

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-478

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VICTOR LEE THOMPSON,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

BRIEF OF RESPONDENT

**PATRICK MORRISEY
ATTORNEY GENERAL**

**Frankie Dame (WV Bar # 14401)
Assistant Solicitor General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305-0220
Email: Frankie.A.Dame@wvago.gov
Telephone: (304) 558-2021
Facsimile: (304) 558-0140**

TABLE OF CONTENTS

INTRODUCTION 1

ASSIGNMENTS OF ERROR 2

STATEMENT OF THE CASE..... 2

SUMMARY OF THE ARGUMENT 8

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 10

STANDARD OF REVIEW 10

ARGUMENT 11

 I. The circuit court properly admitted photographs of Petitioner’s racist tattoos under West Virginia Rules of Evidence 401, 402, 403, and 404..... 11

 A. Petitioner’s tattoos were relevant. 11

 B. Petitioner’s tattoos did not violate Rule 403. 14

 C. Petitioner’s tattoos did not violate Rule 404. 17

 II. The circuit court correctly admitted Darren Jr.’s 911 call under Rules 401, 402, 403, 801, 802, and 803..... 18

 A. The Court should reject Petitioner’s challenge to the 911 call because he did not include in the appendix either the 911 call or a transcript of it and, thus, failed to comply with W. Va. R. App. P. 10(c)(7). 18

 B. The circuit court correctly applied the relevant rules of evidence. 20

 III. Tiffany McCune’s admitted statements do not violate the Confrontation Clause or the hearsay rules. 28

 A. Admitting Tiffany’s statement did not violate the Confrontation Clause. 28

 B. Tiffany’s statement satisfies the hearsay rules. 35

 IV. The circuit court properly denied Petitioner’s motions for post-verdict judgment of acquittal and a new trial because consent to entry is no defense to burglary, and Petitioner exceeded the scope of consent, so he was a burglar regardless. 37

CONCLUSION..... 40

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Anthony C. v. Sarah C.</i> , No. 22-637, 2023 WL 6857317 (W. Va. Supreme Court, Oct. 18, 2023).....	19
<i>Barclay v. Florida</i> , 463 U.S. 939 (1983).....	13
<i>Benjamin v. Sparks</i> , 986 F.3d 332 (4th Cir. 2021)	10
<i>Browning v. Hickman</i> , 235 W. Va. 640, 776 S.E.2d 142 (2015).....	25
<i>Brumfield v. McComas</i> , No. 22-0037, 2023 WL 1798562 (W. Va. Supreme Court, Feb. 7, 2023).....	19
<i>In re C.B.</i> , 245 W. Va. 666, 865 S.E.2d 68 (2021).....	29, 34, 35
<i>Commonwealth v. Corbin</i> , 446 A.2d 308 (Pa. Super. Ct. 1982).....	39
<i>Contreras-Mejia v. Barr</i> , 815 F. App'x 694 (4th Cir. 2020).....	20
<i>Cox v. Commonwealth</i> , No. 2002-CA-1932-MR, 2003 WL 22358796 (Ky. Ct. App. Oct. 17, 2003).....	12
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004).....	29, 34
<i>Davis v. Washington</i> , 547 U.S. 813 (2006).....	32
<i>Donna Kaye M. v. Justin Elliot M.</i> , 197 W. Va. 264, 475 S.E.2d 356 (1996).....	20
<i>Evans v. United Bank, Inc.</i> , 235 W.Va. 619, 775 S.E.2d 500 (2015).....	19
<i>State ex rel. First State Bank v. Husted</i> , 237 W. Va. 219, 786 S.E.2d 479 (2015).....	10

<i>Garnett v. Morgan</i> , 330 F. App'x 671 (9th Cir. 2009)	34
<i>Giles v. California</i> , 554 U.S. 353 (2008).....	34
<i>Hatcher v. McBride</i> , 221 W. Va. 5, 650 S.E.2d 104 (2006).....	16
<i>INS v. Phinpathya</i> , 464 U.S. 183 (1984).....	20
<i>Jones v. Commonwealth</i> , 349 S.E.2d 414 (Va. Ct. App. 1986).....	39
<i>Jones v. State</i> , 843 So. 2d 946 (Fla. Dist. Ct. App. 2003)	39
<i>Juniper v. Davis</i> , 74 F.4th 196 (4th Cir. 2023)	22
<i>Leach v. Collado</i> , No. 18-cv-3427, 2023 WL 4138360 (E.D.N.Y. June 22, 2023).....	33
<i>McCallum v. State</i> , 311 S.W.3d 9, 11 (Tex. App. 2010).....	14, 15, 16
<i>McCord v. State</i> , 825 S.E.2d 122 (Ga. 2019).....	32
<i>McDougal v. McCammon</i> , 193 W. Va. 229, 455 S.E.2d 788 (1995).....	11
<i>Melendez-Diaz v. Massachusetts</i> , 557 U.S. 305 (2009).....	29, 33
<i>Michigan v. Bryant</i> , 562 U.S. 344 (2011).....	30, 31, 33
<i>Navarette v. California</i> , 572 U.S. 393 (2014).....	27
<i>O'Dell v. Ballard</i> , No. 13-0220, 2013 WL 6152368 (W. Va. Supreme Court, Nov. 22, 2013).....	31
<i>Ohio v. Clark</i> , 576 U.S. 237 (2015).....	29, 31, 33, 34

<i>Old Chief v. United States</i> , 519 U.S. 172 (1997).....	22, 23
<i>People v. Drake</i> , 527 N.E.2d 519 (Ill. App. Ct. 1988)	39
<i>People v. Pertsoni</i> , 218 Cal. Rptr. 350 (Cal. Ct. App. 1985).....	12
<i>People v. Tillman</i> , No. 307901, 2013 WL 951269 (Mich. Ct. App. Feb. 19, 2013).....	17
<i>Philpot v. State</i> , 709 S.E.2d 831 (Ga. Ct. App. 2011).....	32
<i>Shafer v. Kings Tire Serv., Inc.</i> , 215 W. Va. 169, 597 S.E.2d 302 (2004).....	10
<i>Smith v. New York</i> , No. 20-cv-9708, 2023 WL 359568 (S.D.N.Y. Jan. 20, 2023)	32
<i>State v. Allen</i> , 579 A.2d 1066 (Conn. 1990)	39
<i>State v. Atkinson</i> , __ Ohio St. 3d __, 2010-Ohio-2825, __ N.E.2d __	16
<i>State v. Bazar</i> , No. 14-0916, 2015 WL 7628722 (W. Va. Supreme Court, Nov. 20, 2015).....	30
<i>State v. Benoit</i> , 363 A.2d 207 (R.I. 1976)	25
<i>State v. Bouie</i> , 235 W. Va. 709, 776 S.E.2d 606 (2015).....	35
<i>State v. Bowling</i> , 232 W. Va. 529, 753 S.E.2d 27 (2013).....	34
<i>State v. Bruffey</i> , 231 W. Va. 502, 745 S.E.2d 540 (2013).....	35
<i>State v. Dennis</i> , 216 W. Va. 331, 607 S.E.2d 437 (2004).....	37
<i>State v. Donley</i> , 216 W. Va. 368, 607 S.E.2d 474 (2004).....	25

<i>State v. Farmer</i> , 185 W. Va. 232, 406 S.E.2d 458 (1991).....	37
<i>State v. Ferguson</i> , 216 W. Va. 420, 607 S.E.2d 526 (2004).....	34, 36, 37
<i>State v. Gill</i> , 167 S.W.3d 184 (Mo. 2005)	25
<i>State v. Harris</i> , 226 W. Va. 471, 702 S.E.2d 603 (2010).....	19
<i>State v. Harris</i> , 230 W. Va. 717, 742 S.E.2d 133 (2013).....	23, 24
<i>State v. Henson</i> , 239 W. Va. 898, 806 S.E.2d 822 (2017).....	34
<i>State v. Honaker</i> , 193 W. Va. 51, 454 S.E.2d 96 (1994).....	19
<i>State v. Hypes</i> , 230 W. Va. 390, 738 S.E.2d 554 (2013).....	15
<i>State v. Jackson</i> , 248 W. Va. 504, 889 S.E.2d 77 (2023).....	22
<i>State v. Jako</i> , 245 W. Va. 625, 862 S.E.2d 474 (2021).....	28
<i>State v. Kaufman</i> , 227 W. Va. 537, 711 S.E.2d 607 (2011).....	10, 30, 31, 33, 35
<i>State v. Kennedy</i> , 229 W. Va. 756, 735 S.E.2d 905 (2012).....	29, 36
<i>State v. Lopez</i> , 908 N.W.2d 334 (Minn. 2018).....	39
<i>State v. Marinitsis</i> , 130 W. Va. 613, 45 S.E.2d 733 (1947).....	21
<i>State v. Marple</i> , 197 W. Va. 47, 475 S.E.2d 47 (1996).....	26
<i>State v. McCoy</i> , 219 W. Va. 130, 632 S.E.2d 70 (2006).....	21

<i>State v. Mechling</i> , 219 W. Va. 366, 633 S.E.2d 311 (2006).....	29, 30, 31
<i>State v. Mediz</i> , No. 2 CA-CR 2012-0455, 2014 WL 5391985 (Ariz. Ct. App. Oct. 22, 2014).....	17
<i>State v. Miller</i> , 194 W.Va. 3, 459 S.E.2d 114 (1995).....	18, 22, 26
<i>State v. Newcomb</i> , 223 W. Va. 843, 679 S.E.2d 675 (2009).....	18
<i>State v. Pagano</i> , 882 S.W.2d 326 (Mo. Ct. App. 1994).....	12
<i>State v. Pettrey</i> , 209 W. Va. 449, 549 S.E.2d 323 (2001).....	36
<i>State v. Plumley</i> , 181 W. Va. 685, 384 S.E.2d 130 (1989).....	6, 38, 39
<i>State v. Rosenbaum</i> , 882 S.E.2d 180 (S.C. Ct. App. 2022).....	12
<i>State v. Salmons</i> , No. 21-0424, 2023 WL 7276668 (W. Va. Supreme Court, Nov. 3, 2023).....	40
<i>State v. Sanders</i> , 241 W. Va. 590, 827 S.E.2d 214 (2019).....	12
<i>State v. Shingleton</i> , 237 W. Va. 669, 790 S.E.2d 505 (2016).....	34
<i>State v. Shrewsbury</i> , 213 W. Va. 327, 582 S.E.2d 774 (2003).....	22
<i>State v. Sites</i> , 241 W. Va. 430, 825 S.E.2d 758 (2019).....	11, 40
<i>State v. Slater</i> , 222 W. Va. 499, 665 S.E.2d 674 (2008).....	38
<i>State v. Stein</i> , 193 Wash. App. 1003 (2016).....	16, 17
<i>State v. Surbaugh</i> , 230 W.Va. 212, 737 S.E.2d 240 (2012).....	37

<i>State v. Trail</i> , 236 W. Va. 167, 778 S.E.2d 616 (2015).....	19
<i>State v. Upchurch</i> , 421 S.E.2d 577 (N.C. 1992).....	39
<i>State v. Vance</i> , 207 W. Va. 640, 535 S.E.2d 484 (2000).....	11
<i>State v. Warsame</i> , 735 N.W.2d 684 (Minn. 2007).....	33
<i>State v. White</i> , No. ___, 2017 WL 3084711 (Del. Super. Ct. July 20, 2017)	17
<i>State v. Wolford</i> , No. 12-1326, 2013 WL 4726548 (W. Va. Supreme Court, Sept. 3, 2013).....	20
<i>United States v. Benson</i> , 957 F.3d 218 (4th Cir. 2020)	34
<i>United States v. Berkman</i> , 433 F. App'x 859 (11th Cir. 2011)	34
<i>United States v. Bowen</i> , 511 F. Supp. 3d 441 (S.D.N.Y. 2021).....	33
<i>United States v. Brito</i> , 427 F.3d 53 (1st Cir. 2005).....	33
<i>United States v. Common</i> , 563 F. App'x 429 (6th Cir. 2014)	35
<i>United States v. Davis</i> , 636 F.3d 1281 (10th Cir. 2011)	15
<i>United States v. Delfino</i> , 510 F.3d 468 (4th Cir. 2007)	21
<i>United States v. Dixon</i> , 191 F. Supp. 3d 603 (S.D. W. Va. 2016).....	12
<i>United States v. Franklin</i> , 415 F.3d 537 (6th Cir. 2005)	34
<i>United States v. Garland</i> , 320 F. App'x 295 (6th Cir. 2008)	23

<i>United States v. Hernandez</i> , 571 F. Supp. 3d 1217 (E.D. Okla. 2021)	34
<i>United States v. Katsipis</i> , 598 F. App'x 162 (4th Cir. 2015)	21
<i>United States v. LaFond</i> , 783 F.3d 1216 (11th Cir. 2015)	14
<i>United States v. Patrick</i> , 513 F. App'x 882 (11th Cir. 2013)	24
<i>United States v. Portsmouth Paving Corp.</i> , 694 F.2d 312 (4th Cir. 1982)	27
<i>United States v. Puff</i> , 211 F.2d 171 (2d Cir. 1954).....	13
<i>United States v. Rezaq</i> , 134 F.3d 1121 (D.C. Cir. 1998).....	25
<i>United States v. Sunmonu</i> , 859 F. App'x 431 (11th Cir. 2021)	24
<i>United States v. Technodyne LLC</i> , 753 F.3d 368 (2d Cir. 2014).....	12
<i>United States v. Wills</i> , 346 F.3d 476 (4th Cir. 2003)	22
<i>Van Cannon v. United States</i> , 890 F.3d 656 (7th Cir. 2018)	39
<i>Villanueva v. State</i> , 576 S.W.3d 400 (Tex. App. 2019).....	33
<i>In re Visitation of L.M.</i> , 245 W. Va. 328, 859 S.E.2d 271 (2021).....	19
<i>W. Va. Dep't of Health & Hum. Res. Emps. Fed. Credit Union v. Tennant</i> , 215 W.Va. 387, 599 S.E.2d 810 (2004).....	20
<i>Wakaksan v. United States</i> , 367 F.2d 639 (8th Cir. 1966)	12
<i>White v. Illinois</i> , 502 U.S. 346 (1992).....	36

<i>William L. v. Cindy E.L.</i> , 201 W. Va. 198, 495 S.E.2d 836 (1997).....	19
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Statutes

W. Va. Code § 61-3-11	38
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Rules

W. Va. R. App. P. 10(c)(7)	18, 19, 20
W. Va. R. Evid. 401	11
W. Va. R. Evid. 402	11
W. Va. R. Evid. 403	14, 22
W. Va. R. Evid. 404	8, 17, 18
W. Va. R. Evid. 803	27

Other Authorities

92 AM. JUR. PROOF OF FACTS 3D <i>Proof of Reliability of Eyewitness and Earwitness Testimony</i> § 379 (Dec. 2023 update).....	22
Christopher B. Mueller & Laird C. Kirkpatrick, <i>Admissible hearsay—“Firmly rooted” exceptions and other statements that pass constitutional muster</i> , in 4 FED. EVID. § 8:31 (4th ed. Aug. 2023 update).	36
Josephine Ross, <i>Cops on Trial: Did Fourth Amendment Case Law Help George Zimmerman's Claim of Self-Defense?</i> , 40 SEATTLE U. L. REV. 1 (2016)	13
Kenneth S. Broun et al., <i>Bad character as evidence of criminal conduct—General rule of exclusion for other crimes—Permissible uses that are not true exceptions—Motive</i> , in 1 MCCORMICK ON EVID. § 190.5 (8th ed. July 2022 update).....	15
4 WILLIAM BLACKSTONE, COMMENTARIES *226-27	38

INTRODUCTION

The circuit court got the evidentiary and legal questions here exactly right.

In May of 2021, Petitioner, who has a swastika and Aryan tattoo, barged into his friend Tiffany McCune's home angry about some bad drugs Tiffany had sold him. He pistol whipped Tiffany and then shot and killed a black man, Darren Salaam. A few minutes after the shooting, Darren's son called 911, and a distraught, panicking Tiffany volunteered to a police officer that Petitioner hit her and then shot Darren. The jury convicted Petitioner of felony murder.

Petitioner argues that the tattoos, 911 call, and Tiffany's statement to police were inadmissible under various evidentiary rules and the Confrontation Clause. And he argues that he cannot have committed the underlying felony of burglary because he had consent to enter.

But he is wrong on all counts. The booking photographs of his racist tattoos were relevant to show his motive—an issue that became crucial once he claimed self-defense. And they were not unfairly prejudicial because the jury already had evidence suggesting race-based animus in the form of other admitted statements that he does not challenge. The 911 call was relevant because it made material facts more likely and confirmed other witnesses' testimony, and the circuit court did not abuse its discretion finding that its emotional nature was not unfairly prejudicial. The call was a present-sense impression and excited utterance, so it was not inadmissible hearsay either. Further, Tiffany's statement didn't violate the Confrontation Clause because it was not testimonial: she said it to address the twin emergencies of Darren's injury and a fleeing, armed Petitioner, it was informal and spontaneous, and it was an excited utterance. After all, she was panicking and distraught—she could not have intended her statement to substitute for trial testimony. Finally, because our burglary statute requires only entry with intent to commit a crime, Petitioner's standing consent to be in the home does not matter. Regardless, he exceeded the scope of consent because he entered intending to—at a minimum—pistol whip Tiffany. The Court should affirm.

ASSIGNMENTS OF ERROR

Petitioner raises four 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

On Memorial Day weekend in 2021, Victor Thompson shot and killed Darren Salaam.

A. That Friday evening (May 29), husband and wife Josh and Tiffany McCune drove from Parkersburg, West Virginia to Akron, Ohio to pick up their drug dealer, Darren Salaam Sr., and Darren’s 15-year-old-son, Darren Jr. App. 73; App. 280-82.¹ They got back to their Parkersburg house very early the next morning (May 30). App. 281. Petitioner, the McCunes’ friend, arrived at the house around the same time they got back. App. 282. Petitioner saw the Salaams when he arrived, App. 438-39 (Petitioner admitting, “Yes. I was there. I’d seen him.”), and knew where they were staying in the house, App. 439 (“Q. Did you tell law enforcement that he was in the back bedroom? A. Yes. I saw him.”). Around the same time (2:00 a.m.), the McCunes sold Petitioner some of the drugs Darren brought with him. App. 282, 329, 418-19.

Shortly after, around 3:00 a.m., the Salaams headed to the back bedroom, App. 74, and the McCunes and Petitioner went their separate ways for several hours. App. 283-84. The McCunes went to Tiffany’s cousin Rhonda Bay’s house to get high. App. 283-84. A few hours later, around

¹ As Petitioner notes, all the players here were deeply involved in the illicit-drug scene. Pet’r’s Br. 5.

6:00 a.m. or 7:00 a.m., Josh and Petitioner had an argument with Petitioner “through a phone call and some text messages” about “the quality of the drugs” the McCunes had sold him. App. 328-29. Josh and Tiffany went back home shortly after, App. 329—around 8:00 a.m., App. 283-84—and slept, App. 178-80. Next, Petitioner and his girlfriend Kiersten came over to Rhonda’s place around 9:00 a.m. asking for some heroin so they would not get “dope sick.” App. 175, 426. Rhonda obliged. App. 175.

About an hour later, Rhonda and Petitioner decided to go to the McCune home. App. 174. Rhonda went to collect \$100 Tiffany owed her, App. 168-69, while Petitioner told Rhonda he was going there because Tiffany “owed him, too,” for the bad drugs from the night before, App. 178; *see also id.* (saying Petitioner “wanted drugs”). When they got there, only Rhonda went inside. App. 175-76. She found Tiffany passed out, so she woke Tiffany up and told her that she and Petitioner wanted their debts paid and asked her to come outside. App. 179-81. Tiffany refused. App. 181. So Rhonda went back to Petitioner and “just told him that Tiffany was out of it and she would get ahold of us later.” App. 177. At first, Petitioner took the news well. But when Rhonda and Petitioner met up with Kiersten a few minutes later, things took a turn. Kiersten began “fighting with” Petitioner, “downing him” and calling him a “punk” and “bitch” “for not collecting the debt.” App. 182-83; *see also id.* at 430 (Petitioner admitting Kiersten was “mad” at him and started a heated argument over him not getting more drugs).

B. The State used several contemporaneous accounts to piece together what happened next. A neighbor’s surveillance video showed Petitioner returning to the McCunes around 2:00 p.m. in a black truck. App. 120-21. At that moment, Kelsea Province and Colton Davis were hanging out on the McCunes’ front porch. Petitioner stormed up the front walk towards them, looking hostile and angry. App. 224-25, 249. He rushed past them, ripping open the front door and saying “what

is your f–ing problem” as he went. App. 224-25, 249. Darren Jr., still in the McCunes’ back bedroom, heard Petitioner “walk[] in the house screaming, yelling.” App. 76. Petitioner accosted Tiffany, saying something like, “Do you think I am a bitch?” or “What do you think I am? A bitch?” and then “hit her with a gun.” App. 333 (Josh recounting Tiffany’s statement to him); *see also id.* at 109 (Officer Deskins testifying Tiffany told him “that Victor Thompson pistol whipped” her); App. 77 (Darren Jr. testifying he heard a male voice say “bitch” then heard a “loud slap like [someone] was hit with something” and Tiffany “started crying loud”); App. 225, 227, 250 (Colton testifying he heard a smack and a few seconds later Colton and Kelsea both heard Tiffany yelling and “screaming”). Tiffany retreated into her bedroom. App. 334.

When Darren heard Tiffany scream, he took something like a curtain rod lying by the door and walked out of the bedroom. App. 78. He met Kelsea (who was walking inside) in the McCunes’ kitchen, and they spoke for a few seconds about leaving. App. 251. Kelsea went back outside. App. 272. Then, a few seconds later, Kelsea and Colton (both outside), Darren Jr. (still in the bedroom), and a nearby neighbor (who had watched Petitioner pull up and rush inside) heard a gunshot. App. 79, 202-03, 225, 251-52, 272; *see also id.* at 436 (Petitioner admitting Darren said “Don’t shoot. Don’t shoot”). The time from Petitioner’s initial “bitch” to the fatal gunshot was around 30 to 60 seconds. App. 84, 120-21, 510. Petitioner immediately fled. App. 229, 252. As he “ran out” of the house and into the truck, the neighbor saw him “put[] something in his pocket.” App. 206. He “took off at a high rate of speed.” App. 207, 229, 252.

Meanwhile, Darren was bleeding profusely, App. 132-33. Petitioner had shot him in the back about four inches to the left of his spine. App. 64. As Colton and Kelsea rushed inside, passing the fleeing Petitioner, they saw Darren lying on the ground. App. 253. He was repeating, “I didn’t do nothing, ... didn’t do nothing.” App. 79. He got up and tried to get away from the

house, jumping out the bathroom window and “[c]rawling to the neighbor’s yard.” App. 127-28, 230, 253. Darren Jr. also jumped out a window of the house and, although he was “very upset,” App. 231, and “flipping out,” called 911, App. 83; *id.* at 350. Tiffany emerged moments later, holding her injured face and “freaking out” and “[f]rantic.” App. 256, 288. She and Kelsea continued “panicking”—and were “pacing” and “in tears.” App. 290. Colton held Darren while Darren Jr. talked to the 911 operator. *Id.*

Police arrived five minutes later. App. 350 (noting that the 911 call came in at 2:18 p.m., and an officer responded at 2:23 p.m.). The first responding officers found Darren bleeding on the back porch of a nearby house. App. 107, 110. Tiffany approached the officers “frantic[ally]” and “emotion[ally].” App. 108. She told him “Victor Thompson pistol whipped” her “and then shot Darren.” App. 109. The police detained everyone at the scene. App. 340. On the sidewalk with Josh, Tiffany showed him a welt on her head just above her eye. App. 296-97. She told him that Petitioner had said something like, “Do you think I am a bitch?” or “What do you think I am? A bitch?” and then had “hit her with a gun.” App. 333. First responders took Darren to the hospital and into surgery. App. 60-61. A few hours later, he died. App. 67.

The police investigation was straightforward. They found large amounts of blood in and outside the house and a spent .45 caliber casing and spent .45 caliber bullet near where Darren was shot. App. 132, 134-36. They found a bullet hole in the curtain acting as a doorway in front of the bedroom where the Salaams stayed. App. 132. And they took statements from the witnesses. They never found a gun at the scene. App. 146-47. The police never pursued a potential self-defense theory of the case because no evidence or witness supported that theory. App. 386-87.

After they secured the scene, law enforcement put an alert out for the black getaway truck Petitioner had used. App. 352-53. Police found it the next day—though someone had tried to hide

it by spray-painting it white. App. 354-55. The police ultimately found Petitioner and Kiersten a week later on June 6. App. 398. As the arresting officers took him in, he pleaded with them that “All of us whites have to stick together.” App. 408. And when the officers explained that race had nothing to do with it, Petitioner lamented: “All of this over a n*****.” *Id.* Petitioner later admitted to the booking officer taking pictures of his swastika and Aryan tattoos, “You guys already know it all. I am going down for manslaughter.” App. 403, 439-40.

C. In January 2022, a grand jury indicted Petitioner on three charges: burglary, felony murder, and murder. App. 4-5. He was tried in October 2022. After the jury heard the State’s witnesses testify to the narrative outlined above, Petitioner moved for a judgment of acquittal. The court rejected that motion. App. 413. Most of Petitioner’s arguments were credibility-based, it said—meaning they were jury questions. *Id.* On the burglary charge specifically, the court emphasized that under *State v. Plumley*, 181 W. Va. 685, 384 S.E.2d 130 (1989), a person satisfies the entry element of burglary when “they exceed[] the scope of consent granted for entry.” App. 413. And plenty of evidence showed that Petitioner “exceed[ed] the scope of the” McCunes’ “consent granted for entry.” App. 413-14.

Petitioner testified on his own behalf. He claimed he killed Darren in self-defense. His testimony differed strikingly on several key points from the other witnesses’ testimony and the physical evidence: he testified that he came to the house unarmed, asked permission to walk inside, and came in only once Tiffany granted him permission. App. 418. He told her the drugs she gave him were bad and that he “ain’t no bitch” and she could not “do that to [him].” App. 419. Tiffany yelled for Josh, became “belligerent,” and “started to reach for” a pistol lying on the bed. *Id.* Petitioner and Tiffany struggled over the pistol. App. 421. Petitioner heard “a big, booming voice,” *id.*, and, looking behind the curtain in the doorway to the bedroom, saw a “black guy,”

App. 439, “creeping behind with a gun” about six or seven feet away, App. 425. So he dropped the curtain and pulled the trigger. App. 426.

It is unsurprising that the jury apparently did not believe Petitioner’s account. At trial, Petitioner changed his initial statement to law enforcement to make it more favorable for himself. App. 436. And he claimed he couldn’t remember crucial details like what he did with the murder weapon, App. 437-38. His story was repeatedly at odds with all the other witnesses on crucial points. For example, everyone else testified that Petitioner came into the house in a rage. He also says two weapons were in the house that day: one near Tiffany on the bed, and one held by Darren. Yet Josh insisted the McCunes did not own a gun or have one in the house, and Josh, Darren Jr., and Kelsea all said the same about Darren. App. 94, 256, 294-95.

Petitioner also contradicted himself at trial. He first told the jury he did not know Darren was in the residence and that he had never seen him before he shot him. App. 422. But after being confronted with Josh’s testimony that he *was* at the house when the McCunes and Salaams got back from Akron, he admitted: “Yes. I was there. I’d seen him.” App. 438-39. And he even knew precisely what room Darren was in. App. 439. He also testified that he did not know the bullet he fired had even hit Darren, App. 426—even though he also testified that he had stepped over the wounded Darren to leave the house, App. 437. Petitioner claimed he had free access to the McCune house and could come and go freely, App. 423-24; yet on the day of the murder he says he asked, “Hey, Tiff. It is Vic. Can I come in?” App. 418. And Petitioner admitted he never contacted police, App. 438, despite claiming self-defense. With respect to the tattoos and racist comments, Petitioner only said he “regret[ed]” making the comments. App. 427. He justified his tattoos by saying in prison “you need to get with your kind or become a victim yourself.” App. 440. And in explaining Petitioner’s thought process during closing, defense counsel reiterated that

Petitioner felt he needed to defend himself because he saw “a black guy he doesn’t know with a gun pointed at his face.” App. 532.

The jury took under two hours to convict Petitioner of “felony murder with the underlying basis being burglary.” App. 556. It also made a finding of no mercy. App. 582. The circuit court denied Petitioner’s post-conviction motion for judgment of acquittal and his motion for a new trial. *Id.* It sentenced Petitioner to life without the possibility of parole. App. 582-83. Petitioner now appeals from that order.

SUMMARY OF THE ARGUMENT

I. The circuit court did not abuse its discretion admitting the photographs of Petitioner’s swastika and Aryan tattoos under West Virginia Rules of Evidence 401, 402, 403, or 404. Petitioner’s self-defense claim put motive at the center of this case: why did he pull the trigger? His tattoos—especially taken alongside his racist comments—are relevant to that answer. Courts routinely consider evidence of race-based motivations relevant in murder cases. Here, too, the tattoos satisfy Rules 401 and 402. And the tattoos are uniquely probative because they could help the jury understand how Petitioner could escalate from drug-fueled anger to murder. The tattoos were not unfairly prejudicial because they were admitted for a legitimate purpose—motive—and the jury already heard Petitioner’s comments that “whites need to stick together” and “all this over a n*****” so they did not cause unique prejudice. The tattoos thus don’t violate Rule 403. And they don’t violate Rule 404 because they are not a “crime, wrong, or other act,” and because they were offered to show motive—a valid purpose.

II. The circuit court also did not abuse its discretion in admitting the 911 call under Rules 401, 402, 403, 801, 802, or 803. First, the Court should dismiss this argument because Petitioner did not include the 911 call in the appendix and, thus, failed to comply with West Virginia Rule of Appellate Procedure 10(c)(7). Second (on the Rule 401 and 402 challenges), the 911 call was

relevant because it makes several crucial facts more likely and confirms the testimony of several other witnesses. And it was an important and expected piece of the story, serving as the bridge between the shooting and the subsequent investigation and manhunt. Third, Petitioner did not preserve a Rule 403 claim and admitting the 911 call was not plain error. It was highly probative for the same reason it was relevant, and because Petitioner admitted to the call's substance, and Darren Jr.'s emotion was not unexpected or unduly intense, it was not unduly prejudicial. The trial's broader context shows the jury convicted Petitioner because it did not believe him—not because of the emotion or unfairness of admitting the call. Finally (on the Rules 801, 802, and 803 claims), the 911 call was not hearsay because it was a present-sense impression and excited-utterance under Rule 803(1)-(2).

III. Tiffany McCune's admitted statement to Officer Deskins that Petitioner pistol whipped her and shot Darren is not testimonial and is an excited utterance. It is testimonial first because she talked to the police in the context of ongoing health and safety emergencies—Darren was dying, and no one knew where Petitioner was; second, because she volunteered it in an informal setting; and third, because she was distraught, making it an excited utterance within a firmly rooted hearsay exception that deals with nontestimonial statements. These facts show that the average witness in Tiffany's position could not have intended their statement to substitute trial testimony, making it nontestimonial. Either way, this admission was harmless beyond reasonable doubt. First, Josh's testimony included the same statement, and it was admitted without a Confrontation Clause objection. Second, Petitioner admitted the same facts during trial. Finally, the testimony showed Tiffany was beside herself and panicking when she spoke to Officer Deskins. That's textbook excited-utterance stress, meaning it is admissible.

IV. The circuit court properly denied Petitioner’s motions for post-verdict judgment of acquittal and a new trial for two reasons. First, in West Virginia, consent to entry is no defense to burglary. The burglary statute requires entering a house with the intent to commit a crime. And the facts show that Petitioner entered the McCunes’ home intending to assault Tiffany—even he admits he at least was going to get drugs—so little question exists he had the required intent when he came inside. Second, even if consent were a defense, Petitioner exceeded the scope of consent here. No one lets a house guest do whatever they want—especially not hurt spouses and shoot friends. Josh confirmed at trial that he would have “absolutely not” let Petitioner in if he knew what he intended. So Petitioner lacked consent.

The Court should affirm Petitioner’s conviction and sentence on all grounds.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the law regarding burglary, the Confrontation Clause, and the rules of evidence raised here—like relevance and hearsay—and are well-established and the facts here are clear, this case does not warrant Rule 19 or Rule 20 oral argument. The Court can decide it on the briefs, and it is appropriate for a memorandum decision.

STANDARD OF REVIEW

“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. 1, *State v. Kaufman*, 227 W. Va. 537, 711 S.E.2d 607 (2011) (cleaned up). This Court does “not substitute [its] judgment for the circuit court’s.” *Shafer v. Kings Tire Serv., Inc.*, 215 W. Va. 169, 177, 597 S.E.2d 302, 310 (2004). Under the abuse-of-discretion standard, this Court draws a line “between the unsupportable and the merely mistaken” decision—reversal is proper only for truly “unsupportable” decisions. *State ex rel. First State Bank v. Hustead*, 237 W. Va. 219, 225, 786 S.E.2d 479, 485 (2015) (cleaned up). Put differently, the Court does not “reverse merely because

it would have come to a different result in the first instance.” *Benjamin v. Sparks*, 986 F.3d 332, 345 (4th Cir. 2021). This Court is so deferential because “evidentiary and procedural rulings, perhaps more than any others, must be made quickly, without unnecessary fear of reversal, and must be individualized to respond to” each case’s specific facts. *McDougal v. McCammon*, 193 W. Va. 229, 235, 455 S.E.2d 788, 794 (1995).

While the standard of review of a lower court’s “disposition of a motion for judgment of acquittal” as *de novo*, “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. Sites*, 241 W. Va. 430, 437, 825 S.E.2d 758, 765 (2019). Finally, the lower court’s rulings on new-trial motions are also reviewed under the abuse-of-discretion standard and, thus, are “entitled to great respect and weight”—reversed only “when it is clear that the trial court has acted under some misapprehension of the law or the evidence.” *State v. Vance*, 207 W. Va. 640, 643, 535 S.E.2d 484, 487 (2000) (cleaned up). As always, questions of law are subject to *de novo* review, and factual findings are subject to the clearly erroneous standard. *Id.*

ARGUMENT

I. The circuit court properly admitted photographs of Petitioner’s racist tattoos under West Virginia Rules of Evidence 401, 402, 403, and 404.

The circuit court properly admitted photographs of Petitioner’s swastika and Aryan tattoos as evidence of his motive in murdering black man Darren Salaam.

A. Petitioner’s tattoos were relevant.

Pictures of Petitioner’s racist tattoos were admissible under Rules 401 and 402. Under those rules, relevant evidence—anything that tends “to make a fact more or less probable than it would be without the evidence”—is generally admissible. W. Va. R. Evid. 401(a), 402. Here, the

pictures made it more likely that race was part of Petitioner’s motive in killing Darren. (Another motivation was, of course, related to drugs. App. 458 (prosecutor explaining State’s theory).²) When Petitioner raised the tattoo issue under Rule 403 before trial, the State explained “the issue with that one is motive, and one would be to the Defendant’s perception that he needed to use self defense.” Suppl. App. 36-37. The circuit court agreed, holding that the pictures’ “probative value [was] not substantially outweighed by the prejudicial value.” Suppl. App. 38.

Petitioner’s motive was a relevant issue generally given the intentional element of the murder charge and became even more important because Petitioner argued self-defense.³ Remember, he admits he shot and killed Darren; he only disputes *why* he did it. *See Cox v. Commonwealth*, No. 2002-CA-1932-MR, 2003 WL 22358796, at *1 (Ky. Ct. App. Oct. 17, 2003) (once the defendant raised a self-defense claim, “the critical issue at trial” became “not what he had done ... but why”). Petitioner therefore cannot complain that the State focused its witnesses, evidence, and theory of the case on answering that *why*.

Indeed, state appellate courts across the country agree that “[e]stablishing a racial motive” is “significant for the State” whenever it bears the burden of proving that a defendant did not kill “in self-defense.” *State v. Rosenbaum*, 882 S.E.2d 180, 188 (S.C. Ct. App. 2022); *see also State v. Pagano*, 882 S.W.2d 326, 331 (Mo. Ct. App. 1994) (“Although motive is not an element of the offense charged,” in a self-defense case, “motive became important”); *People v. Pertsoni*, 218 Cal. Rptr. 350, 354 (Cal. Ct. App. 1985) (holding that in self-defense case, “[e]vidence of his motive”

² “[T]he law recognizes that there may be multiple motives for human behavior; thus, a specific intent need not be the actor’s sole, or even primary purpose.” *United States v. Dixon*, 191 F. Supp. 3d 603, 610 n.3 (S.D. W. Va. 2016) (quoting *United States v. Technodyne LLC*, 753 F.3d 368, 385 (2d Cir. 2014)).

³ Of course, the jury did not need to find specific intent or motive to convict Petitioner of felony murder. *See State v. Sanders*, 241 W. Va. 590, 593, 827 S.E.2d 214, 217 (2019). Petitioner’s motive was instead relevant because the State *also* argued traditional murder—including first- and second-degree murder and voluntary and involuntary manslaughter. App. 494, 497-98.

“was critically important”). Federal circuit courts say the same. *See, e.g., Wakaksan v. United States*, 367 F.2d 639, 645-46 (8th Cir. 1966) (“By arguing self-defense the appellant’s possible motives and mental attitude toward the victim become especially important.”); *United States v. Puff*, 211 F.2d 171, 175 (2d Cir. 1954) (holding “motive was highly important for” the “self-defense” claim). More generally, racist comments can tend to show motive in all sorts of cases, including murder cases. *See, e.g., Barclay v. Florida*, 463 U.S. 939, 948-49 (1983) (noting the “racial motive for the murder” and saying the judge can take these motivations into account in the sentencing phase). And because of that, “[b]ias against a particular subset of people would ordinarily be considered fair game in a murder trial.” Josephine Ross, *Cops on Trial: Did Fourth Amendment Case Law Help George Zimmerman's Claim of Self-Defense?*, 40 SEATTLE U. L. REV. 1, 33 (2016). In the Texas “trial of John William King for the murder of James Byrd,” for example, the court admitted “the defendant’s racist tattoos” because the prosecution argued “that this proved a racial motive in the killings.” *Id.*

Evidence tending to show race-based motive was thus relevant to the State’s case. A juror might wonder how Petitioner’s anger (initially directed at Tiffany) could so quickly and fatally transfer to Darren. Darren’s connection to the drug sale might explain it. But evidence about Petitioner’s views toward people of other races could contribute, too. The tattoos’ permanent nature adds to Petitioner’s in-the-moment comments to make a race-based motive more likely.

Petitioner does not disagree. He argues only that his views were irrelevant here because he did not know Darren was in the house until right before he shot him. Pet’r’s Br. 9-10 (saying he did not “have time to act based on” Darren’s “race” because he “became aware” of Darren’s “skin color” only when he saw Darren pointing a gun at him). And certainly, he was entitled to argue that defense to the jury. He testified during his direct and re-direct examinations he did not

know Darren was at the McCunes. App. 422, 440-41. But that testimony only undercuts the State's theory; it doesn't show the State failed to clear relevance's relatively low bar that made the evidence admissible in the first place. To do that, Petitioner would have to show that race couldn't have been a motivating factor, and the evidence does not support that strong a claim. When on cross-examination the prosecutor confronted Petitioner with Josh's contrary testimony, Petitioner admitted he'd seen Darren at the house the night before when he bought drugs. App. 437-38.

B. Petitioner's tattoos did not violate Rule 403.

The photos were also admissible under Rule 403, which says a court can "exclude relevant evidence if its probative value is substantially outweighed by a danger of ... unfair prejudice." W. Va. R. Evid. 403. This Court reviews a Rule 403 decision "in the light most favorable to admission, maximizing its probative value and minimizing its undue prejudicial impact." *United States v. LaFond*, 783 F.3d 1216, 1222 (11th Cir. 2015). Applying that standard here, the circuit court did not abuse its discretion in finding that the evidence's probative value outweighed its potential for undue prejudice.

Petitioner argues that the tattoos were unfairly prejudicial because the State did not use them to "identify" Petitioner or identify "self-defense injuries." Pet'r's Br. 13-14. But Petitioner never explains—nor could he—how those are the only purposes for which the evidence could be relevant. Indeed, he recognizes that the State used the tattoos to "paint [Petitioner] as a man who possessed no regard for the victim's life on account of perceived racist tendencies." *Id.* In other words, the State used this evidence to show motive. And as explained above, that purpose made the evidence relevant. So Petitioner has to show that the circuit court got Rule 403's balancing wrong. He cannot.

Petitioner's tattoos were highly probative. In addition to the authorities above about the value of race-based evidence to show motive, other out-of-state authorities help here, too. In

McCallum v. State, for instance, the defendant was found guilty of homicide after the court admitted evidence of his Aryan Brotherhood membership. 311 S.W.3d 9, 11 (Tex. App. 2010). Like this case, on appeal, the defendant argued that the evidence of his racist affiliations was inadmissible under the state version of Rule 403; the prosecutor was trying to use it to paint him as a bad person. *Id.* at 14-15. But the Texas court disagreed, explaining that Rule 403 applies only to “unfairly prejudicial” evidence, and the evidence of the defendant’s racist-gang membership was relevant “to explain to the jury why [the defendant] would engage in an unprovoked attack.” *Id.* at 15. Without that evidence, “the jury would have been less able to understand [the defendant’s] anger.” *Id.* at 16. The same is true here. Petitioner’s tattoos made it more likely the jury could have concluded that the victim’s race was part of why Petitioner was willing to escalate so quickly to deadly violence.

So too under West Virginia authorities. In *State v. Hypes*, 230 W. Va. 390, 395, 738 S.E.2d 554, 559 (2013), for example, where the defendant was found guilty of operating a clandestine drug lab, the Court affirmed admitting a defendant’s statement that he knew how to cook meth and enjoyed it. Because the statement showed he had the motive and opportunity to cook meth, its probative value was “significant and substantially outweighed any danger of unfair prejudice.” *Id.* Evidence of motive to kill is significantly probative here as well. *See also, e.g.,* Kenneth S. Broun et al., *Bad character as evidence of criminal conduct—General rule of exclusion for other crimes—Permissible uses that are not true exceptions—Motive*, in 1 MCCORMICK ON EVID. § 190.5 (8th ed. July 2022 update) (saying that “motive may be probative of . . . malice”).

Petitioner’s tattoos were not unfairly prejudicial. Remember that “any evidence that would undermine [Petitioner’s] defense is,” in some sense, “prejudicial.” *United States v. Davis*, 636 F.3d 1281, 1299 (10th Cir. 2011). So the question is not whether the evidence hurts or prejudices

Petitioner’s defense (admittedly, it does), but whether that prejudice is *unfair*. The answer here is no. Petitioner complains the State used his tattoos to show his racist views—but that’s precisely the point of motive evidence. That is also why it is not quite right to say the evidence encouraged the jury to condemn Petitioner for being a racist, *contra* Pet’r’s Br. 15; it helped explain why Petitioner killed Darren. Like the *McCallum* defendant’s tattoos, Petitioner’s tattoos were instead *fairly* prejudicial. Because this evidence was highly probative and not unfairly prejudicial, Petitioner cannot show the circuit court abused its “broad discretion” under Rule 403 in admitting it. Syl. pt. 2, *Hatcher v. McBride*, 221 W. Va. 5, 650 S.E.2d 104 (2006) (cleaned up).

And that conclusion is especially true because the jury had similarly prejudicial evidence before it already. Petitioner is not appealing the circuit court’s admission of his statements that whites need to stick together and “all this over a n*****.” So this is not a case where excluding the evidence would have kept the jury from any evidence of Petitioner’s racial views. Because the jury already had highly similar evidence before it, any additional prejudice from the tattoos was minimal—or at least much less likely to drive the scales in his favor in a Rule 403 challenge.

Both Petitioner’s cases are inapplicable here, too. First, in *State v. Atkinson*, __ Ohio St. 3d __, 2010-Ohio-2825, __ N.E.2d __, at ¶¶ 2 & 6 n.2, a prisoner assaulted a prison guard, who then called the prisoner “a n*****.” That comment couldn’t come in as impeachment evidence under Rule 403. *Id.* ¶¶ 6, 9. But *Atkinson* is not helpful here because it was the *victim* who said the racial slur—not the aggressor as in this case. The court explained that a comment from the victim responding to the attack does not help understand how the attack started—substantial prejudicial value outweighed minimal probative value. *Id.* ¶ 9. But here, Petitioner was the aggressor and placed his motivation at the heart of the case with his self-defense theory. *State v. Stein*, 193 Wash. App. 1003 (2016), suffers from the same flaw. There, a black man killed a white

man with a swastika tattoo and was convicted of second-degree murder. *Id.* at *8. Again, the racist tattoo was on the victim, not the aggressor; the reason it became even “minimally relevant” was because the defendant claimed self-defense from a potentially racially motivated attack. *Id.* at *7. In those circumstances, the lower court did not err in deeming the potential for prejudice great enough to outweigh that minimal value. *Id.* at *8. But especially when viewed under the deferential abuse-of-discretion standard, it is difficult to say whether the same court would have *reversed* the lower court had it decided to allow it—making it poor support for Petitioner’s argument that the lower court here committed reversible error in a case with much great probative value at stake.

C. Petitioner’s tattoos did not violate Rule 404.

Rule 404(b)(1) says that evidence 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.” W. Va. R. Evid. 404(b)(1). The tattoos were not crimes or prior bad acts. Rule 404(b) also does not apply to evidence admitted for another purpose—including, as here, to show “motive.” *Id.*

First, a tattoo is not a crime, wrong, or other act, so “the admissibility of the tattoo is not properly analyzed under” Rule 404(b). *State v. White*, No. ___, 2017 WL 3084711, at *2 (Del. Super. Ct. July 20, 2017); *see also, e.g., People v. Tillman*, No. 307901, 2013 WL 951269, at *2 (Mich. Ct. App. Feb. 19, 2013) (saying Rule 404 “does not apply because a tattoo is not an act”); *State v. Mediz*, No. 2 CA-CR 2012-0455, 2014 WL 5391985, at *1 n.1 (Ariz. Ct. App. Oct. 22, 2014) (“A tattoo, however, is not a crime, wrong, or an act.”). Even Petitioner seems to agree with this when he argues that “a tattoo does not constitute a crime or wrong.” Pet’r’s Br. 16.

Second, even if Rule 404(b) applied, Petitioner *also* emphasizes that the State introduced the tattoos to show that this crime was “racially motivated” and “to prove a racial motive.” Pet’r’s

Br. 16; *see id.* at 17 (noting that the State was trying to both show the jury this murder was “spurred by hatred” and that it “argue[d] racial motivation”). As a result, Rule 404(b)(2) provides an exception to Rule 404(b)(1)’s default rule. W. Va. R. Evid. 404(b)(2) (“This evidence may be admissible for ... proving motive.”). Because the “State presented detailed, specific purposes for the” tattoos, “establishing explanations and rationales for” its admission—that is, because they were admitted “for a legitimate purpose”—there was no abuse of discretion. *State v. Newcomb*, 223 W. Va. 843, 869, 679 S.E.2d 675, 701 (2009).⁴

The tattoo photographs were properly admitted under the rules of evidence. And even if they were not, that admission would have been harmless because the jury did not convict Petitioner of intentional murder, so Petitioner cannot show the result of the trial would have been different without the challenged photographs. The State was entitled to put on its full case, including its intentional-murder theory. But the jury rejected the intentional-murder theory and convicted him instead of felony murder—that is, unintentional, nonmotivated murder. So that admission was because the jury convicted on a theory that just required intent to commit some crime.

II. The circuit court correctly admitted Darren Jr.’s 911 call under Rules 401, 402, 403, 801, 802, and 803.

A. The Court should reject Petitioner’s challenge to the 911 call because he did not include in the appendix either the 911 call or a transcript of it and, thus, failed to comply with W. Va. R. App. P. 10(c)(7).

West Virginia Rule of Appellate Procedure 10(c)(7) requires briefs to include “appropriate and specific citations to the record on appeal.” This Court “may disregard errors that are not adequately supported by specific references to the record on appeal.” W. Va. R. App. P. 10(c)(7).

⁴ Petitioner did not preserve this Rule 404 argument below. So not only must he show the circuit court erred, but under the plain-error analysis, this error must be clear and obvious. Syl. pt. 8, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Petitioner fails to clear that high hurdle here.

Petitioner asks the Court to hold that the 911 call was not relevant or probative, that it was highly prejudicial, and that it was inadmissible hearsay. But he has failed to include that call in any way in the appendix—even in transcript form. All Petitioner’s 911-call arguments require a fact-intensive analysis of the call itself: his hearsay arguments involve the present-sense-impression and excited-utterance hearsay exceptions, which depend in part on what the declarant is seeing and feeling; his Rule 403 argument relies on the degree of emotion on the call; and his relevance argument relies on the exact words Darren Jr. spoke about his father’s injury. This “dearth of” evidence “makes it impossible for this court to find error and is fatal to Petitioner’s” assignment of error. *In re Visitation of L.M.*, 245 W. Va. 328, 335, 859 S.E.2d 271, 278 (2021).

This Court has repeatedly said when “the absence of supporting facts” makes it impossible to meaningfully apply the law, it will “declin[e] to address [the offending] assignment of error.” *Anthony C. v. Sarah C.*, No. 22-637, 2023 WL 6857317, at *1 (W. Va. Supreme Court, Oct. 18, 2023) (quoting *State v. Harris*, 226 W. Va. 471, 476, 702 S.E.2d 603, 608 (2010)) (cleaned up). Put another way, the “failure to comply with Rule 10(c)(7)” will “waive[]” issues on appeal. *State v. Trail*, 236 W. Va. 167, 186, 778 S.E.2d 616, 635 (2015) (citing *Evans v. United Bank, Inc.*, 235 W. Va. 619, 629, 775 S.E.2d 500, 510 (2015) (applying waiver)).

The Court has done just that time and again. In *Brumfield v. McComas*, No. 22-0037, 2023 WL 1798562, at *4 n.8 (W. Va. Supreme Court, Feb. 7, 2023), for example, this Court held that even though the Petitioner claimed he had included “video recordings of the family court hearings,” it could “not find any such recordings in the appendix.” The Court therefore took “as non-existing all facts that do not appear in the appendix record and ignore[d] those issues where the missing record is needed to give factual support to the claim.” *Id.* (quoting *State v. Honaker*, 193 W. Va. 51, 26 n.4, 454 S.E.2d 96, 101 n.4 (1994)) (cleaned up). And similarly, in *William L.*

v. Cindy E.L., 201 W. Va. 198, 201, 495 S.E.2d 836, 839 (1997), the Court refused to disturb the ruling below because while some in-camera testimony was included, there was not a “sufficient record to justify appellant’s contentions.” Finally, take *State v. Wolford*, No. 12-1326, 2013 WL 4726548, at *3 (W. Va. Supreme Court, Sept. 3, 2013), where—just like Petitioner here—the petitioner argued the circuit court improperly admitted under Rules 401 and 403 a “911 call made by the victim’s” family member. The petitioner failed to satisfy his burden by backing up his arguments with record citations—and, in fact, it looked like the 911 call was not even in the appendix—so the Court applied Rule 10(c)(7) and held his arguments meritless. *Id.* (citing syl. pt. 2, *W. Va. Dep’t of Health & Hum. Res. Emps. Fed. Credit Union v. Tennant*, 215 W.Va. 387, 599 S.E.2d 810 (2004)). Because Petitioner, too, failed to include the 911 call, he has not met his burden to “provide the court with a record which substantiates” his assignments of error. *Donna Kaye M. v. Justin Elliot M.*, 197 W. Va. 264, 269, 475 S.E.2d 356, 361 (1996) (cleaned up).

The Court should disregard his 911-call arguments under Rule 10(c)(7).

B. The circuit court correctly applied the relevant rules of evidence.

i. The 911 call was relevant.

Even if this Court considers Petitioner’s arguments on the merits, the circuit court still properly admitted it.

The 911 call was relevant under Rules 401 and 402. Consider just a few of the many important facts the call makes more likely even under Petitioner’s (unsupported) account of what the call includes: that the Salaams were at the McCunes’ house; that Petitioner shot Darren; that Darren lived for a time after being shot; that Darren Jr. was nearby when Petitioner shot his father; and that Petitioner immediately left the scene.⁵ That alone is enough for relevance, but the call

⁵ Of course, Petitioner’s counsel’s representations do not substitute for the call itself. *Contreras-Mejia v. Barr*, 815 F. App’x 694, 699 n.5 (4th Cir. 2020) (saying “unsupported assertions in briefs are not evidence”

does more. Through confirming these facts and others, it corroborates the testimony of several other important State witnesses—like Josh, Kelsea, and Colton, and law enforcement officers—and its length corroborates when law enforcement arrived on the crime scene. That corroboration aspect is important because testimony that bolsters other relevant evidence is relevant on that ground alone. See *United States v. Katsipis*, 598 F. App'x 162, 164 (4th Cir. 2015); *United States v. Delfino*, 510 F.3d 468, 471 (4th Cir. 2007). In *State v. Marinitsis*, 130 W. Va. 613, 621, 45 S.E.2d 733, 737 (1947), for example, the Court said that certain testimony was properly admitted because it was offered “in corroboration of” other relevant evidence regarding the “whereabouts of the accused,” which “is nearly always relevant.” See also *State v. McCoy*, 219 W. Va. 130, 137, 632 S.E.2d 70, 77 (2006) (noting court abuses “discretion when it excludes the testimony of witnesses who would corroborate relevant facts”).

Petitioner disagrees with that analysis, arguing that the call is not relevant because Darren Jr. had “no personal knowledge of any important details” of the shooting. Pet’r’s Br. 18. In other words, Darren Jr.’s testimony is not relevant because he “did not see” the fatal shot itself. *Id.* at 19. This is an unworkably narrow view of relevance. Consider just the highlights of Darren Jr.’s testimony. Darren Jr. had been in the house for hours before the murder, seeing and hearing interactions. He knew both that his father did not have a gun and that he met Petitioner carrying only a curtain-rod-like object—both bits of evidence relevant to the self-defense claim. And he heard Petitioner’s entire time through the house—from crashing through the front door to pistol whipping Tiffany to screaming at her to shooting his father. He also had knowledge of the shooting itself: Petitioner writes in his brief that Darren Jr.’s “description of the alleged event” to the 911 operator “was that his father had been shot and was bleeding.” Pet’r’s Br. 21. That Darren Jr.’s

(citing *INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984))). But because there is no call in the Appendix, if the Court reviews this claim on the merits, Petitioner’s counsel’s description is the best it can do.

personal knowledge came from his ears rather than eyes does not make it less relevant: “eyewitness or ear-witness testimony” are both “forms of direct evidence.” *United States v. Wills*, 346 F.3d 476, 497 (4th Cir. 2003); *see also Juniper v. Davis*, 74 F.4th 196, 250 (4th Cir. 2023); 92 AM. JUR. PROOF OF FACTS 3D *Proof of Reliability of Eyewitness and Earwitness Testimony* § 379 (Dec. 2023 update).

ii. The 911 call was proper under Rule 403.

Petitioner did not object to the 911 call on Rule 403 grounds, just relevance grounds, App. 102-03, so this argument should “not be considered on appeal.” Syl. pt. 9, *State v. Shrewsbury*, 213 W. Va. 327, 582 S.E.2d 774 (2003). If the Court is inclined to consider it, it would review under the demanding plain-error test: Petitioner must show “(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.

First, the circuit court did not err—let alone “clear[ly]” or “obvious[ly].” Syl. pt. 8, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. This call was uniquely probative because it was an important piece of the prosecutor’s narrative puzzle. The *Old Chief* case provides the governing framework here. *See State v. Jackson*, 248 W. Va. 504, 510, 889 S.E.2d 77, 83 (2023) (applying *Old Chief*). The prosecution is “entitled to prove its case by evidence of its own choice”—including by telling “a colorful story with descriptive richness.” *Old Chief v. United States*, 519 U.S. 172, 186-87 (1997). Evidence has “force beyond any linear scheme of reasoning.” *Id.* So as the State’s “pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences ... necessary to reach an honest verdict.” *Id.* Indeed, a full “evidentiary account” can “accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance.” *Id.* A prosecutor can thus put on evidence “as much to tell a story of guiltiness as to support an inference of guilt” by proving the

bare elements. *Id.* at 188. Also, there is a “need for evidence in all its particularity to satisfy the jurors’ expectations.” *Id.* Some of these expectations jurors bring with them, and others “arise in jurors’ minds simply from the experience of a trial itself.” *Id.* at 188-89. So using “witnesses to describe a train of events naturally related can raise the prospect of learning about every ingredient of that natural sequence the same way.” *Id.* at 189. Building on *Old Chief*, this Court has said when jurors’ “expectations are not satisfied,” they “may penalize the party who disappoints them by drawing a negative inference against that party.” *State v. Harris*, 230 W. Va. 717, 722-23, 742 S.E.2d 133, 138-39 (2013) (cleaned up). And because the prosecution bears the burden of persuasion, it “needs evidentiary depth to tell a continuous story”—which means “*res gestae*” evidence is vitally important in many trials. It enables the factfinder to see the full picture so that the evidence will not be confusing and prevents gaps in a narrative of occurrences which might induce unwarranted speculation.” *Id.* (cleaned up).

So the prosecutor here was entitled to tell the narrative of Darren’s death using the 911 call. Perhaps it was not strictly necessary to show the naked elements of burglary and murder—but that does not matter. The prosecutor is allowed to tell a “colorful story with descriptive richness.” *Old Chief*, 519 U.S. at 187. The 911 call is the bridge between the narrative’s climax (the shooting) and its final action (the investigation and man hunt). Without that call, it is harder to bring the State’s various pieces of evidence together to build narrative momentum. *See United States v. Garland*, 320 F. App’x 295, 305 (6th Cir. 2008) (accepting certain evidence because it was “difficult to imagine” how a witness’s story “could have retained any narrative integrity without” it). Yes, the 911 call included emotion—but *Old Chief* says this sort of full evidentiary account is important to establish the “human significance” of events and tell the story of

“guiltiness” rather than just show bare, abstract elements. This is one of those “many trials” where *res gestae* evidence helps tell a continuous story with evidentiary depth.

Also, remember the context of the 911 call: the uncontroverted testimony paints a picture of the fatally wounded Darren having just the strength to throw himself out of a window and crawl across the yard, while Colton, a distraught Kelsea and Tiffany, and an inconsolable Darren Jr. rush out to help him. Every single person tracking with this intense narrative is going to be asking: “What happens next?” No one is going to be satisfied if the next piece of the story is law enforcement and first responders materializing out of thin air. Every juror is going to assume they found out through a 911 call—but who called 911? what did the caller say? did they drop any hints or share details? If Petitioner called 911 that would matter greatly; and if Darren Jr. did not, that would matter, too. Everyone knows 911 calls are recorded, jurors might say—so what gives? These are precisely the sorts of “expectations” *Old Chief* insisted prosecutors could satisfy. It would be wrong to—as *Harris* worried—allow the jury to “penalize” the prosecutor by speculating or drawing negative inferences from this “gap[] in [the] narrative.” *Harris*, 230 W. Va. at 722-23, 742 S.E.2d at 138-39.

This case is like *United States v. Sunmonu*, 859 F. App’x 431, 434 n.3 (11th Cir. 2021), where the court used *Old Chief* to hold that evidence of the defendant reaching for his gun was relevant and admissible although he admitted he possessed a firearm (the bare element). The court reasoned that it was not “required to measure the amount of evidence necessary for a conviction and then to strictly limit the government’s evidence to that amount.” *Id.* So too here. Ultimately, Petitioner’s “apparent willingness to concede certain facts, including” among other things all the details of how his “victim was [shot and died],” does not make Darren Jr.’s 911 call “irrelevant.” *United States v. Patrick*, 513 F. App’x 882, 887 (11th Cir. 2013). That the State could have proved

how law enforcement arrived, other details around Darren’s death, and Darren Jr.’s whereabouts with other evidence does not “negate” its relevance. *Id.* This evidence was properly admitted under Rules 401 and 402. *See United States v. Rezaq*, 134 F.3d 1121, 1137 (D.C. Cir. 1998) (rejecting attempt to force State to present evidence of death a certain way).

Nor was this call unfairly prejudicial. The call’s factual content is not prejudicial because everyone agrees Darren was shot and died. This is like *Browning v. Hickman*, 235 W. Va. 640, 647, 776 S.E.2d 142, 149 (2015), where the Court allowed a 911 call into evidence under Rule 403 when the 911 call’s central fact—that a red truck pulled out in front of a car—was “undisputed.” Similarly, Darren Jr.’s central statement—that his dad was shot and dying—was undisputed. Because the factual content was “fairly innocuous,” *id.*, it was not prejudicial under Rule 403. Petitioner responds that it’s not just what Darren Jr. said—it’s how he said it. Letting the jury hear Darren Jr. “sobbing uncontrollably” was too prejudicial—as evidenced by jurors’ tears. Pet’r’s Br. 19. But evoking jury tears does not alone make testimony prejudicial: “Indeed, a certain level of emotion is to be expected when relatives of a murder victim” testify about their experience—more, as here, if they were with the murder victim as they died. *State v. Gill*, 167 S.W.3d 184, 196 (Mo. 2005). The State agrees that listening to a child sob as he watches his father die will create emotion. But just how emotional—and thus how prejudicial—testimony may be is highly fact-specific, so failing to include the 911 call for the Court’s review is fatal. This Court can hardly assess the intensity of Darren Jr.’s emotion without hearing the call itself. In any event, there is no sense—either from the transcript or Petitioner’s brief—that there was a “genuine risk that the emotions of the jury [were] excited to irrational behavior.” *State v. Donley*, 216 W. Va. 368, 376, 607 S.E.2d 474, 482 (2004) (cleaned up). More generally, emotion does not always come across on a paper record well, which is why appellate courts trust the trial court on these questions. *See*

State v. Benoit, 363 A.2d 207, 213 (R.I. 1976) (saying whether a “witness’ displays of emotion are so frequent and so intense that they produce” too much “passion and prejudice” must be left to the trial judge).

So the lower court did not abuse its discretion in finding that the call’s probative value was not outweighed by prejudice—much less clearly and obviously err. So even if this Court would have decided the Rule 403 issue differently, Petitioner would still lose because any error was not “so conspicuous that the trial judge and prosecutor were derelict in countenancing it.” *State v. Marple*, 197 W. Va. 47, 52, 475 S.E.2d 47, 52 (1996).

Second, admitting the call did not affect Petitioner’s substantial rights because it did not affect “the outcome of the proceedings in the circuit court.” Syl. pt. 9, *Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). The 911 call was relevant and narratively important for the reasons given above. Yet the jury would have certainly convicted without the call. Petitioner’s self-defense argument was weak, and as explained above it contradicted other witnesses at all the crucial points. Petitioner also repeatedly contradicted his own story at trial and in the police report, and he told a different tale than everyone else and the physical evidence. The jury convicted Petitioner because he admitted to killing Darren and the only evidence supporting his self-defense claim was his flawed, incredible testimony—not because Darren Jr. cried on the 911 call.

Third, erroneously admitting the 911 call would not have seriously affected the fairness, integrity, or public reputation of the trial. For the reasons given above, the evidence was relevant and highly probative and not prejudicial—so fairness and integrity were not violated. And if anything, a 911 call is exactly the sort of evidence the public expects to hear at a criminal trial. Finally, Petitioner does not contest the two facts he says Darren Jr. told the 911 operator: that

Darren had been shot and was bleeding out. It is hardly unfair to share two noncontroversial, admitted facts with the jury.

Petitioner fails to show the court plainly erred or that this alleged error affected his substantial rights or the trial's fairness. The Court should deny the first assignment of error.

iii. The 911 call did not violate Rules 801 and 802.

Petitioner did not raise hearsay objections to the 911 call below, so (again, if the Court considers this point at all) the same plain-error analysis applies here. The circuit court properly admitted Darren Jr.'s statement on the 911 call—"that his father had been shot and was bleeding," Pet'r's Br. 21—under the present-sense-impression and excited-utterance hearsay exceptions.

Present-sense impression. Generally, 911 calls are admissible as a present-sense impression, *Navarette v. California*, 572 U.S. 393, 399-400 (2014), and this case is no exception. Rule 803(1) says a present-sense impression is "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." Darren Jr. made the 911 call moments after his father was shot and while he watched him bleed out. Petitioner does not disagree that the 911 call meets the time and descriptive requirements of Rule 803(1). Pet'r's Br. 21. Rather, he argues that Darren Jr.'s statement that Darren had been shot was not within Darren Jr.'s personal knowledge. *Id.* It is true that Darren Jr. didn't physically see the shooting. But again, he watched his dad leave the bedroom, heard a gunshot a few moments later, and saw his dad bleeding out a few moments after that; and Darren explicitly told Darren Jr. he'd been shot. That counts as perceiving the shooting because "[w]e perceive events with our ears as much as with our eyes." *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 323 (4th Cir. 1982).

Excited utterance. 911 calls generally come in under the excited-utterance exception, too. *See Navarette*, 572 U.S. at 399-400. An excited utterance is "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."

W. Va. R. Evid. 803(2). Darren getting shot was a “startling event”; and Petitioner admits Darren Jr.’s 911 call consisted largely of “uncontrollable sobbing and confusion,” Pet’r’s Br. 21, which is textbook “stress of excitement.”

Because the 911 call satisfies these two hearsay exceptions, there was no error—let alone a clear or obvious error. And for the same reasons mentioned above, Petitioner cannot show that the 911 call substantially affected the trial or threatened its fairness or integrity.

III. Tiffany McCune’s admitted statements do not violate the Confrontation Clause or the hearsay rules.

Petitioner’s second assignment of error flows from this bit of Parkersburg Police Officer Anthony Deskin’s testimony: on May 30, 2021, at 2:23 p.m., the Parkersburg 911 dispatcher sent Officer Deskins to the McCune house in response to Darren Jr.’s 911 call. App. 106. He was the initial first responder on the scene. App. 108. After he arrived, he began walking towards the back porch of the house where Darren lay dying. App. 107. He saw Colton holding Darren, Tiffany and Kelsea pacing, and Darren Jr. standing nearby. *Id.* Tiffany immediately began walking towards him, and they met in the middle of the backyard. App. 108. Like everyone else, Tiffany was “frantic” and “emotional.” *Id.* Officer Deskins asked her no questions and did not approach her. App. 109. Tiffany volunteered that Petitioner had “pistol whipped” her “and then shot Darren.” *Id.* Officer Deskins then secured the house. App. 111. At trial, Petitioner objected to this testimony on Sixth Amendment Confrontation Clause and hearsay grounds; the Court overruled the objections. App. 109-10. It was right to do so.

A. Admitting Tiffany’s statement did not violate the Confrontation Clause.

The Confrontation Clauses in the federal and West Virginia Constitutions “bar[] the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.”

Syl. pt. 1, *State v. Jako*, 245 W. Va. 625, 862 S.E.2d 474 (2021) (cleaned up). Tiffany was not at trial and Petitioner did not get to cross-examine her, so the question is whether her challenged statement was testimonial. *In re C.B.*, 245 W. Va. 666, 675, 865 S.E.2d 68, 77 (2021) (saying only testimonial statements trigger the Confrontation Clause). Tiffany’s statement was not testimonial because she intended it to address two ongoing emergencies, she offered it spontaneously in an informal setting and not in response to questioning, and because it was an excited utterance.

