, knocking her into her bedside table. App. 479-80. When she regained consciousness, Mrs. Adkins went to her husband's room and saw the assailant inside. App. 482.

Mr. Adkins and the intruder were "tussling over a gun" and Mr. Adkins was knocked to the floor. App. 485-86. The assailant then hit Mr. Adkins in the head with the butt of the gun. App. 487. The assailant went though Mr. Adkins' drawers and pulled out a gun and clothing. App. 489. Mrs. Adkins saw only one assailant. App. 491. She believed he was about six feet tall. App. 525. Mrs. Adkins also testified that the assailant was wearing red and black checked pants. App. 489.

Mrs. Adkins testified that she was eventually handcuffed to her husband by the assailant while in the bedroom. App. 493. After handcuffing them, the assailant told them he would call for help within twelve minutes of leaving the house and if Mrs. Adkins called anyone he would "come back and blow [her] head off." App. 494. As he left, the assailant threw the key to one set of handcuffs at the couple, so they unlocked that set; the other set was cut off at the hospital. App. 495-96. Both she and Mr. Adkins were taken to the hospital via ambulance. App. 502. Mrs. Adkins suffered cuts on her arms and head as well as a broken tibia and ankle. App. 509. Her injuries necessitated surgery and a lengthy hospitalization. App. 510.

After the assault, Mrs. Adkins found insurance paperwork listing Petitioner's name, which showed that Petitioner had done some work on a drain project at her home. App. 518-20. She testified that the people doing the work would have had access to her garage at that time. App. 519.

Colin Cooper of the Cabell County Sheriff's Office testified that he arrived on scene after both victims were taken to the hospital. App. 543. He left the scene after he was directed to follow a phone ping about eighteen miles from the Adkins home in the Milton area. App. 543-45. He arrived to find a truck on fire. App. 545. Thereafter, he was sent to another set of phone pings toward Barboursville. App. 546-47. They never found the phone that was pinging. App. 547. Later, he researched the VIN on the truck in question and found that it belonged to Mr. Adkins. App.

550-51. Cooper received information that a red Ford truck was involved in the incident and began searching for that truck before other law enforcement officers located a truck matching that description. App. 553.

Chief Deputy Doug Adams testified that he received home security footage of someone who lived on Cooper Ridge showing the Adkins vehicle being followed by a red Ford truck which prompted the search for the truck. App. 560, 563-65. Dep. Adams eventually saw a red Ford truck at a Speedway store that matched the still photograph from the security video including specific chrome trim. App. 569-70. When he pulled into the parking lot, the red truck immediately left. App. 569. Dep. Adams followed the truck which pulled off the side of the road into a parking lot, so Dep. Adams pulled in behind it. App. 569-71. Dep. Adams went to speak with the male driver (who Adams identified as Petitioner) and saw "quite a few" items in the back of the truck, including "miscellaneous tools." App. 572, 577-78.

Petitioner was with a female named Wanda Blankenship at the time and both were arrested. App. 577-78. Blankenship had a police scanner actively running on her phone when they were arrested. App. 580.

Sergeant James Johnston testified that on the date in question he was corresponding via phone with Dep. Adams about his investigation of the red truck. App. 593. Sgt. Johnston met up with Dep. Adams where the red truck stopped. App. 595-96. Sgt. Johnston transported Petitioner to the field office. App. 597.

Sgt. Johnston admitted that during Petitioner's interview he indicated that two men told him that they had "beat up some old people" and that Petitioner met up with those men. App. 609. Petitioner also told Sgt. Johnston that the two men loaded items into his truck. App. 611. Petitioner

also told Sgt. Johnston that one of the men had put red checked pants into Petitioner's truck as well. App. 613.

Lieutenant Steve Vincent testified that he searched the Adkins' residence and took photographs. App. 674-75. Lt. Vincent also obtained surveillance footage from the home. App. 691. The video was shown to the jury. App. 769-70. The video showed only one person entering and exiting. App. 771-72.

Lt. Vincent photographed a bin found in the back of the truck Petitioner was driving as well as many other items. App. 717-29. All of the items in the bin were identified by Mr. Adkins as his items. App. 721. One of Mr. Adkins' business cards was located in the back of the truck. App. 726. An ammunition magazine was located in the cab of the truck. App. 730. A cell phone was found in the center console as well as a surgical mask. App. 732-33, 736. A service revolver was also found in the truck that was noted to belong to Mr. Adkins. App. 738-39. A power washer belonging to Mrs. Adkins was in the truck. App. 743-44. A black hoodie wrapped around a pair of black and red checked pants was found in the truck along with a black toboggan. App. 749-50, 755.

Lt. Vincent testified that Petitioner had called 911 to report the assaults of the Adkinses but claimed he only knew of the incident due to another man bragging about it and seeing the Adkins' drivers licenses in that man's vehicle. App. 782. Petitioner also told police that the man, Jeremy Artrip, had served twenty-six years in prison for manslaughter and that he had known Artrip around twenty years. App. 783-84. Officers were skeptical of Petitioner's claim, as Artrip was only about forty years oldat the time. App. 783-84. In his statement, Petitioner gave "very explicit details about what had occurred throughout the whole thing." App. 790. He claimed that he knew the details from Artrip but stated that two people kicked open the garage. App. 791.

