STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0258 (Wood County 09-F-167)

Matthew Jacob Hubley,
Defendant Below, Petitioner

M. Paul Marteney, counsel for Petitioner.
Laura Young, Assistant Attorney General, counsel for Respondent.

MEMORANDUM DECISION

Defendant below, petitioner herein Matthew Jacob Hubley (hereinafter "Petitioner"), appeals his conviction following a jury trial on one count of sexual abuse in the first degree in violation of West Virginia Code § 61-8B-7.[1] The appeal is taken from the April 7, 2011, order of the Circuit Court of Wood County denying a new trial.

This Court has considered the parties' briefs in relation to the record on appeal. Following oral argument of the parties and consideration of the standard of review, the briefs, the appendix record, and the applicable case law, we determine that the circuit court committed no reversible error. Because this case presents no new or significant questions of law, it qualifies for disposition by way of memorandum decision pursuant to Rule 21 of the Revised Rules of Appellate Procedure.

[1]Petitioner was initially charged in an eight-count indictment involving two different victims. Petitioner's motion to sever the counts applicable to each victim for separate trials was granted. Petitioner's trial in this case involved three counts of sexual abuse in the first degree.

The victim in this case, R.S.,[2] was six years old when the underlying incident occurred. At that time, she and her infant brother lived in a trailer with her mother, Emily S., and the mother's live-in boyfriend, Nathan Persinger. Petitioner, who had not located a place to live, worked with Mr. Persinger. It appears Petitioner traded some possessions with Mr. Persinger in exchange for a place to stay.

According to the mother's trial testimony, Petitioner lived with the family for two and a half days in January 2009. During his brief stay, Petitioner allegedly touched R.S. around her vagina and buttocks when he was left alone with the children in the car at three different times. As related by testimony, one incident occurred when the mother and her boyfriend dropped in for a short visit with a relative of the boyfriend; two other incidents occurred when the mother and boyfriend went into grocery stores.

The mother testified that she never heard her daughter refer to Petitioner by his proper name. Instead the child called him "Tony." She explained that a different person by the name of "Tony Lewis" had stayed with her family for ten days in either June or July of 2008, but was not in the home at the time of the 2009 incidents. The mother's testimony also established that when the daughter reported the touching to her, the child explained the extent of the touching and pointed to the next room when the mother asked who had done the touching. She went on to explain that Petitioner was in the next room, and no one other than Petitioner, herself and the two children were at the residence at that time.

Petitioner was told to leave the residence after R.S. informed the mother that Petitioner would not stop touching her. A report was made to the police and the child was taken to the emergency room (hereinafter "ER") of a local hospital. After the initial examination was completed in the ER, R.S. was referred to the Child Advocacy Center at Charleston's Women's and Children's Hospital for further examination. The second examination took place eight days later, at which time the child was interviewed at the Charleston hospital by a social worker who worked in conjunction with the examining pediatrician at the facility.

R.S. was eight years old at the time of the October 2010 jury trial. When called by the State to testify, she provided sketchy information about relevant details of what had happened to her. The child's testimony revealed that someone touched her private parts, which she demonstrated by pointing to an area on a drawing of a female child, but she

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[2]Due to the sensitive nature of the facts presented in this case, we follow our routine practice of referring to the child by her initials rather by her full name. *See e.g. In re Cesar L.*, 221 W.Va. 249, 252 n. 1 (2007).

did not identify any individual as the person who touched her. Her testimony was that the touching occurred once and that a male had done it. The child's most frequent answer to the questions posed by the State was that she could not remember. Petitioner's trial counsel did not cross examine the child and affirmatively indicated that he had no questions for her. At this point in the trial, the court found the child was an unavailable witness.[3]

The social worker was called as a State's witness after R.S. testified and she explained her responsibilities at the Child Advocacy Center. She stated that the purpose of her interviewing children was to determine what happened to the child and "to get as much information and detail about that so that we can make sure that the child gets into whatever services or counseling or therapy, any kind of medical care that they need." She explained that medical treatment was provided at the facility by physicians and nurses.

When the State recalled the mother, she testified outside the jury's presence as to what the child was told about why she was going to Charleston and the second examination. The mother said that the child was told "that we were going there so a doctor could examine her to make sure she was okay."

