

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 23-478

VICTOR LEE THOMPSON, Petitioner,

v.

STATE OF WEST VIRGINIA, Respondent.

(Appeal from sentencing order of the Circuit Court of
Wood County, West Virginia, 22-F-80)

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

- I. THE CIRCUIT COURT ERRED BY ADMITTING THE BOOKING PHOTOGRAPHS AND THE 911 CALL INTO EVIDENCE
- II. THE CIRCUIT COURT ERRED BY PERMITTING HEARSAY TESTIMONY OF TIFFANY MCCUNE
- III. THE CIRCUIT COURT ERRED BY DENYING THE DEFENDANT’S MOTION FOR POST-VERDICT JUDGMENT OF ACQUITTAL
- IV. THE CIRCUIT COURT ERRED BY DENYING THE DEFENDANT’S MOTION FOR NEW TRIAL

STATEMENT OF THE CASE

This case stems from a tragic incident wherein the Defendant, Victor Thompson (hereinafter “Mr. Thompson”), was forced to use deadly force in self-defense when the alleged victim, Mr. Salaam drew a gun on him. Mr. Thompson was an invited guest at the McCune household and was a longtime and trusted friend of the McCune’s. On the date of the incident, Mr. Thompson was having an argument with Mrs. McCune stemming from a drug transaction the night before. Mrs. McCune, while heavily intoxicated on recreational drugs, escalated the argument by reaching for a gun. At some point during the argument, Mr. Thompson was able to remove the firearm from Mrs. McCune. Upon hearing the scuffle, Mr. Salaam came from a back bedroom and drew his gun on Mr. Thompson. Mr. Thompson then used the gun taken from Mrs. McCune in self-defense against Mr. Salaam. Mr. Thompson was subsequently indicted on one count of first degree murder, one count of felony murder, and one count of burglary.

Mr. Thompson now prays that the Supreme Court of Appeals review the underlying conviction entered on the 22nd day of December, 2022. Mr. Thompson contends that the denial of his *Motion for Post-Verdict Judgment of Acquittal* and *Motion for a New Trial*, were erroneous.

SUMMARY OF ARGUMENT

In order to fully understand this case, it is important to first recognize that all of the parties involved were engaged in illicit drug use. Mr. Thompson was friends with Josh McCune and Tiffany McCune, the occupants of the residence at issue where illicit drug use was common. Indeed, Mr. Thompson was such a close, trusted friend that he was the only person, with the exception of the McCune's, that had the keypad entry code to the front door of the residence. (*See Appx.* at 45).

The trial court erred on four separate occasions, and in doing so, denied Mr. Thompson of his constitutional right to a fair trial. First, the trial court erred when it permitted the State to improperly and methodically use evidence in order to obtain Mr. Thompson's conviction. Such evidence includes Mr. Thompson's booking photos of tattoos depicting a swastika and the Aryan brotherhood logo, both of which are improper 404(b) evidence that were used by the State to argue motive that simply did not exist. The State used a thinly veiled reasoning for its use of the tattoos as a way of identifying Mr. Thompson, despite various other identifiable tattoos that easily could have achieved the same result without any risk of prejudice to him. The purpose for using photographs of the prejudicial tattoos immediately became apparent when the State made numerous mentions of Mr. Thompson's swastika tattoo, along with the statement that Mr. Thompson made at the time he was apprehended after the incident, which was "All this over a n*gger" throughout their opening statement, while painting Mr. Thompson as a man who had no regard for the victim's life because of his beliefs. (*See Appx.* at 21, 42).

Next, the Circuit Court erred in admitting the 911 call into evidence as the evidence contained no probative value as to the issues at trial and any potential probative value was substantially outweighed by the prejudicial effect that the call had on the jury. The prejudicial

effect was obvious in the courtroom as tears stained the faces of every member of the victim's family in the gallery, as well as members of the jury as the recording was played. The 911 recording was played exclusively for dramatic effect and provided the jury no further evidence as to the State's case against Mr. Thompson - and therefore used for an improper purpose at trial by the State. Therefore, the Circuit Court abused its discretion in admitting the call into evidence without performing a proper Rule 403 analysis that would have prevented the evidence from being admitted at trial.

Third, despite the Circuit Court's awareness of the numerous credibility issues of Tiffany McCune - who was deceased and therefore an unavailable witness at trial - it nevertheless abused its discretion and erred by admitting the statements into evidence. Such credibility issues include:

1. Testimony of both her cousin and husband that it was common for her to lie to manipulate people;
2. The presence of a timeline giving her at least twenty minutes to formulate an altered story of the events; and
3. Her abuse of illicit drugs on the day in question to the point in which she was barely able to formulate a coherent sentence.

Pursuant to this Court's prior analysis regarding the admissibility of testimonial and nontestimonial evidence, such admittance of the improper hearsay statements of Tiffany McCune is a clear abuse of discretion.

Lastly, Mr. Thompson asserts that the State failed to meet their burden of proof at trial and that his *Motion for Post-Verdict Judgment of Acquittal* and *Motion for a New Trial* were denied in error. Here, the state failed to meet their burden with their own witness, Josh McCune, the former owner of the residence, who testified that Mr. Thompson had always been a

welcomed guest and trusted at the McCune household with keypad entry by both himself and his wife, thus negating an essential element of the alleged burglary. It is clear based on this testimony that Mr. Thompson lacked the requisite *mens rea* to form the intent necessary to be convicted of felony murder with the underlying offense being burglary. As a welcomed guest, Mr. Thompson could not have statutorily committed a burglary, and thus is not guilty of felony murder. Based on such testimony, no reasonable jury, weighing solely the evidence at trial, could have found that Mr. Thompson possessed the requisite *mens rea* to sustain this conviction.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to Rule 19(a) for the following reasons: (1) the case involves assignments of error in the application of settled law; (2) the case involves an unsustainable exercise of discretion where the law governing that discretion is settled; and (3) the case involves a narrow issue of law.

STANDARD OF REVIEW

The following standards of review apply to Mr. Thompson's four assignments of error:

The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.

State v. LaRock, 196 W. Va. 294, 310-311, 470 S.E.2d 613 (W. Va. 1996) (overruled on other grounds).

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. 4, *State v. Rodossakis*, 204 W. Va. 58, 511 S.E.2d 469 (W. Va. 1998).

It is presumed a defendant is protected from undue prejudice if the following

requirements are met: (1) the prosecution offered the evidence for a proper purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record determination under Rule 403 of the West Virginia Rules of Evidence that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the trial court gave a limiting instruction.

Syl. Pt. 3, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (W Va. 1996) (overruled on other grounds).

The trial court's disposition of a motion for judgment of acquittal is subject to our *de novo* review; therefore, this Court, like the trial court, must scrutinize the evidence in the light most compatible with the verdict, resolve all credibility disputes in the verdict's favor, and then reach a judgment about whether a rational jury could find guilt beyond a reasonable doubt.

State v. LaRock, 196 W. Va. 294, 470 S.E.2d 613 (W. Va. 1996) (overruled on other grounds).

In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged differential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

State v. Vance, 207 W. Va. 640, 535 S.E.2d 484 (W. Va. 2000).

ARGUMENT

I. THE CIRCUIT COURT ERRED BY ADMITTING THE BOOKING PHOTOGRAPHS AND THE 911 CALL INTO EVIDENCE

Evidence is relevant if it has a tendency to make a fact more or less probable than it would be without the evidence and the fact is of consequence in determining the action. *W.Va. R. Evid. 401*. However, even if it is determined that the evidence is relevant, the court should exclude such evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. *W.Va. R. Evid. 403*. When a Defendant would be unfairly prejudiced or the jury would be misled by the admission of evidence, the court should not allow the evidence to be admitted. In this case, Mr. Thompson was

unfairly prejudiced by both the booking photographs and the 911 call. It is clear that the jury was misled as to the actual events in question at trial by being exposed to said prejudicial evidence which gave them a preconceived notion that the act of self-defense by Mr. Thompson was actually a racially motivated killing - a fact not alleged by the State in the *Indictment*. (*See Appx.* at 4).

A. Booking Photographs

The use of Mr. Thompson's swastika tattoo and Aryan tattoo as evidence over the objection of the Defendant¹ violated Rules 401, 403, and 404 of the West Virginia Rules of Evidence and their admittance by the Trial Court constitutes reversible error.

i. The booking photographs were not relevant pursuant to Rule 401 of the West Virginia Rules of Evidence

Rule 401 declares that "evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." In the case at hand, the alleged victim's race did not have a role in the events that led to the unfortunate death of Mr. Salaam. Mr. Thompson went to the residence to visit the McCune's, unaware that Mr. Salaam was there. (*See Appx.* at 440-441). Upon discovering the alleged victim's unexpected presence – for which he was only made aware upon seeing Mr. Salaam with a gun drawn– Mr. Thompson was caught off guard and was forced to make the split second decision to defend himself. He did not have time to act based on any presence of premeditation based on Mr. Salaam's race that would warrant the improper admittance of prejudicial evidence depicting tattoos with a racial undertone. (*See Appx.* at 44-53). Evidence of Mr. Thompson's tattoos did not make the killing any more or less probable

¹*See Appx.* 4-12; *See also Supp. Appx.* 32; 36-38.

than it would be without such evidence. Thus, any evidence of his tattoos would not have any relevance to the case at hand.

It is undisputed that all of the parties involved in this case were engaged in illicit drug use. As stated above, Mr. Thompson was friends with Josh McCune and Tiffany McCune, the occupants of the residence at issue, and such a close friend that he was trusted with the keypad entry code to the front door of their residence; the only such individual whom the McCune's placed such trust in. (*See Appx.* at 45). There was simply no allegation or evidence of racial undertones by Mr. Thompson, given his close relationship with the McCune's - and more importantly - there is no evidence that Mr. Thompson was aware of Mr. Salaam's presence in the home prior to his entry. (*See Appx.* at 439-441). To the contrary, the evidence demonstrated that Mr. Thompson only became aware of Mr. Salaam's presence - and skin color - at the time that Mr. Salaam drew a firearm on Mr. Thompson when he instantly acted in self defense. Therefore, the booking photographs depicting his tattoos were not relevant and should have been excluded at trial.

ii. The use of the photographs were unfairly prejudicial pursuant to Rule 403 of the West Virginia Rules of Evidence.

Even if evidence of Mr. Thompson's tattoos were to be found relevant, the use of such evidence violated Rule 403 of the West Virginia Rules of Evidence. There has been little argument made by the State as to any probative value of the tattoos nor that such value is not substantially outweighed by a danger of unfair prejudice, confusing the issues, and misleading the jury.

Pursuant to Rule 403 of the West Virginia Rules of Evidence, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of

the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”

After a diligent search of relevant case law, it appears that the issue of the prejudicial natures specific to tattoos is one of first impression in the State of West Virginia. The issue is discussed generally in *State v. Meade*, 196 W. Va. 551 (W. Va. 1996) in the context of identification, who stated,

Although the parties have cited no cases in this State involving the display of tattoos were factors to be considered upon the issue of identification in *State v. Tharp*, 184 W. Va. 292, 400 S.E.2d 300 (1990), and *State ex rel. Gonzales v. Wilt*, 163 W. Va. 270, 256 S.E.2d 15 (1979). Nevertheless, cases from other jurisdictions clearly indicate that it is within the discretion of the trial court to require a defendant to display tattoos to the jury in a criminal case, upon the issue of identification.

Id. at 556. However, the court in *Meade* did not address any prejudicial issues, as is the case here.

Upon revisiting the matter, the court in *Creamer* reemphasized this standard in stating:

Ordinarily, it is not an abuse of discretion for a trial court in a criminal case to direct the accused to reveal or display the accused’s tattoos to a witness and to the jury at trial, where the accused’s tattoos are relevant to the question of the identification of the perpetrator of the offense and where the trial court has weighed the probative value of such evidence against the danger of unfair prejudice, etc., pursuant to Rules 401, 402, and 403 of the *West Virginia Rules of Evidence*. (citing Syl. Pt. 2, *State v. Meade*, 196 W. Va. 551, 474 S.E.2d 481 (1996)).

State v. Creamer, No. 11-0848 at *2-3. (W. Va. Apr. 16, 2012).

The booking photographs in question here show Mr. Thompson’s tattoos that depict a swastika and an Aryan logo. Because the prejudicial nature of such tattoos has not been visited in the State of West Virginia, it is important to consult outside jurisdictions to help guide us in how this issue should be considered. Most parallel to the matter here is *State v. Atkinson*. There, in ruling that the probative value of evidence of a swastika tattoo and a racial epithet being used

after an incident was far outweighed by its prejudicial effect. The court in *State v. Atkinson*, No. CA2009-10-129 (Ohio Ct. App. 2010) stated:

Evidence regarding Officer Adkins' alleged swastika tattoo or use of a racial epithet towards appellant is not probative of the material issues of whether a felonious assault occurred, or whether appellant had a valid defense thereto. Although appellant claimed self-defense, he presented no evidence at trial that racial bias instigated the physical altercation between the men. In fact, on cross-examination, appellant was permitted to ask Adkins whether he recalled saying "bring that n*gger back here, he hit me in the face," which clearly references a point in time *after* the physical altercation occurred. Thus, evidence of Adkins' alleged tattoo and use of a racial epithet is not probative of any material issue in this case.

Id. at *2-3.

Additionally, the court in *State v. Stein*, No. 71531-3-I (Wash. Ct. App. Mar. 21, 2016) was faced with a similar circumstance when the Defendant wanted to introduce evidence of the victim's swastika tattoo in order to prove his propensity to harm the Defendant, thus providing a theory of self defense. However, the court explained that:

The State argues that evidence of Smith's swastika tattoo is extremely inflammatory and therefore prejudicial. We agree with the State that it would be difficult "to find a more reviled group to associate with than the Nazi party." Some jurors would have a strong emotional reaction to the swastika that it would override their ability to decide the case rationally. Therefore, the swastika tattoo was prejudicial...The swastika tattoo adds little to Stein's motive argument. On the other hand, the jury, upon learning that Smith had a swastika tattoo, would likely have condemned Smith as a racist. This view of Smith would have provoked a prejudicial response that damaged the jury's ability to make rational decisions. Therefore, the State's interest in excluding the tattoo outweighed Stein's need to introduce it.

Id.

Applied here, the Circuit Court agreed with the State's thinly veiled reasoning as to the probative value of the tattoos as a way of identifying Mr. Thompson and any injuries he may or may not have suffered as a result of self-defense, despite various other identifiable tattoos and photos of the Defendant that could have achieved the same result without the risk of prejudice.

(*See Supp. Appx 36*). However, and in stark contrast to *Meade*, the majority of the conversation about his tattoos was used to describe his character. It is quite obvious that the true purpose for using booking photographs of the prejudicial tattoos was intended to paint Mr. Thompson as a man who possessed no regard for the victim's life on account of perceived racist tendencies. The State never referred to the tattoos for purposes of identifying any injuries the Defendant may or may not have suffered; the very probative argument adopted by the Court. (*Id.* at 36).

The State's intent immediately became apparent in their opening statement as they made numerous mentions of Mr. Thompson's swastika tattoo in accordance with the racially charged statement he made at the time he was apprehended. (*See Appx.* at 21, 42). Additionally, the State questioned Mr. Thompson extensively about the tattoos when he took the stand to testify, indicating their intent to unfairly prejudice his character to the jury. When he was finally given an opportunity to explain the tattoos, Mr. Thompson testified:

State:

Q. Do you think less of black people?

A. No.

Q. Do you have swastika tattoos?

A. Yes.

Q. Do you have Aryan tattoos across your stomach?

A. Yes. That is like in prison –

Q. When you were taken into custody you told Officer Day, "Us white guys have to stick together."?

A. Yes.

Q. You also said, "All this over a n*gger."?

A. Yes.

Q. This is not about self defense. This is about race.

A. No.

Defense:

Q. Mr. Thompson, you started to say something with respect to your tattoos. You want to tell the jury what you had to say about that?

A. Yes. Prison it is a whole different world up there, and you need to get with your kind or become a victim yourself. It is just, it is not like it is out here. It is really backward.

Q. And with respect to the questions about telling law enforcement if you knew where he was or not, that interview took place after you were arrested?

A. Yes.

Q. So just to make sure that everybody is clear, at the time that you went into the house on May 30, did you know that he was there?

A. No.

Q. And so you didn't know that – what room he may be in?

A. No. I learned all this after the fact.

(*See Appx.* at 439-441). Unfortunately, despite Mr. Thompson being able to fully explain the context of the tattoos, the prejudicial damage had already been done.

While the State used a pretextual reasoning of identification of Mr. Thompson to use the photographs, such reasoning falls outside of the scope of this Court's ruling in *State v. Meade* since no efforts were made at trial to use the tattoos to identify Mr. Thompson, thus diminishing their probative value. Even if evidence of the tattoos were to be introduced for the limited purpose of identification or identifying self defense injuries, the court erred by first not weighing the probative value of such evidence against the substantial risk of unfair prejudice as explained by this Court in *State v. Creamer*.

On the more narrow issue of the admissibility of the swastika tattoo, the case at hand is quite similar to the persuasive authority under *State v. Atkinson*. There was no evidence produced at trial that would suggest that the death of the victim was motivated by racial bias. To the contrary, the evidence presented shows split-second decisions that resulted in a spontaneous shooting stemming from a threat of serious bodily injury or death to Mr. Thompson. Further paralleling this matter to *Atkinson* is the fact that the State attempted to use Mr. Thompson's statement of "All this over a n*gger" as evidence of Mr. Thompson's racial propensities and that the tattoos must have been an indication of his intent to kill the victim. However, just as in *Atkinson*, this statement made to law enforcement was made *after* the incident occurred and no racial epithets were conveyed at the time of the incident in issue. Thus, just as in *Atkinson*, evidence of Mr. Thompson's tattoos and the use of a racial epithet was not probative to any material fact in the State's case.

Had the lower court properly performed a Rule 403 balancing test, it would have come to a similar conclusion as *Stein supra*. Unfortunately, because the jury was permitted to view the photographs despite the risk of unfair bias, paired with his use of a racial epithet, the jury condemned Mr. Thompson for being a racist; the very goal of the State in introducing such evidence. As the court stated in *Stein*, evidence of Mr. Thompson's swastika tattoo "would have provoked a prejudicial response that damaged the jury's ability to make rational decisions."

Mr. Thompson's tattoos were not used to identify him at trial and thus, the only use of the evidence was for a prejudicial purpose. The admission of the tattoos into evidence was an abuse of discretion. Pursuant to the extensive analysis above regarding the prejudicial effect of Mr. Thompson's tattoos upon the jury, the circuit court erred by admitting the booking photographs into evidence.

iii. The admission of the booking photographs of Mr. Thompson's tattoos was improper evidence of character or character trait pursuant to Rule 404.

The State used the photographs of Mr. Thompson's swastika and Aryan tattoos in order to paint a picture of a racially motivated crime. Such use, as permitted by the Trial Court over objection of the Defendant, constitutes a clear violation of the West Virginia Rules of Evidence, and thus constitutes reversible error.

Rule 404(a) of the West Virginia Rules of Civil Procedure states: "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Further, Rule 404(b)(1) of the same rules states "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." The only evidence permissible to prove motive is that evidence of a previously committed crime, wrong or other act. See Rule 404(b)(2) of the West Virginia Rules of Evidence. *See e.g. State v. McGinnis*, 193 W. Va. 147, 153–154, 455 S.E.2d 516, 522–523 (1994) (summarizing syllabus point one of *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990)).

Applied here, it is clear that Counsel for the Defendant raised such an issue before the Court. *See Appx. 4-12; See also Supp. Appx. 32; 36-38*). Not only did the State argue that the booking photos were to be introduced for identification purposes as discussed above, they also argued that they were also necessary to prove a racial motive of the Defendant. *See Supp. Appx. 36*. However, it is clear that the rules of evidence only permit crimes or wrongs in order to show a motive to act a certain way. The mere presence of a tattoo does not constitute a crime or wrong, nor is any such evidence used to describe the Defendant taking an action. The State simply used a photograph of a tattoo in an attempt to show the Defendant had a racially charged character trait.

This Court need only look to the transcript to understand that the State used such tattoos to paint Mr. Salaam's tragic death as a racially charged murder, spurred by hatred. The State used the word “nig***” each and every chance it could in order to drill into the minds of the jury such a picture; no less than 10 times in total. (*See generally Appx 6-561*). But nothing illustrates the States motivation to use the tattoos as character evidence more than its closing statement:

What do you remember? All of this over a nigger. That is hate. That is malice. The tattoos consistent with his rendition to the officers, ‘All us white people got to stick together. All of this over a nigger.’

See Appx. 505 at 21-25 (emphasis added)

Accordingly, even if this Court is not persuaded by the Defendants arguments as to the photographs relevance and probative value, it is clear from the record that they were not used for identification purposes, nor was there any need for them to identify Mr. Thompson. Rather, they were primarily used to argue racial motivation, a position the State made clear to the jury on numerous occasions. Therefore, their admittance constitutes character evidence impermissible under rule 404 and the Trial Court finding otherwise constitutes reversible error.

B. The 911 Call

As discussed above, the West Virginia Rules of Evidence only permit relevant evidence, so long as such evidence is not unfairly prejudicial to the Defendant. *See* West Virginia Rules of Evidence, Rule 401 and 403, stated above. When a Defendant would be unfairly prejudiced by or the jury would be misled by the admission of the evidence in question, the court should not allow the evidence in question to be admitted. In this case, Mr. Victor Thompson was unfairly prejudiced by the admittance of the 911 call.

Additionally, Rules 801 and 802 of said Rules prohibits the use of hearsay evidence. Simply put, hearsay evidence is an out of court statement made by a declarant offered for its

truth. *See* West Virginia Rules of Evidence, Rule 801. Generally speaking, hearsay evidence is not admissible in court. *See Id.* at Rule 802. It is clear here that the 911 call is hearsay that does not qualify under any exception due to the fact that the call contained no probative value and was used only to provoke a strong emotional reaction from the jury that resulted in substantial prejudice to Mr. Thompson.

i. The 911 call should have been excluded pursuant to Rule 401 and 403 of the West Virginia Rules of Evidence.

Due to the specific nature of a 911 call and the contents therein, the issue of a prejudicial 911 call in the context of a criminal trial is an issue of first impression in the state of West Virginia. This Court addressed the admissibility of a 911 call in the context of a civil matter in the case of *Browning v. Hickman*, 235 W. Va. 640, 776 S.E.2d 142 (W. Va. 2015). In *Browning*, the court explained that,

First, the caller's statement—"the red truck pulled out in front of the vehicle"—is minimally probative to a determination of the proximity of the vehicles to one another and to the intersection.

Id. at 647. While the court in *Browning* ultimately admitted the 911 call there and the case at bar is distinguishable, the ruling there provides this Court guidance as to how to analyze the prejudicial issue here. Unlike *Browning*, the 911 call here contains no evidence that could be interpreted as even minimally probative compared to the great risk of prejudice towards Mr. Thompson that will result from the admittance of the emotionally charged nature of the call. Additionally, the witness in *Browning* had personal knowledge of the accident due to the fact that the witness saw the accident unfold in the middle of an intersection.

Further differentiating the case here from *Browning* is that the 911 call here was made by the alleged victim's minor son who possessed no personal knowledge of any important details that would permit the admission of such a prejudicial recording. He testified that:

1. He was hidden inside of a closet when the alleged shooting occurred;
2. He did not see Mr. Thompson enter the residence, he did not see any of the events leading up to the shooting;
3. He did not see Mr. Thompson after the incident; and
4. He was only able to perceive the events by listening to everything through the closet.

(*See Appx. at 79-80*). Rather, the 911 call that was presented to the jury contained a young boy, sobbing uncontrollably to a 911 operator while watching his father fight for his life after suffering a gunshot wound. While it is certainly horrible to think about what that young boy had to endure, the fact remains that he simply did not have, nor provided the 911 operator with, any first hand knowledge that would aid the jury in determining the circumstances of the shooting. In fact, the victim's young son admits as such in expressing to the 911 operator that he did not understand what was happening to his father. The young boy was in such a state of shock that he was not even capable of determining what address he had been staying at with his father. (*See Appx. at 83*).

Upon playing the recording within the courtroom, the prejudicial effect became abundantly clear as tears stained the faces of nearly every juror, as well as every member of the victim's family in the gallery. As such, the Circuit Court erred in admitting the call into evidence because the evidence contained little to no probative value as to the issues at trial and any potential probative value was substantially outweighed by the prejudicial effect that the call had on the jury. Therefore, the circuit court abused its discretion in admitting the call into evidence without performing the proper Rule 403 analysis that would have prevented the evidence from being admitted.

ii. The 911 call should have been excluded pursuant to Rule 801 and 802 of the West Virginia Rules of Evidence as hearsay evidence that falls outside of an 803 exception.

Even if this Court is persuaded that the recording is relevant, the 911 call is inadmissible hearsay that is strictly prohibited by Rules 801 and 802 of the West Virginia Rules of Evidence. As discussed above, the court in *Browning* admitted the 911 call into evidence through the present-sense impression exception to the hearsay rule as set forth in Rule 803 of the West Virginia Rules of Evidence. Rule 803 defines a present-sense impression as “a statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.” (emphasis added) The court in *Browning* interpreted this rule by stating that,

It is within a trial court’s discretion to admit an out-of-court statement under Rule 803(1), the present-sense impression exception, of the West Virginia Rules of Evidence if: (1) The statement was made at the time or shortly after an event; (2) the statement describes the event; and (3) the event giving rise to the statement was within a declarant’s personal knowledge.

Id. at 648.

In *Browning*, the court reasoned that the 911 call was admissible because the caller described the event immediately after the caller personally witnessed the accident unfold in the middle of an intersection. Applied here and distinguishable from *Browning*, the victim’s son did not personally witness nor have personal knowledge of the incident that led to his father’s death. In *Browning*, the 911 caller was able to correctly recount specific details that the truck had pulled in front of the car, he was able to describe the scene, and the drivers’ physical conditions. *Id.* at 648. By contrast, the victim’s son in our case was not able to recount any details of the alleged crimes other than what he had heard from inside of the closet. Perhaps most damning here, and as described above, the 911 caller here explained to the operator that he did not know nor could

he understand what was going on at that time. Understanding and interpreting your surroundings is an integral part of any perception that is properly argued to be a present-sense impression.

While it is undisputed that the alleged victim's son's call with 911 was made at a time shortly after an event, the contents of the call fails to qualify as a present-sense impression as set forth by the requirements in Rule 803(1) and *Browning*. The contents of the 911 call did not describe any details concerning the alleged events that transpired between Mr. Thompson and Mr. Salaam. The only description of the alleged event was that his father had been shot and was bleeding. Otherwise, the contents of the call was limited to uncontrollable sobbing and confusion in regards to the location that an ambulance was needed. As such, it cannot be stated that the victim's son's personal knowledge of the event was contained within the 911 call recording because the young boy was hiding in a closet for the duration of the alleged events that transpired between Mr. Thompson and his father. Therefore, the circuit court abused its discretion since the 911 call does not qualify as a present-sense impression within the meaning of Rule 803(1) and *Browning* and is inadmissible hearsay under Rules 801 and 802 of the West Virginia Rules of Evidence.