This Court follows the federal Supreme Court in defining “testimonial” statements using a “‘core class’ of testimonial materials that may be broadened by use of the ‘primary purpose’ test.” *State v. Kennedy*, 229 W. Va. 756, 765, 735 S.E.2d 905, 914 (2012). These core materials are chiefly “ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations” and the resulting statements or confessions, depositions, affidavits, and “prior testimony . . . , or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.” *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004). Tiffany’s statement was none of those: it was a spontaneous, unprovoked exclamation with no trappings of officiality. So Petitioner must show that the statement satisfies the primary-purpose test, which asks “whether the evidence was for the purpose of establishing or proving some fact at trial.” *Kennedy*, 229 W. Va. at 766, 735 S.E.2d at 915 (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-11 (2009)) (cleaned up). The ultimate question is whether the witness gave the statement with the “primary purpose of creating an out-of-court substitute for trial testimony.” *Ohio v. Clark*, 576 U.S. 237, 250-51 (2015). Or as this Court has phrased the test: a statement “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial” is testimonial. Syl. pt. 8, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006). This analysis focuses on the “statement,” syl. pt. 10, *id.*,

and is “flexible and inherently fact-based,” *id.* at 376, 633 S.E.2d at 321. The circumstances surrounding Tiffany’s unprompted statement to the responding officer objectively show that she did not primarily intend for her statement to create material for trial.

First, Tiffany’s testimony addressed ongoing medical and safety emergencies. This Court has said that a statement is not testimonial if it is intended to help police “meet an ongoing emergency.” Syl. pt. 9, *Mechling*, 219 W. Va. 366, 633 S.E.2d 311. When Tiffany accosted Officer Deskins, there were two ongoing emergencies: Darren was bleeding out just feet away, and Officer Deskins had no idea who or where the shooter was. The circumstances here “objectively indicate” that Tiffany was trying to get Darren medical help and explain the situation so Officer Deskins could prevent additional harm. She was also explaining why she was injured. *See State v. Bazar*, No. 14-0916, 2015 WL 7628722, at *3 (W. Va. Supreme Court, Nov. 20, 2015) (holding that a victim’s statement given to an officer just arriving on scene and explaining why she was hurt counted as an “ongoing emergency”). Ultimately, nothing indicates she was trying to “establish or prove past events potentially relevant to later criminal prosecution.” *Kaufman*, 227 W. Va. at 551, 711 S.E.2d at 621.

The most analogous case, though, is *Michigan v. Bryant*, 562 U.S. 344 (2011). The federal Supreme Court found an emergency after ticking through several facts—all of which have close parallels here. Like the *Bryant* victim, nothing Tiffany said “indicated that the cause of the shooting was a purely private dispute or that the threat from the shooter had ended.” *Id.* at 372. Nor did either one share the “motive for the shooting.” *Id.* at 373. Nor did either explain “whether the threat was limited to” them. *Id.* So like *Bryant*, the emergency here “stretche[d] more broadly” and “encompasse[d] a threat potentially to the police and the public.” *Id.* Also like Petitioner, *Bryant* tried to argue that because the shooter was not immediately present, there was no

emergency. But the Court in *Bryant* refused to limit “ongoing emergencies” to “the violent act itself”; like Petitioner, the shooter was still armed and on the loose, so there was still an active emergency. *Id.* at 373-374. Finally, the police in *Bryant*, just like Officer Deskins here, did not know “the location of the shooter” when the declarant spoke. *Id.* at 374. In short, because “there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded” Darren near “the location where the police found” him, Tiffany’s statement was not testimonial. *Id.*

Petitioner argues that the emergency was over because EMS were on their way. Pet’r’s Br. 21. This narrow view of “ongoing emergencies” runs smack into *Bryant*’s expansive understanding of shooting-related emergencies. And it contradicts this Court’s broad, liberal use of that term, too. Take *O’Dell*, where this Court held that a suicide victim’s note was not testimonial. *O’Dell v. Ballard*, No. 13-0220, 2013 WL 6152368, at *1-3 (W. Va. Supreme Court, Nov. 22, 2013). The Court refused to “objectively characterize” the “circumstances” around the note “as nonemergency.” *Id.* at *3. The note was not trying “to establish or prove past events potentially relevant to later criminal prosecution,” but instead trying to “bring closure to a number of events in his life,” it explained. *Id.* And in *Kaufman*, the Court held non-testimonial a domestic violence victim’s diary entries written over several weeks—again, because nothing in the facts showed there was not an “ongoing emergency.” *Kaufman*, 227 W. Va. at 551, 711 S.E.2d at 621. Tiffany’s statement was far more emergent than either of those nontestimonial pieces of evidence: it was given while Darren was dying, before EMS arrived, to the first officer she saw, before the officer knew who or where the shooter was, and while Petitioner was still potentially nearby. It simply was not “objectively apparent that the emergency ha[d] passed.” *Mechling*, 219 W. Va. at 377, 633 S.E.2d at 322; *see also Clark*, 576 U.S. at 246 (saying an “ongoing emergency” can

include wondering sometime during a school day whether to give a preschooler back to a potentially abusing parent at the end of that day).

Further, Petitioner’s narrow focus misses the ongoing *safety* emergency. “[O]fficers called to investigate ... need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.” *Davis v. Washington*, 547 U.S. 813, 832 (2006) (cleaned up). In shooting situations, until the police get those facts, it is almost certainly an ongoing emergency. *See id.* (noting that responding officers “often” receive “nontestimonial statements”). In *Smith v. New York*, No. 20-cv-9708, 2023 WL 359568, at *22 (S.D.N.Y. Jan. 20, 2023), for example, the court held a 911 caller’s description of the perpetrator’s clothing nontestimonial because it was intended to resolve “the exigent emergency, specifically assisting police in apprehending the shooter as quickly as possible.” This case is exactly like *Philpot v. State*, 709 S.E.2d 831, 838-39 (Ga. Ct. App. 2011), where a still-shaken-up burglary victim described the burglar and his actions to the first responding officer. The court held that nontestimonial because the burglar was armed and had “just left the scene”; so even though he was not “immediately threaten[ing]” the victim, that he was on the loose meant he still posed “a serious potential threat to the prior victim and her neighbors. *Id.* at 839. Petitioner here was not immediately present, but he could still have been nearby posing a threat to Tiffany and her friends. Because Tiffany’s statement was “intended to describe current circumstances that required immediate police action”—“securing a crime scene and determining whether an armed killer might still be in the vicinity”—it addressed an ongoing emergency and, thus, was not testimonial. *McCord v. State*, 825 S.E.2d 122, 127 (Ga. 2019).

Second, Tiffany volunteered her statement to police in an informal setting. That a statement is made to an officer outside an interrogation is good evidence it isn’t intended to replace

trial testimony. *Kaufman*, 227 W. Va. at 551, 711 S.E.2d at 621; *see also Clark*, 576 U.S. at 244-45. If statements don't flow from an interrogation, courts are hesitant to call them testimonial. *United States v. Bowen*, 511 F. Supp. 3d 441, 448 (S.D.N.Y. 2021). Even more when the declarant offers the information unprompted: Indeed, some States have a general rule that "spontaneous statements to the police are not testimonial." *Villanueva v. State*, 576 S.W.3d 400, 405 (Tex. App. 2019). So in *State v. Warsame*, 735 N.W.2d 684, 692 (Minn. 2007), for example, when an injured domestic violence victim walked to a police department to report the crime, the court held that non-interrogation statement nontestimonial—even though the whole purpose of the statement was to form the basis for a criminal investigation. Here, an injured Tiffany approached Officer Deskins voluntarily, at the scene instead of after-the-fact, and without "the structure and formality of an official interrogation"—so the case against finding it testimonial is even clearer than in *Warsame*.

Third, that Tiffany's statement counts as an excited utterance, *infra* Section III(b), is strong proof it is not testimonial. In *Melendez-Diaz*, 557 U.S. at 324, the Court noted that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial." And that includes excited utterances. *Bryant*, 562 U.S. at 362. That is because, "[b]y their nature," excited utterances "are 'made for a purpose other than use in a prosecution.'" *Leach v. Collado*, No. 18-cv-3427, 2023 WL 4138360, at *6 (E.D.N.Y. June 22, 2023) (quoting *Bryant*, 562 U.S. at 362 n.9). The excited-utterance and testimonial-statement analyses are closely linked: the former "focuses on whether the declarant was under the stress of a startling event," and the latter asks "whether a reasonable declarant, similarly situated (that is, excited by the stress of a startling event), would have had the capacity to appreciate the legal ramifications of her statement." *United States v. Brito*, 427 F.3d 53, 61 (1st Cir. 2005). So while establishing that a statement falls into a hearsay exception does not resolve Confrontation Clause concerns on its own, it provides strong

evidence the court is dealing with something outside the testimonial realm. Here, the evidence shows Tiffany was distraught, easily satisfying the excited-utterance test. *See* Section III(b). The Court should therefore hold Tiffany’s statement nontestimonial.

But even if her statement was testimonial, its admission was harmless for two reasons. *See In re C.B.*, 245 W. Va. at 675, 865 S.E.2d at 77 (“Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.” (cleaned up)).

First, Petitioner does not challenge Josh’s identical testimony on Confrontation Clause grounds.⁶ Remember that when police were lining up witnesses on the sidewalk, Tiffany told Josh that Petitioner had pistol whipped her and shot Darren. App. 333-34. In other words, the jury heard Tiffany’s second-hand account (that time through Josh’s testimony) about both of those crimes anyway. So even if this Court assumes, “arguendo, that [Tiffany’s] statements were testimonial, their admission was harmless given the State’s other evidence at trial.” *State v. Shingleton*, 237 W. Va. 669, 684, 790 S.E.2d 505, 520 (2016).

⁶ Any Confrontation Clause objection here would have been dead on arrival. Statements to nongovernmental persons—especially when they are family or a friend—are not testimonial. *See Crawford*, 541 U.S. at 51 (saying “casual remark[s] to an acquaintance” are not testimonial). Federal and state courts consistently reject these objections. *See, e.g., Clark*, 576 U.S. at 249; *Giles v. California*, 554 U.S. 353, 376 (2008); *United States v. Benson*, 957 F.3d 218, 230 (4th Cir. 2020); *United States v. Berkman*, 433 F. App’x 859, 863-64 (11th Cir. 2011); *Garnett v. Morgan*, 330 F. App’x 671, 672 (9th Cir. 2009); *United States v. Franklin*, 415 F.3d 537, 545 (6th Cir. 2005); *United States v. Hernandez*, 571 F. Supp. 3d 1217, 1222 (E.D. Okla. 2021). West Virginia is no different. This Court has said that *Crawford* does not extend to “statements to non-official and non-investigatorial witnesses, made prior to and apart from any governmental investigation.” *State v. Ferguson*, 216 W. Va. 420, 423, 607 S.E.2d 526, 529 (2004) (the witness was declarant’s friend); *see also State v. Bowling*, 232 W. Va. 529, 545, 753 S.E.2d 27, 43 (2013) (sister). Because Tiffany’s comment was “made to [her] loved one[,]” it was “not the memorialized, judicial-process-created evidence” *Crawford* applies to. *State v. Henson*, 239 W. Va. 898, 910, 806 S.E.2d 822, 834 (2017). Sharing with Josh would not “lead an objective witness” in Tiffany’s position to reasonably believe her “statement would be available for use at a later trial.” *Id.* So there is no argument that her statements to Josh were testimonial.

Second, Petitioner admitted both these facts at trial: “Q. You admitted that you did hit Tiffany McCune in the head, correct? A. Yes,” App. 431, and “Q. ... you admit you shot Darren Salaam, Sr., right? A. Yes, ma’am,” App. 427. In *In re C.B.*, this Court explained that because of the petitioner’s other admissions supporting the disputed fact, any Confrontation-Clause error in admitting the suspect evidence “was harmless beyond a reasonable doubt.” 245 W. Va. at 675, 865 S.E.2d at 77 (cleaned up). That rule makes sense: The Clause protects defendants’ right to confront witnesses against them to cast doubt on their testimony. A defendant who personally confirms the same facts has little need to invoke that right. Or take *State v. Bruffey*, where the circuit court had allowed a police officer to testify about a conversation with a bank-robbery witness. 231 W. Va. 502, 507, 745 S.E.2d 540, 545 (2013). The Court said that even if the witness’s statement was testimonial, the error was harmless beyond all reasonable doubt because, among other things, the petitioner did not deny the information and other evidence corroborated it. *Id.* at 513, 745 S.E.2d at 551. This case is even easier because Petitioner admitted the same facts in Tiffany’s statement directly. So “any Confrontation Clause violation” here “would have been harmless.” *United States v. Common*, 563 F. App’x 429, 435 (6th Cir. 2014) (noting that other testimony established the disputed fact).

