IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Appeal No. 24-16

STATE OF WEST VIRGINIA,

Respondent,

v.

JAMES DEE MCKINNEY, AKA 1227,

Petitioner.

BRIEF OF RESPONDENT

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INTRODUCTION

Petitioner James Dee McKinney, AKA 1227, fails to allege any claim that entitles him to appellate relief. Contrary to his arguments, the record reveals that Detective Cumberledge's testimony did not violate any constitutional or evidentiary commands and that any alleged error was actually invited by Petitioner on cross-examination. Likewise, Petitioner has failed to demonstrate that his sentence was based on any impermissible factor or was disproportionate to any other actor in the robbery. Consequently, his sentence neither subjectively shocks the conscience nor is it excessive. Finally, the circuit court properly sequestered all witnesses at trial at the request of the parties and properly instructed counsel to advise each witness not to discuss their testimony with anyone. Petitioner waived any challenge to the court's sequestration order and has failed to satisfy the plain error analysis as he has not demonstrated a violation of the sequestration order or that the court itself was *required* to instruct each witness individually. This Court should reject Petitioner's claims on appeal and affirm the sentencing order of the Circuit Court of Harrison County.

ASSIGNMENTS OF ERROR

Petitioner raises four assignments of error in his brief. Petitioner's first two assignments of error allege that the circuit court erred in allowing the testimony of a witness who did not appear at trial in violation of the Confrontation Clause and the rule against hearsay. Pet'r's Br. 1. His third assignment of error asserts that his sentence is excessive, "shocks the conscience because it relied on improper factors," and is disproportionate "to the other actors involved in the incident." Pet'r's Br. 1. Finally, Petitioner contends that the circuit court erred in failing to "instruct witnesses not to discuss the case with one another." Pet'r's Br. 1.

STATEMENT OF THE CASE

In January 2023, Petitioner was indicted by a Harrison County grand jury on three counts of first degree robbery, two counts of possession of firearm by person prohibited from possessing firearm, one count of assault during commission of a felony, and two counts of presentation of a firearm during commission of a felony. App. 8-11. These charges stemmed from a July 25, 2022, incident, wherein Petitioner robbed Charles Shaner and Sabrina Woodson in their home, using a firearm. App. 10-11.

On that date, at around 5:00 p.m., Jennifer Walls knocked on the door of a residence occupied by Charles Shaner and Sabrina Woodson on Smithfield Avenue, between Anmoore and Bridgeport, West Virginia. App. 332:21-24; 379:14-21. Ms. Walls told Mr. Shaner through the door that her boyfriend threw her out and asked if he could help her out. App. 281:20-23; 333:1-6. Mr. Shaner agreed to help Ms. Walls, with whom he was acquainted, and unlocked the door. App. 281:20-23; 331:3-6. As he opened the door, Petitioner and two other men, Sloane Lockett and James Robinson, rushed into the residence. App. 333:3-9; 379:11-21. Petitioner carried a black semiautomatic handgun, a nine millimeter Beretta. App. 334:21-24. Mr. Lockett knew Mr. Shaner and Ms. Woodson, having been friends with them and visiting them in their home "quite a few times." App. 277:16-20; 331:19-24. When the three men entered the residence, Ms. Woodson was lying in bed and saw Petitioner point a gun at Mr. Shaner, demanding money and drugs, and threatening Mr. Shaner's life. App. 282:5-9; 333:22-3. Petitioner also threatened to shoot the dog and Ms. Woodson. App. 284:14-15; 335:12-16. Petitioner "discharged a round" when Mr. Shaner did not comply with his requests. *See generally*, App. 283. Because Mr. Shaner did not comply with Petitioner's demands fast enough, Petitioner placed the barrel of his gun in Ms. Woodson's mouth, threatening to kill her and demanding whatever valuables were in the apartment. *See generally*, App. 283; 334:10-15.

Petitioner and the two other men took approximately $400, some cell phones, and a box containing a Playstation. App. 285:20-24; 338:5-7; 395:1-7. Before the men could leave the residence, Mr. Shaner ran out of the house and went to the neighbor's house banging on the door yelling that he had been robbed and asking them to call 911. App. 285:6-10; 336:17-23; 337:1-11. The neighbor called 911, as did Ms. Woodson, after the men left her house. App. 337:12-16. When law enforcement arrived, Mr. Shaner advised that Petitioner cycled a live round that was chambered in the semiautomatic handgun. App. 340:18-21. Petitioner left an unfired nine millimeter cartridge in a wastebasket of the residence. App. 380:6-14.

During the investigation, Detective Cumberledge and Deputy Wariner obtained copies of Petitioner's jail calls, particularly two conversations on different occasions with females wherein they discussed intimidating the victims in the two robberies to prevent them from testifying in court. App. 92:6-13; *see generally*, App. 406-07. Joseph Burge, an acquaintance of Petitioner's, testified that Petitioner also threatened Joshua Boram's life regarding his reporting of a robbery in a different matter in which Petitioner was charged. App. 8-11; 112:15-24; *see also* App. 186:18-24.

On cross-examination by Petitioner, Detective Cumberledge testified that Ms. Woodson made certain statements to him during a telephone call on August 9, 2022. The exchange in question began when Petitioner asked Detective Cumberledge if he either looked for or found a firearm inside Mr. Shaner and Ms. Woodson's home and if Mr. Shaner advised the Detective that he owned a firearm like the one Petitioner used during the robbery. *See generally*, App. 426-28. Detective Cumberledge testified that he did not recall if Mr. Shaner had advised him that he owned a similar firearm but if he did it would be contained in his report. App. 426-28. After asking the Detective the same question multiple times, Petitioner handed Detective Cumberledge a transcript

of the August 9, 2022, telephone call with Mr. Shaner and Ms. Woodson and asked him to review it to refresh his memory. App. 428-29. Petitioner asked the Detective to quietly read the transcript and advise when he was finished. App. 429, 431:9-13. After reviewing the transcript, Detective Cumberledge stated that the transcript refreshed his memory and that he "vividly" recalled a telephonic conversation with Ms. Woodson on August 9, 2022. App. 431:14-17. He testified that Ms. Woodson "was trying to inform" him "that through an acquaintance of Charlie and Sabrina's who are also acquaintances of [Petitioner] that they have been openly telling everybody that they planned to kill —." App. 431:17-20. At that point, counsel interrupted and said, "Sir, my question was whether that refreshed your recollection." App. 431:21-22.

