

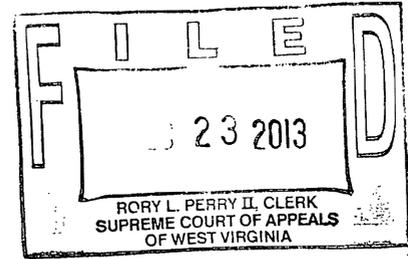
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, PLAINTIFF
BELOW, RESPONDENT

vs.)

No. 13-0745
(12-F-90)

MARCUS PATRELE MCKINLEY, DEFENDANT BELOW,
PETITIONER.



PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR¹

1. The trial court erred in admitting other bad act evidence.
2. The trial court erred in admitting the testimony of witness Sandra Dorsey.
3. The trial court erred in excluding the testimony of defendant's psychiatric expert.
4. The trial court erred in rejecting defendant's plea agreement.
5. The trial court erred in permitting opinion evidence from a factual witness without sufficient foundation to support said opinions.
6. The trial court erred concerning potential evidence not properly disclosed to the defendant.
7. Defendant should be granted relief based on the cumulative effect of the errors cited herein.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

Petitioner, Marcus McKinley, was indicted by the February 2012 term of the grand jury of Mercer County on one count of Murder-First Degree. (A1). Mr. McKinley was accused of killing his girlfriend and the mother of his child, Ayanna Patton. (A1). After a jury trial, petitioner was convicted of Murder-First Degree without a recommendation of mercy from the jury. (A22). The trial judge sentenced Mr. McKinley to life in prison without the possibility of parole. (A22). After Mr. McKinley's post trial motions were denied, present counsel was appointed to appeal. (A40-A41).

STATEMENT OF FACTS

Appellant's conviction stems from an occurrence on May 19, 2011 in which Mr. McKinley shot Ayanna Patton in her apartment in Bluefield, West Virginia after spending the

¹ Appellant intentionally does not present Assignments of Error #1, #6 and #7 from the Notice of Appeal.

night with her. (A1). No one else was present at the time of the incident. Distraught after the incident, Mr. McKinley left the scene and ended up in North Carolina.

At the time of arrest, appellant was questioned and revealed that he wasn't trying to run and had killed the decedent. These statements occurred prior to being mirandized, but after the defendant was in custody. At a minimum the admission that he did the crime was made in response to questioning. (A111-A112). Thereafter, despite the fact that appellant asserted his right to remain silent, he was questioned by the police regarding the murder weapon. (A97, A113-A114).

In addition, while being transported back to West Virginia from North Carolina on June 2, 2011, Mr. McKinley made incriminating statements to the transporting officers, again after having asserted his right to remain silent. (A98A-A99). Those statements included incriminating himself in the shooting, denying any premeditation, his desires to apologize to her family, and hopes for the setting of bond. (A100-A101). These admissions occurred during a three hour trip in which the officers bought the appellant dinner and conversed about many things. (A105). Despite excluding one statement (concerning the murder weapon) made in North Carolina after Mr. McKinley asserted his right to remain silent, the trial court allowed the introduction of the statements made at the time of arrest and on the return trip. (A4-A5, A97, A123-A124).

After being returned to West Virginia, appellant was indicted. (A34). Prior to trial, the prosecution provided notice that it sought to introduce two domestic violence incidents from month(s) before the day of the shooting. The first incident occurred on March 11, 2011 over two months before the shooting. (A45). In that incident, police were called to the Knights Inn in Bluefield, West Virginia. (A46). The decedent alleged that Mr. McKinley had grabbed

her by her neck. (A46, A51-54). Importantly, Mr. McKinley reported that the decedent was attempting to commit suicide. (A48, A50). Mr. McKinley saw the officer approaching and signaled for him to come over. (A51). Such actions are inconsistent with a person who was the aggressor.

The second incident occurred on April 12, 2011 more than a month before the shooting. (A57, A61). In that incident, an argument over a car seat used in exchanging the parties' child resulted in an altercation between Mr. McKinley and the decedent. (A46-47). Both parties were arrested as both exhibited injuries. (A47-48, A59, A63, A65). Introduction of these incidents was allowed by the trial court as intrinsic evidence. (A2-A3, A76). Defense counsel then expressed his need to give the whole story by introducing other incidents...the barn door was opened to examine significant amounts of extraneous matters. (A176-178).

During the investigation into evidence to be used at sentencing, a potential conflict of interest for the prosecutor, Scott Ash was discovered. After research, it was determined that Mr. Ash, while serving in the public defender's office, had actually represented Mr. McKinley concerning a criminal case resulting in a conviction for "unlawful shooting" that the prosecution sought to use at trial for sentencing purposes. (A157-A158). The trial court was initially reluctant to excuse Mr. Ash. Thus, the parties were able to negotiate a plea agreement for Mr. McKinley to plead guilty to murder in the second degree. (A158). The record, unfortunately, does not identify the terms of the plea agreement. In conversations between the court and counsel for the parties, which were not recorded, the trial court decided to reject that plea. On November 13, 2012, the trial court summarized those discussions and rejected the plea because it was primarily motivated by the trial court's reluctance to relieve the prosecutor and

was opposed by the victim's family. (A6-A7, A158-A159). A new prosecutor was appointed and the trial was continued. (A7).

After the plea was rejected, and facing trial, defense counsel sought to utilize psychiatric testimony, arising from a forensic psychiatric evaluation, of Dr. Bobby Miller to explain that Mr. McKinley was experiencing an "extreme emotional disturbance" at the time of the homicide and, therefore, could not have deliberated upon or premeditated his actions. (A189, A193-A200, A203). Despite the fact that the psychiatrist identified that Mr. McKinley did possess a mental condition (admittedly not recognized by DSM- IV), the trial court, upon motion by the state, refused to allow this evidence to be presented at trial. (A9-A10, A194-A195, A205-A206, A213).

The case proceeded to trial on March 19-22, 2013. (A40A). During the course of jury selection, counsel for the defendant objected to the lack of African Americans on the panel, but took no further action to develop the issue. (A264-A265). Apparently, the jury questionnaire process sought by the defense had eliminated many minority potential jurors. Counsel for the defendant eventually requested that the last African-American juror be struck for cause. (A407-A408).

Following opening statements, the state presented evidence from 29 witnesses. The prosecution first called Patrolman Davis who is a Bluefield Police Department Officer. Patrolman Davis found the decedent's body on May 19, 2011. (A496-A503) When found, she was in a fetal position with her head facing down in between a wall and a gap between the mattress on the bed. (A504).

The next witness called was Crystal Hick. Ms. Hick lived in the same apartment complex as the decedent and was her neighbor. (A511). Ms. Hick heard a noise and then heard someone leaving the apartment and running down the stairs. (A511-A512).

Ms. Howard, an employee of the West Virginia State Police Crime Lab, testified that she was the forensic analyst who evaluated the sex crime kit from the decedent. (A520-521). The sex crime kit revealed no semen or other signs of sexual activity. (A522-523).

Kent Cochran was called next to testify about his work as the fire and tool mark examiner with the West Virginia State Police Forensic Laboratory. (A528). Officer Cochran independently verified that the fired bullets provided by the police matched the .45 caliber weapon that was recovered. (A540).

Officer Macewan was another employee of the West Virginia State Police Forensic Laboratory within the forensic analysis trace evidence section and drug identification section. (A555). According to her, an analysis of a jacket owned by the Defendant revealed gunshot residue. (A556-A558).

The state next called Robert Carson, a West Virginia State Police audio expert. His testimony concerned his enhancement of a recording. (A563-A565).

Trooper First Class J.M. Ellison of the West Virginia State Police was called next to discuss his work in processing the crime scene. The trooper identified the crime scene photographs. (A567-A575). Importantly, the trooper also testified to blood splatter evidence that he found at the crime scene. The trooper defined blood splatter evidence as “what happens after the bullet passes through the body and then the blood will actually make a certain pattern on the wall”. (A575) Defense counsel objected to this testimony and moved to strike the evidence unless the trooper was properly qualified. (A576-A577). The Court overruled the objection.

(A577) Upon reviewing the photograph exhibits showing the blood splatter, the trooper then testified that “[j]ust like I said just suspected that was the blood that came from the victim whenever, you know, whenever she was shot.” (A577).

The trooper also testified about various casings that were found (spent cartridges) and their locations. (A581-589) Thereafter, the photographs depicting the blood spatter evidence were admitted into evidence for the jury to review over defense counsel’s objection. (A590-591). During examination, the prosecutor asked the trooper to provide expert testimony regarding where the gun was or where the shooter was at the time based upon the shell casings final positioning. Over defense counsel’s objection, the trooper stated that in a lay “opinion” that the shooter would have been in the “center of the bed facing the victim [and] shooting in the direction of the victim for all of the rounds to go where they did”. (A601-A603). The trooper confirmed that he had only regular crime scene training and was not a “superior, expert, or doctor” in ballistics. (A604).

Next called was the Trooper Shrewsbury from the Princeton detachment who arrived and served as the team leader for the crime scene. (A606). The trooper testified as to obtaining shell cases from the scene as well as spent bullets recovered from the scene. (A607-609).

Alice Walton, another neighbor of the victim who was present on the date of the shooting, testified that at approximately 10:45 on the night before the shooting, she heard Ayanna (the decedent) arguing with a man but she could not tell who it was. Around 6:15 or 6:20 the next morning, she heard two real loud bangs and someone running down the back steps. (A613-A614).

Christopher Vance of the West Virginia State Police reviewed a cellular telephone that was provided to him. (A620-A626). The phone allegedly contained information from the defendant in the form of text messages asking the recipient to “[p]ray for me. I did not want this to happen. I seen that shit and just lost it.” (A627). Another text message advised “I’m so sorry. I loved her more than anything.” (A628). Additional messages also ask for forgiveness. (A629).

Brittany Pannell, who was a long-time friend of the decedent, testified that Marcus McKinley had text messaged her attempting to locate the decedent’s apartment. (A660-A662).

Shay Gravely, who identified herself as a best friend of the decedent testified that the decedent and the defendant had been boyfriend and girlfriend for roughly between three and a half and four years. (A668-A669). She also testified that the decedent had told her mother that the decedent did not want anything else to do with the defendant. (A669). She was the recipient of the text message asking for her to “pray for me I did not want this to happen. I seen that shit and just lost it.” (A670). The text message was from the decedent’s phone but had actually been texted to her by the defendant. (A670).

Cherise Calloway was another friend of the decedent. She testified that the decedent had sought her help in trying to get away from the defendant because he was “controlling her”. She had also introduced the decedent to Sandra Dorsey, a domestic violence advocate the witness thought would be able to help the decedent. (A675).

After completing the first day of trial, the State continued with witness, Sandra Dorsey, on the next day. Ms. Dorsey is currently employed as a magistrate in Mercer County as of January 1, 2013. (B12). Prior to serving as a magistrate, Ms. Dorsey oversaw the batterer’s intervention program at the Mercer Day Report Center and Raleigh Day Report Center. (B12).

She started working with victims of domestic violence in 1996 and then in 2006 started a social work program. (B13). Ms. Dorsey worked with the decedent, Ayanna Patton, starting on February 2, 2011. (B13). She had last met with the decedent approximately a month before she was killed in May of 2011. (B14). Ms. Dorsey, over the defendant's objection, was allowed to testify about the decedent's alleged state of mind in believing that the defendant was going to kill her. (B15-B23). According to Ms. Dorsey, "[s]he had voiced that she was concerned he was going to kill her, and she wanted to make sure that her mother got the baby." (B23) The prosecutor then reiterated the testimony by confirming that "she asked you to make sure her mother got the baby ... when the defendant killed her?" (B27). The court then, over the defendant's objection, allowed Sandra Dorsey to offer opinion evidence concerning what she believed based upon her communications with the defendant. (B30-B32). Thus, the prosecutor asked the following questions: "Based on your understanding of the relationship specifically between Ayanna and the defendant, Marcus McKinley, can you tell the jurors how control figured into the relationship?" Ms. Dorsey responded as follows: "[i]f someone is afraid that they are going to be harmed, then—and that's what Ayanna's concern was, was that she [was] going to be severely injured—then whatever the individual, Marcus in this case, tells them to do, they're going to do it, because they are going to want to live one more day. So if it's fear for the child, fear that they're going to take the child away from them through a CPS case, through other means, they're going to do whatever. If you get invited out to eat dinner, you're going to go out to eat dinner, even though there is a restraining order." (B32) The defendant continued to object to this testimony and moved to strike. The Judge granted the motion to strike the evidence; however, the bell had been rung.

Ms. Dorsey was then allowed to testify about her concerns for the decedent's safety. She advised "I wrote letters to the baby's attorney. I talked with the baby's attorney. I wrote to Ayanna's attorney; CPS was notified, because as a social worker, I'm required by law if I believe reasonably that someone is going to get harmed or killed, I have to report that. So I wrote to Mr. Ash, also. I mean, they all received a—S.A.F.E. received a copy of my concerns." (B33). "You made these notifications in April and early May before Ayanna was killed?" "Yes I did." (B33). After the door was opened regarding the opinions made by Ms. Dorsey, defense counsel felt obligated to go into facts to undermine the validity of that opinion. Defense counsel spent a significant amount of time talking about incidents that had taken place and contact that the decedent had had with the defendant. (B35-B38). Then after defense counsel had impeached Ms. Dorsey with the fact that she wrote a memo to Scott Ash, the prosecuting attorney, feeling that it was not appropriate for both the victim and the defendant to be arrested after a domestic violence incident, the Court allowed the entire letter to be read to the jury. That letter contained numerous opinions and further opened the door to substantial amounts of opinion evidence. (B36, B39-B46).