Thereafter, the prosecutor informed the trial court of his intention to have the social worker from Women's and Children's Hospital testify concerning what the child had told her during the interview. Defense counsel objected on the basis of hearsay and because doing so would violate the defendant's constitutional right to confront the witness against him. The trial court ruled that the social worker's testimony was admissible by stating:

> [T]his type of an interview is non-testimonial in that, at least from the evidence presented, the purpose of this is to try to determine whether the child has been abused or injured for purposes of taking care of the child, and then, of course, doing any kind of medical treatment and/or psychological treatment that might be necessary.

Upon taking the stand the second time, the social worker was qualified as an expert witness. During the course of her testimony she noted that the evaluation at the Center was not intended for law enforcement purposes. She explained that the interview with R.S., which was observed by the examining pediatrician, was used to determine the way that the physical exam and treatment should proceed. As to the information she

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[3]It was suggested during oral argument that this ruling was made so that the child could not be recalled as a witness.

obtained from the child during the interview, the social worker testified that the following exchange occurred between herself and the child when she asked the victim if there were any kinds of touches that she didn't like to get:

> "This guy one time we were in the car and my mommy told him to sit with us, and he touched me right there," and while she was telling me this she pointed to her vagina and said, "Right there and right there," and she put her hand behind her and pointed to her butt and she said, "He touched me there in the private and I didn't like it. . . ."
>
> I asked her what this guy's name was, and she said, "I call him Tony, but his real name isn't Tony." So I asked her some more to try to determine, you know, who that was, and I asked her, "How do you know Tony?" And she said, "He's my daddy's worker. He works with my daddy at Hardee's."

The social worker further testified that the victim stated that the touching happened on more than one occasion and that "Tony" touched her with his hand in what the child indicated to be the vaginal area. Defense objection to the testimony was overruled.

The trial testimony of the treating pediatrician at Women's and Children's Hospital, Dr. Phillips, established that there were no physical findings upon her examination of the child. She went on to state that her diagnosis of abuse was made by "look[ing] at the child in total. [W]e look at the child's statements, we look at the child's medical exam and evaluation, and then . . . make a diagnosis."

The investigating officer, State Trooper Kocher, also was called as a witness and during his testimony said he had Mirandized Petitioner. Although Petitioner's trial counsel did not object, the trial judge admonished the prosecutor outside the presence of the jury about the impropriety of informing the jury that the defendant had been Mirandized. Trooper Kocher also testified that he was not able to locate a person by the name of "Tony" who worked at Hardee's.

Petitioner took the stand and denied the allegations.

The jury found Petitioner guilty of one count of first degree sexual abuse for which he was sentenced to five to twenty-five years in prison with credit for time served. Petitioner filed a motion for a new trial that was denied by order dated April 7, 2011.

On appeal to this Court, Petitioner raises six points of error which readily consolidate into three issues: 1) whether the admission of the medical report and testimony of the social worker violated Petitioner's right to confront his accuser and/or constituted impermissible hearsay evidence; 2) whether the existence of Tony Lewis was exculpatory evidence the State was obligated to disclose before trial; and 3) whether evidence that Petitioner had been Mirandized by the police officer was unfairly prejudicial.

To the extent that the issues presented in this case involve questions of law, our review is de novo. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). Review of the final order and ultimate disposition by the circuit court is reviewed under an abuse of discretion standard, and the underlying factual findings of the circuit court are considered using a clearly erroneous standard. Syl. Pt. 1, *Burnside v. Burnside*, 194 W.Va. 263, 460 S.E.2d 264 (1995). We have further stated that "'[r]ulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless these has been an abuse of discretion.' *State v. Louk*, [171] W. Va. [639, 642], 301 S.E.2d 596, 599 (1983)." Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983).

Petitioner asserts that the circuit court erred in allowing the victim's statements to be introduced into evidence after the State was unable to obtain the information from the child through her direct testimony and following the trial court's finding that the child to be an unavailable witness. Petitioner argues that not only did this violate his constitutional right to confront the witness against him[4] due to his inability to cross-examine his accuser, but that the statements of the social worker were also improperly admitted as impermissible hearsay.

Upon review, it is apparent from the record that Petitioner had the opportunity to cross-examine R.S., but that he elected not to do so and thereafter urged the trial court to find that the child was an unavailable witness. We further note that although the lower court found the child to be an "unavailable witness," it later ruled that the statements the child made to the social worker were non-testimonial. Petitioner relies on *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006), for his argument that the victim's statements were improperly admitted through the social worker. However, syllabus point six of *Mechling* does not support Petitioner's position:

> Pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 117(2004), the Confrontation Clause

[4]*See* U.S. Const. amend. VI and W. Va. Const. Art. III, § 14.

> contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* 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.

(Emphasis added.) This Court stressed in *Mechling* that "*Crawford* makes clear that *only* 'testimonial statements' cause the declarant to be a 'witness' subject to the constraints of the Confrontation Clause. Non-testimonial statements by an unavailable declarant, on the other hand, are not precluded from use by the Confrontation Clause." *Id*. 219 W.Va. at 373, 633 S.E.2d at 318 (emphasis added). The statements R.S. made to the social worker for medical evaluation and treatment purposes were deemed non-testimonial, and thus no right to confrontation was implicated.

Petitioner's challenge to the social worker's testimony regarding the child's statements to her being inadmissible hearsay likewise have no merit. In circumstances such as those in this case where statements are made to obtain a medical diagnosis and treatment, the availability of the witness is simply irrelevant. Rule 803(4) of the West Virginia Rules of Evidence provides in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (4) Statements for purposes of medical diagnosis or treatment.

A six-year-old's statements to a social worker whose interview is being observed by the treating pediatrician for the purpose of determining the proper course of treatment falls within the purview of this exception to the hearsay rule. Based upon the foundation laid through the testimony of the mother, the social worker and the treating physician, the admission of the child's statements to the social worker was a proper exercise of the trial court's discretion. *Accord*, Syl. Pt. 9, *State v. Pettrey*, 209 W. Va. 449, 549 S.E.2d 323 (2001) (holding testimony of a social worker may fall within Rule 803(4) exception to hearsay if those statements were made for the purpose of promoting and providing medical treatment).

Petitioner next argues that the State withheld exculpatory evidence during discovery regarding the person the child was referring to as "Tony." He asserts that this error violated his due process rights pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982). According to the brief of the

Petitioner, the first time that he learned that "Tony" existed and had the surname of "Lewis" was when the mother testified in the State's case in chief that someone named Tony Lewis had stayed in her home the summer before Petitioner arrived.

Again we find that the record does not support the assertion based on established principles. In syllabus point two of *State v. Youngblood*, 221 W. Va. 20, 650 S.E.2d 119 (2007), this Court addressed what factors establish that due process rights have been violated with regard to exculpatory evidence as follows:

> There are three components of a constitutional due process violation under *Brady v. Maryland*, 373 U.S.83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982): (1) the evidence at issue must be favorable to the defendant as exculpatory or impeachment evidence; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must have been material, i.e., it must have prejudiced the defense at trial.

Based upon our review, the prosecution did not withhold exculpatory or impeachment evidence. During pre-trial discussions concerning "Tony," the prosecutor stated on the record that he had disclosed the evidence he had regarding Tony to defense counsel. Petitioner states in his brief that defense counsel had a copy of the grand jury testimony in which the investigating Trooper made reference to Tony Lewis. Furthermore, the evidence at issue was not material to the outcome of the case. According to the unchallenged testimony of the mother, Tony Lewis was not residing and did not have any contact with R.S. when the alleged touching incidents occurred. At the time the child reported that someone was inappropriately touching her, the mother testified that only she and the children were in the home with Petitioner. The child pointed to the next room where Petitioner was sitting when the mother asked her where the person was who touched her. In sum, nothing in the record demonstrates that the State suppressed evidence concerning Tony Lewis.

The final issue raised by Petitioner alleges that he was prejudiced by the Trooper testifying before the jury that he had been "Mirandized" during the investigative stage of the case. First of all, Petitioner failed to object to the Trooper's testimony and did not request a curative instruction or move for a mistrial. Moreover, Petitioner's counsel said during his opening statement that Petitioner had been Mirandized before the trooper was called to testify. Thus, any error which resulted was invited by Petitioner and "[a] judgment

will not be reversed for any error in the record introduced or invited by the party asking for the reversal." Syl. Pt. 7, *State v. Mills*, 211 W. Va. 532, 566 S.E.2d 891 (2002).

For the foregoing reasons we find no reversible error. The April 7, 2011, order denying a new trial is affirmed, and Petitioner's conviction and sentence stand.

Affirmed.

ISSUED: November 8, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh