IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-535

STATE OF WEST VIRGINIA,

Respondent,

v.

RANDY C. CAIN,

Petitioner.

BRIEF OF RESPONDENT

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INTRODUCTION

Petitioner Randy Cain is requesting this Court reverse two of his convictions due to inadmissible hearsay, but he did not object to some of the hearsay, and the hearsay was all admissible under hearsay exceptions in Rule 803. Petitioner further asserts the circuit court committed reversible error for refusing Petitioner's proposed jury instruction on out-of-court statements despite the circuit court adequately instructing the jury on out-of-court statements. The circuit court committed no error and the August 15, 2023, sentencing order should be affirmed.

ASSIGNMENTS OF ERROR

Petitioner argues the circuit court abused its discretion by admitting out-of-court statements of the victim and refusing Petitioner's proposed jury instruction on out-of-court statements. Pet'r's Br. 1.

STATEMENT OF THE CASE

Beginning at some time between November 2021 and March 2022, Petitioner and his elderly, ill, and infirm mother, Brenda McClellan, lived together in a remote location in Cabell County, West Virginia. App. 168-69, 175, 509-10. After a few months of co-habitating, Petitioner pistol whipped and kicked his mother with steel toed boots injuring both of her legs. App. 174-175, 208-09, 511-13, 515-16. Petitioner refused to take his mother to the hospital because he was worried that he would go to jail if he did so. App. 211.

After a few days, Ms. McClellan left a voicemail on her sister, Anita Vasquez's, cell phone stating Petitioner had pistol whipped her and fired a shot in the house and she needed the police to come to the house. App. 174-75, 208-09, 514. Ms. Vasquez contacted local law enforcement, who initially refused to go to the house because Ms. McClellan had not contacted them herself. App. 175, 208-09. Ms. Vasquez, however, met with the deputies at a local Exxon station and played the

voicemail recording for law enforcement who determined there was probable cause sufficient for them to go to Petitioner's home and investigate. App. 175, 208-09.

Cabell County Deputy Nate Rogers and Deputy (now State Trooper) Dakota Render went to Petitioner's home. App. 208-09. Upon arrival, Deputy Rogers stayed with Petitioner on the front porch while Trooper Render went inside to speak with Ms. McClellan. App. 210. Trooper Render could see the victim through the front glass screen door and she looked distraught and upset and was crying. App. 210. Ms. McClellan gave Trooper Render a statement that Petitioner had been abusing her for several days, kicked her on the legs with steel-toed boots, hit her with some kind of club or bat, hit her on the head with the butt end of a pistol, and fired a shot in the home. App. 211.

After Petitioner was placed under arrest, Ms. Vasquez was allowed to come to the scene to talk with Ms. McClellan and assist with her injuries. App. 175-76, 212. Ms. McClellan told Ms. Vasquez that Petitioner had struck her in the head with a pistol. App. 179.

Subsequently, Cabell County Deputy Jacob Bailey obtained a search warrant and found two pistols and five rifles in Petitioner's bedroom. App. 292-93, 306, 324-26, 330-33, 345-46, 351-53, 364-66. The two pistols from Petitioner's bedroom were admitted into evidence although no forensic evidence was taken from either pistol. App. 345-46, 360-62. No guns were found in the victim's bedroom or in the living room. App. 304, 367. Further, Dale Mosley, digital forensic analyst for the West Virginia State Police, testified he downloaded screenshots of digital videos taken from a surveillance system at the crime scene. App. 371-74. Three screen shots dated March 21 and 22, 2022, were downloaded by Mr. Mosley showing Petitioner wearing a pistol sidearm at the crime scene the day before, and the day of, the alleged March 22, 2022, incident. App. 379-84.

The State submitted photographic evidence and testimony from Deputy Bailey that a television was found in the home with a hole in it that looked like a bullet hole. App. 340-343, 354-56, 358. Upon cross-examination, Deputy Bailey admitted that no forensic analysis was offered to confirm the hole was made by a bullet that matched the guns found in Petitioner's bedroom. App. 359.

