

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

Plaintiff below, Respondent,

v.

Supreme Court No.: 23-733
Case No. 22-F-5
Circuit Court of Ohio County

WILLIAM ROSS CARMAN,

Defendant below, Petitioner.

PETITIONER'S REPLY

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REPLY ARGUMENT

No one disputed Petitioner and his wife were in the decedent's home when she died—the question was which of them killed her.¹ Petitioner appeals because the circuit court upset that credibility contest in two ways. First, it misapplied the forfeiture by wrongdoing exception to the Confrontation Clause and admitted the decedent's identification of Petitioner as her assailant, and second, it misapplied WVRE 609 and disallowed Petitioner from impeaching his wife's character with a prior conviction.²

As to the Confrontation Clause violation, the Response jettisons both the State's argument below and the circuit court's reasoning.³ It instead argues that, categorically, statements made between friends are not testimonial.⁴ It is mistaken. Courts must review whether statements are testimonial on a case-by-case basis. And here, the decedent's identification satisfies the Supreme Court's "primary purpose" test.⁵ There is no statement more quintessentially testimonial than answering the question, whodunit?

The Response also argues that the court properly rejected Petitioner's proposed impeachment because his argument was confusing.⁶ But the record refutes this. WVRE 609's sole focus is impeachment and that was why Petitioner sought admission.⁷ The "kitchen sink" of arguments are due to the court's insistence that Petitioner put forward a substantive, non-impeachment basis for the conviction.⁸ Rather than justify exclusion, the discussion of substantive relevance illustrates the court's mistake of law.

Finally, these errors harmed Petitioner. The physical evidence showed what no one disputed: Petitioner was there. But these errors go directly to the issue jurors did have to answer: who to believe.

¹ Compare A.R. 994 with A.R. 1461.

² A.R. 947; A.R. 1222.

³ Resp.'s Br. 8.

⁴ Resp.'s Br. 13. It also argues that the statement did not violate the West Virginia Rules of Evidence. To be clear, Petitioner has only assigned error under the state and federal constitutions.

⁵ See *Ohio v. Clark*, 576 U.S. 237, 245 (2015).

⁶ Resp.'s Br. 8.

⁷ A.R. 934–35.

⁸ Resp.'s Br. 16; A.R. 940–41.

I. The decedent's identification was testimonial because her friend asked whodunit to establish the identity of the crime victim's assailant.

The State below argued that the West Virginia Rules of Evidence trump the Constitution, and the court ruled that Petitioner forfeited confrontation because the State presented a prima facie case that he killed the decedent.⁹ With good reason, the Response abandons both rationales. For the first time, it argues the decedent's identification was nontestimonial.¹⁰ This too is unavailing. Examining "all of the relevant circumstances"¹¹ shows that the friend asked whodunit to "prove past events potentially relevant to later criminal prosecution."¹²

Absent inapplicable exceptions, the Confrontation Clause of the United States Constitution prohibits the State from using testimonial statements of non-testifying witnesses.¹³ A "core class" of statements are so obviously testimonial that individual analysis is an inefficient use of judicial resources.¹⁴ Outside this core class, the Confrontation Clause bars the out-of-court statements if their "primary purpose ... is to establish or prove past events potentially relevant to later criminal prosecution."¹⁵ "In determining whether a declarant's statements are testimonial, courts should look to all of the relevant circumstances."¹⁶

The Response Brief's reasoning falters in two related ways. It urges a per se rule where the constitution requires objective, case-by-case analysis, and concomitantly, it fails to fully analyze the decedent's statements beyond noting that conversations between friends do not fall within the core class of unquestionably testimonial statements.¹⁷ The inquiry does not end there.

⁹ A.R. 1220–21.

¹⁰ A.R. 1222.

¹¹ *Michigan v. Bryant*, 562 U.S. 344, 369 (2011).

¹² *Davis v. Washington*, 547 U.S. 813, 822 (2006).

¹³ *See Crawford v. Washington*, 541 U.S. 36, 59 (2004).

¹⁴ *Davis*, 547 U.S. at 822.

¹⁵ *Clark*, 576 U.S. at 244.

¹⁶ *Bryant*, 562 U.S. at 369.

¹⁷ *See Resp.'s Br.* 13–14.

For hearsay outside the “core class” of testimonial statements, the Constitution requires a case-by-case inquiry that examines “all of the relevant circumstances.”¹⁸ The Response’s suggestion that the Court adopt a per se rule that statements to friends are never testimonial is therefore inappropriate. There may be a “core class” of statements that are always testimonial, but there is no class of statements that can never be testimonial.

Under the facts of this case, the decedent’s identification of her attacker was testimonial. The decedent reported that the emergency had occurred the night before.¹⁹ The friend asked in the context of urging her to report the crime.²⁰ He was too far away to meet an ongoing emergency, which the decedent denied existed.²¹ And his question—whodunit—is the quintessential testimonial inquiry. Other aspects of the conversations were nontestimonial.²² But he asked that specific question—who did this—to hold the responsible party to account, and the decedent answered accordingly.²³ The State may have considered this evidence probative, but that doesn’t make it admissible.²⁴

Because the decedent’s friend asked whodunit with the primary purpose of proving past events relevant to a criminal prosecution, and because the decedent answered with this understanding, her identification of Petitioner was testimonial and thus inadmissible.