Petitioner requested a sidebar and moved for a mistrial based on the Detective's statement regarding Petitioner's threat to kill Mr. Shaner and Ms. Woodson. App. 432:9-12. In response, the State argued that the entirety of the trial was "premised on threats and intimidation of witnesses by [Petitioner] and people acting as his agents." App. 432:14-16. The State noted that Mr. Shaner testified earlier in the trial that he had received those threats from Petitioner, Mr. Lockett, and others. App. 432:17-21. The State argued that because the Detective's testimony was consistent with evidence already presented, a mistrial was not warranted. App. 432:21-23. The court acknowledged that Petitioner "created the situation" by asking the Detective to review the transcript for an extended period and the Detective responding to Petitioner's request. App. 433:7-9. Petitioner responded that he did not ask Detective Cumberledge to read the transcript aloud verbatim but simply asked him to "refresh his recollection on whether that point had come up before, and I don't believe that gives him carte blanche to just start reading a transcript." App. 433:23-24; 434:1-2. The court stated that Petitioner had asked the same question of the Detective

eight times and that the allegations of violence and threats was persistent throughout the trial. App. 434:21-24; 435:1-5.

The jury convicted Petitioner of two counts of first degree robbery of Mr. Shaner and Ms. Woodson, one count of possession of a firearm by a person prohibited from possessing a firearm, and one count of presentation of a firearm during the commission of a felony. App. 6-7. The circuit court sentenced Petitioner to two determinate terms of imprisonment of thirty years for the first degree robbery convictions, a determinate term of five years of imprisonment for possession of a firearm by person prohibited from possessing firearm, and a determinate term of ten years of imprisonment for presentation of a firearm during the commission of a felony. App. 6-7. In imposing sentence, the circuit court stated that it specifically considered the following factors: Petitioner's lengthy criminal history, his prior convictions for crimes of violence, his "lack of remorse and acceptance of responsibility," his repeated failure to appear at court proceedings in other jurisdictions, outstanding warrants in other jurisdictions, his prior failure to abide by the terms of alternative sentencing, the violent nature of the current offenses, his intimidation of witnesses in the present matter, and the fact that the State did not prosecute Petitioner as a recidivist despite his eligibility for a lifetime recidivist prosecution. App. 5.

SUMMARY OF ARGUMENT

I. The circuit court did not err in admitting the testimony of Detective Cumberledge regarding statements Ms. Woodson made to him. To begin, Petitioner invited the alleged error in admitting the Detective's testimony when he repeatedly asked the Detective to review a transcript of a telephone call between him and Ms. Woodson. Petitioner's counsel directed that the Detective read the transcript and let him know when he was finished. After reviewing the transcript, the Detective began to read the transcript aloud and was stopped only when the Detective read to the jury the very beginning portion of Petitioner's threats to Ms. Woodson and Mr. Shaner. Counsel

could have stopped the Detective from reading the transcript aloud at any time but chose not to. Detective Cumberledge did not simply "spring" this information on Petitioner.

Notwithstanding Petitioner's role in inviting any alleged error, the Detective's testimony did not violate the Confrontation Clause because Ms. Woodson's statements were nontestimonial. Her statements were made in a non-custodial manner and were not part of an interrogation. Rather, Ms. Woodson's statements were made in a telephone call nearly two weeks following the robbery and not with any reasonable belief that they would be used at trial. But even if this Court finds that Ms. Woodson's statements were testimonial, they did not violate the Confrontation Clause because they were not admitted for the purpose of establishing the truth of the matter asserted. Detective Cumberledge was advising Petitioner's counsel that he had read the transcript and that it vividly refreshed his recollection of the telephone call with Ms. Woodson and what statements in particular caused him to remember the call. Ms. Woodson's statements were consistent with Mr. Shaner's prior testimony regarding Petitioner's or his agent's threats against them to prevent their testimony and were analogous to the threats made against Mr. Boram. Even if the court erred in admitting the Detective's testimony, such error was harmless as it was duplicative of this prior testimony regarding the threats. The circuit court did find that Ms. Woodson's statements were consistent with this other evidence making them reliable and harmless beyond a reasonable doubt. This Court should affirm the circuit court's admission of the Detective's testimony.

II. Petitioner's sentence was not subjectively excessive as it was not based on any impermissible factor and was not disproportionate to the sentences of the other actors involved in the robbery. First, this Court has found it proper for a circuit court to rely upon a defendant's failure to accept responsibility and lack of remorse at sentencing. The court's reliance upon these two factors, out of many factors, was proper. Second, Petitioner's sentence of thirty years of

imprisonment for first degree robbery was proportionate to the twenty-eight year sentence of Mr. Robinson for the same offense. Petitioner received a second first degree robbery sentence regarding the robbery of Ms. Woodson, as well as two gun-related charges, whereas Mr. Robinson was not convicted of such crime. Such additional conviction and sentence was reflective of Petitioner's involvement and presentation and discharge of a firearm during the robbery. Petitioner's sentence, therefore, did not shock the conscience and this Court should affirm his sentence.