The victim, Brenda McClellan, was deposed for evidentiary purposes on June 2, 2023, due to poor health. App. 504-33. Counsel for Petitioner participated in the evidentiary deposition of Ms. McClellan. App. 504-33. Ms. McClellan died prior to the start of trial on June 23, 2023. App. 19.

Petitioner did not testify at trial, called no witnesses, and offered no evidence other than some of the victim's medical records. App. 200-03, 393, 524-25. Petitioner was found guilty by a jury on five of the six charges in the Indictment. App. 469-74. On August 7, 2023, the circuit court sentenced Petitioner to two-to-ten years of incarceration for malicious assault, which was enhanced to four-to-ten years under the recidivist enhancement of West Virginia Code § 61-11-18; six years of incarceration for use or presentment of a firearm during the commission of a felony; twelve months in jail for domestic battery; three years of incarceration for wanton endangerment; and three years of incarceration for being a person prohibited from possessing a firearm. App. 469-72, 486-87. The jury acquitted Petitioner of the unlawful restraint charge. App. 470. Some of the sentences were ordered to run consecutively and some were to run concurrently. App. 486-87.

This appeal concerns only the convictions for malicious assault and wanton endangerment involving the use of a firearm and is based on the jury hearing portions of the out-of-court statements of Ms. McClellan which were included in the testimony of Anita Vasquez and Trooper

Render. Pet'r's Br. 1. Petitioner also appeals the circuit court's refusal to give a separate limiting instruction regarding Ms. McClellan's out-of-court statements.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

SUMMARY OF ARGUMENT

Petitioner did not object in the circuit court when Anita Vasquez testified regarding out-of-court statements of the victim, Brenda McClellan. Petitioner has waived any hearsay objection to that testimony and any plain error analysis does not permit Petitioner to prevail on appeal. The circuit court correctly allowed Trooper Dakota Render to discuss a separate out-of-court statement from Ms. McClellon pursuant to Rules 803(1) and (3) of the West Virginia Rules of Evidence. Petitioner offers no rebuttal argument or authority in the Petition. The content of Petitioner's requested jury instruction was adequately addressed in the circuit court's standard charge and jury instructions and no abuse of discretion occurred when Petitioner's proposed jury instruction was refused. Reviewing all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution, and crediting all inferences and credibility assessments that the jury might have drawn in favor of the prosecution, shows sufficient evidence to support the present jury verdict.

This Court should affirm.

STANDARD OF REVIEW

The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion. *State v. Brooks*, 214 W. Va. 562, 591 S.E.2d 120 (2003); *State v. Harris*, 216 W. Va. 237, 605 S.E.2d 809 (2004).

Issues arising from jury instructions have a two-part review. "As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo.*" *State v. Hoard*, 248 W. Va. 428, 437, 889 S.E.2d 1, 10 (2023) (citing syl. pt. 1, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996)).

ARGUMENT

I. Out-of-court statements of the victim, Brenda McClellan, were correctly received without objection and were admissible hearsay pursuant to Rules 803(1) and (3) of the West Virginia Rules of Evidence.

A. Anita Vasquez's testimony was received without objection.

"It is well settled law that an objection must be raised below to preserve an error or that error is waived." *Edwin W. v. Mutter*, No. 21-0419, 2023 WL 356199, at *2 (W. Va. Supreme Court, Jan. 23, 2023) (memorandum decision); *see* syl. pt. 10, *State v. Bragg*, 140 W. Va. 585, 87 S.E.2d 689 (1955) (holding that "[a]n error in the admission of evidence not objected to by the defendant is deemed waived by him"); *State v. Larock*, 196 W. Va. 294, 315-17, 470 S.E.2d 613, 634-36 (1996) (discussing the "raise or waive" rule and the discretionary and limited application of the plain error doctrine). Because of this long-standing provision of law, this Court should find Petitioner's claim in his first assignment of error waived.

