

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 24-16

JAMES DEE MCKINNEY AKA 1227,
Petitioner,

v.

STATE OF WEST VIRGINIA,
Respondent.

PETITIONER JAMES DEE MCKINNEY'S REPLY IN SUPPORT OF APPEAL BRIEF

Civil Action No. 23-F-36
In the Circuit Court of Harrison County, West Virginia
(Honorable Thomas A. Bedell)

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ARGUMENT

I. The admission of Detective Cumberledge’s testimony regarding Ms. Woodson’s statements was improper and violated Petitioner’s Constitutional Rights because the testimony was not invited and was testimonial hearsay.

A. Petitioner simply asked Detective Cumberledge to refresh his memory and did not invite him to testify to his conversation with Ms. Woodson.

Respondent argues that Petitioner invited the error he seeks remedy for. (Resp’t Br. 10). Invited error is defined as, “a cardinal rule of appellate review applied to a wide range of conduct. It is a branch of the doctrine of waiver which prevents a party from inducing an inappropriate or erroneous response and then later seeking to profit from that error.” *State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996). Notably, Respondent fails to cite a case with similar facts granting an invited error ruling. Here, Petitioner did not induce Detective Cumberledge to improperly testify to his call with Ms. Woodson because Petitioner specifically asked him to “read [the transcript] quietly to yourself” for the purpose of refreshing his recollection. (A.R. 429). This was not an invitation to read aloud and testify to the document’s contents. Detective Cumberledge took it upon himself to expand the narrow scope of what Petitioner asked and was quickly interrupted by Petitioner to remedy the improper expansion. Therefore, Petitioner’s question cannot be considered an invited error because, not only was it only supposed to be a *quiet* recollection, but also Petitioner wasted no time ameliorating the extent of the witness’s error.

B. Admission of Ms. Woodson’s statements pursuant to Detective Cumberledge’s testimony violated Petitioner’s constitutional right to confront witnesses against him.

Pursuant to both the Sixth Amendment of the United States Constitution and Article III, Section 14 of the West Virginia Constitution, the Confrontation Clause “bars 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. 6, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006) (overruled on other grounds). *See also*, *Crawford v. Washington*, 541 U.S. 36 (2004). Whether a statement is “testimonial” starts with a “core class” of testimonial materials but may be broadened by the primary purpose test. *See State v. Kennedy*, 229 W. Va. 756, 766, 735 S.E.2d 905, 915 (2012) (citing *Davis v. Washington*, 547 U.S. 813 (2006)). The United States Supreme Court elaborated that the test focuses on whether the evidence was “for the purpose of establishing or proving some fact at trial.” *Id.* (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310-311 (2009)).

Respondent admits the call between Detective Cumberledge and Ms. Woodson regarded “questions the Detective had of Ms. Woodson and Mr. Shiner regarding the robbery.” (Resp’t Br. 13). Those questions would only be asked for the purpose of establishing facts relevant to the robbery at trial. Answers to those questions undoubtedly made up a portion of Detective Cumberledge’s investigation to be used at trial. This Court opined, “witness statements made to law enforcement officers that are comparable to those that would be given in a courtroom – that is, statements about ‘what happened’ – are testimonial statements the use of which is proscribed by the Confrontation Clause.” *Mechling*, 219 W. Va. at 376, 633 S.E.2d at 321. In this case, Ms. Woodson made statements to Detective Cumberledge about what happened surrounding or relating to the robbery, and therefore Petitioner should have been able to confront Ms. Woodson on those admitted testimonial statements.

Respondent asserts that “spontaneous statements to the police are not testimonial” and relies on *State v. Warsame*, 735 N.W.2d 684, 692 (Minn. 2007) to support this assertion. (Resp’t Br. 13). In *Warsame*, shortly after being battered, the injured party sought help by walking directly to the police department. *Id.* On her way to the police department, the injured party

encountered an officer and immediately said “[m]y boyfriend just beat me up.” *Id.* The Supreme Court of Minnesota held that this statement was nontestimonial because it was spontaneous and not for the primary purpose of prosecuting the perpetrator. *Id.* Notably, the court reasoned that speaking with the police for the primary purpose of prosecution could have been achieved at a later time, after the injured party had sought medical attention and recovered from the injuries. *Id.* Here, Ms. Woodson’s statements cannot be construed as spontaneous because they were voluntarily given over two weeks after the robbery. The robbery allegedly occurred on July 25, 2022, and the call did not occur until August 9, 2022. (A.R. 52). Accordingly, Respondent’s referenced case law demonstrates that Ms. Woodson’s statements were made for the primary purpose of prosecution and therefore were testimonial.

Respondent also claims that, even if Ms. Woodson’s statements were testimonial, Petitioner’s Confrontation Clause rights were not violated because the Confrontation Clause does not bar “testimonial statements offered for purposes other than establishing the truth of the matter asserted.” (Resp’t Br. 14) (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)). Respondent relies on *State v. Morris*, 227 W. Va. 76, 81, 705 S.E.2d 583, 588 (2010), which concerned testimony involving statements from others offered by an officer to explain prior conduct in carrying out an investigation. West Virginia law holds that testimony offered to explain an officer’s prior conduct is not hearsay. *See State v. Phelps*, 197 W. Va. 713, 722, 478 S.E.2d 563, 572 (1996). However, here, Detective Cumberlandge did not simply explain prior conduct, but began testifying to the material contents of his investigation. As opposed to explaining why the telephone call was made, the testimony was offered for the truth of the contents of the telephone call. Specifically, the truth of a material fact that Petitioner is violent, as evidenced by the statement that he “planned to kill--” someone. (A.R. 431).

Respondent contends that extrajudicial testimony under the Confrontation Clause was properly admitted. (Resp't Br. 14). Extrajudicial testimony may be admitted consistent with the Confrontation Clause if the party introducing the evidence can "(1) demonstrat[e] the unavailability of the witness to testify; and (2) prov[e] the reliability of the witness's out-of-court statement." Syl. Pt. 3, *Mechling*, 219 W. Va. at 366, 633 S.E.2d at 311. "In order to satisfy its burden of showing that the witness is unavailable, the State must prove that it has made a good-faith effort to obtain the witness's attendance at trial. This showing necessarily requires substantial diligence." Syl. Pt. 3, *State v. James Edward S.*, 184 W. Va. 408, 410, 400 S.E.2d 843, 845 (1990) (overruled on other grounds). "Where there is a lack of evidence in the record demonstrating the State's good-faith efforts to secure the witness for trial, the prosecution has failed to carry its burden of proving unavailability." *Id.* at Syl. Pt. 4. This Court has held that a testifying police officer is a representative of the State. *See State v. Boyd*, 238 W. Va. 420, 441, 796 S.E.2d 207, 228 (2017).

As to the first prong, Respondent claims Petitioner was the party admitting evidence and therefore the State does not have to meet its burden. (Resp't Br. 14). Pursuant to *Boyd*, a testifying officer is a representative of the State and therefore Detective Cumberlandledge's admission of Ms. Woodson's statements is akin to the State's admission of unavailable witness hearsay testimony. Respondent made no attempt to have Ms. Woodson available for trial or to establish her unavailability.

As to the second prong, Respondent claims Petitioner caused Ms. Woodson's unavailability by making threats against Mr. Shaner and Ms. Woodson to avoid their testifying. (Resp't Br. 14–15). However, Respondent shows no evidence that Petitioner intended to make Ms. Woodson unavailable to testify. *See State v. Jako*, 245 W. Va. 625, 633, 862 S.E.2d 474, 482

(2021) (requiring a person to act wrongfully “with the intent to cause a witness to be unavailable”).

Additionally, Respondent contends that any error in admitting the Detective’s testimony is harmless. (Resp’t Br. 15). "Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syl. Pt. 3, *Jako*, 245 W. Va. 625, 862 S.E.2d 474 (internal quotation and citation omitted). As the beneficiary of the error, it is Respondent’s burden to prove beyond a reasonable doubt that the error did not contribute to the verdict obtained. *See State v. Blevins*, 231 W. Va. 135, 156, 744 S.E.2d 245, 266 (2013) (*citing State v. Frazier*, 229 W. Va. 724, 729, 735 S.E.2d 727, 732 (2012)). Even if the testimony is consistent with other admitted evidence, the improperly proffered testimony demonstrates the alleged violent nature of Petitioner. It creates an impermissible inference, making the jurors more inclined to convict someone on robbery charges if he was allegedly openly threatening the robbery victims. Jurors will be moved to draw this impermissible inference, making Petitioner more likely to be unjustly convicted on charges unrelated to the threat allegations. Admission of this improper testimony denies Petitioner his constitutional right to challenge these claims and impeach the declarant. Moreover, it reinforces the highly prejudicial notion that Petitioner has violent propensities, making him more likely to have committed the robbery.

C. Detective Cumberledge’s testimony of Ms. Woodson’s out of court statements was hearsay because it was offered for the truth that Petitioner has violent propensities.

Hearsay is defined as statement “that the declarant does not make while testifying at the current trial or hearing” and “that a party offers in evidence to prove the truth of the matter asserted in the statement.” W.Va. R. Evid. 801(c). Hearsay “does not operate against such

testimony offered for the mere purpose of explaining previous conduct.” *State v. Rexrode*, 243 W. Va. 302, 317, 844 S.E.2d 73, 88 (2020) (quoting *State v. Maynard*, 183 W. Va. 1, 4, 393 S.E.2d 221, 224 (1990)).

Citing *Rexrode*, Respondent argues that Detective Cumberledge’s testimony of Ms. Woodson’s out of court statements were offered to refresh his recollection as opposed to being offered for the truth that Petitioner is violent. (Resp’t Br. 16). In *Rexrode*, statements were admitted because they explained why the police officer was in the defendant’s house pursuant to his investigation. *Rexrode*, 243 W. Va. at 317, 844 S.E.2d at 88. Here, Ms. Woodson’s statements were not offered to explain the Detective’s conduct because they were not used to explain why the investigatory telephone call occurred. When asked to quietly refresh his memory, the Detective began audibly testifying to the contents of the telephone call. This content included allegations that, through an acquaintance, Ms. Woodson heard of Petitioner “openly telling everyone that [he] planned to kill--.” (A.R. 431). This is not analogous to *Rexrode* because Detective Cumberledge testified to the contents of the investigatory telephone call as opposed to explaining the conduct that led to it.

Even if the testimony is found to be explanatory of the Detective’s conduct, it should have been barred because it creates a prejudicial inference that Petitioner has violent propensities. *See State v. Ricks*, 136 Ohio St. 3d 356, 364, 995 N.E.2d 1181, 1189 (2013) (holding “if the testimony that is ostensibly offered to explain police conduct is more prejudicial than probative, the jury is more likely to rely on the testimony to prove the matter asserted, which tilts the particular testimony into hearsay.”) In *Ricks*, the statements were excluded because they were admitted as a pretext for connecting the defendant to the crime. *Id.* at 365, 995

N.E.2d at 1190. The court reasoned the “testimony goes beyond answering what had led the police to obtain” the evidence pursuant to the investigation. *Id.*

Here, Detective Cumberledge’s testimony prejudiced Petitioner because it created an inference in the jurors’ minds that Petitioner is more likely to have robbed the alleged victims if he subsequently made threats about them. If he threatened to commit one violent act against the victims, who is to say he did not commit another? Additionally, this creates a highly prejudicial inference that Petitioner has violent propensities, making him more likely to have committed a violent criminal act such as robbery. The reference to Petitioner’s alleged threats goes beyond answering what led the Detective to his telephone call investigation.

II. The circuit court erred in failing to instruct each witness not to discuss the case with one another.

Respondent argues that Petitioner acquiesced to counsel instructing the witnesses of sequestration as opposed to the court because Petitioner filed a joint motion to sequester all witnesses and did not object to the court’s instruction for counsel to instruct the witnesses. (Resp’t Br. 24–25). West Virginia Rule of Evidence 615 states that, “[a]t a party’s request, the court must order witnesses excluded so that they cannot hear other witnesses’ testimony.” The rule “makes the exclusion of witnesses a matter of right, and the decision is no longer committed to the trial court’s discretion.” Syl. Pt. 1, *State v. Omechinski*, 196 W. Va. 41, 468 S.E.2d 173 (1996). Failure to instruct the witnesses fully after invocation of Rule 615 may cause reversal. *Id.* at Syl. Pt. 4. In discussing problems with parties circumventing Rule 615, this Court stated that problems “can be avoided by instructions from the trial court *to counsel and witnesses* when the rule’s invocation is announced making it clear that witnesses not only are excluded from the courtroom but also are not to relate to other witnesses what their testimony has been and what has occurred in the courtroom.” *Id.* at 46, 468 S.E.2d at 178. (emphasis added).

The explicit text of the statute requires the court to order the witnesses excluded. The *Omechinski* court further elaborated on the importance of the court informing both counsel and the witnesses. The court informing both counsel and the witnesses is not only for “making it clear,” but also makes it known that all witnesses heard the court’s instructions. In this case, the trial court failed to instruct the witnesses individually and directly, resulting in the potential for unclear instructions or no instructions received at all. Additionally, “[i]n criminal cases, when a trial court fails to comply with Rule 615 of the West Virginia Rules of Evidence, prejudice is presumed, and reversal is required unless the prosecution proves by a preponderance of the evidence that the error was harmless.” *Id.* at Syl. Pt. 6. Respondent makes no showing that the error is harmless.

Instead, Respondent argues that Petitioner waived the issue for appeal by failing to object. (Resp’t Br. 24–25). Waiver means “the intentional relinquishment or abandonment of a known right.” *State v. Myers*, 204 W. Va. 449, 460, 513 S.E.2d 676, 687 (1998) (quotations and citations omitted). “When there is an opportunity to speak, silence may operate as a waiver of objections to error and irregularities at the trial which, if seasonably made and presented, might have been regarded as prejudicial.” *State v. Grimmer*, 162 W.Va. 588, 595, 251 S.E.2d 780, 785 (1979) (*overruled in part on other grounds by State v. Petry*, 166 W.Va. 153, 273 S.E.2d 346 (1980)). Waived rights are not reviewable for plain error. *Crabtree*, 198 W. Va. at 631, 482 S.E.2d at 616 (quotations and citations omitted).

Here, although silence may operate as a waiver, it is not required to operate as such. Petitioner’s statutory right to witness exclusion was undermined by the trial court’s failure to individually instruct both the witnesses and counsel as discussed in *Omechinski*. Therefore, a substantial right possessed by Petitioner was violated and should be remedied.

Petitioner did not waive the issue, and thus the Court must review the assignment of error under the plain error doctrine. To trigger the doctrine, the proponent 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, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). “Plain error warrants reversal ‘solely in those circumstances in which a miscarriage of justice would otherwise result.’” *Id.* at 18, 459 S.E.2d 129 (citing *United States v. Frady*, 456 U.S. 152, 163 n.14, 102 S. Ct. 1584, 1592 n.14, 71 L. Ed. 2d 816, 827 n.14 (1982)). “To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.” *Id.* at Syl. Pt. 9.

An error exists because Petitioner’s Rule 615 right to have the court exclude witnesses was violated, which plainly falls within the text of the rule. The Petitioner’s substantial right to have witnesses instructed on their exclusion by the court was undermined by the court’s delegation of its duty to counsel. The outcome may have been different because, without the court having given the instruction to the witnesses, it is unknown what, if any, instructions were given to them. Additionally, the witnesses likely discussed the trial with one another because it was likely unclear to them whether they were permitted to discuss the trial or not. The burden is on Respondent to prove that a Rule 615 error was harmless by a preponderance of the evidence, and Respondent notes it is unknown whether the witnesses were advised by counsel. (Resp’t Br. 27).

CONCLUSION

For the foregoing reasons, Petitioner’s conviction should be reversed, his sentence should be vacated, and this matter should be remanded for further proceedings.

/s/ John D. Pizzo

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*Respondent.***

I hereby certify that on the 17th day of June, 2024, I filed ***PETITIONER JAMES DEE MCKINNEY'S REPLY IN SUPPORT OF APPEAL BRIEF*** via the File and ServeXpress system upon the following counsel of record:

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