The letter takes nearly five pages of the transcript and ends with her prediction that the decedent will become another statistic by "1) she may end up dead; 2) she probably will not testify based upon the fact that she obtained a restraining order which he violated; 3) she has left the situation, as society expects women to do; 4) she was arrested when he violated the restraining order and charge." (B46-B50). After reading this lengthy memo, Ms. Dorsey was then allowed to provide further opinion as to why the decedent would continue to have contact with Marcus McKinley. She opined "[w]hen as stated before—when Ayanna thought he was going to kill her, she would do whatever he asked her, recommended to her, told her to do in

order to stay alive another day. So if he asked her out, she was going out. She went out with him. She would pretend that there was a chance that they could get back together again, that she was happy in the relationship.” (B51). The Judge sustained defense counsel’s objection and cut her off there but the evidence remained before the jury. (B52). A limiting instruction was given by the Court but that limiting instruction, again, could not unring the bell. (B53-B54, B57-B59).

Danny Via who serves as chief engineer with WVVA Television enhanced a cell phone voicemail by removing the file from a cell phone and burning it onto an audio CD. (B73-B75).

Police Officer, Jason Shrewsbury with the Bluefield Police Department testified that he maintained security at the scene of the homicide. (B76-B78).

Detective Aaron Crook with the Bluefield Police Department testified next. The detective originally arrived on the scene and left to go to the victim’s mother’s residence. Then he attempted to locate the Defendant through the use of GPS technology on the cell phone. (B79-B82). Ultimately, the detective was involved in tracking down the defendant in North Carolina using GPS coordinates. (B82-B83). He also transported the firearm, magazines for the firearm, nine unfired bullets, and two fired bullets to lab. (B84-B85).

Thomas Reed, Jr., testified that he was like an uncle to the child of the deceased. (B88-B89). He was involved in the transport of the parties’ child, Marcus McKinley, Jr. (B92). He testified about a protective order that prevented the parties from being around each other. (B93). He also worked with the WVVA engineer to get the recording off of the cell phone. (B95-B95). Importantly, he was yet another witness to testify about a domestic violence incident concerning arguments over a car seat that happened in April, a month before the decedent was killed. (B97-B99).

Jamie Nunley was a Department of Health and Human Resources Child Protective Services worker involved with the parties in this case. (B102-B103). Ms. Nunley was extensively questioned about her role with the family. Ms. Nunley testified about her interactions with the parties, about becoming involved with the parties after a violation of a domestic violence protective order by Mr. McKinley, the arrest of both Mr. McKinley and the decedent, and about other incidents that she dealt with throughout the time she was involved in the case. (B103-B107). Then over the defendant's objection, the trial court allowed Ms. Nunley to provide information as to what the decedent had said to her. Namely, she felt like the defendant would try to kill her. (B109-B110). Ms. Nunley also testified about removing Marcus McKinley, Jr. and placing the child with another party. (B112).

Detective John Whitt with the Bluefield Police Department testified that he had travelled to North Carolina to bring the defendant back to West Virginia. (B117-B118). According to Officer Whitt, the defendant had volunteered that:

... he didn't take the gun up there to shoot her, he had the gun for protection because he had been shot in the past, and that some of Ayanna Patton's brothers had threatened him.

He said that if he was up there—he was up there the evening before, around 6 o'clock, and if he had intended to shoot her, he would've shot her then.

He also asked if he would be able to talk to the detectives....he asked to speak with the prosecutor and then I told him that before he spoke with the prosecutor or any law enforcement, he should talk to his attorney...he said he didn't want this to happen this way, he wanted to work things out because of their child.

And he said that he wanted to let her family know that he was sorry for what he had done, and that her mother had sent word to him saying she forgave him, but he knew deep down it would be hard for someone to forgive someone who killed your child...

(B119-B120). According to Mr. Whitt, these statements were made spread out over the trip back from Charlotte to West Virginia. The trip took two and a half to three hours. (B119-B121).

Patrolman Michael Ramsey of the Bluefield Police Department testified next. A three and a half year veteran of the department, he had had prior contact with the defendant and the decedent. (B124-B125). He testified about an incident at the Knights Inn where he responded to a call from an individual reporting that someone was attempting to jump from the top floor and harm herself or kill herself. (B125). When he got to the room, he located the defendant at the doorway who advised that Ms. Patton was suicidal. (B125). After speaking with Ms. Patton, the officer learned that she was simply attempting to get away from the defendant because he had been harming her by choking her and throwing her around the room. (B125). He testified as to arresting the defendant because he was irate and because he had injured Ms. Patton. (B126-B127). The officer confirmed that the defendant had been charged with both domestic battery and disorderly conduct, but he was not aware of what happened with regard to the case. Defense counsel continued to preserve his objection to the introduction of this 404(b)/*res gestae* evidence. (B132-B133).

Deputy Heather Walters had responded to a domestic call in April 2011 involving the parties at 224 Vine Street. (B134). This was an incident wherein an argument over a car seat allegedly resulted in Ms. Patton being assaulted and Ms. Patton, the decedent, assaulting the defendant. (B134-B138). Both parties ended up being arrested for domestic battery and Mr. McKinley was charged with violating a protective order. (B138). Again, because the door had been opened to substantial amounts of domestic violence testimony, defense counsel felt obligated to review the policies and procedures involved in responding to domestic incidents as well as what had actually been done in this case. (B141-B146).

Stanley Cuthbertson was the decedent's brother. (B168-B169). He testified about the relationship between the decedent and the defendant. (B169-B174). Mr. Cuthbertson called Marcus McKinley on the date of the incident after the shooting had taken place but before the family knew of it. Marcus McKinley answered the phone and advised him that the decedent was gone and that "[s]he's in heaven." (B178) He later received a text message from the defendant saying that he had loved the decedent and that he was sorry. (B180).

Shirley Reed was a family friend of the decedent's mother for over forty years. (B182). Ms. Reed had kept Marcus McKinley, Jr., at the request of social services. (B182-B183). She also received a call from Marcus McKinley stating "I didn't mean to do it. And the only thing I want from you and God is forgiveness." (B184).

Lieutenant Scott Myers, with the Bluefield Police Department, was in charge of the investigation in this case. (B190-B191). He testified as to the actions he took to secure the scene and investigate the case including the location of various evidence. (B193-B197). He then testified about law enforcement's efforts to track down Marcus McKinley around the Charlotte, North Carolina area. (B198-B200). During the search of the house in which Marcus McKinley was located in North Carolina, the Ruger .45 caliber pistol was recovered. (B200). In addition, he seized a gray flannel hooded sweatshirt from the upstairs bedroom in Charlotte, North Carolina. Cell phones were seized in North Carolina also. (B206-B208).

Lieutenant Myers did have a conversation with the defendant at the house in Charlotte. (B208-209). After going upstairs and securing the evidence, he returned downstairs and the defendant was in custody of the North Carolina, Charlotte, Mecklenburg Police Department. When he approached Mr. McKinley, he asked defendant if he was willing to talk

about what had happened and defendant advised “Well, I did it, so, yeah, so I’ll talk to you.” (B209).

Next, the Court played the videotaped deposition of Dr. Zia Sabet, the medical examiner, who provided evidence regarding his findings in the course of the autopsy. (B218).

At the beginning of day three of the trial, trial counsel for the defense became concerned about the fact that new evidence, not previously disclosed to the defense, had appeared at trial in the form of Facebook evidence pre-marked as State’s Exhibit Number 41. (B230-B233). Thereafter, defense counsel questioned his first witness Detective Scott Myers about certain other Facebook information that he had obtained and provided to the prosecution. (B243-B247). Objections from the state stopped the questioning. Because of concerns that use of the defense’s Facebook evidence might open the door to the prosecution’s use of the Facebook evidence that had not been properly disclosed, defense counsel was given time to review proposed Exhibit 41 by recessing the trial. (B245-B247, B251-B257, B264-B265). After review, trial counsel chose not to utilize the Facebook information previously provided in the discovery or Exhibit 41. (B266). Importantly, this entire situation created a rift between the defendant and his trial counsel that appears on the record as a strong disagreement concerning trial strategy. (B248-B251, B254-B257).

The defense’s next witness was Terri Williams. Terri Williams served as a probation officer for Mercer County Circuit Court at the time of the incident. (B268). She had supervised Mr. McKinley with regard to the domestic violence issues between himself and the decedent. (B268-B269, B284-B295). Defense counsel felt it necessary to go into this because of the opening of the door of the domestic violence history by the trial court. (B270-B273). The probation officer proceeded to provide substantial testimony concerning the relationship between

the parties. (B275). After the decedent had been killed, Mr. McKinley called the probation officer and advised her that he was not running that he would be coming back. He also advised her that he had “just lost it” and “[i]t just happened.” He also told her that the victim was awake at the time of the incident and that he had shot her more than once. (B279).

The next witness called by the defense was Greg Arnold. Mr. Arnold was called to testify about a domestic violence incident between Marcus McKinley and the decedent. (B298-B304).

Rhonda Lowe testified about the counseling that she made to the defendant in the fall of 2010 about his domestic situation. (B306). In cross-examination, the prosecution again brought out all prior bad acts in the relationship including the fact that the defendant had been violent towards Ayanna, had allegedly kicked her, stabbed her, hit her, and choked her before the incident that lead to her death. (B309-B310). The prosecutor also specifically brought up the protective order that was in place and the violation of that protective order. (B311-B312).

The defense’s next witness was Officer William Rose with the Mercer County Sheriff’s Department. Once again, the defense went into the domestic violence incidents that had taken place between the parties. (B313-B319).

Shante McKinley advised that she worked with Family Restoration Services, which is a company contracted through CPS that reunites children with their parents. (B319). Ms. McKinley also testified about the domestic relationship involving the parties, the violence thereof, and that the decedent was often the aggressor. (B320-B326). The prosecutor felt compelled to ask Ms. McKinley (who is also defendant’s sister) if she had heard about Mr. McKinley being abusive towards the decedent, if her brother had stabbed the decedent, put his

hands around her throat and choked her, hit her, or when she was pregnant if he had kicked her in the stomach such that she had to go to the hospital. (B326).

Sylvia Taylor was a longtime friend of Marcus McKinley, having known him for seventeen years. Once again, the defense asked Ms. Taylor to provide information about the relationship of the decedent and defendant. (B329). And, once again, the prosecuting attorney felt compelled to ask her if she knew the defendant had hit the decedent, kicked her in the stomach when she was pregnant, cut her, or put his hands around her throat and choked her. (B330).

Audrey Hairston testified that she was the guardian and grandmother of the defendant's daughter. (B335-B336). She testified that she had never known Marcus to be violent. He had always been respectful and a nice person. (B337).

Sabrina Granger was a former girlfriend of Marcus McKinley who testified that he was never violent with her. (B339-B341)

Shirley Merriweather was called next by the defense to discuss her knowledge of Marcus McKinley since he was a little boy. Marcus had participated in a youth community program through the church. She knew Marcus as a wonderful young man and that to her knowledge, he was truthful and dependable. (B345-348).

The defense next called Stephanie Graves. Ms. Graves was another person who has known Marcus McKinley for a substantial period of time. She knew him as a sweet, kind, and honest person. (B348-B350).

The next witness called by defense was Evelyn Cathy Pannell. She had known Marcus with time at her home with her sons when they were in school. She also described defendant as a kind, soft-spoken, honest and loveable person. (B351-352).

Diana Hall, Marcus McKinley's mother, was the next witness called by the defense. Marcus had come to her and asked for a ride and then had spent time with her on the date of the incident. (B353-B368).

The next witness to testify was defendant, Marcus McKinley. (B375). Mr. McKinley testified that he had met the decedent in 2007 or early 2008. (B376). Defense counsel asked Mr. McKinley about incidents of domestic violence. (B377). He first testified about the incident that Officer William Rose had responded to in which the decedent was arrested after she had physically assaulted him then she had started kicking his car. (B377). The next incident he discussed was on Crotty Street. In that incident he was ready to go to work around 7:15 or 7:20 in the morning on October 18. Ms. Patton was standing in the doorway with the parties' child in her hand and a knife in her other hand. She was attempting to cut the defendant. (B378-B379). There were DVPs back and forth between the two parties. (B379). The Family Court Order confirmed that the decedent had serious issues that interfered with her parenting, including anger issues leading to domestic violence and that she had committed substantial domestic violence against the father by punching his eye and by punching holes in the walls. (B379-381). In addition to the above incidents, the defendant also testified about the incident involving the car seat. (B382-386).

On the day before the Ms. Patton was shot, at 10:00 or 11:00, Ms. Patton had called the defendant on a private number that was blocked so that DSS would not know that she was calling Mr. McKinley. (B391). Ms. Patton was asking for money to help with her cell phone bill. (B391-392). Around 3:00, he got off work and Ms. Patton got off work at about 3:30. The parties met and he helped her with the phone bill. (B392). The parties then ate at McDonald's and returned to her apartment. (B393-394). Mr. McKinley and the decedent were

driving in two separate cars so Mr. McKinley didn't know exactly where she lived. He knew in general where she lived. (B394-B395). He found out exactly where she lived from his friend Brittany Pannell. (B395).

When he arrived, they did not have an argument immediately, but an argument did develop. (B396). Ms. Patton found out about the texting between Mr. McKinley and Brittany Pannell when the defendant told her about those texts. (B397). That resulted in a verbal fight and resulted in Ms. Patton hitting and screaming at Mr. McKinley. (B398). The argument lasted about ten minutes and the decedent calmed down. (B398-B399).

The defendant had a gun with him because he was getting threats from the decedent's brother. (B400). Her brother had told defendant that he had arranged a prior incident in which the defendant had been assaulted. (B400).

Marcus testified that he did not want to leave the relationship because he didn't want to abandon his family. (B403). Even though counseling was suggested to them by DSS and Jamie Nunley, the parties never obtained counseling because of their work schedules. (B404).

On the night of the incident, Ms. Patton wanted to call Brittany Pannell to confront her about the text messaging between Brittany and the defendant. (B404-B405). Mr. McKinley became suicidal and pulled out the gun he was carrying and told her that he was going to kill himself. She advised him that she would change. The defendant removed the bullet from the chamber of the weapon and placed it back into the clip and put the gun away. (B405-B406). Thereafter, the parties fell asleep around 10:00.

In the morning sometime around 6:00, the defendant woke up. (B408). He went to get some cigarettes from the decedent's pocket and her cell phone fell out. At that time, her

phone was lighting up because she had text messages. Although one of the text messages was from her mother asking where she was and telling her to get home, another message was from another man. (B409). She acknowledged that she had been meeting this man previously and upon reviewing the text message history, the defendant found that she had met him on numerous occasions. (B409-B410). This led to another argument wherein the decedent was attempting to punch and attack the defendant to get her phone back. (B410-B411). As he was continuing to review the text messages, he came across one where the other man had stated “[y]ou taste so good.” (B411). Upon reading that text message, the defendant in the heat of the moment, pulled out the gun and shot her. (B411). After shooting her, the defendant returned to confirm that she was dead. (B411).

The defendant later called the decedent’s mother and informed her that Ms. Patton was dead. (B412). He was planning to kill himself so he called his mother to ask her to take care of the baby. (B413). The defendant decided that killing himself would be selfish. (B414). He met up with his mother who took him to his brother’s house. (B414-415). He informed his brother as to what he had done but had not yet told his mother. (B415). The defendant called Terri Williams and informed her that he was not running but that he needed time to tell the family what he had done and to apologize. (B416).

The defendant ended up going to North Carolina to clear his mind. (B417). When the defendant had spoken with Ms. Reed, he thought he was talking with the decedent’s mother, Barbara Patton. During that conversation, he had asked her to forgive him and she had advised him to get right with God and to seek forgiveness. (B418-B419).

In cross-examination, the prosecutor once again went into all of the prior incidents of domestic violence that he alleged had occurred. Including whether the defendant struck her

previously, cut her previously, kicked her when she was pregnant, or held a gun to her head previously. This was all based on information allegedly told by Ms. Patton to her friends. (B420-B422). The prosecutor then spent a substantial amount of time inquiring about the violence that had occurred between the parties. (B424-429, B437-443) The prosecutor also focused on the alleged violations of the domestic violence protection orders. (B434-B436).

The cross-examination also included the prosecutor asking the defendant about the mechanism of firing the gun and how many shots he had fired. (B444-B445). He was also asked to describe where he was at the time he fired the shots. (B446-B451). The defendant admitted that the phones were his and the decedent's and that the hoodie that was recovered with gunshot residue on it was also his. (B453-B454).

The prosecutor utilized the statements made to Sandra Dorsey by the victim that she was scared of the defendant in cross-examination as well. (B457-B458). He also reiterated the letter that had been written by Ms. Dorsey. (B458-B459). In addition, the prosecutor referred to the testimony from various friends that had been told by the decedent that Marcus was going to kill her. (B459-B460).

During cross examination, the prosecutor became so personally involved in the case that he provided testimony during the middle of the trial. The defendant became confrontational and challenged the prosecutor as to why the decedent had not called the police about these incidents instead of just telling her friends. The prosecutor testified:

I've been doing this for 20 years, dealing with a lot of domestic violence situations. A lot of victims of domestic violence don't call the police because if their abuser gets arrested, when they get out, they get it worse and they're scared. They're scared to stay and they're scared to leave. And the ones that successfully make a break, or try to, like somebody like Ayanna, who has a baby, and if she won't do it for herself, she was doing it for little Marcus...She

was trying to get away from you. She got her own apartment. She didn't want you to know where it was. She got her a new job...She was trying to move on without you. That bothered you

(B461).