Anita Vasquez testified that her sister, Brenda McClellan, told her at the scene that Petitioner had struck her in the head with a pistol. App. 179-80. Petitioner admits that he did not object to the out-of-court statement which he now challenges as error. App. 179, 404-06. A photograph of the victim's head wound was authenticated by Ms. Vasquez, admitted into evidence, and published to the jury without objection. App. 179. Rule 103(a) of the West Virginia Rules of Evidence requires that a party claiming error in a ruling to admit evidence must timely object to the evidence or move to strike the evidence. W. Va. R. Evid. 103(a). Petitioner did neither. This

Court has advised litigants that the procedural requirements of Rule 103(a) are mandatory. *Reed v. Wimmer*, 195 W. Va. 199, 204 n.4, 465 S.E.2d 199, 204 n.4 (1995).

Here, it was not until after the photograph was published to the jury that Petitioner interposed a hearsay objection to the next question and answer by Ms. Vasquez. App. 180. The circuit court sustained that objection but Petitioner did not move to strike Ms. Vasquez's prior testimony. App. 180. This failure prevents Petitioner from succeeding on appeal. This Court has "recognize[d] that there are situations in which it is impossible to object to an improper question before the witness responds" but "when this situation occurs the trial attorney must object as soon as possible and move to strike the witness's response to the improper question." *Voelker v. Frederick Bus. Props. Co.*, 195 W. Va. 246, 255, 465 S.E.2d 246, 255 (1995) (citing 1 FRANKLIN D. CLECKLEY, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS § 1-7(D) (3d. ed. 1994)).[1] "If the trial attorney fails to move to strike, then the ruling of the trial judge is not preserved for appellate review." *Id.* In *Voelker*, the defendant's counsel made an objection to certain testimony but failed to move to strike the testimony. This Court ruled the defendant failed to preserve the issue for appellate review. *Id.* Such is the case here.

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[1] "After the question is answered, an objection alone is insufficient unless accompanied by a motion to strike the answer." *Id.*

> If, the trial court having responded by so instructing the jury, the objector should still consider that the interests of his client have been irremediably prejudiced and that the actions of the trial court, although favorable, have not been effective in removing from the minds of the jury the prejudicial effect of the objectionable matter, then a motion must be made at the time for a mistrial...Timely objections, followed by appropriate and timely motions, are necessary to preserve such points on appeal.

Reed, 195 W. Va. at 204 n.4, 465 S.E.2d at 204 n.4 (citing *Anderson v. Jaeger*, 317 So.2d 902, 906-07 (Miss. 1975)).

It is undisputed that Petitioner did not object, on any basis, to Ms. Vasquez's testimony involving Ms. McClellan's statement that Petitioner hit her on the head with a gun and fired a shot in the home. App. 179-180, 404-06. Thereafter, Petitioner objected to similar testimony. App. 180, 406. Petitioner also never requested the circuit court to strike that initial hearsay testimony of Ms. Vasquez. W. Va. R. Evid. 103(a)(1)(A). In fact, the circuit court was not requested to do anything. An error in the admission of evidence not objected to by the defendant is deemed waived by him. *Edwin W.*, 2023 WL 356199, at *2 (quoting syl. pt. 10, *Bragg*, 140 W. Va. 585, 87 S.E.2d 689). When a defendant fails to object to inadmissible evidence at trial, he forfeits the right to assign error on appeal and the appellate court may review arguments only for plain error. *State v. Marple*, 197 W. Va. 47, 51, 475 S.E.2d 47, 51 (1996). Therefore, Petitioner has waived any objection to the out-of-court statement of Ms. McClellan and may not now challenge that hearsay testimony unless he invokes the plain error rule. *State v. Miller*, 194 W. Va. 3, 18, 459 S.E.2d 114, 129 (1995).