III. Finally, the circuit court did not violate Rule 615 of the West Virginia Rules of Evidence when it failed to instruct each witness not to discuss their testimony with anyone. The circuit court, at the parties' request, gave a general sequestration instruction at the inception of trial and directed counsel to advise each witness not to discuss their testimony with anyone. Petitioner did not object to the court's direction or ask the court to give such instruction to every witness. Petitioner thus did not preserve his objection and waived his right to challenge the court's sequestration order. Even under a plain error analysis Petitioner's argument fails because he has not provided any law or jurisprudence requiring the circuit court to give the instruction to each witness itself. Moreover, because he has not come forth with any evidence that the State failed to instruct its witnesses as ordered, Petitioner's substantial rights were not affected and neither was the integrity of the judicial process. Petitioner's argument is without merit.

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), (4).

STANDARDS OF REVIEW

"'The decision to declare a mistrial, discharge the jury, and order a new trial in a criminal case is a matter within the sound discretion of the trial court.' Syllabus point 8, *State v. Davis*, 182 W. Va. 482, 388 S.E.2d 508 (1989)." Syl. pt. 2, *State v. Thomas*, 249 W. Va. 181, 895 S.E.2d 36 (2023) (quoting syl. pt. 1, *State v. Costello*, 245 W. Va. 19, 857 S.E.2d 51 (2021)). "The decision to grant or deny a motion for mistrial is reviewed under an abuse of discretion standard." *Id.* at __, 895 S.E.2d at 42 (quoting *State v. Lowery*, 222 W. Va. 284, 288, 664 S.E.2d 169, 173 (2008)).

This Court reviews sentencing orders "under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." *State v. Hoyle*, 242 W. Va. 599, 611, 836 S.E.2d 817, 829 (2019) (quoting syl. pt. 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997)); *see also State v. Gibbs*, 238 W. Va. 646, 659, 797 S.E.2d 623, 636 (2017). "Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syl. pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982).

"In making a Rule 615 ruling, a trial court must exercise its sound discretion. Thus, this Court accords substantial deference to rulings and factual determinations of a trial court regarding the qualifications, competency, and extent of a witness's testimony." *State v. Omechinski*, 196 W. Va. 41, 44, 468 S.E.2d 173, 176 (1996) (citing *McDougal v. McCammon,* 193 W. Va. 229, 235, 455 S.E.2d 788, 794 (1995); *Michael v. Sabado,* 192 W. Va. 585, 595, 453 S.E.2d 419, 429 (1994)). This Court reviews "these determinations either under a clearly erroneous or an abuse of discretion standard." *Id.* (citing *Grillis v. Monongahela Power Co.,* 176 W. Va. 662, 666-67, 346 S.E.2d 812, 817 (1986)).

ARGUMENT

I. The circuit court did not err in denying Petitioner's motion for mistrial because Petitioner invited any error. Further, Ms. Woodson's statements were not testimonial or hearsay.*

Petitioner first contends that the circuit court impermissibly allowed Detective Cumberledge to testify to statements made to him by Ms. Woodson. Pet'r's Br. 4. He asserts that Ms. Woodson's statements were testimonial and made in violation of the Confrontation Clause of the United States and West Virginia constitutions and the rule against hearsay. Pet'r's Br. 4-15. Petitioner is wrong.

The record reveals that on cross-examination by Petitioner, Detective Cumberledge testified that Ms. Woodson made certain statements to him during a telephone call on August 9, 2022. The exchange in question began when Petitioner asked Detective Cumberledge if he either looked for or found a firearm inside Mr. Shaner and Ms. Woodson's home and if Mr. Shaner advised the Detective that he owned a firearm like the one Petitioner used during the robbery. *See generally*, App. 426-28. Detective Cumberledge testified that he did not recall if Mr. Shaner had advised him that he owned a similar firearm but if he did it would be contained in his report. App. 426-28. After asking the Detective the same question multiple times, Petitioner handed Detective Cumberledge a transcript of the August 9, 2022, telephone call with Mr. Shaner and Ms. Woodson and asked him to review it to refresh his memory. App. 428-29. Petitioner asked the Detective to quietly read the transcripts and advise when he was finished. App. 429, 431:9-13. After reviewing the transcript, Detective Cumberledge stated that the transcript refreshed his memory and that he

* In his first two assignments of error, Petitioner challenges the admission of Detective Cumberledge's testimony regarding statements made to him by Ms. Woodson on Confrontation Clause and hearsay grounds. The State combines these two arguments and addresses them together in this first section.

"vividly" recalled a telephonic conversation with Ms. Woodson on August 9, 2022. App. 431:14-17. He testified that Ms. Woodson "was trying to inform" him "that through an acquaintance of Charlie and Sabrina's who are also acquaintances of [Petitioner] that they have been openly telling everybody that they planned to kill —." App. 431:17-20. At that point, counsel interrupted and said, "Sir, my question was whether that refreshed your recollection." App. 431:21-22.

Petitioner requested a sidebar and moved for a mistrial based on the Detective's statement regarding Petitioner's threat to kill Mr. Shaner and Ms. Woodson. App. 432:9-12. In response, the State argued that the entirety of the trial was "premised on threats and intimidation of witnesses by [Petitioner] and people acting as his agents." App. 432:14-16. The State noted that Mr. Shaner testified that he had received those threats from Petitioner, Mr. Lockett, and others. App. 432:17-21. The State argued that because the Detective's testimony was consistent with evidence already presented, a mistrial was not warranted. App. 432:21-23. The Court acknowledged that Petitioner "created the situation" by asking the Detective to review the transcript for an extended period and allowing the Detective to respond to Petitioner. App. 433:7-9. Petitioner argued that he did not ask Detective Cumberledge to read the transcript aloud verbatim but simply asked him to "refresh his recollection on whether that point had come up before, and I don't believe that gives him carte blanche to just start reading a transcript." App. 433:23-24; 434:1-2. The court stated that Petitioner had asked the same question of the Detective eight times and that the allegations of violence and threats was persistent throughout the trial. App. 434:21-24; 435:1-5. The circuit court, thus, properly denied Petitioner's request for a mistrial. App. 435:8-9.

A. Petitioner cannot complain of any error in the admission of Detective Cumberledge's testimony because he elicited the testimony and actually invited the error.

This Court has held, "[a] judgment will not be reversed for any error in the record introduced by or invited by the party asking for the reversal." Syl. pt. 21, *State v. Riley*, 151 W.

Va. 364, 151 S.E.2d 308 (1966), *overruled on other grounds by Proudfoot v. Dan's Marine Serv., Inc.*, 210 W. Va. 498, 558 S.E.2d 298 (2001).

> "Invited error" is 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 [ruling] and then later seeking to profit from that error. The idea of invited error is . . . to protect principles underlying notions of judicial economy and integrity by allocating appropriate responsibility for the inducement of error. Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences.

State v. Rollins, 233 W. Va. 715, 728, 760 S.E.2d 529, 542 (2014) (quoting *State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996)). Petitioner asked Detective Cumberledge at least eight times about Mr. Shaner's firearm and about certain statements Mr. Shaner gave to the Detective. Petitioner's counsel asked the Detective repeatedly to read the transcript of a telephone call between him and the victims and to let counsel know when he was finished. In response to Petitioner's question, the Detective testified that he was done and that he "vividly" remembered what Ms. Woodson told him. He testified as to what she said and only when the testimony broached an area Petitioner did not like did he then object. By now claiming error, Petitioner has fallen squarely into the realm of invited error. "An appellant . . in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case." *Id.*, syl. pt. 4 (internal quotation marks and citations omitted). Because Petitioner elicited the testimony from Detective Cumberledge, he should not be allowed to complain that admission of the evidence was improper under the invited error doctrine. Should this Court find that Petitioner did not invite any alleged error in admitting the testimony, the State further addresses each of his claims below.

B. Petitioner's constitutional right to confront witnesses was not violated when the circuit court admitted Detective Cumberledge's testimony.

The Confrontation Clause of the Sixth Amendment of the United States Constitution and Article III, Section 14 of the West Virginia Constitution guarantees a criminal defendant the right to confront witnesses who testify against the defendant at trial. *See State v. Mechling*, 219 W. Va. 366, 371, 633 S.E.2d 311, 316 (2006), *holding modified by State v. Jako*, 245 W. Va. 625, 862 S.E.2d 474 (2021). The Confrontation Clause provides, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. "Pursuant to *Crawford v. Washington*, 541 U.S. 36[] (2004), 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. 1, *Jako*, 245 W. Va. 625, 862 S.E.2d 474, *cert. denied sub nom. Jako v. West Virginia*, 142 S. Ct. 1680 (2022); *see also* syl. pt. 6, *Mechling*, 219 W. Va. 366, 633 S.E.2d 311. Ms. Woodson 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) (stating only testimonial statements trigger the Confrontation Clause).

This Court follows the United States 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) (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009)). 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). A testimonial statement is

"a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Syl. pt. 7, *State v. Henson*, 239 W. Va. 898, 806 S.E.2d 822 (2017) (quoting syl. pt. 8, *Mechling*, 219 W. Va. 366, 633 S.E.2d 311). Ms. Woodson's statement was made to Detective Cumberledge in an informal setting: during a telephone call regarding questions the Detective had of Ms. Woodson and Mr. Shiner regarding the robbery.

That a statement is made to an officer outside an interrogation is good evidence it is not intended to replace trial testimony. *State v. Kaufman*, 227 W. Va. 537, 551, 711 S.E.2d 607, 621 (2011); *see also Ohio v. Clark*, 576 U.S. 237, 244-45 (2015). If statements do not 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, Ms. Woodson voluntarily made her statement during a telephone call, and without "the structure and formality of an official interrogation"—so the case against finding it testimonial is even clearer than in *Warsame*. Her statements, therefore, were not testimonial as they were not "made under circumstances which would lead an objective witness reasonable to believe that the statement would be available for use at a later trial." Syl. pt. 6, *State v. Bouie*, 235 W. Va. 709, 776 S.E.2d 606 (2015).

But even if Ms. Woodson's statements were testimonial, they did not violate the Confrontation Clause because they were not admitted for purposes of establishing the truth of the matter asserted. *See Crawford*, 541 U.S. at 59 n.9 ("'[t]he [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' *Tennessee v. Street*, 471 U.S. 409, 414[] (1985)'"). Ms. Woodson's statements were offered by Detective Cumberledge to refresh his memory of the call upon the insistence of Petitioner and were not admitted to prove the truth of her statements. *See State v. Morris*, 227 W. Va. 76, 81, 705 S.E.2d 583, 588 (2010).

"The two central requirements for admission of extrajudicial testimony under the Confrontation Clause contained in the Sixth Amendment to the United States Constitution are: (1) demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness's out-of-court statement." Syl. pt. 3, *Mechling*, 219 W. Va. 366, 633 S.E.2d 311. "[T]o 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, 400 S.E.2d 843 (1990), *overruled on other grounds by Mechling*, 219 W. Va. 366, 633 S.E.2d 311, *holding modified by State v. Kennedy*, 205 W. Va. 224, 517 S.E.2d 457 (1999). If there is no evidence showing "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.

Regarding the first prong, the record in this case shows that Petitioner was the party admitting the Detective's testimony and not the State. The State did not attempt to introduce any testimony regarding Ms. Woodson's statements: Petitioner did. As to the second prong, Mr. Shaner previously testified at trial as to threats Petitioner or his agents made against him and Ms. Woodson

so they would not testify against Petitioner. App. 354-56. Thus, the circuit court did not violate the Confrontation Clause in admitting Detective Cumberledge's testimony.

Even if the court erred in admitting the Detective's testimony, such error was harmless. "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). "Courts assessing the harm arising from the introduction of evidence violating the Confrontation Clause have focused upon whether the information gleaned by the jury through such evidence contributed to the verdict or addressed a critical issue involving conflicting and pivotal evidence at trial." *State v. Blevins*, 231 W. Va. 135, 156, 744 S.E.2d 245, 266 (2013). This Court has noted that "[i]n a criminal case, the burden is upon the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (quotation omitted). The circuit court found that Ms. Woodson's statement was consistent with other evidence already admitted at trial and hence was reliable and harmless beyond a reasonable doubt.The statement of Ms. Woodson did not contribute to the verdict and was duplicative of already admitted evidence that Petitioner and his agents had threatened the victims and other possible witnesses. As such, any error the court may have committed in admitting the Detective's testimony is harmless.

C. Detective Cumberledge's testimony referencing Ms. Woodson's statements was not hearsay because it was not offered for the truth of the matter asserted.

Petitioner argues that even if Detective Cumberledge's testimony and Ms. Woodson's statements were not testimonial, the circuit court still should have excluded it because it constituted inadmissible hearsay. Pet'r's Br. 11-15. Pursuant to Rules 803(24) and 804(b)(5), Petitioner argues that Detective Cumberledge's testimony was not trustworthy, was specifically offered to tell the

jury Petitioner was "violent and ha[d] a reason to want to harm Mr. Shaner and Ms. Woodson," and was highly prejudicial. Pet'r's Br. 13.

Rule 801(c) of the West Virginia Rules of Evidence defines hearsay as "a 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." "The hearsay rule . . . 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)).

Petitioner argues that Detective Cumberledge's testimony constituted hearsay and was admitted solely for the purpose of establishing the truth of the matter asserted, i.e., that "Petitioner is a violent person and had a reason for wanting to kill Mr. Shaner and Ms. Woodson." Pet'r's Br. 12. Petitioner is wrong because the Detective's testimony was not admitted to prove the truth of Ms. Woodson's statement regarding Petitioner's threat against her. Moreover, any error the court may have committed in admitting the testimony was harmless as the evidence was duplicative of evidence already admitted during trial.

A review of the record shows that Detective Cumberledge's testimony was provided as an explanation for how he remembered the August 9, 2022, telephone call with Ms. Woodson, the transcript of which Petitioner provided the Detective to refresh his recollection regarding whether Ms. Woodson or Mr. Shaner had mentioned a firearm. *See Rexrode*, 243 W. Va. at 317, 844 S.E.2d at 88 (finding that an officer may testify about another individual without offending notions of hearsay when offered to explain the course of the officer's actions or investigation). Detective Cumberledge's testimony regarding Ms. Woodson's statements received as part of his investigation were not offered to prove the matter asserted. Rather, the Detective offered the

statement as a reason why reading the transcript refreshed his recollection of the telephone call. *See State v. Randolph*, 219 So.3d 425, 434 (La. Ct. App. 4 Cir. 2017) (stating law enforcement's testimony may include information from another individual without constituting hearsay when it is offered to explain the court of the investigation or the officer's actions).

Further, the circuit court did not engage in any relevancy analysis. *See State v. Phelps*, 197 W. Va. 713, 478 S.E.2d 563, 572 (1996) ("[*State v.*] *Maynard*[, 183 W. Va. 1, 5-6, 393 S.E.2d 221, 225-26 (1991)] instructs us that in the instant matter we must determine whether the officers' testimony was relevant and, if not, did introduction of the testimony amount to harmless error"). The court also did not make any specific findings regarding hearsay, but this is still a valid ground supporting a rejection of Petitioner's arguments. "This Court may, on appeal, [however,] affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. pt. 4, *White v. Haines*, 215 W. Va. 698, 601 S.E.2d 18 (2004) (quotation omitted). Therefore, the Court should affirm the admission of the Detective's statement on these grounds as well.

The circuit court essentially determined that Detective Cumberledge's testimony was harmless, or not prejudicial, because the trial was replete with references to allegations that Petitioner and his agents had threatened witnesses not to testify, including the victims, Mr. Shaner and Ms. Woodson. App. 435:1-5; *see also generally*, App. 354-56. Detective Cumberledge's ever so slight mention of Ms. Woodson's statement regarding Petitioner's threat to her, therefore, was duplicative of other evidence already admitted during the trial. As such, any error the court may have made in admitting the Detective's testimony was harmless. *See also* W. Va. R. Crim. P. 52(a)

("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

II. Petitioner's sentence is not unconstitutional as it does not shock the conscience, is not based on any impermissible factor, and is not disproportionate to that of his co-defendants.

Petitioner argues that his sentence is unconstitutionally excessive because subjectively, it shocks the conscience in two respects. Pet'r's Br. 16-17. First, the sentence is shocking because the circuit court relied upon Petitioner's lack of remorse and his failure to accept responsibility which Petitioner claims are improper sentencing factors. Pet'r's Br. 17-18. Second, Petitioner contends that his sentence shocks the conscience when compared to the sentences of the other actors involved in the criminal activity. Pet'r's Br. 18-19. Petitioner's sentence is not subjectively unconstitutional because the circuit court did not rely upon any impermissible factors in sentencing Petitioner and comparatively, his sentence is not disproportionate to the sentences of his fellow criminal actors.

The Eighth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution set forth the proportionality principle, mandating that, "[p]enalties . . . be proportioned to the character and degree of the offence." Syl. pt. 3, *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981) (citing syl. pt. 8, *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980)) (recognizing that Article III, Section 5 of the West Virginia Constitution is the counterpart to the 8th Amendment to the United States Constitution). At the same time, "we have traditionally held that the Legislature has a broad power in defining offenses and prescribing punishments, limited in severity only by the constitutional prohibition against cruel or unusual or disproportionate sentences." *Id.* at 533, 276 S.E.2d at 211.

Even though the proportionality principle is "implicit in the cruel and unusual punishment clause of the Eighth Amendment, courts have been reluctant to apply it in practice." *Vance,* 164

W. Va. at 231, 262 S.E.2d at 432 (1980). "Such reluctance is an expression of due respect for legislative authority." *State v. James*, 227 W. Va. 407, 416, 710 S.E.2d 98, 107 (2011). Hence, appellate courts yield "substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishment for crimes, as well as to the discretion that Circuit Courts possess in sentencing convicted criminals." *Solem v. Helm,* 463 U.S. 277, 290 (1983).

When analyzing whether a sentence violates the proportionality requirement, the Court applies two tests. *State v. Cooper*, 172 W. Va. 266, 272, 304 S.E.2d 851, 857 (1983); *see also State v. Allen*, 208 W. Va. 144, 155 n.19, 539 S.E.2d 87, 98 n.19 (1999) (recognizing the same). The first test is subjective and requires the Court to determine whether the sentence "shocks the conscience and offends fundamental notions of human dignity." Syl. pt. 5, *Cooper*, 172 W. Va. 266, 304 S.E.2d 851. In determining whether a sentence shocks the conscience, the Court considers "all of the circumstances surrounding [the] offense[ ], the information contained in the presentence investigation report[,] and the findings made by the sentencing judge." *State v. Phillips*, 199 W. Va. 507, 513, 485 S.E.2d 676, 682 (1997). If the Court decides the sentence is "so offensive that it cannot pass a societal and judicial sense of justice," then the Court need not proceed to the second test. *Cooper*, 172 W. Va. at 272, 304 S.E.2d at 857. Petitioner's sentence is not subjectively unconstitutional.

The second test is objective and gives consideration "to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction." Syl. pt. 5, *Wanstreet*, 166 W. Va. 523, 276 S.E.2d 205. Petitioner challenges the excessiveness of

his sentence only under the subjective test and, therefore, the State does not address the objective test.

A. The circuit court did not rely upon any impermissible factors in sentencing Petitioner.

There is nothing in the record, or argued in Petitioner's brief, which sets forth "that the court relied on any impermissible sentencing factor, inaccurate information, or bias against [P]etitioner" as recognized by this Court. *State v. Ruffner*, No. 22-665, 2024 WL 313754, at *2 (W. Va. Supreme Court, Jan. 25, 2024) (memorandum decision). Acknowledging a trial court's "wide discretion in the sources and types of evidence used in determining" sentencing, this Court has identified "impermissible factors" to include "race, sex, national origin, creed, religion, and socioeconomic status." *State v. Via*, No. 20-0743, 2022 WL 123200, at *3 (W. Va. Supreme Court, Jan. 12, 2022) (memorandum decision) (quoting *State v. Moles*, No. 18-0903, 2019 WL 5092415, at *2) (W. Va. Supreme Court, Oct. 11, 2019) (memorandum decision) (internal quotation and citation omitted)). Outside of those limited impermissible factors, "[a] trial court has wide discretion in the sources and types of evidence used in determining the kind and extent of punishment to be imposed." *State v. Norman,* No. 21-0374, 2022 WL 3931414, at *3 (W. Va. Supreme Court, Aug. 31, 2022) (memorandum decision).

The circuit court found that Petitioner had not accepted responsibility in two respects. First, Petitioner had not accepted responsibility for his previous convictions as he "never paid court costs or fines in any of his prior cases," which totaled approximately $6,500. App. 874:15-17. In sentencing Petitioner, the circuit court acknowledged "the nonpayment of court costs," and concluded that "it shows that [Petitioner], you know, has not accepted responsibility or not lived up to his obligations in those matters." App. 880:21-24; 881:1.

Second, the court found that Petitioner did not accept responsibility for the current convictions. App. 881:6-24. In making this finding, the circuit court noted Petitioner initially gave law enforcement "the wrong name," which the court considered a failure to accept responsibility. App. 881:11-13. At sentencing, Petitioner asked the court for leniency so that he could spend time with his then seven-year-old son. (App. 879:11-16.) Though he apologized "for wasting everybody's time for even being here," App. 879:17-18, Petitioner continued to state that he did not want to "argue whether I feel like everything was done fairly," App. 879:7-9, and that there were "other people that was involved in the same case [who] are out there with their kids and I'm the one facing life," App. 879:14-15. This Court has repeatedly held that it is not error for a circuit court to consider a petitioner's lack of acceptance of responsibility for his crimes during sentencing. *See State v. Eakle*, No. 22-0287, 2023 WL 6012557, at *2 (W. Va. Supreme Court, Sept. 15, 2023) (memorandum decision); *State v. Arbough*, No. 15-0685, 2016 WL 4611188, at *2 (W. Va. Supreme Court, Sept. 6, 2016) (memorandum decision); *State v. Keith R.*, No. 13-0768, 2014 WL 1686932, at *2 (W. Va. Supreme Court, Apr. 28, 2014) (memorandum decision). Petitioner offers no authority to support his argument that failure to accept responsibility is an impermissible sentencing factor; thus, there is no basis to find that the circuit court abused its discretion in considering this failure in sentencing.

The court also considered Petitioner's lack of remorse for his actions. At sentencing, the circuit court noted that the presentence report reflected Petitioner's opinion that "everybody was lying" about the events and that Petitioner "said it was all about drugs." App. 881:17-20. Though Petitioner admitted he robbed the victim, it was the victim's plan or scheme to "get back at" Petitioner and "was a cry for help because he'd been the victim of a violent crime." App. 881:19-24. But, the court did not err in taking this information into account. "This Court has identified

remorse or the lack thereof as a factor to be taken into account by a trial judge when sentencing a defendant." *State v. Jones*, 216 W. Va. 666, 669, 610 S.E.2d 1, 4 (2004). Thus, there is no basis to find that the circuit court abused its discretion by considering Petitioner's lack of remorse at sentencing.

It should be noted that these two factors were not the only ones the circuit court considered. The court also considered Petitioner's lengthy criminal history and prior felony crimes of violence, his outstanding warrants in other jurisdictions, his failure to abide by terms of alternative sentencing, the violent nature of the instant convictions, his intimidation of witnesses, and the fact that the State gave Petitioner a break when it did not prosecute him as a recidivist. App. 5. The court carefully discussed all of the factors and concluded that society, and Petitioner's victims, would best be served by incarcerating him. Petitioner has failed to demonstrate the circuit court abused its discretion. Moreover, Petitioner has failed to demonstrate that the court's consideration of his lack of remorse or acceptance of responsibility resulted in a subjectively excessive sentence that shocks the conscience.

