IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-733

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STATE OF WEST VIRGINIA,

Respondent,

v.

WILLAM ROSS CARMAN,

Petitioner.

BRIEF OF RESPONDENT

**Appeal from the November 11, 2023, Order
Circuit Court of Ohio County
Case No. 22-F-5**

**PATRICK MORRISEY
ATTORNEY GENERAL**

Holly M. Mestemacher (WV Bar # 7996)
Assistant Attorney General
State Capitol Complex
Building 6, Suite 406
Charleston, WV 25305-0220
Email: hmestemacher@wvago.gov
Telephone: (304) 558-5830
Facsimile: (304) 558-5833
Counsel for Respondent

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INTRODUCTION

Petitioner William Carman robbed and brutally murdered Anorah Schostag by stabbing her fifteen times, with one stab wound nearly decapitating her. In addition to the stab wounds, Ms. Schostag had thirteen bilateral broken ribs, numerous incisions and lacerations, bruising, and approximately five hundred milliliters of hemorrhaged blood in her thoracic cavity. Both Petitioner and his then-wife, Amanda Carman, were present in Ms. Schostag's home when the murder took place. Petitioner claimed innocence and pointed his finger at his wife, but the jury found the DNA evidence, video evidence, and testimony from numerous witnesses proved beyond a reasonable doubt that Petitioner was the murderer. In addition to first degree murder, the jury also convicted Petitioner of burglary, robbery, and two counts of gross child neglect creating a substantial risk of serious bodily injury or death. Despite the overwhelming evidence against him, Petitioner seeks a new trial based on his unfounded claims that the circuit court violated the Confrontation Clause, West Virginia Rule of Evidence 609, and the provisions of *State v. Michael C.* For the reasons set forth below, Petitioner's claims are meritless, and this Court should affirm Petitioner's convictions and the Circuit Court of Ohio County's November 11, 2023, Order.

ASSIGNMENTS OF ERROR

Petitioner advances two assignments of error:

I. Are statements by the decedent automatically exempt from the Confrontation Clause due to forfeiture by wrongdoing, or must the State show that the defendant intended to prevent the decedent from testifying?

II. Can a circuit court exclude evidence of a conviction, offered to impeach a felon's credibility under WVRE 609, because aside from credibility it is irrelevant to the facts of the current case?

Pet'r's Br. 1

STATEMENT OF THE CASE

Petitioner and his then-wife, Amanda Carman, were the only two adults present at the time of Anorah Schostag's murder. *See* App. Vol. 3, 521. Petitioner pointed blame at Ms. Carman, App. Vol. 3, 521; and Ms. Carman pointed blame at Petitioner, App. Vol. 3, 521. The difference, however, is that significant DNA evidence, including blood evidence, Petitioner's fingerprints in blood on the cell phone located next to the mutilated body, and testimony of lay witnesses and law enforcement corroborate Ms. Carman's testimony and tie Petitioner—and Petitioner alone—to the crimes. The jury found Petitioner guilty beyond a reasonable doubt. App. Vol. 5, 908.

Petitioner's Statement of the Case is mostly accurate, albeit with a slant favorable to Petitioner. *See* Pet'r's Br. 1-10. Given the voluminous Appendix, pursuant to West Virginia Rule of Appellate Procedure 10, Respondent will focus its Statement of the Case on supplementing and clarifying Petitioner's Statement of the Case. Respondent notes its disagreement with Petitioner's self-serving characterizations of the circuit court's rulings and the evidence.

1. Mr. Fink's Texts and Telephone Calls with Ms. Schostag

The evidence introduced at trial included numerous text messages and three telephone calls between Ms. Schostag and her friend, Roger Fink. *See* Suppl. App. 1-5; App. Vol 8, 1389-1421; App. Vol. 10, 1874-81. On the morning of the murder, Ms. Schostag called Mr. Fink, sobbing. App. Vol 8, 1391-94. Ms. Schostag told him she had been bound and beaten throughout the night and referred to her attacker as "her husband." App. Vol 8, 1394-95. Mr. Fink knew Ms. Schostag's husband had died the previous year and took "her husband" to mean the husband of the friend—whose name he did not know at the time—staying with her. App. Vol. 8, 1395. Mr. Fink advised her to call 911. App. Vol. 8, 1396. Ms. Schostag wanted to get her child out of the home first, and she was reluctant to call the police because there were drugs in the home. App. Vol. 8, 1397-98. She further feared CPS involvement if she called police. *See* App. Vol. 8, 1534.

Over the next two hours, Ms. Schostag and Mr. Fink remained in contact by text. App. Vol. 8 1398-99. When she stopped answering the texts, he texted that he would call 911 if she did not call him in the next two minutes. App. Vol. 8, 1400. She called. App. Vol. 8, 1400-01. Because of her flat demeanor when she answered, he asked if the attacker was in the room. App. Vol. 8, 1402. He was. App. Vol. 8, 1402. Mr. Fink had Ms. Schostag pass the phone to the attacker—whose name Mr. Fink did not know—and he told the attacker he was coming to kill him and was forty-five minutes away. App. Vol. 8, 1402-1404. The attacker handed the phone back to Ms. Schostag. App. Vol. 8, 1404. Mr. Fink said she sounded calmer. App. Vol. 8, 1404. They hung up and exchanged a few more texts for approximately twenty minutes. App. Vol. 8, 1404-1408. Then he never heard from her again. App. Vol. 8, 1408.

2. <u>The Stabbing and Ms. Carman Seeking Help</u>

Petitioner took Ms. Schostag to her office upstairs where she kept drugs. Ms. Carman was holding one child in her arms at the time she saw Petitioner reach across the office desk and stab Ms. Schostag in the chest. App. Vol. 6, 993. Ms. Carman fled outside, where she flagged down a vehicle. App. Vol. 4, 581. The driver described her as "very scared and it looked like she just witnessed something bad," "[s]he had a face full of fear and just dread in her eyes." App. Vol. 4, 581. Despite this, she said she did not need help, but needed to get a child out of the house. App. Vol. 4, 582. Ms. Carman ran back inside for the other child, where she got the keys to Ms. Schostag's car, and drove away. App. Vol. 6, 998. The driver called 911. App. Vol. 4, 590-92.

While driving, Ms. Carman discarded cell phones she believed were stolen out of the car then drove back toward Ms. Schostag's home to see if law enforcement had responded. App. Vol.

6, 998-99, 1006. Law enforcement had arrived at the church parking lot across the street from Ms. Schostag's home, and Ms. Carman drove directly to them for help. App. Vol. 4, 595, 611; App. Vol. 6, 998-99. She was "frantic" as she reported that her friend had been attacked, and indicated that she didn't know if her friend was still alive. App. Vol. 4, 581, 611-13; App. Vol. 6, 994.

While Ms. Carman was speaking with law enforcement, Petitioner fled out the back of Ms. Schostag's home with law enforcement in hot pursuit. App. Vol. 4, 621-23; App. Vol. 6, 999. He discarded evidence in a ravine, later recovered by law enforcement. App. Vol. 5, 794. Petitioner was arrested and taken to the hospital for treatment of the gash to his hand, App. Vol. 4, 624, which he stated he received at Ms. Carman's hands when he tried to block her from stabbing Ms. Schostag, App. Vol. 4, 624; App. Vol. 8, 1461. While at the hospital, law enforcement collected his blood-covered socks and other evidence. *See* App. Vol. 3, 517; App. Vol 6, 1131.

3. <u>DNA, Fingerprints, and Video Surveillance Evidence</u>

Forensic evidence linked Petitioner to the crime. The murder was extremely brutal, "blood was everywhere" including the ceiling. App. Vol. 4, 646; App. Vol. 7, 1245-46. DNA blood evidence included Petitioner's bloody clothes containing Petitioner's and Ms. Schostag's DNA, App. Vol. 7, 1187; Petitioner's blood in the room of the murder and around the house, App. Vol. 7, 1187; Ms. Schostag's blood all over the socks Petitioner wore at the time of his arrest, App. Vol. 7, 1179; and a bloody cell phone found next to body containing Petitioner's fingerprints, App. Vol. 7, 1210, 1213-14; *see* App. Vol. 3, 517. Petitioner's hand was severely slashed and required hospital treatment. App. Vol. 4, 624.

There was a single drop of blood on Ms. Carman, located on her ankle, and it was conclusively determined to belong to neither Petitioner nor Ms. Schostag. App. Vol. 4, 626; App. Vol. 7, 1187. Ms. Carman had no wounds. App. Vol. 4, 626.

Ms. Schostag's neighbor was an eyewitness to Petitioner fleeing from Ms. Schostag's home through the backyards minutes after law enforcement located Ms. Schostag's body. App. Vol. 4, 696, 699. The same eyewitness to Petitioner fleeing the scene also had a Ring camera that captured video of a "prowler" between the neighbor's house and Ms. Schostag's house multiple times between 1:00 a.m. and 3:00 a.m. *See* App. Vol. 3, 519-20; App. Vol. 4, 750. The video shows the prowler carrying a bag, which was later found stuffed in the neighbor's trashcan, containing a knife, gloves, gun holster (for the stolen gun located in Ms. Schostag's home, App. Vol. 4, 564-71, 753), and flashlight. App. Vol. 4, 711-12.

4. <u>Rule of Evidence 609 and Ms. Carman's 2013 Conviction of Drug Distribution</u>

In July 2022, Petitioner filed a motion to introduce Ms. Carman's 2013 federal conviction for distribution of narcotics as 404(b) evidence to demonstrate "potential motive or modus operandi" for the robbery and murder of Ms. Schostag. App. Vol. 10, 1858-59. During the November 2022 pretrial hearing, Petitioner argued the conviction should be admitted to show "possible motive, or lack of mistake, or some other 404(b)" reason. App. Vol. 1, 24-25. When questioned as to what motive this 2013 conviction for drug distribution would show, Petitioner specified murder. App. Vol. 1, 25. According to Petitioner, the conviction demonstrated Ms. Carman had sufficient knowledge of the drug trade, how drug transactions work, and how drugs or money may be stored, to "potentially" give her motive for robbery and murder. App. Vol. 1, 24-25. The circuit court deferred ruling on the motion, App. Vol. 1, 25, then denied it by written Order, App. Vol. 10, 1898.

No further mention was made of Ms. Carman's conviction until she was called as a witness during trial. App. Vol. 5, 934-36. The circuit court recessed the trial proceedings to read the case identified by Petitioner's counsel, returned to the bench, and agreed that Rule 609 applied to the conviction and, per *Michael C.* proceeded with the Rule 403 balancing test. App. Vol. 5, 936-37. The ensuing discussion was convoluted, replete with conflicting arguments by Petitioner. App. Vol. 5, 938-947. Below, Petitioner presented a "kitchen sink" argument which incorporated every potential theory of admissibility: Ms. Carman's prior conviction made it more likely that she would disobey the law (App. Vol. 5, 938, 941, 945); it bolstered Ms. Carmen's testimony about her and the victim's interactions with drugs by making it *more* likely that she was telling the truth (App. Vol. 5, 938-39); it would somehow be useful in discussing whether Ms. Carmen ever disclosed spousal abuse to her probation officer (App. Vol. 5, 938); and that it could be used to impeach Ms. Carman's testimony if she "decide[d] to change her testimony." App. Vol. 5, 940. The culmination of this argument was that maybe Petitioner wanted to use the conviction to prove Ms. Carmen was telling the truth about drug use, or maybe he wanted it to prove Ms. Carmen was lying about spousal abuse, or maybe he would like to use it to impeach Ms. Carmen if she lied, or—*perhaps*—to admit the evidence for the intended purpose of Rule 609.

It was upon this multi-faceted theory of admissibility that the circuit court was left to sift through the evidentiary value of Ms. Carmen's nearly ten-year-old conviction and issue a ruling. The circuit ultimately ruled "that the probative value [wa]s substantially outweighed by the danger that it will create unfair prejudice, confuse the issues, and mislead the jury." App. Vol. 5, 947. It nonetheless repeatedly stated that Petitioner could use the conviction to impeach Ms. Carman if she testified falsely to questions about dealing drugs. App. Vol. 5, 940-41, 948. It also allowed the defense to "explore" drugs involved in this case. App. Vol. 5, 948. The circuit court placed no limits on that exploration. App. Vol. 5, 948. It stated it did not know what Ms. Carman's testimony would be and thus advised that objections could be made as the evidence was presented and that it would rule on those objections as they came in. App. Vol. 5, 948. Second, the circuit court found that Petitioner could ask Ms. Carman about being on probation. App. Vol. 5, 943. Third, the circuit court made clear that if Ms. Carman denied drug use or being probated, then that would "open the door" and allow Petitioner to introduce the conviction. App. Vol. 5, 941.

5. <u>Petitioner's Motion to Exclude Mr. Fink's Testimony as Hearsay.</u>

Prior to trial, Petitioner filed a motion in limine to exclude each of Ms. Schostag's three conversations with Mr. Fink as hearsay. App. Vol. 10, 1860-63. The State argued the statements were exceptions to hearsay pursuant to Rule 803(1) present sense impressions, 803(2) excited utterances, Rule 803(3) existing state of mind, and Rule 807's residual exception. App. Vol. 10, 1864-72. Following a hearing, the circuit court admitted the first phone call, occurring the night before the murder, as *res gestae*. App. Vol. 1, 71-144; Suppl. App. 3. It admitted the second phone call, occurring at 11:00 a.m. the day of the murder, during which Ms. Schostag stated the attacker was "her husband," finding the conversation admissible as present sense impression and excited utterance. Suppl. App. 2-3. It found the third telephone conversation, which occurred at 1:08 p.m. on the day of the murder, to also be admissible under the present sense impression and the excited utterance exceptions to hearsay. Suppl. App. 2-3. The circuit court lastly found that

> the statements of the decedent as testified to by Roger Fink have the equivalent circumstantial guarantees of trust-worthiness; is offered as evidence of a material fact; is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and admitting it will best serve the purposes of the Rules of Evidence and the interests of justice under Rule 807.

Suppl. App. 3.

During the hearing regarding hearsay exceptions, the circuit court also discussed whether Rule 804 applied. App. Vol. 1, 18-19. Petitioner argued Rule 804 was irrelevant because there was no evidence Petitioner killed Ms. Schostag with the intent to prevent her testimony, but it did not rule on it at that time. App. Vol. 1, 18-19. Petitioner revisited the matter during trial. App. Vol. 7, 1218-1222. The circuit court considered the parties' arguments and concluded that the doctrine of forfeiture for wrongdoing applied, thus extinguishing Petitioner's right to confront the witness. App. Vol. 7, 1218- 1222. In so ruling, however, the circuit court did not make a finding of intent.

SUMMARY OF ARGUMENT

I. Both 804(b)(6) and the Confrontation Clause are triggered by *testimonial* statements. Hence, neither Rule 804(b)(6) nor the Confrontation Clause were violated when the circuit court admitted Ms. Schostag's out of court statements to her friend, Roger Fink, into evidence despite Ms. Schostag's absence from trial, because the statements were nontestimonial. Nontestimonial statements by an unavailable declarant, on the other hand, are not precluded from use by the Confrontation Clause or by Rule of Evidence 804(b)(6). Although the circuit court did not address whether Ms. Schostag's statements were testimonial, the nontestimonial nature of the statements is nonetheless dispositive of this assignment of error.

II. The circuit court properly excluded Ms. Carman's prior conviction for impeachment purposes because the conviction's low probative value was substantially outweighed by the danger of creating unfair prejudice, confusing the issues, and misleading the jury. Even if this ruling was erroneous, the impact was negligible. The circuit court allowed Petitioner to question Ms. Carman about probation arising from that conviction and, noting the significant amount of drugs involved in this case, to "explore that" with Ms. Carman as well, both of which were reasons Petitioner sought Rule 609 admission. The only prohibitions were that Petitioner could not identify the specific charge and he could not question Ms. Carman about what was or was not in her probation officer's file regarding spousal abuse. Otherwise, Petitioner's cross-examination of Ms. Carman was unlimited, subject to any objections that arose as the evidence was presented.

III. Petitioner received a fair trial. Both assignments of error are nonconstitutional in nature, making any error harmless when it is highly likely that the error did not impact the outcome of the proceeding. Here, there was no error and even if there was error, the ample evidence independent from Ms. Carman's testimony and Mr. Fink's testimony makes it highly probable that error did not contribute to the jury's finding of guilt.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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).

STANDARD OF REVIEW

A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are reviewed for an abuse of discretion. *State v. Blake*, 197 W. Va. 700, 705, 478 S.E.2d 550, 555 (1996). The admission of the victim's out-of-court statement and the exclusion of Rule 609 evidence are evidentiary rulings, thus subject to review under an abuse of discretion standard. Syl. pt. 8, *State v. Blevins*, 231 W. Va. 135, 744 S.E.2d 245 (2013). "Under an abuse of discretion standard, the underlying facts are reviewed for clear error; and questions of law and interpretations of statutes and rules are subject to a *de novo* review." *State v. Jako*, 245 W. Va. 625, 632-33, 862 S.E.2d 474, 481-82 (2021), *cert. denied sub nom. Jako v. West Virginia*, 142 S. Ct. 1680 (2022) (mem.). "An appellate court should find an abuse of discretion only when the trial court has acted arbitrarily or irrationally." *State v. Beard*, 194 W. Va. 740, 748, 461 S.E.2d 486, 494 (1995).

Petitioner alleges the circuit court erred in excluding a witness's prior conviction for impeachment pursuant to Rule of Evidence 609. "The extent to which prior convictions may be introduced to impeach the credibility of a witness other than the defendant in a criminal trial rests within the sound discretion of the trial court." Syl. pt. 3, *State v. Michael C.*, 248 W. Va. 75, 887 S.E.2d 60 (2023) (quotations omitted).

Petitioner alleges a violation of his confrontation rights, which is "reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." *Jako*, at 633, 862 S.E.2d at 482 (quotations omitted); Syl. pt. 6, *State v. Hoard*, 248 W. Va. 428, 889 S.E.2d 1 (2023).

Harmless Error

"Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction." *State v. Jenkins*, 195 W. Va. 620, 629, 466 S.E.2d 471, 480 (1995) (quoting syl. pt. 20, *State v. Thomas*, 157 W. Va. 640, 203 S. E.2d 445 (1974)); *see also State v. Omechinski*, 196 W. Va. 41, 48 n.11, 468 S.E.2d 173, 180 n.11 (1996) ("Most errors, including constitutional ones are subject to harmless error analysis . . . simply because it makes no sense to retry a case if the result assuredly will be the same.") (citing *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993)).

"Nonconstitutional error is harmless when it is highly probable the error did not contribute to the judgment." *State v. Guthrie*, 194 W. Va. 657, 684, 461 S.E.2d 163, 190 (1995). When dealing with the wrongful admission of evidence, the appropriate test for harmlessness "is whether we can say with fair assurance, after stripping the erroneous evidence from the whole, that the remaining evidence was independently sufficient to support the verdict and the jury was not substantially swayed by the error." *Id.*

ARGUMENT

I. Neither Rule 804(b)(6) nor the Confrontation Clause were violated when the circuit court admitted Ms. Schostag's out of court statement into evidence despite her absence from trial.

Petitioner asserts that the circuit court erred in admitting Ms. Schostag's statements to Mr. Fink because the circuit court's ruling fell short of Rule of Evidence 804(b)(6) and the Confrontation Clause. Pet'r's Br. 13. Petitioner relies on *State v. Jako*, which discussed forfeiture by wrongdoing at great length. *See Jako*, 245 W. Va. 625, 862 S.E.2d 474. According to Petitioner, the circuit court's ruling thus fell fatally short of *Jako* because it did not apply the correct burden of proof and it failed to make findings regarding Petitioner's intent. Pet'r's Br. 13.

But, the Court need not reach this question. Petitioner is not entitled to relief because both 804(b)(6) and the Confrontation Clause are triggered by *testimonial* statements. Ms. Schostag's statements were not testimonial. As a result, neither Rule 804(b)(6) nor the Confrontation Clause were triggered or violated, and *Jako*'s forfeiture-by-wrongdoing requirements are inapplicable. Although the circuit court did not address whether Ms. Schostag's statements were testimonial, the nontestimonial nature of the statements is nonetheless dispositive of this assignment of error. "This Court may, on appeal, 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. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965).

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). 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; *see also* syl. pt. 6, *Mechling*, 219 W. Va. 366, 633 S.E.2d 311. Thus, it is "testimonial statements" that cause the declarant to be a "witness" subject to the constraints of the Confrontation Clause. *Smith v. Arizona*, 144 S. Ct. 1785, 1791 (2024); *Mechling*, 219 W. Va. at 373, 633 S.E.2d at 318. As with the Confrontation Clause, only *testimonial* statements trigger the forfeiture-by-wrongdoing doctrine codified in West Virginia Rule of Evidence 804(b)(6). Syl. pt. 4, *Jako*, 245 W. Va. 625, 862 S.E.2d 474.

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 "extrajudicial statements . . . contained in formalized testimonial materials" and "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*, 541 U.S. 36, 51-52 (2004); *see, e.g.*, *Davis v. Washington*, 547 U.S. 813, 822 (2006) (victim's statements "made in the course of police interrogation" were testimonial when "the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution"); *Jako*, 245 W. Va. at 634, 862 S.E.2d at 483 (undisputed by the parties that unavailable witness's recorded statements to law enforcement implicating defendant were testimonial). In other words, where a statement is functionally trial testimony, it is testimonial and subject to the constraints of the Confrontation Clause. *Crawford*, 541 U.S. at 51. This satisfies "the basic objective of the Confrontation Clause, which is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial." *Michigan v. Bryant*, 562 U.S. 344, 358 (2011).

Nontestimonial statements by an unavailable declarant, on the other hand, are not precluded from use by the Confrontation Clause or by Rule of Evidence 804(b)(6). *Smith*, 144 S. Ct. at 1792 ("In speaking about 'witnesses'—or 'those who bear testimony'—the Confrontation Clause 'confines itself to "testimonial statements."'"). Nontestimonial statements include statements such as a "casual remark to an acquaintance" and a witness's statement to law enforcement "when the primary purpose is to enable police assistance to meet an ongoing emergency." *Crawford*, 541 U.S. at 51; *Davis,* 547 U.S. at 828. Recently, in *State v. Henson*, this Court reaffirmed that statements between friends and acquaintances are nontestimonial. 239 W. Va. 898, 909-10, 806 S.E.2d 822, 833-34 (2017) (quoting *United States v. Jordan*, 509 F.3d 191, 201 (4th Cir. 2007)). Ms. Schostag, being deceased, was not at trial and, thus, not subject to cross-examination, so the only other question is whether Ms. Schostag's statements to Mr. Fink were testimonial. They were not.

Applying the distinction between testimonial and nontestimonial statements to this case makes clear that Ms. Schostag's statements to her friend, Mr. Fink, were nontestimonial. Ms. Schostag's conversations with Mr. Fink were not part of a criminal investigation, they were not part of a statement to or interrogation by law enforcement or some other official, they were not a sworn statement, and they were not part of litigation, a court proceeding, or testimony recorded for any purpose. Instead, Ms. Schostag called him for comfort and guidance promptly after Petitioner released her from the vicious beating, while she was badly injured and highly upset. App. Vol 8, 1391-95. Ms. Schostag's statements are precisely the type of nontestimonial statements both the United States Supreme Court and this Court have refused to consider as *Crawford* material: statements made by one friend to another.

This Court, in fact, has expressly rejected the argument that *Crawford* applies to statements made by a declarant to friends or associates. *Henson*, 239 W. Va. at 909-10, 806 S.E.2d at 833-34. In so ruling, this Court found a Fourth Circuit Court of Appeals opinion persuasive, in that,

> [t]o our knowledge, no court has extended *Crawford* to statements made by a declarant to friends or associates. *See United States v. Franklin*, 415 F.3d 537, 545 (6th Cir. 2005) (concluding that statements were nontestimonial where witness "was privy to [Declarant]'s statements only as his friend and confidant"); *United States v. Saget*, 377 F.3d 223, 229 (2d Cir. 2004) ("Thus, we conclude that a declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*."); *United States v. Manfre*, 368 F.3d 832, 838 n.1 (8th Cir. 2004) ("[Declarant]'s comments were made to loved ones or acquaintances and are not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks.").

Id. (citing *Jordan*, 509 F.3d at 201). The *Henson* Court thus concluded "there is no implication of the Confrontation Clause as the statements made to friends or acquaintances were nontestimonial, as the statements 'would [not] lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *Id*. (citing syl. pt. 8, *Mechling*, 219 W. Va. 366, 633 S.E.2d 311). The same principles apply to the case at bar: statements between friends are nontestimonial.

Consequently, because Ms. Schostag's statements to Mr. Fink during their telephone conversations were nontestimonial, neither Rule of Evidence 804(b)(6) nor the Confrontation Clause were triggered. Correspondingly, the lower court never needed to even consider *Jako* or the forfeiture by wrongdoing doctrine because of the nontestimonial nature of the statements. For this reason and because the circuit court found Ms. Schostag's telephone conversations with Mr. Fink to be admissible hearsay pursuant to Rules 803(1) present sense impression exception, 803(2) excited utterance exception, and the Rule 807 residual exception—rulings that are not challenged on appeal—the circuit court did not abuse its discretion in allowing Mr. Fink to testify about his conversations with Ms. Schostag. The circuit court should be affirmed.

II. The circuit court properly excluded a witness's prior conviction for impeachment purposes because the conviction's low probative value was substantially outweighed by the danger of creating unfair prejudice, confusing the issues, and misleading the jury.

Petitioner next argues that the circuit court misapplied and misunderstood Rule of Evidence 609 and *Michael C.* when it precluded him from impeaching Ms. Carman with her 2013 federal conviction for drug distribution. Pet'r's Br. 15-16. Petitioner contends the circuit court required the eligible conviction to be factually related to the issues charged, which this Court deemed immaterial for purposes of 609. Pet'r's Br. 16. He thus argues that the circuit court weighed the wrong factors, placing weight on relevance rather than the value of impeachment. Notably, however, if it did so, the reason exemplifies the soundness of its ruling: Petitioner's argument to the lower court was disjointed and essentially tossed a mess of theories at the proverbial fan.

Under Rule of Evidence 609, evidence of a witness's prior felony conviction is relevant to impeach the witness's credibility. Syl. pt 3, *Michael C.*, 248 W. Va. 75, 887 S.E.2d 60. While Rule 609 makes a prior conviction relevant for impeachment purposes, it does not create carte blanche admissibility of a prior conviction; rather, admissibility is always tempered by a Rule 403 analysis. W. Va. R. Evid. 609(a)(2). "The sole issue to be determined by the circuit court is whether the probative value of the impeachment evidence is substantially outweighed by the danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Syl. pt 4, *Michael C.*, 248 W. Va. 75, 887 S.E.2d 60.

Although Petitioner unsuccessfully attempted to have the evidence of Ms. Carman's 2013 conviction ruled admissible 404(b) evidence during the pretrial stage (App. Vol. 1, 24-25; App. Vol 10, 1858-59), it was not until the State called Ms. Carman as a witness at trial that Petitioner advised the circuit court that he intended to use the conviction as impeachment material under Rule 609 and *Michael C.* App. Vol. 5, 934-36. The circuit court recessed the trial proceedings to read the case, returned to the bench, and agreed that Rule 609 applied to the conviction and, per *Michael C.*, proceeded with the Rule 403 balancing test. App. Vol. 5, 936-37.

The ensuing discussion was convoluted, replete with conflicting arguments by Petitioner. App. Vol. 5, 938-947. Below, Petitioner presented a "kitchen sink" argument which incorporated every potential theory of admissibility: Ms. Carman's prior conviction made it more likely that she would disobey the law (App. Vol. 5, 938, 941, 945); it bolstered Ms. Carmen's testimony about her and the victim's interactions with drugs by making it *more* likely that she was telling the truth (App. Vol. 5, 938-39); it would somehow be useful in discussing whether Ms. Carmen ever disclosed spousal abuse to her probation officer (App. Vol. 5, 938); and that it could be used to impeach Ms. Carman's testimony if she "decide[d] to change her testimony." App. Vol. 5, 940. The culmination of this argument was that maybe Petitioner wanted to use the conviction to prove Ms. Carmen was telling the truth about drug use, or maybe he wanted it to prove Ms. Carmen was lying about spousal abuse, or maybe he would like to use it to impeach Ms. Carmen if she lied, or—*perhaps*—to admit the evidence for the intended purpose of Rule 609. It was upon this multi-faceted theory of admissibility that the circuit court was left to sift through the evidentiary value of Ms. Carmen's nearly ten-year-old conviction and issue a ruling.

Despite the disjointed nature of Petitioner's arguments, the circuit court issued an appropriate ruling. First, the circuit court repeatedly stated that Petitioner could use the conviction to impeach Ms. Carman if she testified falsely to questions about dealing drugs. App. Vol. 5, 940-41, 948. The circuit court emphasized the significant amount of drugs involved in this case and expressly ruled that the defense could "explore that" with Ms. Carman, handing Petitioner an open key to question Ms. Carman as to both her—and the victims'—use and distribution of controlled substances. App. Vol. 5, 948. Critically, the circuit court placed no limits on that exploration. App. Vol. 5, 948. It stated it did not know what Ms. Carman's testimony would be and advised that objections could be made as the evidence was presented and that it would rule on those objections as they came in. App. Vol. 5, 948. Second, the circuit court found that Petitioner could question Ms. Carman about probation. App. Vol. 5, 943. Third, the circuit court made clear that if Ms. Carman made any denials about drug use or being on probation, then that would "open the door" and allow Petitioner to introduce the prior conviction. App. Vol. 5, 941. These rulings clearly reflect a circuit court willing to enable a defendant to engage in meaningful cross-examination of a key State witness. In the chaos of arguments, the circuit court still managed to give methodical rulings.

Moreover, the fundamental differences between *Michael C.* and the instant case underscore the soundness of the circuit court's ruling. Michael C. was charged with child abuse resulting in serious bodily injury of the infant son of Michael C.'s then-girlfriend, T.E. The sole issue was whether the baby sustained the injuries during the period of time when he was alone with the defendant. *Michael C.*, 248 W. Va. at 79, 887 S.E.2d at 64. Michael C. sought to introduce evidence that two years earlier T.E. had been convicted of felony child endangerment, a charge arising from her failure to provide nutrition and medical care to her six-month-old daughter. *Id*. at 78-79, 887 S.E.2d at 63-64. The circuit court refused the admission of the conviction under Rule 404(b). *Id*. at 80-81, 887 S.E.2d at 65-66. Its entire reasoning was that the conviction's "prejudicial impact outweighs the probative value, because this isn't a neglect case. This is a somebody beat the hell out of this kid case. It's just a different thing." *Id.* The circuit court also refused to admit the evidence for impeachment purposes under Rule 609, finding only that the evidence was irrelevant and that its prejudicial impact outweigh[ed] the probative value. *Id*. On appeal, this Court focused its analysis on the issue of prejudice. It held that the circuit court's exclusion of the evidence under Rule 403 on the ground that it was prejudicial in some "nebulous, unspecified way" instead of identifying exactly how the prejudicial effects of the evidence outweighed the probative value pursuant to Rule 403 was clear error. *Id*.

The present case does not contain these deficiencies. The circuit court noted that this is a criminal conviction subject to Rule 609. App. Vol. 5, 937. Unlike the circuit court in *Michael C.*, the circuit court dove deeply into the probative value of Ms. Carman's nearly 10-year old conviction. App. Vol. 5, 937-48. Although the circuit court focused on assessing the probative value of the conviction as part of its analysis, this was neither error nor misapplication of Rule 609 and *Michael C.*, because a circuit court cannot determine if the danger of unfair prejudice outweighs the probative value of a conviction for impeachment purposes unless it knows that probative weight. Ultimately, the circuit court found the 2013 conviction's probative value was not "very high." App. Vol. 5, 947. Unlike *Michael C.*, the circuit court then found "that the probative value [wa]s substantially outweighed by the danger that it will create unfair prejudice, confuse the issues, and mislead the jury." App. Vol. 5, 947. Given the confusion reflected in the transcript about the value of a nearly ten year old conviction, the circuit court soundly found that admitting the conviction would confuse the jury.

Even if the Court finds the circuit court's ruling to be erroneous, it is harmless error because the impact of that ruling was negligible. As previously discussed, Petitioner was expressly permitted to question Ms. Carman about probation and explore the drug aspect of the case, which he did. App. Vol. 6, 1118-20. The only prohibitions were that Petitioner could not identify Ms. Carman's specific charge and he could not question Ms. Carman about what was or was not in her probation officer's file regarding spousal abuse. App. Vol. 5, 947-48. Otherwise, Petitioner's cross-examination of Ms. Carman was unlimited, subject to any objections that arose as the evidence was presented. App. Vol. 5, 948. Even with these limitations, Petitioner thoroughly cross-examined Ms. Carman about spousal abuse. App. Vol. 6, 1120-1123. The circuit court further left open the possibility that, depending on Ms. Carman's testimony, the conviction may be deemed admissible impeach evidence on other grounds. App. Vol. 5, 941. It is only "[w]hen the harmlessness of the error is in grave doubt, [that] relief must be granted." *Blake*, 197 W. Va. at 705, 478 S.E.2d at 555. This is not one of those cases. The circuit court's ruling with respect to the admissibility of Ms. Carman's prior conviction was proper and should be affirmed.

III. Petitioner received a fair trial.

Petitioner lastly contends that the combination of these two "errors" denied him a fundamentally fair trial because the case turned on Ms. Carman's credibility. Pet'r's Br. 17-19. Specifically, Petitioner argues that the State cannot prove beyond a reasonable doubt that Ms. Carman's statements to Mr. Fink identifying her attacker shortly before the murder played no role in jury deliberations. Pet'r's Br. 19. Petitioner also contends it met its burden as to West Virginia Rule of Evidence 609. Petitioner is wrong on both counts.

This Court has explained that a violation of constitutional magnitude is reversible unless the error was harmless beyond reasonable doubt. *Jako*, 245 W. Va. at 633, 862 S.E.2d at 482. As explained above, there was no violation of the confrontation clause because Mr. Fink's testimony about his conversations with Ms. Schostag was nontestimonial. Thus, no constitutional violation occurred, and the circuit court's two evidentiary rulings at issue on appeal are subject to a harmless error analysis.

A nonconstitutional error is deemed harmless when it is highly likely that the error did not impact the outcome of the proceeding. *See Guthrie*, 194 W. Va. at 684, 461 S.E.2d at 190 ("[N]onconstitutional error is harmless when it is highly probable the error did not contribute to the judgment."). "The harmless error inquiry involves an assessment of the likelihood that the error affected the outcome of the trial." *State v. Bradshaw*, 193 W. Va. 519, 539, 457 S.E.2d 456, 476 (1995). Here, there was no error and even if there was, the ample evidence independent from Ms. Carman's testimony and Mr. Fink's testimony that Ms. Schostag identified Petitioner as her assailant makes is highly probable that error did not contribute to the jury's finding of guilt.

Petitioner's contention that Ms. Carman's credibility was a determinative issue because "none of the physical or documentary evidence uniquely pointed to Petitioner's guilt" unless the jurors believed Ms. Carman, is defeated by the record. Pet'r's Br. 18. The record is replete with "unique evidence" establishing Petitioner's guilt. The State admitted 208 exhibits and six forms of evidence—testimony, physical evidence, expert scientific evidence, photographs, video, forensic pathology, and medical—tying Petitioner to the crimes and pinpointing him as the culprit. *See* App. Vol. 8, 1544. The murder was brutal. "[B]lood was everywhere," including on the ceiling. App. Vol. 4, 646; App. Vol. 7, 1245-46. Yet, Ms. Carman had only a single drop of blood on her, which was neither Ms. Schostag's nor Petitioner's blood. App. Vol. 4, 627; App. Vol. 5, 736; App. Vol. 7, 1187. Petitioner's blood, however, was all over Ms. Schostag's house, including in the downstairs hallway, on his clothing, and on Ms. Schostag. App. Vol. 6, 1123; App. Vol. 7, 1176-78, 1180, 1187 1253, 1255; App. Vol. 8, 1462, 1480, 1535, 1538. The socks Petitioner was wearing at the time of arrest were covered in Ms. Schostag's blood. App. Vol. 4, 615-16; App. Vol. 7, 1179-80; App. Vol 8, 1538. The bloody cell phone located next to Ms. Schostag's mutilated body carried Petitioner's fingerprints. App. Vol. 7, 1214, 1286, 1329; App. Vol. 8, 1538-39. None of this can be said about Ms. Carman. Had she been involved in the extremely bloody murder of Ms. Schostag, the blood evidence would have linked her to it just as it linked Petitioner. Added to the forensic evidence against Petitioner, Petitioner fled from Ms. Schostag's residence and law enforcement, App. Vol. 4, 620-23, 649-51, 731, whereas Ms. Carman flagged down help, App. Vol. 4, 581, and went straight to law enforcement when she saw them on-scene, App. Vol. 4, 611, 638. Mr. Fink's testimony that Ms. Schostag identified "her husband" as the attacker was no surprise in light of the evidence. This is just a sample of the evidence cutting through Petitioner's claims of innocence. Had the jury not heard this testimony from Mr. Fink, the additional overwhelming evidence would still have resulted in Petitioner's conviction.

As far as Petitioner's laser focus on the circuit court precluding him from introducing Ms. Carman's 2013 conviction for drug distribution, it is highly probable that this ruling also had no bearing whatsoever on the jury's verdict. First, the jury was fully aware of Ms. Carman's drug use, Ms. Schostag's drug use, and the use of drugs in their relationship. App. Vol. 3, 517, 523; App. Vol. 5, 851, 853; App. Vol. 6, 967, 979, 983, 1029. Second, the circuit court expressly permitted Petitioner expressly to question Ms. Carman about probation and explore the drug aspect of the case. App. Vol. 5, 947-48. Third, the circuit court further left open the possibility that, depending on Ms. Carman's testimony, the conviction may be deemed admissible impeach evidence on other grounds. App. Vol. 5, 940, 948. Fourth, it is inconceivable that informing the jury of the specific conviction would somehow tip the scales against Ms. Carman, when the jury fully knew she was on probation, had that probation revoked for consuming drugs in violation of probation, and was aggressively cross-examined about it. App. Vol. 6, 1118-20. Given this, it is unlikely the jury would have reached a different decision if informed that Ms. Carman was convicted of dealing drugs nearly a decade before. Indeed, if the omission of the crime itself raised any questions, it was just as likely to have fueled speculation *against* Ms. Carman than in her favor.

Also, while Petitioner currently takes offense that the jury "learned about [his] entire, lengthy, criminal history," Pet'r's Br. 17, Petitioner is the one who presented his criminal history to the jury during his testimony, App. Vol. 8, 1438-39. The State did not seek to admit it. Hence, any perceived error arising from the admission of Petitioner's prior convictions was invited. "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).

For these reasons, although a rational jury *could* have believed Petitioner's testimony but for the testimony of Ms. Carman, it does not mean the jury *would* have believed it. Petitioner's success hinges on more than "could." The jury had evidence far beyond the testimony of Ms. Carman and Mr. Fink upon which they could-and did- find Petitioner guilty beyond a reasonable doubt. Thus, the ample evidence tying Petitioner to the crimes and Ms. Carman's frank admissions of drug use and dealing make it "highly probable" that any error by the circuit court in these two evidentiary rulings had no bearing on the outcome of trial.

CONCLUSION

This Court should affirm Petitioner's convictions and the Circuit Court of Ohio County's November 11, 2023, Order.

Respectfully submitted,

PATRICK MORRISEY

ATTORNEY GENERAL

/s/ Holly M. Mestemacher

Holly M. Mestemacher (WV Bar # 7996)
Assistant Attorney General
State Capitol Complex
Building 6, Suite 406
Charleston, WV 25305-0220
Email: hmestemacher@wvago.gov
Telephone: (304) 558-5830
Facsimile: (304) 558-5833
Counsel for Respondent

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-733

STATE OF WEST VIRGINIA,

Respondent,

v.

WILLAM ROSS CARMAN,

Petitioner.

CERTIFICATE OF SERVICE

I, Holly M. Mestemacher, do hereby certify that the foregoing Brief of Respondent is being served on counsel of record by File & Serve Xpress this 5th day of August 2024.

Matthew Brummond, Esq.
One Players Club Drive
Charleston, WV 25311
matt.d.brummond@wv.gov
Counsel for Petitioner

/s/ Holly M. Mestemacher
Holly M. Mestemacher
Assistant Attorney General