Petitioner also knew details as to the type of gun stolen from the home, how the Adkinses were injured, the location of the robbery, the items taken, and how the assailant got away. App. 873-74. Lt. Vincent noted that Artrip is six feet two inches and 165 pounds while Petitioner is six feet tall and 270 pounds. App. 876-77.

Petitioner also placed himself in the area where Mr. Adkins' truck was found burned and knew that the truck had burned. App. 793. In fact, Petitioner told Lt. Vincent that he followed Artrip out a windy road near where the fire occurred and Artrip then loaded Petitioner's vehicle with the items the police later found. App. 857.

Lt. Vincent testified that the surveillance video showed the assailant entering the home wearing a blue surgical mask. App. 814. The investigation revealed that Mr. Adkins had ripped such a mask off the assailant, breaking the ear loops, and that the assailant left the home not wearing a blue surgical mask. App. 814. Such a mask was found in Petitioner's truck. App. 814-15. Some blood on the ear loop was tested and found to be that of Mr. Adkins. App. 815. The toboggan found in Petitioner's truck looked like the one Mrs. Adkins described the assailant wearing. App. 825.

Megan Dangerfield, formerly of the State Police Laboratory, testified that the ear loop mask she tested had DNA from both Petitioner and Mr. Adkins. App. 1029. The hooded jacket found in Petitioner's truck had Mr. Adkins' DNA on it as well as Petitioner's DNA. App. 1031-32. Finally, a glove found in Petitioner's truck had Mr. Adkins' DNA on it. App. 1034.

Deputy Jacob Bailey testified regarding evidence seized from Petitioner that was reported stolen by the Adkinses. App. 1075-77, 1085-99. Dep. Bailey also discussed swabs of blood and fingerprints obtained at the scene. App. 1083-84.

Jeremy Artrip, who had worked for Petitioner in the past, testified that he had never been to the Adkins home. App. 1109, 1111. Artrip ceased working for Petitioner in 2013 because Petitioner "shorted" him money. App. 1112. Artrip denied seeing Petitioner on the date in question and produced a clock in and clock out sheet for his work showing he was at work that day. App. 1114-15. Artrip specifically denied committing any part of these crimes. App. 1116. The last time Artrip saw Petitioner was in 2013. App. 1119.

West Virginia State Police digital forensics employee Robert Boggs testified regarding his examination of Petitioner's phone. App. 1129-38. A police scanner app was found on the phone. App. 1148. Further, at the time police were searching for Petitioner there were searches on his phone inquiring as to what certain numbers mean in "cop code" and searches for police radio codes App. 1149-50.

Wanda Blankenship, who was with Petitioner when he was arrested, testified that Petitioner picked her up before sunrise on the date in question. App. 1158. The two picked up another female. App. 1163. The three then parked in a parking lot near some houses and an 84 Lumber store. App. 1164-65. Petitioner exited the vehicle in a surgical mask, blue jeans with red and black checkered pants under them, and a black jacket. App. 1166-67. Blankenship and the other female were left in the truck for "hours" and spent the evening getting high and playing on Blankenship's phone. App. 1169. The two women left in the truck to go to McDonald's then returned to the 84 Lumber lot, then went to the female's apartment. App. 1170-73. Eventually Petitioner called Blankenship and the women drove to a Marathon parking lot to meet him, and they were instructed by Petitioner to follow a black Ford Ranger at that time. App. 1173-76. They stopped, then Petitioner unloaded "all the stolen stuff" from the black truck into the red truck. App. 1178-79. Petitioner then pushes the black truck over the hill where it hit a tree. App. 1180. They dropped off the other female after

leaving the area. App. 1184. Blankenship admitted to lying to the police in an effort to "stick with the same story that Nathan was telling them." App. 1188.

Cabell County Sheriff's Department employee Preston Stephens testified regarding Wanda Blankenship's cell phone extraction. App. 1289, 1291. The extraction showed that Blankenship downloaded a police scanner app on the date in question. App. 1293. The cell phone also shows calls from and to two telephone numbers on that date (1-681-378-9436 and 1-681-888-1880) App. 1297-98. Those calls were detailed in Stephens' testimony. App. 1299-1303. Stephens also testified to text messages from Blankenship's phone including one noting that there was information coming across the police scanner, one reporting vehicles passing, and one noting Blankenship was in a truck with someone driving to McDonald's. App. 1304-06. These calls and text messages were associated with Petitioner. App. 1310.

B. PowerPoint Exhibit

During the trial, Petitioner objected that the State intended to introduce a PowerPoint presentation that he claimed he never received. App. 1102. Petitioner noted that the State told them it was sent to them but Petitioner could not locate the same. App. 1102. Petitioner indicated he would need a continuance of the trial in order to hire an expert witness. App. 1102. The State indicated that the PowerPoint was based upon data obtained from AT&T, which was provided to Petitioner. App. 1103. Counsel admitted having the raw data but argued that it was "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 residence" where the robbery occurred. App. 1103. Petitioner further admitted that the information "may be buried somewhere in the data and maybe [the witness] 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." App. 1103.

On November 7, 2022, during the trial, Petitioner filed a written motion to exclude the PowerPoint presentation, noting that it "is actually a report of an expert witness." App. 23. Petitioner concluded that since the PowerPoint was not disclosed in discovery, pursuant to Rule 16 of the Rules of Criminal Procedure, the PowerPoint should be excluded from evidence. App. 24.