II. THE CIRCUIT COURT ERRED BY PERMITTING HEARSAY TESTIMONY OF TIFFANY MCCUNE

Rules 801 and 802 of the West Virginia Rules of Evidence prohibits the use of hearsay evidence. As stated above, any out-of-court statement made by a declarant, asserted for its truth constitutes hearsay. *See* Rule 801 *supra*. Any such statement that does not fall under an exception or exemption is not admissible in court. *See* Rule 802 *supra*. Additionally, the Sixth Amendment of the United States Constitution declares that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. In this case, Mr.

Thompson was unfairly prejudiced and deprived of his Sixth Amendment right of confrontation by the admitted hearsay testimony of Tiffany McCune.

This Court has established the applicable standard in dealing with hearsay evidence of an unavailable witness in *State v. Kaufman*, No. 35691, 711 S.E.2d 607 (W. Va. 2011). As this Court reiterated in *Kaufman*: “Under the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution, an accused is guaranteed the right to confront and cross-examine the witnesses against him.” *Id.* at *20. This Court further explained that “[a]n 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.” *Id.* at *20-21.

In *Kaufman*, this Court reviewed a string of cases that refined the appropriate standard for this issue. This Court explained that:

We recognized in *Mechling* that, pursuant to *Crawford*, “testimonial” out-of-court statements are barred from admission under the Confrontation Clause: “Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” *Mechling*, 219 W. Va. at 372, 633 S.E.2d at 317 (quoting *Crawford*, 541 U.S. at 59). “The Confrontation Clause is the rule of procedure, not a rule of evidence. If there is one theme that emerges from *Crawford*, it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admissibility of hearsay statements.” *Id.* (quoting *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004).

State v. Kaufman at *23-24. Thus, the only remaining issue is whether or not the statement is “testimonial” or “non-testimonial.” In citing syllabus points eight and nine of its ruling in *Mechling*, this Court explained in *Kaufman* that,

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 witness’s statement taken by a law enforcement officer in the course of an interrogation is testimonial when the circumstances objectively

indicate that there is no ongoing emergency, and that the primary purpose of the witness's statement is to establish or prove past events potentially relevant to later criminal prosecution. A witness's statement taken by a law enforcement officer in the course of an interrogation is non-testimonial when made under circumstances objectively indicating that the primary purpose of the statement is to enable police assistance to meet an ongoing emergency.

Id. at *25-26.

This Court need only look to the State's opening statement when examining whether or not the statements made by Tiffany McCune were testimonial in nature. During their opening statement, it became clear that the statements obtained from Tiffany McCune were used to establish and prove the events that occurred prior to law enforcement's arrival, for which such statements would likely be relevant later in a criminal prosecution. Because EMS was en route to the location to treat the alleged victim, the primary purpose of law enforcement's involvement at the scene was now to investigate the events that had occurred at the residence for potential future prosecution.

This is evidenced by officers securing both of the relevant residences and collecting information and evidence. (*See Appx.* at 33-38). Because the shooting had already occurred upon law enforcement's arrival, and the alleged shooter was not present, the only remaining emergency was to transport the victim to the hospital, which requires no such statement to be taken from a witness. As such, there was no emergency currently in progress for law enforcement - and certainly not with respect to any statements taken from Tiffany McCune.

Pursuant to this Court's ruling in *Kaufman*, the testimonial evidence from Tiffany McCune should only be admitted if she was unavailable as a witness and only if Mr. Thompson had a prior opportunity to cross-examine her. Clearly, the tragic death of Tiffany McCune caused by an overdose satisfies the unavailable witness part of this test. However, because Mr. Thompson did not have an opportunity to cross-examine her to reveal potential motives, biases,

intoxication, and other credibility concerns, any and all testimonial evidence from Tiffany McCune should have been suppressed in accordance with Mr. Thompson's Sixth Amendment right to confront his accusers. The Circuit Court abused its discretion and erred when it allowed the testimonial evidence of Tiffany McCune to be entered in court over Mr. Thompson's objections.

Even if this Court is to consider Mrs. McCune's statements to be non-testimonial, they would still be inadmissible at trial under the Sixth Amendment right of confrontation and her reliability concerns. In *Kaufman*, this Court stated that, "Unlike testimonial out-of-court statements, *nontestimonial* statements may be admissible in a criminal trial if it is shown that the witness was unavailable for trial, and that the witness's statement bore adequate indicia of reliability." *Id.* at *28. This Court explained this standard by stating that,

Even though the unavailability requirement had been met, the Confrontation Clause contained in the Sixth Amendment to the United States Constitution mandates the exclusion of evidence that does not bear adequate indicia of reliability. Reliability can usually be inferred where the evidence falls within a firmly rooted hearsay exception. However, where such statements are not offered under a hearsay exception considered to be "firmly-rooted," then the statements are presumptively unreliable and must be excluded "at least absent a showing of particularized guarantees of trustworthiness." *Edward James S.*, 184 W. Va. at 414, 400 S.E.2d at 849 (internal quotations omitted).

State v. Kaufman, No. 35691, at *28-29 (W. Va. 2011).

Even if Mrs. McCune's statements are nontestimonial, her statements did not bear adequate indicia of reliability. The Circuit Court improperly admitted Mrs. McCune's statements under the excited utterance hearsay exception despite various concerns relating to her credibility issues. The state conceded in their opening statement that Tiffany McCune was intoxicated on controlled substances to the point that she was having trouble communicating properly and performing normal day-to-day functions at the time of the alleged offenses. (*See Appx.* at 24-26).