B. Petitioner's sentence is not disproportionate to the sentences of the other persons involved in the criminal activity.

Petitioner alleges that the other persons involved in the criminal activity received less severe sentences. Pet'r's Br. 18-19. According to Petitioner, Jennifer Walls was sentenced to a suspended sentence of one-to-five years for conspiracy to commit first degree robbery; Stoane Lockett was sentenced to a suspended sentence of twenty years for aiding and abetting first degree robbery; and Joseph Robinson was sentenced to twenty-eight years of incarceration for one count of first degree robbery of Mr. Shaner. Pet'r's Br. 18-19. Petitioner argues that Mr. Robinson's "sentence was less than half of Petitioner's sentence. This is disproportionate and unfair to Petitioner." Pet'r's Br. 19.

But, "[d]isparate sentences for codefendants are not per se unconstitutional." *State v. Lane*, No. 22-0298, 2024 WL 313303, at *2 (W. Va. Supreme Court Jan. 25, 2024) (memorandum decision) (quoting *State v. Robey*, 233 W. Va. 1, 3-4, 754 S.E.2d 577, 579-80 (2014)); syl. pt. 2, *State v. Buck,* 173 W. Va. 243, 314 S.E.2d 406 (1984). Disparate sentences for codefendants or for all actors involved in the criminal activity may be justified by analyzing "each codefendant's respective involvement in the criminal transaction (including who was the prime mover), prior records, rehabilitative potential (including post-arrest conduct, age and maturity), and lack of remorse. If codefendants are similarly situated, some courts will reverse on disparity of sentence alone." *Id.*

Here, Petitioner was charged with the first degree robbery of both victims whereas Mr. Robinson was charged with only the first degree robbery of one victim. The sentences are relatively the same for each victim: 30 versus 28 years. Petitioner contends that Mr. Robinson, however, "did not receive a sentence for the second charge of first-degree robbery, possession of a firearm by a prohibited person, or presentation of a firearm during the commission of a felony." Pet'r's Br. 19. Though Petitioner and Mr. Robinson were charged the same for conduct arising out of the same criminal activity, Petitioner's argument that "Mr. Robinson's sentence was less than half of Petitioner's sentence," which is "disproportionate and unfair to Petitioner" falls flat. Pet'r's Br. 19. Despite Petitioner's argument, he fails to demonstrate that Mr. Robinson and Petitioner were *convicted* of similar charges. To assert a plausible claim of disparate sentencing, a petitioner must, at the outset, demonstrate that he is similarly situated to the codefendants with whom he compares his sentence. *See State v. Watkins*, 214 W. Va. 477, 481, 590 S.E.2d 670, 674 (2003) (finding "appellant's claim of disparate sentencing [to be] untenable given the guilty pleas and subsequent convictions to two separate and distinct offenses by the appellant and the codefendant"); *accord*

State v. Wilkerson, No. 19-0471, 2020 WL 7231107, at *2 (W. Va. Supreme Court, Dec. 7, 2020) (memorandum decision). Thus, regardless of all other factors, the difference in the crimes of which Petitioner and Mr. Robinson were convicted is a single decisive factor. *See id.* Accordingly, Petitioner's claim of disparate sentencing is untenable given the fact that Petitioner was convicted of four crimes as opposed to Robinson's one crime: Petitioner was twice convicted of first degree robbery in addition to possession of a firearm by a person prohibited from possessing a firearm and presentation of a firearm during the commission of a felony. Mr. Robinson apparently was convicted of only first degree robbery of Mr. Shaner. Any disparity in sentence of the two individuals, therefore, is not unlawful.

III. The circuit court did not err in failing to instruct each witness not to discuss the case with one another.

Finally, Petitioner alleges that the circuit court failed to instruct all the witnesses not to discuss the case with one another in violation of Rule 615 of the West Virginia Rules of Evidence and as required by *Omechinski*, 196 W. Va. 41, 46, 468 S.E.2d 173, 178. Pet'r's Br. 19-21. He does not contend that any witness violated the general sequestration instruction of the court. Rather, Petitioner argues that "it is unclear whether the witnesses knew they were not permitted to discuss their testimony with one another. Accordingly, the witnesses likely discussed the trial with one another." Pet'r's Br. 21. Petitioner also avers that prejudice is presumed unless proven by a preponderance of the evidence that prejudice did not occur. Pet'r's Br. 21. Petitioner's unsupported, ambiguous allegations are insufficient to carry his burden of showing error.

At trial, the circuit court acknowledged the parties' joint motion to sequester all witnesses. App. 26. The court, however, advised counsel "to instruct their witnesses to remain outside of the courtroom until called upon to testify, and further, not to discuss their testimony with anyone yet to testify." App. 26. Petitioner neither objected below to the court's instruction nor identifies in

the record where his objection to the circuit court's failure to instruct each witness separately was preserved below. Moreover, there is no evidence that counsel failed to instruct their witnesses not to discuss their testimony with anyone.

"To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect." *See State v. Drexel M.*, No. 20-0322, 2021 WL 2577147, at *8 (W. Va. Supreme Court, June 23, 2021) (memorandum decision) (citing *State v. Shrewsbury*, 213 W. Va. 327, 334, 582 S.E.2d 774, 781 (2003)). Petitioner has waived his right to challenge the court's sequestration order and instructions by not objecting below and giving the lower court a chance to address the issue. This Court has found that "[w]aiver . . . is 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). "[S]ilence 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 on other grounds by State v. Petry*, 166 W. Va. 153, 273 S.E.2d 346 (1980). "[W]hen there has been such a knowing waiver, there is no error and the inquiry as to the effect of the deviation from a rule of law [or violation of a right] need not be determined." *Crabtree*, 198 W. Va. at 631, 482 S.E.2d at 616 (quotations and citations omitted). Importantly, "[w]hen a right is waived, it is not reviewable even for plain error." *Id.* Petitioner, having made no objection to the circuit court's general instruction to counsel to advise all witnesses of their duties or to the court's failure to instruct each witness as to their duties, has waived his objection to the court's failure instruct all witnesses not to discuss the case with one another.