An in-camera hearing was held on the issue. App. 1251. Petitioner alleged a "clear violation of Rule 16" as he qualified the PowerPoint as an expert witness report. App. 1252. Petitioner noted that a continuance was an "unpalatable" option and that counsel could not effectively cross-examine the witness on the issues. App. 1252-53. Petitioner admits to receiving the AT&T records that were noted by the State to be "the locations of Mr. Adkins's phone." App. 1253. The State explained that the AT&T information was put into a PowerPoint created by the Fusion Center but that Eddie Prichard would testify to the information as the Fusion Center employees did not have the qualifications to testify. App. 1254. The assistant prosecuting attorney noted that she had a conversation with Petitioner's counsel about these facts on July 29 as per her notes. App. 1254-55. The State further represented that the PowerPoint was provided to Petitioner in the form of a flash drive. App. 1255. The two assistant prosecuting attorneys had a conversation via text message on April 1 about providing the PowerPoint to Petitioner's counsel. App. 1255.

Petitioner's counsel could not recall any conversation about the Fusion Center. App. 1256. Petitioner's counsel did note that there had been "a number of conversations" with the State and "she may have mentioned something about this witness" but counsel claimed not to have the report or the CV of Prichard. App. 1256-57. Assistant Prosecuting Attorney Shoub obtained the PowerPoint from Assistant Prosecuting Attorney Plymale and attempted to email the same but could not; thus, he recalled placing it and Prichard's information on a thumb drive and placing it

in Petitioner's counsel's mail box in the courthouse. App. 1258. Petitioner's counsel did note that he had written on his witness list beside Prichard's name "phone stuff" so he was aware as to what Prichard would testify to at trial. App. 1258. Petitioner's counsel noted it was not objecting to the raw data but would object to Prichard's interpretation of said data. App. 1260.

While Petitioner argued that he did not know there would be an expert in this case, the State countered that the AT&T records could not be entered without an expert witness. App. 1261-62. The court pointed out that Petitioner had the raw data and could have had it analyzed himself. App. 1267. The court opined that the law says it should look at whether failure to obtain a copy of the expert report would "dampen the initiative of the defense to have their own independent examination of that evidence if they had the underlying data" and found that the defense could still have had the data analyzed and did not. App. 1274.

Eddie Prichard with the Huntington Police Department testified regarding the AT&T records. App. 1321. This includes the GPS location of the phone. App. 1322. Prichard indicated that the PowerPoint was created by the West Virginia Fusion Center but that he had reviewed it and compared the phone records to the results. App. 1331-32. Prichard knows the cell tower locations and indicated that the information is also available on the internet. App. 1342. Prichard repeatedly testified that he had reviewed the pinged GPS locations and compared it to the PowerPoint. App. 1343, 1346, 1355. Prichard noted that he "plotted them [himself] on Google Maps to verify the accuracy of the Fusion Center's work here, and [he] also loaded these call detail records into [his] program . . .and it came back with the same results as the . . . PowerPoint." App. 1347-48.

Prichard explained specifically how the phone location documentation was calculated using the PowerPoint to assist in the explanation. App. 1332-43. The locations were put on a map,

including the Adkins' home. App. 1343. Likewise, the location of the cell towers that Petitioner's phone pinged were plotted on the PowerPoint map. App. 1343. The PowerPoint showed an animation tracing the cell phone connections to the cell towers on a map, tracing Petitioner's path on the date of the robbery. App. 1343-51. Between 4:29 a.m. and 9:01 a.m. the phone was in the area of the Adkins' home. App. 1346-47. The phone was then shown moving away from the Adkins' home. App. 1348. Prichard was cross-examined on his findings extensively. App. 1353-60.

After the State rested, Petitioner moved for judgment of acquittal. App. 1362-63. Relevant to this appeal, Petitioner argued that there was insufficient evidence to support the kidnapping conviction because, while the Adkinses were restrained by force, there was no intent to hold them for ransom, transport with intent to inflict injury, or terrorize the victims. App. 1366. In response to the kidnapping argument, the State countered that the Adkinses were restrained by handcuffs and were told not to get help or they would be killed, which is akin to a concession. App. 1371. The court denied the motion. App. 1374. The defense rested without presenting evidence. App. 1376.

Petitioner was found guilty of entry of a building other than a dwelling (count 1); grand larceny (counts 2 and 12); burglary (count 3); first degree robbery (counts 4 and 5); attempted first degree murder (count 6); malicious assault (count 7); kidnapping (counts 9 and 10); use or presentment of a firearm (count 11); and third degree arson (count 13). App. 1550-52. Petitioner was found not guilty of malicious assault (count 8). App. 1551.

Following the trial, Petitioner moved for judgment of acquittal or for a new trial. App. 55. Petitioner argued that there was no "direct evidence" that Petitioner was the perpetrator and renewed his objection to the "purported expert report offered by Officer Prichard." App. 56-57.

Petitioner maintained that he never received the PowerPoint and did not have the opportunity to refute the evidence with his own expert. App. 57-59.

The sentencing order memorialized Petitioner's sentence. App. 68-70. Petitioner appeals from this order.

SUMMARY OF THE ARGUMENT

Petitioner's claims must fail. Petitioner cannot sustain a Confrontation Clause violation because the opinion or interpretation of the cell phone data in this case was from the person testifying, not the creator of the PowerPoint. Also, Petitioner cross-examined the expert in this case. The preparer of the PowerPoint was not an expert and the raw data is not testimonial hearsay. Further, the court properly considered a possible discovery violation and determined that even if the PowerPoint was not disclosed timely, there was no prejudice to Petitioner nor was Petitioner surprised.

Petitioner's kidnapping convictions should be upheld because the evidence is sufficient to sustain the convictions. The record supports a finding that Petitioner unlawfully restrained the Adkinses in exchange for a concession that they not call for help, and to terrorize them or inflict bodily injury. The kidnappings were not incidental to the robbery. Thus, this Court should affirm Petitioner's sentences.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the West Virginia Rules of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record. Accordingly, this case is appropriate for resolution by memorandum decision.

ARGUMENT

A. Standard of Review

"A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syl. Pt. 8, *State v. Blevins*, 231 W.Va. 135, 744 S.E.2d 245 (2013) (quoting Syl. Pt. 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998)). "Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." Syl. Pt. 9, *Blevins*, 231 W.Va. 135, 744 S.E.2d 245 (quotations omitted). With regard to the admission of rape shield testimony, this Court has held, "a trial court's ruling on the admissibility of testimony is reviewed for an abuse of discretion, but to the extent the circuit court's ruling turns on an interpretation of a West Virginia Rules of Evidence, our review is plenary." *State v. Quinn*, 200 W. Va. 432, 435, 490 S.E.2d 34, 37 (1997).

B. Allowing the PowerPoint as evidence was not erroneous.

Petitioner first argues that the trial court erred in allowing the introduction of a cell phone tracking expert. Pet'r's Br. 5. Petitioner argues that the entry of this evidence violates the Confrontation Clause and violates discovery rules. Pet'r's Br. 11, 13. The PowerPoint in question, however, was merely an explanatory exhibit not an expert report, and was explained in depth by Eddie Prichard. Further, Petitioner cross-examined Prichard on the GPS coordinates and phone tracking. Likewise, Petitioner cannot succeed on his discovery violation claims as Petitioner had the raw data necessary to examine in this case and chose not to do so. The PowerPoint was merely a compilation of the raw data in PowerPoint form. Finally, even if the court below erred in admitting this evidence, any error is harmless.

1. The Confrontation Clause was not violated as Petitioner cross-examined Prichard.

Petitioner argues that the PowerPoint presentation was prepared by an expert who did not testify at trial. Pet'r's Br. 12. The record belies this claim as the PowerPoint was not an expert report but merely a compilation of information readily available and received by Petitioner. Moreover, the creator of the PowerPoint presentation was not an expert with the ability to testify to the phone coordinates, which is undisputed in this case. Thus, no violation of the Confrontation Clause occurred.

This Court reviews Petitioner's Confrontation Clause claim under a multi-faceted standard of review: "Three separate levels of scrutiny apply to Confrontation Clause claims: The circuit court's order is reviewed for abuse of discretion; its factual findings are reviewed for clear error; and its legal rulings are reviewed de novo." *State v. Martin*, No. 13-0112, 2013 WL 5676628, at *2 (W. Va. Supreme Court, Oct. 18, 2013) (memorandum decision).

The Sixth Amendment to the United States Constitution provides, in pertinent part, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." The confrontation right includes the right of cross-examination. "The Sixth Amendment to the United States Constitution guarantees an accused the right to confront the witnesses against him. The Sixth Amendment right of confrontation includes the right of cross-examination." Syl. Pt. 1, *State v. Mullens*, 179 W. Va. 567, 371 S.E.2d 64 (1988). "'An essential purpose of the Confrontation Clause is to ensure an opportunity for cross-examination. In exercising this right, an accused may cross-examine a witness to reveal possible biases, prejudices, or motives.'" Syl. Pt. 2, in part, *State v. Phillips*, 194 W.Va. 569 461 S.E.2d 75 (1995) (quoting Syl. Pt. 1, in part, *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995), *overruled on other grounds by State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006)). "Whether rooted directly

in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi*, [93 S.Ct. 1038 (1973)], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 106 S.Ct. 2142, 2146 (1986) (quoting *California v. Trombetta*, 104 S.Ct. 2528, 2532 (1984)). Importantly, "[t]he West Virginia Rules of Evidence. . . .allocate significant discretion to the trial court in making evidentiary and procedural rulings." Syl. Pt. 4, *State v. Larry M.,* 215 W. Va. 358, 599 S.E.2d 781 (2004).

To begin, while the Fusion Center created the PowerPoint presentation, the presentation was neither an expert report nor created by an expert. In fact, the State specified that the employee of the Fusion Center who created the PowerPoint "does not have the qualifications" to testify and only created the exhibit. This is no different than if the APA herself created the exhibit to aide in Prichard's testimony. The expert in question was Eddie Prichard, not the Fusion Center employee who merely created an explanatory exhibit for Prichard to use. And, there is no question that Petitioner had the ability to confront Prichard and did so.