Additionally, Rhonda Bay, Tiffany McCune's cousin, testified as to Tiffany's unreliability, testifying,

Defense:

Q. So I believe the last question that I asked you was, does Tiffany have a reputation of not telling the truth?

A. Yes.

Q. Does she often manipulate people to get what she wants?

A. Yes.

Q. And did she, in fact, do that to you?

A. Yes.

Q. And she did that by asking to borrow money from you, didn't she?

A. Yes.

Q. And then the day that you went back there to get it was another example of when Tiffany lied to you about payment, correct?

A. Correct.

(See Appx. at 195-196).

Tiffany McCune's husband, Josh McCune, also testified in regards to his wife's unreliability, testifying:

Defense:

Q. Let's talk some about Tiffany's character. Can you tell the jury what type of person Tiffany was at that time?

A. Tiff's in her head.

Q. Meaning that she wasn't always honest with people?

A. Correct.

Q. Meaning that she may try to manipulate people to get what she wants?

A. Correct.

Q. Meaning that she might not always tell you exactly how things went down?

A. Correct.

Q. So even though she was your wife at that time you knew that that was part of her mind set, to lie and manipulate to her own advantage if the situation called for it?

A. Yes. I think that's typical with an addict.

(*See Appx.* at 306-307).

Despite the numerous concerns regarding Tiffany McCune's reliability, the Circuit Court admitted her statements into evidence under the excited utterance hearsay exception, despite Defense's argument to the Court:

When she is making a statement, Mr. McCune just testified this was after EMS had gotten there. We know from the previous evidence in this case and just from the sheer duration of the call that took place that that was approximately twenty minutes. Not only is there at least a twenty minute gap in time, she had already spoken to a police officer. She could have already formulated in her mind what she wants to tell people that is not the truth. You heard testimony in this case that both her cousin and friend Rhonda Bay testified she is not truthful and that she may say things to manipulate people or get her way or get a certain outcome that she wants, as did Mr. McCune who is her husband and saying at the time she had those tendencies being in her drug-addicted state of mind where it is all about self preservation and saying whatever is going to benefit me.

(*See Appx.* at 324-325).

While seemingly ignoring the ample reasons disputing Tiffany McCune's reliability –including both her cousin and husband testifying that it was common for her to lie to manipulate people, a time span of at least twenty minutes where she could have formulated an altered story of what actually happened, and the fact that she was highly intoxicated on the day in question – the circuit court abused its discretion and erred by admitting her statements into evidence. Pursuant to this Court's analysis in *Kaufman* regarding the admissibility of testimonial

and nontestimonial evidence, the Circuit Court abused its discretion and deprived Mr. Thompson of his Sixth Amendment right to confront his accuser by admitting the improper hearsay statements of Tiffany McCune.

III. THE CIRCUIT COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR POST-VERDICT JUDGMENT OF ACQUITTAL

To sustain a conviction, the state must prove each element of the alleged crime beyond a reasonable doubt. The state failed to meet their burden here when they failed to prove beyond a reasonable doubt that Mr. Thompson committed the underlying offense of burglary necessary for a finding of guilt for felony murder. Mr. Thompson was convicted of one count of felony murder, with the underlying felony being burglary. Any crime alleged that requires intent must be proved beyond a reasonable doubt, and if it is shown that the Defendant lacked the mental capacity to form the requisite culpability to commit the crime, intent is not formed.

The residence that Mr. Thomson is alleged to have committed burglary in was owned by Josh McCune and Tiffany McCune. Josh McCune had granted Mr. Thompson (Vic)'s free access to the residence, in testifying:

Defense:

Q. You testified that you and he would swing by the house just every day?

A. Regularly. I trusted Vic, yes. Definitely. He was one of the people I trusted at the house.

Q. You did have a level of trust with Vic that you did not have with other people?

A. Correct.

Q. In fact, you had allowed Vic to have the key pad entry to your front door?

A. Yes, sir.

Q. And why would you do that?

- A. Because Vic, me and Vic were so close and we built a pretty close bond over the past few months we been living there. To elaborate a little bit, a lot of people in that lifestyle you cannot trust. They will steal from you. Vic is one person that would not do that.
- Q. You felt that Vic was not one the ones you had to watch your back? You are passed out in the bedroom and he is there, you didn't worry about that he was going to steal something from you?
- A. No. He would watch out for me.
- Q. But like any relationship you guys had some arguments here and there?
- A. Surely, yes.
- Q. Describe that to us.
- A. Me and Vic had arguments before at the residence and got physical at one point and we made up immediately and continued being friends.
- Q. When you get into these types of episodes with each other, of course, you both were probably under the influence?
- A. Yes, yes.
- Q. But that was something that would happen from time to time because of the lifestyle that you were living?
- A. Correct.
- Q. Now, Vic was also really good friends with Tiffany, right?
- A. Yes. They knew each other before Vic and I knew each other.
- Q. Vic and Tiffany were friends before you were around?
- A. Yes.
- Q. And they also had a similar type of relationship, correct?
- A. I don't know. I don't know if they ever had physical altercation or what.
- Q. I mean to say that they were, that she shared your sentiment that you could trust Vic?
- A. Yes.

Q. Allow him to have the key pad to come in the house?

A. Yes. A mutual agreement with Tiff.

(*See Appx.* at 302-304).

Josh McCune further explains that Mr. Thompson had permission to be inside the residence at the day in question, testifying:

Defense:

Q. I want to be very clear about this, you had seen, you and Tiffany had both seen Vic the night before, really the early morning of around 1 to 2 a.m., right?

A. Yes.

Q. And so the day when he came back at whatever time it was, you would agree with me that unequivocally Mr. Thompson was still allowed to come back through your front door and was a welcome guest of both you and Tiffany?

A. Yes.

(*See Appx.* at 312-313).

The Circuit Court instructed the jury in this case that burglary is committed when any person or persons break and enter or enters without breaking a dwelling house or outhouse adjoining thereto, or occupied therewith, of another person with the intent to commit a crime therein. (emphasis added) *See Appx.* at 497. A reasonable jury could not have found that the essential elements of the crimes were committed when such doubt was cast upon Mr. Thompson's permission to be in the residence and his lack of intent to commit a crime within the McCune's household upon entering. Mr. Thompson was a welcomed guest and entered as such - - thereby negating the essential element of break and enter or entry without breaking. Further, there was no evidence of intent to enter the residence in order to commit a crime.

Because a reasonable jury could not have found the essential elements of the crime beyond a reasonable doubt, the Court must grant the motion for acquittal. *See United States v. Evans*, 318 F.3d 1011, 1018 (10th Cir. 2003). According to the testimony of Josh McCune – the owner of the residence at the time of the events herein – Mr. Thompson was always a welcomed guest and trusted at the McCune household with keypad entry by both himself and his wife. There most certainly must be a reasonable doubt that Mr. Thompson not only broke and entered, but also had the requisite *mens rea* to form the intent necessary to be convicted of felony murder with the underlying offense being burglary.

In reviewing this case *de novo*, even when scrutinizing the evidence in the light most favorable to the verdict, the credibility disputes cannot be resolved in the verdict's favor because the State's own witness casted reasonable doubt upon its case, and the State therefore failed to meet its burden. Therefore, the Motion for Post-Verdict Judgment of Acquittal should have been granted and was reversible error by the circuit court because no rational jury could have found Mr. Thompson guilty beyond a reasonable doubt based on the arguments and evidence presented herein.

IV. THE CIRCUIT COURT ERRED BY DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL

The accused is entitled to a new trial if it is required in the interest of justice pursuant to W. Va. R. Crim. P. 33. The accused must be found guilty by the state proving beyond a reasonable doubt that he or she has committed the crime(s) alleged. Syllabus Point 1 *State v. Starkey*, 161 W. Va. 517, 244 S.E.2d 219 (W. Va. 1978) (“In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt”). However, when the evidence is inadequate which has resulted in a subsequent injustice, the

Court should “interfere” with the erroneous verdict of guilty. Syllabus pt. 1, *State v. Bowles*, 117 W. Va. 217, 185 S.E. 205 (W. Va. 1936).

Applied here, the state created reasonable doubt when their own witness, Josh McCune, the former owner of the residence, testified that Mr. Thompson was always a welcome guest and trusted at the McCune household with keypad entry by both himself and his wife. Such a statement most certainly casts reasonable doubt that Mr. Thompson had the requisite *mens rea* to form the intent necessary to be convicted of felony murder with the underlying offense being burglary. After creating such reasonable doubt, the jury had to consider that reasonable doubt regarding Mr. Thompson’s intent at the time the alleged crime occurred. Based on the testimony at trial regarding Mr. Thompson’s continuous authority to enter and remain at the residence, a reasonable jury could not have found the essential elements of the crimes alleged by the State.

Any crime alleged that requires intent must be proved beyond a reasonable doubt, and if it is shown that the Defendant lacked the mental capacity to form the requisite culpability to commit the crime, intent is not formed. The residence that Mr. Thomson is alleged to have committed burglary in was owned by Josh McCune and Tiffany McCune. As discussed throughout Josh McCune’s testimony in the previous section, Mr. Thompson had free and permissive entry to the residence whenever he pleased and the state did not show that he had exceeded the scope of his consent for entry due to the fact that the group of friends would frequently squabble over various issues and remain friends afterwards.

As argued herein and throughout, Mr. Thompson produced evidence that triggered the State’s burden to then prove that he had the requisite intent to commit burglary. Because the State’s own witness seemingly confirmed the fact that Mr. Thompson did not enter into his residence to commit a crime therein, the State failed to meet its burden. Consequently, the jury

could not have found that the State met their burden to prove that Mr. Thompson committed felony murder with the underlying offense being burglary beyond a reasonable doubt. Any resulting conviction obtained by a jury that is based upon the failure to show beyond a reasonable doubt that a crime has been committed must be set aside and a new trial must be granted in the interest of justice. (emphasis added).

In reviewing this case with the abuse of discretion standard of review, the circuit court abused its discretion in denying Mr. Thompson's Motion for a New Trial. Mr. Thompson asserts that the circuit court's finding that his entry into the residence constituted burglary was clearly erroneous since substantial evidence showed that Mr. Thompson's presence at the residence was normal, welcome, and permitted. Therefore, denial of Mr. Thompson's Motion for a New Trial was reversible error by the circuit court since the court abused its discretion and relied upon clearly erroneous factual findings.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Court reverse the circuit court's ruling and remand the case back to the circuit court for a ruling consistent with this Court's findings.

Respectfully submitted:

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

VICTOR LEE THOMPSON,
Petitioner,

Appeal No. 23-478

v.

STATE OF WEST VIRGINIA,
Respondent.

CERTIFICATE OF SERVICE

I, William R. Morris, hereby certify that I have served a true and correct copy of the foregoing **Petitioner's Brief** upon the following parties of record via the WV File & ServeXpress system this 12th day of December, 2023.

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