Even if this Court were to decide that Petitioner did not commit waiver below, it must review the assignment of error under the plain error doctrine. "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 7, *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 at 129 (citing *United States v. Frady*, 456 U.S. 152, 163 n. 14 (1982)). As Petitioner cannot show a miscarriage of justice, his conviction should be affirmed.

Petitioner "bears the burden of persuasion on each of the four prongs of the plain error standard." *Lowery v. United States*, 3 A.3d 1169, 1173 (D.C. 2010). And "[s]atisfying all four prongs of the plain-error test is difficult[.]" *United States v. Williamson,* 706 F.3d 405, 413 (4th Cir. 2013). "Plain error warrants reversal 'solely in those circumstances in which a miscarriage of justice would otherwise result.'" *United States v. Frady*, 456 U.S. 152, 163 n. 14, (1982)." *Miller*, 194 W. Va. at 18, 459 S.E.2d at 129. Justice Cleckley expanded on this proposition, stating that if an error is plain, the analysis must advance to the last prong where it must be determined whether the error "affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice." Syl. pt. 9, *id.*

Petitioner certainly cannot sustain his burden in proving plain error. Petitioner cannot meet the first two factors, as there was no error. "The exclusion of witnesses from the courtroom during trial is a time-honored practice designed to prevent 'influenced' testimony. *See Frideres v. Schiltz,* 150 F.R.D. 153, 158 (S.D. Iowa C.D. 1993) ("Sequestering witnesses to assist in ascertaining truth

is at least as old as the Bible")." *Omechinski*, 196 W. Va. at 44, 468 S.E.2d at 176. Rule 615 of the West Virginia Rules of Evidence provides that "[a]t a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own." The purpose of this Rule "is to prevent the shaping of testimony by one witness to match that of another and to discourage fabrication and collusion." Syl. pt. 2, *Omechinski*, 196 W. Va. 41, 468 S.E.2d 173. A circumvention of the Rule "occurs where witnesses indirectly defeat its purpose by discussing with other witnesses who are subject to recall testimony they have given and events occurring in the courtroom." *Id.*, at syl. pt. 3.

Here, the circuit court properly ordered the witnesses sequestered, upon the joint motion of Petitioner and the State. App. 26. The court further directed counsel to inform and instruct their witnesses that they must remain outside the courtroom until they are called to testify and that they were "not to discuss their testimony with anyone yet to testify." App. 26. Pursuant to the court's instruction to counsel, the court did not give these same instructions to every witness at the conclusion of their testimony. Further, there is no evidence that counsel did not do just as they were instructed and advise all witnesses not to speak to one another. But, this Court cannot know, because Petitioner did not object to the circuit court's instruction to counsel to advise their respective witnesses not to discuss their testimony with anyone or request that the court itself advise the witnesses. As this Court found in *Omechinski*, "it is of crucial importance to us that the defendant failed to request the very instruction that is the subject of his complaint." 196 W. Va. at 47, 468 S.E.2d at 179. Moreover, no objection was made at the end of trial so, again, it is unknown if the witnesses were advised by counsel.

Petitioner contends that *Omechinski* places the burden of instructing each witness on the court rather than counsel. Pet'r's Br. 20. Petitioner is mistaken. Rule 105 of the West Virginia

Rules of Evidence "mandates that curative, limiting, and cautionary instructions must be given upon demand of one of the parties." *Omechinski*, 196 W. Va. at 47, 468 S.E.2d at 179. But "in the absence of a specific request by the complaining party, a defendant may not claim error as a result of the failure of a trial court to instruct witnesses as to the impact of a sequestration order." *Id.*

Even if Petitioner had requested the court to instruct the witnesses not to discuss their testimony with anyone, nothing in Rule 615 or in *Omechinski* prohibits the court from requiring the parties to instruct their witnesses. As in *Omechinski*, Petitioner has not established the sequestration order was violated or that the court had a duty to instruct each witness, despite a presumption of prejudice. *Id.*, syl. pt. 5 ("The rights granted under under Rule 615 of the West Virginia Rules of Evidence are not self-executing. In the absence of a specific request by the complaining party, a defendant may not claim error as a result of the failure of the trial court to instruct witnesses as to the impact of a sequestration order.").

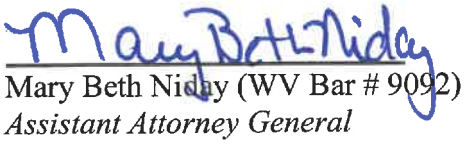
Petitioner also does not satisfy the last two factors of the plain error analysis because he has not established any error, his substantial rights were not affected. Moreover, he has not alleged any specific noncompliance with the court's order and, therefore, he has failed to demonstrate the fairness and integrity of the trial was affected. For these reasons, the circuit court did not err in directing the parties to instruct their witnesses to refrain from discussing the case with anyone.

CONCLUSION

For the foregoing reasons, Respondent requests that this Court affirm the order of the Circuit Court of Harrison County.

Respectfully submitted,

PATRICK MORRISEY
ATTORNEY GENERAL



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Appeal No. 24-16

STATE OF WEST VIRGINIA,

Respondent,

v.

JAMES DEE MCKINNEY, AKA 1227,

Petitioner.

CERTIFICATE OF SERVICE

I, Mary Beth Niday, do hereby certify that on the 28th day of May, 2024, I served a true and accurate copy of the foregoing **Respondent's Brief** upon the below-listed individuals via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure:

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