Petitioner relies on this Court's decision in *State v. Kennedy*, 229 W. Va. 756, 735 S.E.2d 905 (2012), but this case is inapplicable. *Kennedy* notes the bar on "a testimonial statement by a witness who does not appear at trial," but this PowerPoint presentation is not a testimonial statement. Syl. Pt. 2, in part, *Kennedy*, 229 W. Va. 756, 735 S.E.2d 905. The PowerPoint presentation contains no testimonial statements from someone who did not testify at trial. It was created as an aide to the testimony of Prichard. The information in the PowerPoint could have just

as easily been conveyed using a photograph of a Google map blown up for trial by the APA, to be drawn on or otherwise marked by Prichard during his testimony.

Petitioner attempts to equate the PowerPoint to an autopsy report testified to by a doctor who did not create the report, which is what occurred in *Kennedy*. The two are not the same. It is unquestionable that an autopsy report would be created by an expert witness. A PowerPoint can be created by anyone. Petitioner presents no argument or reasoning as to how the creation of the exhibit with the use of raw data Petitioner indisputably possessed elevated the creator to the level of an expert.

Petitioner's right to confront the expert witness in this case, who was Eddie Prichard, was not violated. Prichard testified that he had checked the accuracy of the PowerPoint and Prichard was properly qualified as an expert. App. 1343, 1346, 1355. As the lower court noted, Petitioner had the AT&T records showing the GPS coordinates of Petitioner's phone for a significant period of time, and, at the very latest, received the PowerPoint several days before Prichard's testimony. App. 1266. Petitioner had the essential requirement to satisfy the Confrontation Clause—the opportunity to cross-examine Prichard.

The Fourth Circuit has clearly identified a distinction between a "statement" and "data," with the latter not calling into question a confrontation clause issue if someone other than the one who compiled the data testifies regarding that data at trial. In *United States v. Washington*, 498 F.3d 225, 229 (4th Cir. 2007), the court faced an issue involving drug testing results wherein the defendant was qualifying assertions that Washington's blood sample contained PCP and alcohol as a "statement." The "statements" were not made by the testing technician. *Id.* The court found that the "statement" that the blood contained PCP and alcohol was actually made by the machine testing the blood, and, thus, it was of no moment that a different person testified regarding this

"statement" since "technicians could neither have affirmed or denied *independently* that the blood contained PCP and alcohol because all the technicians could do was to refer to the raw data printed out by the machine." Id. at 230 (emphasis in original). The court then found that "the statements to which [the testifying expert] testified in court-the blood sample contained PCP and alcohol-did not come from the out-of-court technicians, and so there was no violation of the Confrontation Clause." *Id.*

Similar to the facts in *Washington*, the raw data points are not produced from someone; they are produced by data that is stored on a telephone, which is then transposed onto a PowerPoint presentation. Each blip on the map is not a "statement," but simply a recorded data point reflecting each time cellphone tower received a ping from a person's cell phone. So, the PowerPoint is not inadmissible simply because the person who compiled the data did not testify. Under these circumstances, there was no Confrontation Clause violation.

2. There was no discovery violation here, and any potential violation was not prejudicial.

Petitioner next complains that the PowerPoint was not disclosed, creating a discovery violation which should have resulted in the exclusion of the PowerPoint. Pet'r's Br. 15. As detailed in the record, there was significant controversy regarding whether the PowerPoint and Prichard's testimony was discussed with and sent to Petitioner's counsel, but the court's ultimate ruling was not improper here.

A careful examination of the record is required here. First, the record reflects that Petitioner's counsel had a history of misplacing discovery. Earlier in the trial, counsel objected to another witness, stating that they had not received a report or a CV, and that the witness was not on the State's witness list. App. 1009. As it turned out, counsel was mistaken and had received the

report. App. 1010. Further, the APA had emails from Petitioner's counsel from prior to trial, asking for items to be resent that they had lost. App. 1264-65.

Petitioner admitted that throughout the pendency of the case no pleadings had been filed by either side documenting what was provided during discovery. App. 983-84. The court chastised counsel for both parties for failing to document discovery. App. 984. Petitioner's counsel admitted that he had received "some via email, some things via flash drive, some things via disks . . . ." App. 984. In relation to the PowerPoint, both APAs had specific recollections of discussions and turning over the PowerPoint and Prichard's CV. APA Plymale had notes as to the date on which she spoke with Petitioner's counsel in this regard. App. 1255. APA Shoub recalled placing the document on a thumb drive and depositing the same in Petitioner's counsel's box in the courthouse. App. 1258. While Petitioner's counsel denied receiving the documents, the court was not wrong in allowing the admission of this PowerPoint in light of these facts.

Even if the disclosure was not made when the State indicated that it was made, there was no prejudice here. "The traditional appellate standard for determining prejudice for discovery violations under Rule 16 of the West Virginia Rules of Criminal Procedure involves a two-pronged analysis: (1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case." Syl. Pt. 2, *State ex rel. Rusen v. Hill*, 193 W. Va. 133, 454 S.E.2d 427 (1994). Petitioner can meet neither prong of the test.

Petitioner was not surprised on a material fact in this case. He had the raw data with the GPS coordinates of where his phone was located on the date of these crimes. App. 1103. While his defense was that he was not there, it defies reason that he would not at least review the raw data to determine if there was exculpatory evidence contained within the records. All Prichard did was plot the GPS coordinates that were supplied by the State to Petitioner onto a map, showing

that he was in the area of the victim's home. This was not a surprise to Petitioner in that the State had charged him with this crime and would undoubtedly try to prove that he was present in the area.