II. The circuit court misapplied WVRE 609 in light of *Michael C.*

This case tracks *Michael C.*²⁵ beat for beat. Pretrial the defense moved to use his wife’s prior conviction as substantive evidence.²⁶ The court denied its request, so at trial Petitioner renewed his motion under WVRE 609 to impeach his wife with it instead.²⁷

¹⁸ *Bryant*, 562 U.S. at 369.

¹⁹ A.R. 1394–96.

²⁰ A.R. 1395.

²¹ *Id.*

²² *See, e.g.*, A.R. 1390 (casually stating Petitioner’s wife was a houseguest).

²³ *See* A.R. 1400.

²⁴ *E.g. Jensen v. Clements*, 800 F.3d 892, 894 (7th Cir. 2015) (Confrontation Clause barred admission of decedent’s pre-death assertions that, if killed, her husband did it).

²⁵ *State v. Michael C.*, 248 W. Va. 75, 887 S.E.2d 60 (2023).

²⁶ *See Michael C.*, 248 W. Va. at 77; A.R. 24.

²⁷ *See Michael C.*, 248 W. Va. at 77; A.R. 947.

Instead of applying *Michael C.*'s holding to the court's reasoning, the Response Brief misreads the record.²⁸ Per the Response, Petitioner presented an incoherent rationale for the conviction's substantive relevance.²⁹ This is incorrect. Petitioner cited WVRE 609 to use his wife's conviction for impeachment.³⁰ He gave the court a copy of *Michael C.* to review.³¹ Yet it made the exact same error.³² The judge insisted, aside from impeachment, that the defense prove the conviction had substantive relevance.³³

Rather than justify the court's ruling, the Response Brief's argument illustrates the error. At trial, Petitioner specifically cited WVRE 609 as authority to impeach his wife.³⁴ But the court diverted counsel to irrelevancies and demanded, as a condition of admissibility, that the defense explain the evidence's substantive value.³⁵ The circuit court turned WVRE 609 on its head, misread *Michael C.* as standing for the exact opposite of its holding, and improperly prevented Petitioner from impeaching his wife.

Jurors heard Petitioner's entire criminal history despite no showing it had any bearing on the case aside from impeachment.³⁶ It is not credible that a single question about the State witness's felon status would confuse jurors.

III. It was prejudicial for the court to illegally bolster the State witness's credibility and prevent Petitioner from impeaching her.

It is nearly axiomatic that errors effecting witness credibility are prejudicial if jurors must evaluate that witness's credibility.³⁷ Petitioner and his wife both testified.³⁸ If jurors

²⁸ See Resp.'s Br. 15.

²⁹ *Id.*

³⁰ A.R. 947.

³¹ A.R. 935–37.

³² A.R. 947.

³³ A.R. 940–41.

³⁴ A.R. 934–35.

³⁵ A.R. 940–41.

³⁶ E.g. A.R. 1438–39; *but see* WVRE 609(a)(1).

³⁷ E.g. *State v. Brooks*, 160 W. Va. 728, 729, 238 S.E.2d 181, 181 (1977); *State v. Toppings*, 166 W. Va. 40, 46, 272 S.E.2d 463, 467 (1980); *D.C. v. Clawans*, 300 U.S. 617, 632 (1937).

³⁸ See A.R. 994; A.R. 1461.

believed Petitioner's wife, they could, as they did, vote to convict. But if they believed Petitioner, they were duty-bound to acquit. Preventing Petitioner from impeaching his wife therefore affected the verdict,³⁹ and the State cannot prove beyond a reasonable doubt that illegally buoying her testimony with uncontroverted hearsay had no impact on jurors.⁴⁰

The Response argues these errors are harmless because the evidence was overwhelming.⁴¹ It is legally and factually mistaken. Legally, in *Chapman v. California* the Supreme Court rejected an "overwhelming evidence" rule that focused on the strength of the State's case.⁴² Except for truly extreme cases, the test is qualitative—did the error concern the issues jurors had to resolve? Here they did. Jurors had to decide who to believe, and were duty-bound to acquit if they credited Petitioner over his wife.

And factually, the State's physical evidence is not as dispositive as the Response wishes it to be. The circumstantial evidence showed only what no one disputed: Petitioner was present.⁴³ But the central question jurors had to answer was who to believe.⁴⁴ The evidence was not so one-sided that jurors would necessarily convict even if they had believed Petitioner instead of his wife.⁴⁵

CONCLUSION

Reasonable jurors, hearing that the decedent herself identified her assailant hours before her death, would consider her testimony especially compelling. But that doesn't make it admissible—it makes it prejudicial.

Respectfully submitted,
William Ross Carman,
By Counsel

³⁹ See Syl. pt. 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979).

⁴⁰ See *Chapman v. California*, 386 U.S. 18, 24 (1967).

⁴¹ Resp.'s Br. 20.

⁴² *Chapman*, 386 U.S. at 23.

⁴³ See Petr.'s Br. 18.

⁴⁴ See A.R. 1520–46 (State's closing); A.R. 1546–84 (defense closing); A.R. 1584–93 (rebuttal).

⁴⁵ See *Mays v. Chang*, 213 W. Va. 220, 225, 579 S.E.2d 561, 566 (2003) (erroneous exclusion of evidence prejudicial because rational jurors could have drawn different conclusions had they received it).

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