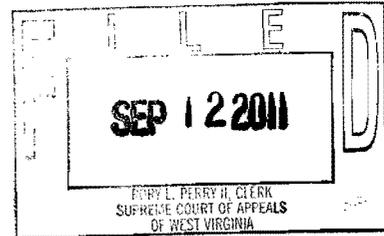


In the Supreme Court of Appeals

of

West Virginia

DOCKET No. 11-0561



STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent

vs.

Appeal from a final order of
Case No. 10-F-14
Webster County Circuit Court

JULIA SURBAUGH, Defendant Below,
Petitioner.

Appellant's Reply Brief

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Introduction. The State Response Brief (also referred to as “Respondent’s Brief” and for citation purposes as “SRB”) misrepresents important facts of record in this case, fails to properly cite to the appendix and generally fails to respond to many of the legal arguments made by Appellant in her Appellant’s Brief previously filed.

APPELLANT’S REPLY TO “STATEMENT OF CASE” IN RESPONDENT’S BRIEF.

A. Respondent’s Brief gets off to a bad start by minimizing uncontested facts, and misrepresenting what Appellant stated in her Brief.

1. The fifth sentence of the State Response Brief seeks to minimize an uncontested fact and in the same sentence misrepresents what Appellant stated in her Brief:

a. Respondent’s Brief states: “Appellant asserts that she was of a peaceful and non-violent nature...” SRB at 1. *This was more than an assertion, it was an uncontested fact.* Appellant cited the evidence at trial pertaining to her peaceful nature as set forth and referenced in the trial transcript. This was testified to by State witnesses: Leon Adamy, (Vol. II, JT 215), Ann Wilson, (Vol. II, JT 266), the Sheriff of Webster County, Jerry Hamrick, (Vol. II, JT 214). As well as Defense witness Gary Weir. (Vol. II, JT 729). The State made no effort to challenge this evidence. (This is critical to Appellants argument that she was entitled to a “good character” instruction. See, Appellant’s Brief at 36 to 40.)

b. Respondent’s Brief goes on to state in the same sentence: “...and that Michael Surbaugh was an admitted methamphetamine addict.” SRB at 1. *Appellant’s*

Brief neither stated nor asserted that. Appellant's Brief stated: "Michael Surbaugh ...*dated*...an admitted methamphetamine ('meth') addict." Appellant's Brief at 1. (Emphasis added.) Appellant's Brief in Statement of Case, Section H. 1., sets forth the page numbers in the transcript detailing Michael Surbaugh's relations with Ms. Morton and her admission that she was a methamphetamine addict until July 25, 2009. This section also sets forth some use of methamphetamine and marijuana by Mr. Surbaugh. Appellant's Brief at 10.

B. State Response Brief again minimizes actual stipulated facts concerning the victim's loss of his job as teacher at Webster County High School:

1. Respondent's Brief states: "Michael Surbaugh lost his teaching job in Webster County because he was caught with marijuana on school property..." SRB at 1. *This statement minimizes the actual facts.* The actual facts were stipulated and are accurately set forth and cited in Appellant's Brief in Statement of Case, Section H. 3.

The facts were that:

On May 22, 2009, victim was found in possession of 10 grams of marijuana and a loaded gun on school property after the police brought drug dogs to Webster County High School for a surprise sweep. (Vol. I, AR 88). A dog "hit" on Michael Surbaugh's vehicle located in the parking area of the school property. (Vol. I, AR 88). Victim was arrested for second offense possession of a controlled substance, placed on bond pending trial on September 16, 2009. (Vol. I, AR 88). Police also found a loaded gun in the vehicle but victim was not charged. (Vol. I, AR 88). Appellant's Brief at 11.

C. State Response Brief next mischaracterizes evidence concerning "shots fired."

1. Respondent's Brief states: "On the morning of August 6, 2009 at

approximately 7:30 a.m., Leon Adamy, who lived just across the street from the Surbaughs, was leaving his residence when he heard three shots in rapid succession with each shot followed by a groan... Mr. Adamy did not hear any sounds consistent with a struggle or verbal argument." SRB at 2. *Appellant challenges the "three shots in rapid succession" statement.* The actual testimony from Mr. Adamy is:

Q. (By State's Counsel) About how far apart were the shots, if you could just tell the jury?

A. (By Mr. Adamy) Probably, maybe a second and a half apart, the first two. The third one was -between the second shot and the third was a little longer.

(Vol. II, JT 209).

Despite hearing gunshots and groans (after the first two shots), Mr. Adamy did not call police or 911. He learned there had in fact been a shooting incident when "persons" called and he later turned up his scanner. (Vol. II, JT 211). The only cross on what Mr. Adamy heard or could hear pertained to Mr. Adamy not being able to hear Michael Surbaugh talking on his cell phone when he was in the yard in front of the house. (Vol. II, JT 218).

D. State Response Brief makes a categorically false statement and attempts to wrongly portray what the actual evidence at trial was.

1. Respondent's Brief states: "Mr. Surbaugh was immediately taken to Webster County Memorial Hospital for further treatment. At this point the firearm used in the incident had not been located." SRB at 3. *This statement is categorically false.* It is clear the firearm used in the incident was located prior to Mr. Surbaugh being taken to

the hospital:

a. Corporal Edward Lee Loughridge, WVDPS, testified at the pre-trial hearing that he assisted in the investigation regarding the shooting of Michael Surbaugh. (Vol. II, 15Apr 51). He showed up just moments after Officers Vandevender and Clayton. He heard the victim say: "The bitch shot me." Corporal Loughridge then states:

So, I heard Mike say that. And the only thing I knew was that there's a gun somewhere and it's not outside where I was at. So I was more concerned about finding this gun. And I know there's two deputies inside the house; I didn't know what was going on in there. So I walk - as I'm walking inside the house I hear Mike ask for some Copenhagen and then that was the last I heard Mike talk. As soon as I walked in the door there was blood there in the living room and there was a revolver laying in a wastebasket right next to the door.

(Vol. II, 15Apr 51-52).

b. Dan Moran, a paramedic for Webster Memorial Hospital EMS, testified that he was dispatched to the Surbaugh residence. That he heard some statements of the victim concerning who had done the shooting ("I didn't" ... "she did") but not much else about the incident. (Vol. II, JT 297). Mr. Moran did an assessment and found the victim alert, good blood pressure, good pulse and oriented. The following questions show the gun was located prior to victim's removal to the hospital:

Q. (State's Counsel) So you stabilized him, got him ready to go and put him in the ambulance, is that right?

A. (Dan Moran) I did check on his wife for him. I also did observe in the house to try to get an assessment of blood loss and look for the weapon used.

Q. Did you find the weapon?

A. It was laying in the laundry bin next to the door, and it was left lying

there for law-enforcement.

Q. And what about the blood loss?

A. There was not a significant amount in the bedroom; there was a small amount, but not enough that I was concerned about blood loss.

Q. After you put him on the ambulance where did you go?

A. Webster Memorial.

Q. Did you hand him off to somebody there?

A. The staff....

(Vol. II, JT 298 to 299).

c. Deputy David Vandevender testified that he went into the house to look for the gun. (Vol. II, JT 406). He states "One of the other officers, Deputy Clayton or Officer Loughridge, found it in a hamper." (Vol. II, JT 406). State's Counsel then inquires about taking a statement:

Q. At some point somebody had the idea for you go (sic) talk to Mike at the hospital?

A. Yes.

Q. Who were they?

A. I believe it was Officer Loughridge suggested I should go over there and try to get a statement if at all possible.

(Vol. II, JT 406 to 407).

2. State Response Brief attempts to wrongly portray evidence by continuing with the suggestion that the statement taken by Vandevender at the hospital was part of an emergency situation to locate the gun. SRB at 3 to 4. After describing Vandevender taking a statement at the hospital in which victim could not "give a further location of the gun," State Response Brief suggests the officers "[i]n the interim...searched the Surbaugh home...." and "[t]he officers also eventually found the gun in a laundry basket near the front door." SRB 4. It is clear from the quotations in the preceding paragraph D. 1., and it's sub-paragraphs in this Reply Brief, that the gun had already

been found and that Vandevender went to the hospital to take a statement and not to look for the gun. (Note. The statements refer to "wastebasket," "laundry bin," and "hamper." It is apparent that these references are to the same container where the gun was located. Further note. The categorically false statement and the continued false portrayal concerning when the gun was found in relation to when the statement was taken at the hospital is related to the State Response Brief argument that the hospital statement of victim was a part of an ongoing emergency. The argument is discussed in this Reply Brief in "I. Reply to Error in Admitting Statements of Victim pertaining to *Crawford v. Washington*, Testimonial Statements and other Hearsay Statements," on page 12.)

E. State Response Brief stops citing the Appendix on pages 4 through 8 of its "Statement of Case" response, making further reply in this Reply Brief difficult. Appellant notes that this is in violation of Rule 10(c)(4), of the Revised Rules of Appellate Procedure. This Rule applies equally to Respondent's Brief as related in Rule 10(d), Revised Rules of Appellate Procedure. Nevertheless, Appellant attempts to reply in a general way to the rest of the State Response Brief "Statement of Case."

1. It is important to note that much of Appellant's Brief "Statement of Case" is not responded to and therefore not contested by Respondent. *See*, Rule 10(d), Revised Rules of Appellate Procedure. Specifically, the State Response Brief does not respond to nor contest Appellant's Brief "Statement of Case" section "G. Resolution of Conflicting Forensic Evidence" nor does the State Response Brief contest section "H.

Victim's Downward Spiral," and "I. Victim's Psychological and Physical Abuse of Appellant." See, Appellant's Brief pages 10 to 15. (Note. State Response Brief does respond briefly to forensic expert Dr. Sptiz outside of the Statement of Case. See, Respondent's Brief at page 12. And does respond briefly to physical abuse of Appellant on page 21.)

2. Half of the State Response Brief in its "Statement of Case" section deals with Appellant's Statements. SRB at 4 to 8. More than half of the State Response Brief in its entirety responds to Appellant's contention that the portion of her third statement after Trooper Jordan entered the room with an arrest warrant, and she was not re-Mirandized, is inadmissible. SRB at 4 to 8, and 12 to 19 (twelve of twenty-two pages). Again, it is interesting to note in this context what the State Response Brief does not argue on any page of its Response Brief: **HARMLESS ERROR**.

3. As noted in Appellant's Brief at page 6, Appellant gave three statements to the police. Appellant was not under arrest during the first two statements and Appellant does not contend any error pertaining to these two statements. Also, Appellant does not assert error on the third statement until such time as Trooper Jordan enters the room with an arrest warrant for her. Appellant's Brief at 27.

a. The State Response Brief refers to the first two statements (without citation to the appendix). It is evident that Appellant was speaking during these statements under "emotional distress and trauma" (Vol. II, 15Apr 208), at times "talking faster" than the police officers "could comprehend," (Vol. II, 15Apr 62 to 63) and that

during the second statement Appellant spoke almost non-stop for one hour and twenty-three minutes with the police hardly being able to get "a word in edgewise." (Vol. II, 15Apr 95). The second statement was "hard to follow at times," Appellant had to be directed back to "the events of the day," and that she was basically "venting." (Vol. II, 15Apr 95 to 96). The State did not contend that everything in the second statement was untruthful. For example, the State placed reliance on the part of the statement dealing with past domestic violence.

b. The State Response Brief takes two different comments of Appellant on page 5 of Respondent's Brief and deftly conveys a false impression. The second full paragraph on page 5 recounts the untruthful statement of Appellant concerning the discharge of the gun. (This is discussed succinctly in Appellant's Brief section "F. Resolution of Conflicting Statements of Appellant." Appellant's Brief at 6 to 7.) The false impression made in the State Response Brief is in the third full paragraph on page 5. The lawyer "hanging me by my toenails" comment. That statement pertains not to the untruthful statement concerning the discharge of the gun, but to the relationship of victim and his girlfriend, Janet Morton. This is the context of that comment:

DV (Deputy Vandevender): Did he ever admit to you that they were more than just friends or anything like that?

JS (Julia Surbaugh): No he never admitted that but he also said that even if they were he would never admit that because the will hadn't been read yet. And ah, he didn't want Joe to be able to think that there was any kind of adultery going on. I mean, I, it, it, it just gets, my lawyer would prob, well my lawyer has not been retained yet, but he would probably be hanging me by my toenails if he knew I was just telling you guys the truth, and the stuff that has transpired. Because it sounds stupid. It

doesn't make any sense. But it is the truth. Um, anyway, um, after ah, but I mean, all of this happened like in a month. All of these things started happening. And he was spiraling, I mean he was just spiraling down.... (Vol. 1, AR 164). (Note. Any discussion of guns had ended five pages before.) (Vol. I, AR 159).

c. The State Response Brief on the top of page 8 of its Respondent's Brief sets forth several statements (again not cited to the appendix) Appellant is supposed to have made. These statements were not recorded and not written down. Perhaps the following cross examination puts some of these statements in some context:

Q. (Defense Counsel) All right. You suggested a hypothetical to her on the day of her arrest, immediately before her arrest, correct?

A. (Deputy Clayton) Uhm...

Q. Mike had a girlfriend?

A. Correct, yes.

Q. He was planning on leaving you, you said that?

A. Yes.

Q. I know this for a fact, there are other statements, he was planning on leaving you. You definitely had motive; you're talking about Janet. You did this because of Janet; that's what you were saying to her?

A. Basically, yes.

Q. So later on, after - well, after she was arrested and she's taken over to the magistrate's court and she's waiting to be arraigned, she told you it had nothing to do with Janet, it had everything to do with the boys?

A. That's what she was - I think that's what she was trying to get across, yes.

Q. All right. Now, Officer, I want you think (sic) about what I just said to you. I said it had nothing to do with Janet, it had everything to do with the boys, and that's a direct quote. And the court reporter can play it back.

A. Okay.

Q. It's not the same as, I want you to know I didn't do it because of Janet, I did it because he was going to take my boys?

A. That's pretty much what she said to me.

Q. It's not, not what I said just a second ago.

A. Okay. Well ---

Q. Did you write it down?

A. No, I didn't write it down.

Q. Did you record it?

A. No, I did not.
(Vol. II, JT 623 to 624).

Similarly the statement supposedly heard by Jordan was not written down. (Vol. II, JT 510), Sheriff Hamrick didn't remember the exact words. (Vol. II, 388), and Deputy Vandevender testified that Appellant said something "about her kids being safe," (Vol. II, 15Apr 88) and "I don't remember the exact words." (Vol. II, 15Apr 89).

4. The statement Appellant did make with regard to physical violence in her second statement was this: "In the past year, he has shaken me, he has pushed me, and he has grabbed my arm to the point that I had bruises. I covered all that up." (Vol. 1, AR 159). And at trial Appellant testified that: "He would pinch me here and drop me to my knees; that is an area that does not show." This is interpreted in Respondent's Brief as: "The worst the appellant could say about the decedent was that he would pinch her on the arm, get loud and throw things." SRB at 21.

5. The State Response Brief deals with the uncontested testimony of Dr. Daniel Spitz in the following three sentences:

In appellant's brief counsel argues that the victim's statements are unreliable and should not have been admitted in light of uncontested blood spatter evidence rendered by Dr. Daniel Spitz. The jury heard that evidence. The jury also heard the cross-examination of Dr. Spitz regarding investigative procedures and conclusions reached in the book which he helped co-author versus the inconsistent factual conclusions which he was highly paid to reach in this case.

SRB at 12.

Appellant asserts that State's Counsel did not discredit any of Dr. Spitz's

testimony in cross-examination concerning blood spatter. (Vol. I, JT 698 to 721). In fact, State's Counsel argued that that a total fee of approximately \$6,000.00, for evaluating the case and testifying (by telephone) at trial was an unreasonable fee. (Vol. II, JT 721). (Note. The lower court approved the fee as an expense of appointed counsel.) (Vol. I, AR 3 at line 120). Note. Appellant correctly related that Dr. Daniel Spitz is a *co-editor* of Spitz and Fisher's *Medicolegal Investigation of Death, Guidelines for the Application of Pathology to Crime Investigation*, 4th Edition, Spitz WU (Editor) (Thomas Publishing Ltd., 2006). (Vol. II, JT 695). Appellant's Brief at 9. Respondent's Brief states that Dr. Daniel Spitz is *co-author*. The father of Dr. Daniel Spitz, Dr. Warner Spitz, is co-author.

As set forth in the Appellant's Brief the only forensic expert that was discredited, if at all, was the State's forensic expert: Failed to perform standard test to confirm State's theory of mechanism of death. (Vol. II, JT 570 to 572). No basis in scientific fact for State's theory of mechanism of death. (Vol. II, JT 692 to 694). Failed to perform test to determine Defense theory of mechanism of death. (Vol. II, JT 707). (The mechanism of death was critical in the present case because under the State's theory of the case, the shot to the face caused an air embolism leading to death. Under the Defense theory of the case the self-inflicted shot to the side of the head lead to death.) Not board certified. (Vol. II, JT 573). Failed three times (and still had not passed at the time of trial) first test of three to achieve board certification. (Vol. II, JT 573 to 575). *See*, Appellant's Brief, pages 9 to 10. *See also*, this Reply Brief paragraph 1 of this section E.

The State Response Brief fails to show how Dr. Spitz is wrong in his uncontested

testimony that the blood spatter showed that “Mr. Surbaugh, especially when he sustained the gunshot wound to the right side of the head, which is the near-contact range wound that he was in a relative upright position.” (Vol. II, JT 687 to 688) Dr. Spitz also noted: “...[T]he scene evidence...is often times more reliable since witness statements can be somewhat misleading. And...potentially not accurate.” (Vol. II, JT 711). The evidence of the blood spatter is preserved by photographs and is available for additional or future interpretation. In the present case, the State’s forensic expert did not offer an opinion to contradict Dr. Spitz on the blood spatter issue. Appellant argues that this evidence is uncontested. This evidence totally contradicts the State’s theory of the case that Appellant shot her husband in his sleep.

I. Reply to Error in Admitting Statements of Victim pertaining to *Crawford v. Washington*, Testimonial Statements and other Hearsay Statements.

The State Response Brief may be correct in bringing to this Court’s attention the recent United States Supreme Court case of *Michigan v. Bryant*, 131 S.Ct. 1143 (2011). The *Bryant* case, however, deals with the “primary purpose” and “ongoing emergency” inquiries in a context *outside* of the “narrower zone” of domestic violence cases. *Supra*, 131 S.Ct. at 1156. The instant case is obviously a domestic violence case.

As carefully noted above in this Reply Brief in section D., at page 3, State Counsel’s factual portrayal of the gun not being found when the statement was taken at the hospital is categorically false. The first full paragraph on Respondent’s Brief page 11, is also not borne out by the record. The Surbaugh children were not in the Surbaugh

residence. They had spent the night at the Wilson residence. (Vol. II, JT 260). Police never acted as though they thought Appellant was a danger to them or anyone else. She was allowed to go to a neighbor's house, take a shower (Vol. II, 15Apr 56 to 57) and was not arrested for almost a week. (Vol. II, 15Apr 128). When she was arrested she was not handcuffed. (Vol. II, 15Apr 57 to 58).

This newfound theory of the State attempting to portray the statement taken at the hospital as an ongoing emergency is totally at odds with how the matter was presented during the trial. Appellant's Brief accurately, and with reference to the appendix, sets forth these facts in section "C. Shots Fired." and section "D. Resolution of Conflicting Statements of Victim." Appellant's Brief at pages 5 to 6. Further, the record shows that victim walked into the emergency room and talked to a nurse before talking to the doctor. (Vol. II, JT 307). The death of victim did not appear imminent and there was surprise when it was learned that he had died. (Vol. II, JT 300).

The State Response Brief does not address the authority and holdings of this jurisdiction pertaining to Appellant's argument concerning the non-testimonial statements of the victim. Appellant argued that each statement should have been considered individually by the lower court. See, Appellant's Brief at 26. Appellant also argued that the lower court's ruling that the catch-all exception of Rule 804(b)(5), West Virginia Rules of Evidence, applies to all of victim's statements is fundamentally flawed. See, Appellant's Brief pages 22 to 24. Appellant relies on her Appellant's Brief pages 17 to 26, as to all other issues and arguments pertaining to the admissions of

victim's testimonial and non-testimonial statements.

II. The State Response Brief Fundamentally Misunderstands Appellant's Argument with regard to Error in the Admission of part of the Third Statement.

Appellant's argument with regard to the portion of the third statement contested is based on her right to counsel under the Sixth Amendment to the *United States Constitution*. The State Response Brief cites no cases in opposition and does not challenge the cases, rules and statutes cited in Appellant's Brief asserting that criminal proceedings had been commenced against her at some point prior to Trooper Jordan entering the room where she was being questioned. *See*, Appellant's Brief pages 31 to 32. The State Response Brief does not challenge or assert contrary authority to the two syllabus points set forth on page 30 of Appellant's Brief. Rather, Respondent's Brief muddies the waters and argues voluntariness issues under the Fifth Amendment to the *United States Constitution*. Although voluntariness was argued in hearings prior to trial, Appellant elected to proceed on appeal based on the clearer ground that "Miranda warnings must be repeated once custodial interrogation begins." Syl. Pt. 4, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995). And based upon the fact that judicial proceedings had been initiated "by way of formal charges." *See*, Syl. Pt. 3 *State ex rel. Sims v. Perry*, 204 W.Va. 625, 515 S.E.2d 582 (1999). Thus, Appellant avoided argument and issues of deference regarding the lower court's factual findings regarding voluntariness.

In the present case the State had clearly committed to prosecution as opposed to investigation when Trooper Jordan obtained the signed criminal complaint and warrant. (Vol. II, 15Apr 116). The record further shows that State's Counsel drafted the criminal complaint and it was not an action unknown to the prosecution. (Vol. I, AR 91). The State Response Brief fails to counter Appellant's argument that the lower court was in error when it admitted the portion of the third statement when it was clear that Appellant's custodial status had changed and she was neither told of this change of status nor re-Mirandized.

Appellant relies and refers to her Appellant's Brief at pages 27 to 32 for all other matters pertaining to this argument.

III. Reply to the State Response Brief on the *State v. Harden* Issue.

The State Response Brief argues that absent a "night of domestic terror," (SRB at 21) an admittedly "emotionally abused" woman (Vol. II, JT 657) is not entitled to any instruction based upon this Court's decision in *State v. Harden*, 223 W.Va. 796, 697 S.E.2d 628 (2009). Appellant disagrees.

In the present case, the portion of Appellant's Brief in section "H. Victim's Downward Spiral" was not contested. The lower court found that Appellant was "emotionally abused" based upon uncontested evidence of Appellant and her neighbors. (Vol. II, JT 657). The facts of what happened the morning of August 6, 2009, are obviously contested.

Appellant requested instructions based on *State v. Harden*, to support her theory that based on victims prior erratic behavior and victim's actions on the morning of August 6, 2009, her actions were not unreasonably disproportionate and/or she did not have malice or intent. Appellant argued that the trigger for the instruction is proof of harassment, proof of psychological abuse and/or proof of overt or covert threatening acts. See, Appellant's Brief at 35 to 36. Appellant relied not only on her statements concerning the actions of victim, but also that of her neighbors Ann Wilson and Deb White. As noted previously, the State Response Brief did not contest the Statement of Case section "H. Victim's Downward Spiral" in Appellant's Brief at 10 to 14.

Appellant refers to her Appellant's Brief at pages 32 to 26 as to all issues presented therein in place of further argument in this Reply Brief.

IV. Appellant was Entitled to Some Instruction on her Good Character Evidence and the Failure of the Lower Court to give any Instruction at all was Error.

It is appropriate that this case begins and ends with good character. This is because:

Good character is an important fact with every man; and never more so than when he is put on trial charged with an offense which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with any such crime.

State v. Padgett, 93 W.Va. 623, 117 S.E. 493, 495 (1923)

The lower court did not rule that the proffered instruction was a misstatement of the law. (Vol. II, 886). The lower court also recognized the citation of Defense Counsel for the instruction as "WV Criminal, 6th Edition, Jury Instructions, page 26." (Vol. II,

886). The Court in *State v. Brown*, 107 W.Va. 60, 146 S.E. 887 (1929) approved the following instruction on character evidence:

...The jury are therefore instructed that evidence of good character is a substantial fact, like any other, tending to establish the innocence of the defendant, and if the jury believe that the evidence of good character of the defendant as proven in this case is sufficient to raise a good and reasonable doubt as to his guilt, when considered with all the other evidence in the case, they then should acquit the prisoner...

Id., 146 S.E. at 888.

The instruction (Instruction No. 10, quoted in full on pages 36 to 37 of Appellant's Brief) offered in the present case is similar, especially as to the point complained of by the State Response Brief: That is good character alone "can" give rise to a reasonable doubt. This facet of Appellant's proposed instruction was never discussed, objected to specifically or ruled upon by the lower court. It is raised here on appeal for the first time. At trial State's Counsel only commented that "I don't like that instruction at all." (Vol. II, JT 666). The lower court agreed and left the following ruling on record:

As to Defendant's Instruction 10, the Court cited *State versus Cobb*, 166 W.Va. 65, as reviewed by the Supreme Court, not enough evidence to support, no basis for it. Mr. James cited WV Criminal, 6th Edition, Jury Instructions, page 26. The Court refused Defendants (sic) Instruction 10, and noted defendant's objection, but did not preclude Mr. James from arguing.
(Vol. II, JT 886).

If there were any inaccuracy in the transcript concerning the ruling on this instruction the State Response Brief does not make any correction. The quoted ruling is

consistent with the fact that no instruction on good character is to be found at all in the charge to the jury. (Vol. II, 886 to 905).

Appellant argues that she was entitled to the instruction proffered on good character in this case. The evidence of Appellant's good character is uncontested and ample. See, section "B. Good Character" in Appellant's Brief at page 2. The Syllabus point in *Brown* states:

As a general rule, a trial court is under no duty to correct or amend an erroneous instruction, but where, in a criminal case, a defendant has requested an instruction, defective in some respect, on a pertinent point vital to his defense, not covered by any other charge, and which is supported by uncontradicted evidence; and because of the state of the evidence relied upon for conviction, and the peculiar facts and circumstances of the case, a failure to instruct on this important point, may work a miscarriage of justice, it is error for the trial court not to correct the instruction and give it in proper form.

State v. Brown, 107 W.Va. 60, 146 S.E. 887 (1929).

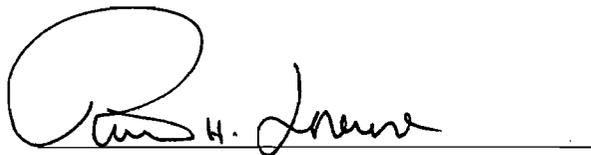
As to all other points and authority, Appellant refers to her Appellant's Brief at 36 to 40.

CONCLUSION

The Appellant's conviction should be reversed, and this matter should be remanded for a new trial.

Respectfully submitted,

Julia Surbaugh,
By Counsel



A handwritten signature in black ink, appearing to read "R. H. Jones", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this **12th** day of **September, 2011**, true and accurate copies of the foregoing **Appellant's Reply Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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