This alleged failure to disclose the evidence did not hamper Petitioner's defense. Petitioner's defense was that he was not at the victim's home and, instead, that he met another man who committed the crimes and gave Petitioner the stolen goods. Petitioner had the information at his fingertips that his cell phone positioned him near the victims' home at the time of the crime. Further, Petitioner did receive the PowerPoint prior to Prichard's testimony, and the court noted that he had "a few days" to review the same. App. 1266. Petitioner has not indicated how reviewing the PowerPoint earlier would have changed his defense. Thus, the admission of this evidence was not erroneous.

3. Any error in the admission of the PowerPoint presentation was harmless.

Even if this Court finds that the admission of the PowerPoint was erroneous, the error would be harmless in this case. "Most errors, including constitutional ones are subject to harmless error analysis ... simply because it makes no sense to retry a case if the result assuredly will be the same." *State v. Omechinski*, 196 W. Va. 41, 48 n.11, 468 S.E.2d 173, 180 n.11 (1996) (citing *Sullivan v. Louisiana,* 508 U.S. 275, 278 (1993)). While Petitioner attempts to frame this as a constitutional issue, the true complaint is the admission of evidence in the form of the PowerPoint. When dealing with the wrongful admission of evidence, the appropriate test for harmlessness "is whether we can say with fair assurance, after stripping the erroneous evidence from the whole, that the remaining evidence was independently sufficient to support the verdict and the jury was not substantially swayed by the error." *State v. Guthrie*, 194 W.Va. 657, 684, 461 S.E.2d 163, 190 (1995). "The harmless error inquiry involves an assessment of the likelihood that the error affected

the outcome of the trial." Syl. Pt. 13, in part, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995). "An evidentiary ruling exceeding the circuit court's discretion does not require that the defendant's conviction be disturbed . . . if the resulting error is harmless." *State v. Varlas*, 237 W. Va. 399, 406, 787 S.E.2d 670, 677 (2016) (citing W. Va. R. Crim. P. 52(a)). This Court has identified the following test, used to evaluate the prejudice of improperly admitted evidence:

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

Syl. Pt. 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979).

The evidence in this case is voluminous absent the PowerPoint. Petitioner was found with copious amounts of items stolen from the Adkins home. App. 717-50. Items inside the vehicle tested positive for Mr. Adkins' blood. App. 815, 1031-32. While Petitioner blamed Jeremy Artrip for the crime, Artrip testified that he had been at work at the time and denied culpability. App. 1114-15. Wanda Blankenship testified to Petitioner disappearing during the period of time these crimes were committed, wearing the clothing identified by the victims. App. 1166-67. Blankenship then testified to helping Petitioner move the later identified stolen items from a truck Petitioner was driving to his red Ford. App. 1178-79. Blankenship then testified that Petitioner got rid of the truck by pushing it over a hill. App. 1180. Much of Blankenship's testimony was supported by her cell phone records. App. 1304-06. As all of this evidence is sufficient to convict Petitioner, the error of admitting the PowerPoint is harmless.

C. The evidence was sufficient to sustain the kidnapping convictions and the kidnapping charges were not incidental to the robbery charges.

Petitioner next argues that the kidnapping did not meet the statutory definition, or was incidental to the robbery. Pet'r's Br. 17. Petitioner cannot meet the heavy burden of a sufficiency of the evidence claim, and his claim that the kidnapping was incidental to the robbery was not presented below and should not be reviewed. Thus, Petitioner's conviction should be affirmed.

1. The evidence in this case when reviewed in the light most favorable to sustaining the verdict meets the statutory elements of kidnapping.

Petitioner argues that the facts of this case do not meet the statutory criteria for a kidnapping conviction. Pet'r's Br. 16. Petitioner admits that the facts prove that the Adkinses were unlawfully restrained against their will, but argues that the State did not meet the other requirements for kidnapping. Pet'r's Br. 19. Petitioner is mistaken.

A petitioner who challenges the sufficiency of the evidence underlying his or her conviction faces a heavy burden. Syl. Pt. 3, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163. To prevail, a petitioner must establish that "no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *LaRock*, 196 W. Va. at 303, 470 S.E.2d at 622. While undertaking its review of the record, this Court must "review all the evidence . . . in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution." Syl. Pt. 3, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163.

This Court has ruled that it may accept any adequate evidence, including circumstantial evidence, as support for a conviction. *State v. Spinks*, 239 W. Va. 588, 611, 803 S.E.2d 558, 581 (2017) (citing *Guthrie*, 194 W. Va. at 668, 461 S.E.2d at 174). As the Court explained in *Guthrie*, it will not overturn a verdict unless "reasonable minds could not have reached the same

conclusion." 194 W. Va. at 669, 461 S.E.2d at 175. Finally, "[t]he evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt." *Id.* at Syl. Pt. 3. Instead, a verdict "should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *Id.* "This standard is a strict one; a defendant must meet a heavy burden to gain reversal because a jury verdict will not be overturned lightly." *Id.* at 667–68, 461 S.E.2d at 173–74. This Court likewise has stated:

> A convicted defendant who presses a claim of evidentiary insufficiency faces an uphill climb. The defendant fails if the evidence presented, taken in the light most agreeable to the prosecution, is adequate to permit a rational jury to find the essential elements of the offense of conviction beyond a reasonable doubt. Phrased another way, as long as the aggregate evidence justifies a judgment of conviction, other hypotheses more congenial to a finding of innocence need not be ruled out. We reverse only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

LaRock, 196 W. Va. at 303, 470 S.E.2d at 622. "To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. Pt. 4, *State v. Etchell*, 147 W. Va. 338, 127 S.E.2d 609 (1962) (quoting Syl. Pt. 1, *State v. Bowles*, 117 W. Va. 217, 185 S.E. 205 (1936)). Petitioner cannot sustain his heavy burden on this assignment of error.