B. Petitioner cannot succeed even if this Court reviews his argument under plain error.

This Court discussed the "raise or waive" rule in *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613, and explained why issues not preserved below "do not merit serious appellate consideration," *id.* at 316, 470 S.E.2d at 635. In *LaRock*, the Court noted that an unpreserved error can only be reviewed under the plain error doctrine. *Id.* "Even then, errors not seasonably brought to the attention of the trial court will justify appellate court intervention only where substantial rights are affected." *Id.* Petitioner has not asserted plain error in the Petition. Nevertheless, should this Court choose to lift the procedural bar and review Petitioner's hearsay contentions, it must do so under plain error.

"The 'plain error' doctrine grants appellate courts, in the interest of justice, the authority to notice error to which no objection has been made." *Miller*, 194 W. Va. at 18, 459 S.E.2d at 129; *see also* W. Va. R. Crim. P. 30, 52. Historically, the "plain error" doctrine authorizes the appellate court to correct only "particularly egregious errors" that seriously affect the fairness, integrity or public reputation of judicial proceedings. *Miller*, 194 W. Va. at 18, 459 S.E. 2d at 129. "Plain error warrants reversal 'solely in those circumstances in which a miscarriage of justice would otherwise result'" *Id.* (citing *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)). Plain error is defined as (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. *Id.*

Where a party must rely on plain error review, that party is obligated to cite plain error law and make an argument applying that law. Petitioner does not assert or argue plain error in his Petition. "An assertion of plain error on appeal pursuant to [appellate rules] requires defendant to cite authority defining the relevant standard and to apply that standard to the specific facts of the case at hand." *State v. McMillian*, 588 S.E.2d 585 (N.C. Ct. App. 2003) (Table) (text available at 2003 WL 22704263, at *4). In the absence of such citation and argument, a plain error claim is waived. *See, e.g.*, *State v. Davis*, No. 11-1775, 2013 WL 1501435, at *4 (W. Va. Supreme Court, Apr. 12, 2013) (memorandum decision) ("Petitioner fails to list the elements of a plain error analysis or to argue how the circuit court's alleged failure to give a self-defense instruction comports with those elements. We find no error."); *State v. Erin S. T.*, No. 15-1195, 2016 WL 6819049, at *12 (W. Va. Supreme Court, Nov. 18, 2016) (memorandum decision) ("On appeal, petitioner concedes that defense counsel failed to object to the admission of this evidence at the time it was presented and, in a footnote, states simply that 'this Court would review under a plain error standard.'") Petitioner fails to make any further argument in support of plain error or to

adequately brief the issue for review. This Court has repeatedly cautioned that, in the absence of supporting authority, it will not further review alleged errors that have not been adequately briefed. *State v. Hoke*, No. 17-0912, 2018 WL 4944414, at *4 n.3 (W. Va. Supreme Court, Oct. 12, 2018) (memorandum decision) ("It should also be noted that petitioner fails to cite any authority concerning plain error, the standard for obtaining relief under this doctrine, or otherwise apply such authority to the facts of his case."). Here, Petitioner's omissions are fatal to his Petition and this Court should affirm the circuit court.

Importantly, Petitioner "bears the burden or persuasion" on each of the four prongs of the plain error standard including the burden of proving prejudice. *State v. Todd C.*, Nos. 21-0969 & 22-0278, 2023 WL 7179191 (W. Va. Supreme Court, Nov. 1, 2023) (memorandum decision); *see also Lowery v. United States*, 3 A.3d 1169, 1173 (D.C. 2010); *United States v. Hall*, 625 F.3d 673, 684 (10th Cir. 2010).

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

Todd C., 2023 WL 7179191, at *15.

Regarding the first two prongs, Ms. Vasquez testified regarding the out-of-court statement of Ms. McClellan without objection. Petitioner's counsel also never moved to strike the out-of-court statement nor requested a limiting instruction by the circuit court. Therefore, there was no error, plain or otherwise. Nevertheless, if Petitioner had objected to Ms. Vasquez's testimony, the circuit court would have been correct in allowing the out-of-court statement of Ms. McClellan to be heard by the jury because, similar to the testimony of Trooper Render discussed *infra*, it met the requirements of West Virginia Rule of Evidence 803(1) and (3) and was excepted from the rule against hearsay.

Ms. McClellan's statement to Ms. Vasquez falls into the category of present sense impression under Rule 803(1) of the West Virginia Rules of Evidence. An out-of-court statement can be admitted under the "present sense impression exception" if "(1) The statement was made at the time or shortly after an event; (2) the statement describes the event; and (3) the event giving rise to the statement was within a declarant's personal knowledge." Syl. pt. 10, *State v. Rollins*, 233 W. Va. 715, 760 S.E.2d 529 (2014) (citation omitted). The statement occurred almost immediately following Ms. Vasquez's arrival at the incident scene and following days of abuse and violence which Petitioner inflicted upon Ms. McClellan. Second, Ms. McClellan's statements to her sister summarized the abuse Petitioner inflicted on Ms. McClellan over a several day period. She told Ms. Vasquez that Petitioner had been abusing her for several days, kicked her on the legs with steel-toe boots, hit her with some kind of club or a bat, struck her in the head with the butt end of a pistol, and fired a shot in the home. Third, the statement of Ms. McClellan clearly describes the acts for which Petitioner was convicted and the events giving rise to the statements were within Ms. McClellan's personal knowledge as the victim of the crimes. The circuit court would have been correct to allow Ms. Vasquez's testimony of Ms. McClellan's statement to be heard by the jury because it met the requirements of West Virginia Rule of Evidence 803(1) and was not excluded by the rule against hearsay.

The circuit court could have further relied upon Rule 803(3) to permit Ms. Vasquez to testify regarding the statement of Ms. McClellan. Rule 803(3) allows the admission of hearsay if the statement represents a "then-existing . . . physical condition (such as mental feeling, pain, or bodily health." W. Va. R. Evid. 803(3). The statement of Ms. McClellon met the requirements of a statement of her physical condition because it identified her physical condition caused by the

injuries inflicted upon her by Petitioner and identified the reason she sought rescue and medical assistance from law enforcement.

Moreover, Rule 807 of the West Virginia Rules of Evidence would have allowed admission of this statement. Rule 807 requires that the statement have "guarantees of trustworthiness," be "offered as evidence of a material fact," be "more probative. . . than any other evidence" and, if admitted, "best serve the purposes of these rules and the interests of justice." W. Va. R. Evid. 807(a). This statement meets all four prongs. The statement was made by the victim to her sister almost immediately after Ms. McClellan's injury; the statement is evidence of the material fact of how Ms. McClellan was injured; the statement is probative evidence; and admitting the statement serves the interests of justice. Thus, there was no error in the admission of this evidence, because had Petitioner objected, the evidence was admissible under multiple evidentiary rules.

As to the last two prongs of the plain error standard, there was no violation of Petitioner's substantial rights, as he was permitted to defend the charges as he chose and the out-of-court statement of Ms. McClellan did not affect the fairness, integrity, or public reputation of the judicial proceedings. As to any claim that the admission of this evidence is not harmless error, Respondent contends that the admission of this evidence was not error at all, and, thus, no harmless error analysis is necessary. Thus, Petitioner cannot succeed under the plain error test, and his sentence should be affirmed.

C. Trooper Dakota Render's testimony was correctly excluded from the ban against hearsay pursuant to Rules 803(1) and (3) of the West Virginia Rules of Evidence.

Petitioner also complains that the lower court erred in admitting certain testimony of Trooper Render regarding the use of a firearm. But, the evidence of which he complains was admitted prior to Trooper Render taking the stand, and Petitioner failed to object as noted above.

The victim's sister clearly testified that the victim was hit in the head with a gun. By the time Trooper Render took the stand, the jury already properly had this information.

Petitioner relies upon *State v. Maynard*, 183 W. Va. 1, 393 S.E.2d 221 (1990), to challenge Trooper Dakota Render's testimony regarding Ms. McClellan's out-of-court statements. Pet'r's Br. 7-8. In *Maynard*, this Court stated,

> Generally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules.

Maynard, 183 W. Va. at 4, 393 S.E.2d at 224 (internal citations omitted). *Maynard* does not preclude admission of this evidence.

There were three out-of-court statements of Ms. McClellan relevant to the trial: (1) the out-of-court statement contained in the voicemail recording received by Ms. Vasquez and played for Trooper Render, App. 12-13, 208-09; (2) the statement Ms. McClellan gave to Ms. Vasquez at the scene, App. 179; and (3) the statement Ms. McClellan gave to Trooper Render upon his arrival at the scene, App. 210-11. Prior to trial, pursuant to Petitioner's Motion in Limine, the circuit court ruled the voicemail recording of Ms. McClellan was hearsay and was not admissible at trial. App. 12-13. Accordingly, the State did not play any portion of the voicemail during the trial. App. 12-13. While the circuit court excluded the actual out-of-court statement contained in the voicemail recording, the circuit court allowed Trooper Render to discuss the out-of-court statements of Ms. McClellan contained in the voicemail and the statement she gave Trooper Render at the scene. App. 12-13, 208-11. The circuit court explained that the out-of-court statements were allowed to be heard by the jury pursuant to Rules 803(1) and (3) of the West Virginia Rules of Evidence. App. 215, 406. In other words, Trooper Render was permitted to testify regarding Ms. McClellan's out-

of-court statements under sub-section 3 of *Maynard* because, while hearsay, the statements fell within exceptions provided for by the Rules of Evidence.

Trooper Render testified that the victim, Ms. McClellan, gave him a statement that Petitioner had been abusing her for several days, kicked her on the legs with steel-toe boots, hit her with some kind of club or a bat, hit her on the head with the butt end of a pistol and fired a shot in the home. App. 210-11. Petitioner argues the circuit court erred by allowing Trooper Render to discuss Ms. McClellan's statement under sub-section 1 of *Maynard*. Petitioner's argument is misguided because the circuit court admitted Trooper Render's testimony regarding Ms. McClellan's statements under sub-section 3 of *Maynard* explaining that, while hearsay, they fell within the exceptions contained in Rules 803(1) and (3) of the West Virginia Rules of Evidence. App. 215.

Petitioner's argument that the out-of-court statements were allegedly "elicited under the guise of establishing why the testifying witness acted as they did" applies only to the voicemail recording that was never admitted into evidence or heard by the jury. App. 12-13; Pet'r's Br. 7-8. Notably, in the Petition, Petitioner offers no argument or authority challenging the circuit court's application of Rules 803(1) or (3) to admit the out-of-court statements of Ms. McClellan referenced by Trooper Render in his testimony. Accordingly, the circuit court's ruling on the admissibility of Trooper Render's testimony under Rules 803(1) and (3) of the West Virginia Rules of Evidence should be affirmed.

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

(3) the event giving rise to the statement was within a declarant's personal knowledge." Syl. pt. 4, *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75 (1995).

Applying this exception to the facts at hand, first, both Ms. McClellan's voicemail statement and her in-person statement to Trooper Render occurred during and following days of abuse and violence which Petitioner inflicted upon her. Second, Ms. McClellan's statements summarized the abuse Petitioner inflicted on her over a multi-day period. She told Trooper Render that Petitioner had been abusing her for several days, kicked her on the legs with steel-toe boots, hit her with some kind of club or a bat, struck her in the head with the butt end of a pistol, and fired a shot in the home. Third, the statement of McClellan clearly describes the acts for which Petitioner was convicted and the events giving rise to the statements were within Ms. McClellan's personal knowledge as the victim of the crimes. The circuit court was correct to allow Trooper's testimony of Ms. McClellan's statements to be heard by the jury because they met the requirements of West Virginia Rule of Evidence 803(1) and were not excluded by the rule against hearsay.

The circuit court further relied upon Rule 803(3) to permit Trooper Render to testify regarding the statements of Ms. McClellan. App. 215.

> Under Rule 803(3), a statement which is hearsay is admissible if it is "a statement of the declarant's then existing state of mind, emotion, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)[.]" ...
>
> Statements admissible under Rule 803(3) must relate to the state of mind existing at the time of the communication.

Phillips, 194 W. Va. at 579, 461 S.E.2d at 85.

Here, when he arrived at the scene, Trooper Render could see the victim through the front glass screen door and she looked distraught, upset, and was crying. App. 210. Ms. McClellan gave Trooper Render a statement that Petitioner had been abusing her for several days, kicked her on the legs with steel-toe boots, hit her with some kind of club or a bat, hit her on the head with the

butt end of a pistol and had fired a shot in the home. Statements of physical condition do not have to be made to physicians for them to be admissible. *Phillips*, 194 W. Va. at 580 n.15, 761 S.E.2d at 86 n.15. The circuit court correctly determined that this statement of Ms. McClellon met the requirements of a "statement of present bodily condition" because it identified her physical condition caused by the injuries inflicted upon her by Petitioner and identified the reason she sought rescue and medical assistance from law enforcement. Nevertheless, Petitioner had the opportunity to confront and cross-examine Ms. McClellon during her evidentiary deposition and Petitioner chose not to inquire regarding the presence or use of a gun by Petitioner. App. 519-27.

A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard. Syl. pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998). The circuit court did not abuse its discretion by permitting Trooper Render to testify regarding the statements of Ms. McClellan and the jury's verdict should be affirmed.

II. Petitioner's Jury Instruction No. 10 was correctly refused since it was included in the circuit court standard charge and jury instructions.

Petitioner also asserts error regarding the circuit court's refusal to give a separate limiting instruction regarding Ms. McClellan's out of court statements. Pet'r's Br. 6, 9. Instead, the circuit court read a standard charge and jury instructions that correctly and adequately addressed out-of-court statements of the witnesses. App. 417-18.

Petitioner requested the following limiting Jury Instruction No. 10 be read to the jury:

> The Court instructs the jury that if there were any out-of-court statements, said by a witness, from a person who later testified, the jury is to ignore those statements as they are inadmissible hearsay. The only testimony you should consider of a named witness is that testimony which they have given at trial.

App. 534. The State argued that Defendant's proposed limiting instruction was actually "an eliminating instruction" that advised the jury to disregard all out-of-court statements. App. 406. Petitioner concedes that the vast majority of hearsay was kept out of the trial via Petitioner's motions in limine and trial objections. App. 404-06. The trial transcript reflects that the only hearsay that was admitted was the testimony of Anitia Vasquez, to which Petitioner concedes he never objected, and the testimony of Trooper Render, which the circuit court ruled was excepted from the hearsay rule pursuant to Rules 803(1), (3) of the West Virginia Rules of Evidence. App. 215, 404-07. The circuit court correctly refused to give Petitioner's limiting Jury Instruction No. 10.

Jury instructions are left to the sound discretion of the trial court. It is not error to refuse to give an instruction to the jury, though it states a correct and applicable principle of law, if the principle stated in the instruction refused is adequately covered by another instruction or other instructions given by the circuit court. *Hoard,* 248 W. Va. at 441, 489 S.E.2d at 14. The jury instructions must be reviewed as a whole. *Id.*

Here, the circuit court gave its standard charge and jury instructions which included the following:

> You are instructed that in considering extra-judicial or out-of-court statements, you have the right to take into consideration the circumstances under which they were made, the credibility of the witness or witnesses by whom they are detailed, the condition and circumstances of the party alleged to have made them, and the probability or improbability of such statements, and that you have the right to consider the same in connection with all the evidence in the case.
>
> In a criminal case out-of-court statements of any nature of the accused are admitted into evidence with caution, and the Court instructs you that it is within your province to consider all the circumstances under which the out-of-court statements were made.
>
> You are further instructed that you should consider any such out-of-court statements with caution under all the circumstances and that you are at liberty to

> disregard such out-of-court statements in their entirety or give them such weight as you, the jury, may determine they are entitled to.
>
> You are further at liberty to judge any such out-of-court statements in a manner similar to its consideration of all the other evidence, and you may attach to such out- of-court statement such weight as you see fit.
>
> You are the sole judges of the weight and credit to be given to any such out-of-court statement admitted into evidence by this court.

App. 417-18.

This Court has stated it will be presumed that a trial court acted correctly in giving or in refusing to give instructions to the jury, unless it appears from the record in the case that the instructions given were prejudicially erroneous or that the instructions refused were correct and should have been given. *Maples v. W. Va. Dep't of Com., Div. of Parks*, 197 W. Va. 318, 475 S.E.2d 410 (1996); syl. pt. 1. *State v. Turner*, 137 W. Va. 122, 70 S.E.2d 249 (1952). The failure to give a proffered instruction is not *per se* error, but must be examined in relation to the facts of the case to determine the adequacy of the instructions as a whole and the effect of the omission on the defendant's case under the three-part test announced in Syllabus Point 11 of *State v. Derr,* 192 W. Va. 165, 451 S.E.2d 731 (1994). *LaRock*, 196 W. Va. at 308, 470 S.E.2d at 627. Under the *Derr* test, a circuit court abuses its discretion in failing to give a requested instruction only if "(1) the instruction is correct and is supported by evidence; (2) the court did not address the substance of the instruction in its charge; and (3) the failure to give the instruction seriously impaired a defendant's ability to give an effective defense." *Id.*

"A defendant is not entitled to an instruction of his or her choice if the trial court otherwise adequately instructs the jury on the elements of the crime and any defense raised by the facts." *LaRock*, 196 W. Va. at 309, 470 S.E.2d at 628. Here, the circuit court addressed the substance of Petitioner's Jury Instruction No. 10 in its standard charge and instructed the jury by stating that they could completely disregard any out-of-court statements or attach as much weight and

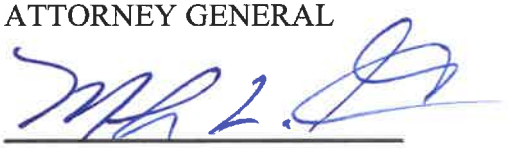
credibility to them to which they believe they are entitled. App. 417-18, 534. The State referenced briefly the out-of-court statements three times in its closing argument. App. 445, 447, 456. Petitioner did not mention the out-of-court statements of Ms. McClellan in his closing argument. App. 448-54. The jury was free to give the out-of-court statements as little or as much weight and credibility as it deemed appropriate. In his closing, in accordance with the circuit court's standard charge and jury instructions, Petitioner had every opportunity to refute the out-of-court statements or convince the jury to disregard the statements but chose to do neither. App. 448-54. The circuit court's standard charge and jury instructions included the substance of Petitioner's Jury Instruction No. 10 and the jury's verdict should be affirmed.

CONCLUSION

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

Respectfully submitted,

PATRICK MORRISEY
ATTORNEY GENERAL



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 23-535

STATE OF WEST VIRGINIA

Respondent,

v.

RANDY C. CAIN,

Petitioner.

CERTIFICATE OF SERVICE

I, Mark L. Garren, do hereby certify that the foregoing Brief of Respondent is being served on counsel of record by File & Serve Xpress this 25th day of March, 2024.

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