B. Tiffany’s statement satisfies the hearsay rules.

Petitioner argues that even if Tiffany’s statement is not testimonial, the circuit court still should have excluded it because it lacked “adequate indicia of reliability.” Pet’r’s Br. 24. But Petitioner fails to mention that “evidence [that] falls within a firmly rooted hearsay exception” satisfies that requirement. *Kaufman*, 227 W. Va. at 552, 711 S.E.2d at 622 (cleaned up); *see also State v. Bouie*, 235 W. Va. 709, 718, 776 S.E.2d 606, 615 (2015) (noting that nontestimonial statements “needed only to satisfy ‘a firmly rooted hearsay exception’ in order to be properly admitted” (quoting syl. pt. 4, *Kaufman*, 227 W. Va. 537, 711 S.E.2d 607)). In fact “no independent

inquiry into reliability is required when the evidence falls within a firmly rooted hearsay exception.” *State v. Pettrey*, 209 W. Va. 449, 457, 549 S.E.2d 323, 331 (2001) (emphasis added). That rule ends Petitioner’s reliability challenge because Tiffany’s statement was an excited utterance, which is one of the firmly rooted hearsay exceptions. *See White v. Illinois*, 502 U.S. 346, 355-357 (1992); *State v. Kennedy*, 229 W. Va. 756, 762, 735 S.E.2d 905, 911 (2012) (noting that this Court has “adopt[ed]” *White* on Confrontation Clause issues); accord Christopher B. Mueller & Laird C. Kirkpatrick, *Admissible hearsay—“Firmly rooted” exceptions and other statements that pass constitutional muster*, in 4 FED. EVID. § 8:31 (4th ed. Aug. 2023 update).

The Court uses a three-part test for excited utterances: “(1) the declarant must have experienced a startling event or condition; (2) the declarant must have reacted while under the stress or excitement of that event and not from reflection and fabrication; and (3) the statement must relate to the startling event or condition.” Syl. pt. 1, *Ferguson*, 216 W. Va. 420, 607 S.E.2d 526 (cleaned up). After the circuit court conducted an in-camera review using this test, it found that Tiffany’s statements satisfied the excited utterance exception. App. 317-326. It explained first that Tiffany had “clear[ly]” experienced a “startling event.” App. 325. Second, Josh’s testimony that Tiffany was “terrified and shaking, a nervous wreck, was not calm at all” showed that she was still “under stress or excitement without reflection or fabrication” when she talked to the officer. *Id.*; *see also id.* at 318 (Josh testifying that Tiffany “was terrified. . . . She was shaking. She was just like a nervous wreck, the body language. She was not calm at all”; *id.* at 332 (calling Tiffany “[f]rantic, really nervous, upset, shaking”—“definitely not calm”). And third, Tiffany’s statement plainly relates to the pistol whipping and Darren’s shooting. So her testimony was admissible. *Id.*

The circuit court got all that right. First, Tiffany had just been pistol whipped by Petitioner, audibly witnessed Darren’s shooting, and was watching him slowly die—those are (putting it mildly) startling events. Second, Josh’s uncontroverted testimony shows these startling events deeply emotionally and physically affected her. App. 325; *see also id.* at 288 (saying Tiffany was “freaking out” and “[f]rantic” after the shooting); *id.* at 290 (describing Kelsea and Tiffany as “freaking out ... panicking,” “pacing,” and “in tears”). This is precisely the sort of emotional reaction that satisfies the excited utterance test. *See State v. Dennis*, 216 W. Va. 331, 350, 607 S.E.2d 437, 456 (2004) (noting a sufficient foundation for excited utterance exception was laid when the witness testified that the declarant was “hysterical, screaming. She was crying. Sweat was running off her where you could just tell she was upset, and she just—like I said, hysterical”). And third, Tiffany’s statements related to the events, straightforwardly describing them. This is like the excited utterance in *State v. Farmer*, 185 W. Va. 232, 236-37, 406 S.E.2d 458, 462-63 (1991), where the victim of a shooting who was still “in an agitated state and was suffering from” his “wound to the forehead” told his friend and a police officer within minutes of the attack. Or like *State v. Surbaugh*, 230 W.Va. 212, 225, 737 S.E.2d 240, 253 (2012), where a shooting victim recounted his story “almost immediately after he was shot” while he was still receiving medical treatment, and his statement related “to the identity of the person who” did the shooting. Because the record shows that the statements here “were made by a person in an emotionally upset condition, just minutes after a frightening event,” and nothing “suggest[s] fabrication,” this was an excited utterance. *Ferguson*, 216 W. Va. at 423, 607 S.E.2d at 529.

IV. The circuit court properly denied Petitioner’s motions for post-verdict judgment of acquittal and a new trial because consent to entry is no defense to burglary, and Petitioner exceeded the scope of consent, so he was a burglar regardless.

Petitioner’s third and fourth assignments of error advance a single argument: he couldn’t have burgled the McCunes’ house because he “was always a welcome guest” and even “trusted”

with “the keypad entry” code. Pet’r’s Br. 31. This, he says, gave him “continuous authority to enter and remain at the residence.” *Id.* In other words, he couldn’t have burgled because the McCunes consented to him being there, and thus couldn’t have been convicted of felony murder.

Petitioner’s argument fails because in West Virginia consent is no defense to burglary; and even if it were, Petitioner far exceeded the scope of his consent.

Consent is no defense. West Virginia’s definition of burglary is simple: breaking and entering a house, *or* entering without breaking, with the intent to commit a crime. W. Va. Code § 61-3-11; *see also* App. 497 (reciting this same language); Pet’r’s Br. 29 (same). That statutory language includes no requirement “that the entry must be by force or that it must be against the will of the occupant.” *Plumley*, 181 W. Va. at 688, 384 S.E.2d at 133. Indeed, under any state statute that defines “burglary as an entry without breaking with intent to commit a criminal offense”—as West Virginia’s does—“it is uniformly held that consent to enter is not a defense” to burglary. *Id.* at 688-689, 384 S.E.2d at 133-134; *see also State v. Slater*, 222 W. Va. 499, 504, 665 S.E.2d 674, 679 (2008) (saying “consent ... is not an absolute defense to a charge of burglary”). The State’s witnesses’ testimony, and the prosecutor’s theory of the case, showed beyond a reasonable doubt that Petitioner entered the McCunes’ house intending at least to get drugs and attack Tiffany—if not shoot Darren, too. *Supra*, at 3-4. That’s enough for the burglary predicate. So the Court can dispose of assignments of error three and four on that ground alone.

Petitioner exceeded the scope of consent. Even if consent were a viable defense, Petitioner far exceeded the scope of consent. Authorities have recognized for hundreds of years that someone who lawfully enters a residence can burgle if they exceed the original scope of the homeowner’s consent. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *226-27 (many scope-exceeding behaviors “have been adjudged burglarious, though there was no actual breaking; for the law will

not suffer itself to be trifled with by such evasions”). As this Court said in *Plumley*: “The statutory requirement of entry is also fulfilled when a person with consent to enter exceeds the scope of the consent granted.” Syl. pt. 1, 181 W. Va. 685, 384 S.E.2d 130. That is the standard rule nationwide. *See, e.g., State v. Lopez*, 908 N.W.2d 334 (Minn. 2018); *Van Cannon v. United States*, 890 F.3d 656, 665 (7th Cir. 2018); *Jones v. State*, 843 So. 2d 946, 948 (Fla. Dist. Ct. App. 2003); *State v. Upchurch*, 421 S.E.2d 577, 588 (N.C. 1992); *State v. Allen*, 579 A.2d 1066, 1074 (Conn. 1990); *People v. Drake*, 527 N.E.2d 519, 520 (Ill. App. Ct. 1988); *Jones v. Commonwealth*, 349 S.E.2d 414, 417 (Va. Ct. App. 1986); *Commonwealth v. Corbin*, 446 A.2d 308, 311 (Pa. Super. Ct. 1982).

Here, *contra* Pet’r’s Br. 31, Petitioner plainly exceeded the scope of the McCunes’ consent. No person consents to any and all behavior by guests—especially not violent behavior toward friends and loved ones. So Petitioner cannot reasonably argue the McCunes had consented to him pistol whipping Tiffany and killing Darren. In fact, during Josh McCune’s testimony the prosecutor asked him directly if he consented to Petitioner coming into his home to confront and hit Tiffany or shoot Darren. Josh responded: “Absolutely not. I would have never allowed anything like that. ... No.” App. 300-01. And the prosecutor pointed this out during the portion of his rebuttal closing that addressed the scope of consent: “Josh testified, he told you, ‘Yes, we were friends. He could come and go.’ We asked him, ‘Would you have consented, would you have allowed him to come in if you knew that he was coming in to ... pistol whip your wife, and shoot Darren?’ No, obviously not.” App. 539. What’s worse, Petitioner’s counsel praised Josh’s testimony on the witness stand as dependable. *See, e.g., App. 525* (“[Josh] was sitting there honoring the oath that he took before you and before this Court to tell the truth”). And he specifically commended Josh’s testimony to the jury on the burglary point. App. 535. The jury listened, finding Petitioner guilty of felony murder with the predicate of burglary.

This case is like *State v. Salmons*, No. 21-0424, 2023 WL 7276668, at *1 (W. Va. Supreme Court, Nov. 3, 2023), where the Court upheld a burglary conviction because the defendant exceeded the scope of the owner’s consent. In *Salmons*, the homeowners’ son invited a couple acquaintances including the defendant over to drink and shoot pool; while there, defendant stole thousands of dollars’ worth of items. *Id.* Just like Petitioner here, the defendant asserted “that as an invited guest,” she “could not have been convicted of burglary.” *Id.* at *3. But that argument both in *Salmons* and here “flies directly in the face of” *Plumley*. *Id.* Stealing isn’t playing pool, the Court said, and because the defendant exceeded the scope of consent, she had burgled. *Id.* at *4. Similarly, Petitioner was invited over to do get high and hang out. Pistol whipping Tiffany and shooting Darren isn’t that. So he far exceeded the scope of his consent. The Court should affirm Petitioner’s felony murder conviction with its burglary predicate. *Sites*, 241 W. Va. at 437, 825 S.E.2d at 765.

CONCLUSION

The Court should affirm the lower court.

Respectfully submitted,

PATRICK MORRISEY
ATTORNEY GENERAL

/s/ Frankie Dame
Frankie Dame (WV Bar # 14401)
Assistant Solicitor General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305-0220
Email: Frankie.A.Dame@wvago.gov
Telephone: (304) 558-2021
Facsimile: (304) 558-0140

Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-478

VICTOR LEE THOMPSON,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

CERTIFICATE OF SERVICE

I, Frankie A. Dame, do hereby certify that the forgoing Brief of the State of West Virginia is being served on all counsel of record by email and File & Serve Xpress this 26th day of January, 2024.

/s/ Frankie A. Dame

Frankie A. Dame

Assistant Solicitor General