The version of the kidnapping statute in effect at the time of this crime enumerates four ways a defendant can be convicted of kidnapping if a defendant unlawfully restrained someone for one of the following reasons:

> (1) To hold another person for ransom, reward or concession;
>
> (2) To transport another person with the intent to inflict bodily injury or to terrorize the victim or another person; or

> (3) To use another person as a shield or hostage, is guilty of a felony and, upon conviction, shall be punished by confinement by the Division of Corrections for life, and, notwithstanding the provisions of article twelve, chapter sixty-two of this code, is not eligible for parole.

W.Va. Code § 61-2-14a(a)(1)-(3) (2017). A review of the evidence shows that Petitioner could potentially meet either the first or second subsection and so Petitioner's claims must fail.

Petitioner discounts any argument that Mr. and Mrs. Adkins were held with the intent to inflict bodily injury or to terrorize them with a single sentence. Pet'r's Br. 19. This is incorrect when viewing the evidence in the light most favorable to the State. Handcuffing together two injured and bleeding elderly victims was clearly done both to inflict bodily injury and to terrorize them. Mrs. Adkins testified to injuries to both arms. App. 505-06. The handcuffs placed by Petitioner eventually had to be cut off of the victims. App. 496. While Petitioner obviously caused serious injury to both victims prior to handcuffing them, the handcuffing itself created additional injury.

Moreover, the evidence revealed that Petitioner threatened to "blow [Mrs. Adkins'] head off" if she attempted to call police after handcuffing the pair. App. 494. This statement, along with handcuffing the two together, makes it clear that Petitioner sought to terrorize Mr. and Mrs. Adkins so that they would not call for help and lead to his capture. The mere effect of handcuffing the two elderly victims together, in and of itself, was done to terrorize them and protect Petitioner's identity.

Petitioner discounts any argument that the Adkins couple was unlawfully restrained for the purpose of concession. Petitioner cites to dictionary definitions but ignores this Court's definitions of concession relating to the kidnapping statute. This Court has noted in relation to kidnapping that "the intent to demand a concession or advantage has a much broader meaning and may encompass other benefits or purposes as well." *State v. Hanna*, 180 W. Va. 598, 605, 378 S.E.2d 640, 647

(1989). In the *Hanna* case, this Court found the concession to be a promise that the victim would reconcile romantically with the perpetrator. *Id.* at 605-06, 378 S.E.2d at 647-48. In the present case, the concession was for the victims not to call for help so that Petitioner could get away.

The Fourth Circuit has found that a concession under the kidnapping statute can be a promise not to call a perpetrator's parole officer under the threat of death. *United States v. D'Arco*, 139 F.3d 894 (4th Cir. 1998) (table). This is substantially similar to this case in which Petitioner threatened death upon Mr. and Mrs. Adkins if they called for help. Under the facts of this case, the jury could have found that Petitioner met either subsection (1) or (2). To that end, the kidnapping conviction should be affirmed.

2. This assignment is not subject to this Court's review, but under a plain error analysis the kidnappings in this case arose from separate actions from the robbery. Therefore, the kidnappings were not incidental to the robberies.

Petitioner next argues that the kidnappings in this case were incidental to the robbery. Pet'r's Br. 22. Petitioner, however, did not make this argument before the circuit court. This Court has declined to address errors when a litigant did not object on the same ground below. *State v. Edward C.,* No. 19-0831, 2020 WL 6051314, at *4 (W. Va. Supreme Court, Oct. 13, 2020) (memorandum decision). This Court notes that "[t]o preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect." *Id.*, citing *State v. Sites*, 241 W. Va. 430, 438, 825 S.E.2d 758, 766 (2019) (additional citation omitted). "'One of the most familiar procedural rubrics in the administration of justice is the rule that the failure of a litigant to assert a right in the trial court likely will result' in the imposition of a procedural bar to an appeal of that issue." *State v. Miller*, 194 W. Va. 3, 17, 459 S.E.2d 114, 128 (1995). Because Petitioner failed to object on this ground at trial, this Court should decline to address this argument on appeal.

If this Court reviews this assignment of error, Petitioner must proceed under the plain error doctrine. "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. Plain error warrants reversal "solely in those circumstances in which a miscarriage of justice would otherwise result." *Id.* at 18, 459 S.E.2d at 129 (citing *United States v. Frady*, 456 U.S. 152, 163 n. 14 (1982)). As Petitioner cannot show a miscarriage of justice, his conviction should be affirmed.

Petitioner "bears the burden of persuasion on each of the four prongs of the plain error standard." *Lowery v. United States*, 3 A.3d 1169, 1173 (D.C. 2010). *See also United States v. Hall*, 625 F.3d 673, 684 (10th Cir. 2010) ("The defendant has the burden of establishing all four elements of plain error."); *United States v. Epstein*, 426 F.3d 431, 443 (1st Cir. 2005) ("The test for plain error contains four prongs, which the defendant bears the burden of proving."); *United States v. Clarke*, 767 F. Supp. 2d 12, 24 (D.D.C. 2011) ("The defendant bears the burden of proving each element of the plain error standard."). And "[s]atisfying all four prongs of the plain-error test is difficult[.]" *United States v. Williamson,* 706 F.3d 405, 413 (4th Cir. 2013). In short, while appellate courts may review forfeited objections for plain error "such error is rarely found." 9 James Wm. Moore et al., *Moore's Federal Practice* ¶ 46.02[2] (3d ed. 2002). The *Miller* Court noted that "[h]istorically, the 'plain error' doctrine 'authorizes [an appellate court] to correct only 'particularly egregious errors' . . . that 'seriously affect the fairness, integrity or public reputation of judicial proceedings [.]' " *Miller,* 194 W. Va. at 18, 459 S.E.2d at 129, citing *United States v. Young*, 470 U.S. 1, 15, (1985). Moreover, "'[p]lain error warrants reversal "solely in those circumstances in which a miscarriage of justice would otherwise result."' *United States v. Frady*,

456 U.S. 152, 163 n. 14, (1982)." *Miller*, 194 W. Va. at 18, 459 S.E.2d at 129. Justice Cleckley expanded on this proposition, stating as follows:

> Assuming that an error is "plain," the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.

Syl. Pt. 9, *Miller*, 194 W. Va. 3, 459 S.E.2d 114.

Petitioner certainly cannot sustain his burden in proving plain error. Petitioner cannot show an error that is plain. While this Court has found that "[t]he general rule is that a kidnapping has not been committed when it is incidental to another crime," the kidnapping in this case was not incidental to the robbery. Syl. Pt. 2, in part, *State v. Miller*, 175 W. Va. 616, 336 S.E.2d 910 (1985). This Court has developed a test to determine whether a kidnapping is incidental to another crime, including an examination of "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." *Id.*

While the Adkinses were not held for a lengthy amount of time, due to their injuries and advanced ages this factor weighs in the State's favor. Petitioner left the victims bleeding and seriously injured and took Mr. Adkins' cell phone with him when he left. App. 462, 509-10.

As to the second factor, while the Adkinses were not moved from their home, this Court has recognized that "kidnapping technically could be committed by the slightest degree of forcible movement or detention." *Miller*, 175 W. Va. at 620, 336 S.E.2d at 914. It is without question that Petitioner had to forcibly move either Mr. or Mrs. Adkins in order to handcuff them together, particularly because Mr. Adkins was unresponsive and Mrs. Adkins had broken bones in her leg. App. 462, 509-10. While any movement was not a great distance here, the movement itself

subjected two elderly, bleeding, injured victims to additional harm. This Court has previously placed significance on a kidnapping when the victim was confined in an apartment so that the perpetrator could evade capture or arrest after the attack. *See State v. Lewis*, 238 W. Va. 627, 638, 797 S.E.2d 604, 615 (2017).

The location in which the victims were detained was their home. But, as noted above, both were seriously injured.

Most significant to this case is the fourth factor. Both victims were subject to additional harm by being left handcuffed to one another in the home. This Court noted that leaving a seriously injured victim confined without access to medical treatment increases the risk of death "substantially." *Lewis,* 238 W. Va. at 638, 797 S.E.2d at 615. The evidence in this case showed that both victims were seriously injured, with Mr. Adkins "covered in blood and nearly unresponsive and handcuffed" when found. App. 835.

As to the other plain error factors, Petitioner's substantial rights were not violated here as the jury properly convicted him of two counts of kidnapping. Further, Petitioner has made no argument that this conviction seriously affects the fairness, integrity, or public reputation of the proceedings. Finally, Petitioner has not and cannot show that these convictions represent a miscarriage of justice such that reversal is necessary.

A review of the facts of this case shows that the kidnapping was not incidental. Petitioner had already completed the robbery of the elderly victims and seriously injured both. There was no reason to then forcibly handcuff the couple to one another. The act of forcibly moving the couple together in order to handcuff them was a separate and distinct act from the robbery and other various crimes and should be charged and punished as such. Thus, if this Court reviews this assignment of error, it should then affirm Petitioner's convictions under the plain error standard.

CONCLUSION

For the foregoing reasons, Respondent respectfully asks this Court to affirm Petitioner's sentencing order.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Respondent,

By Counsel,

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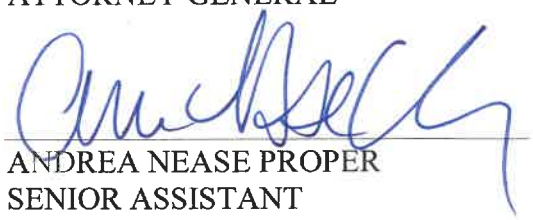
ATTORNEY GENERAL



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-160

STATE OF WEST VIRGINIA,

Respondent,

v.

NATHAN DOLEN,

Petitioner.

CERTIFICATE OF SERVICE

I, Andrea Nease Proper, do hereby certify that on the 29 day of September, 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, and further, a courtesy copy was mailed to said individuals at the addresses below:

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