At this point, the defendant rested and the prosecution continued by calling, Mrs. Patton, the victim's mother. (B512).² Mrs. Patton testified about her daughter, the history of the relationship with the defendant, and her disapproval of it. (B512-B523). Over defendant's objection Mrs. Patton testified about the decedent telling her that she had to go to the hospital because defendant had kicked her in the stomach, had sat on her, and was pushing down on the baby while she was pregnant. (B526-B532). Mrs. Patton also talked about how the baby was eventually placed with her because the defendant and her daughter had continued seeing each other. (B544-B545). At the time of the shooting, Ayanna had her own apartment, but had not fully moved in and was still residing with her mother at night. (B547). After the shooting had occurred, but before Mrs. Patton was aware of it, she contacted the defendant trying to find her daughter. (B555-B556). Defendant eventually told her over the phone that her daughter was dead. (B556). She also got a voicemail from the defendant that was later enhanced by the WVVA engineer. (B557-B558).

At the close of the state's evidence, the defense moved to dismiss the murder first degree charge because of insufficient proof of premeditation and deliberation and renewed all prior motions. (B565). All motions were denied. (B565).

The state then called six rebuttal witnesses. The express purpose of the entire rebuttal case was to put on evidence of more other act evidence. (B566). Cherise Calloway testified that the decedent had expressed fears that defendant would kill her. (B569-B570).

² The parties had agreed to allow Mrs. Patton to be called out of turn.

Sandra Dorsey testified that the decedent had reported that defendant had previously put a gun to her head while threatening to kill her and had stabbed her. (B572). Stephanie Wright testified that Ms. Patton had shown her fresh stabbing type wounds on her left arm and lower breast allegedly caused by the defendant. (B579). A photograph demonstrating the injury was admitted into evidence over defendant's objection. (B580-B582). Chelsey Richards testified that the decedent had reported to her that defendant had stabbed her. She reported that she could see the cut on her arm and chest. (B586-B587). She also testified about Ayanna reporting being afraid of defendant and that he threatened to kill her. (B588). Bobbi Tynes also testified about the decedent reporting the cutting incident to her. (B591-B592). Ms. Tynes reported that she had confronted the defendant about the issue, but he denied cutting Ayanna. (B593). She also testified that decedent said, on May 16, 2011, that defendant told her he was going to kill her. (B594). The last rebuttal witness, Givanna Brown, testified about an incident that took place around the end of the first week of May, 2011. Ms. Brown and the decedent were driving together when defendant called. (B599). Decedent answered the phone only after telling her to be quiet and turning the music down. (B600). During the call, the defendant sounded like her was being "hateful towards her" and after the call decedent told her that "Girl, he is crazy." (B600). Over defendant's objection, she also testified that Ms. Patton also told her that she did not want defendant knowing where she lived. (B600-B602). She had also seen a bruise on Ayanna's arm. (B602).

The defendant was convicted of murder in the first degree without a recommendation of mercy. (B700-B702). The trial court allowed the defendant to speak prior to sentencing. Importantly, defendant confirmed he would have accepted a plea bargain in this case. (B709). Defendant was sentenced to life in prison without mercy. (B713).

The defendant filed a Motion to Set Aside Verdict or For a New Trial. (A16-A17). That motion raised each of the issues raised in this appeal except for cumulative error. (A16-A17, A24-A33, B718-B733). A hearing on the motion was held on April 11, 2013. Of significance for this appeal, in that hearing the court confirmed that the plea agreement rejected by court had been offered because of the trial court's initial refusal to allow the prosecutor to withdraw and had been rejected solely because the victim's family objected to it. (B721). All post-trial motions were denied. (A24-A33).

SUMMARY OF THE ARGUMENT

Mistakes in evidentiary rulings prevented Marcus McKinley from receiving a fair trial. The cumulative effect of these errors ensured a wrongful conviction in this matter by improperly bolstering the state's case while simultaneously undermining any effective defense.

Mr. McKinley was charged with the murder in the first degree of his girlfriend and the mother of his child, Ayanna Patton. There was no dispute that Mr. McKinley had shot the decedent. However, Mr. McKinley's premeditation and deliberation were at issue. Only two people were present in the room where the shooting occurred, defendant and decedent. Thus, the state had to rely upon circumstantial evidence to meet its burden to show premeditation and deliberation.

Instead of relying on permissible circumstantial evidence, the state offered speculative and objectionable evidence. The first category of wrongfully admitted evidence was other bad act evidence. The trial court admitted this evidence as intrinsic even though it was either too distant in time to be relevant, or ambiguous. The next category of improper evidence was state of mind evidence of the decedent, admitted even though her state of mind was irrelevant. The third category of testimony improperly relied upon by the state was lay opinion

testimony that was not supported by personal knowledge, not rationally based on the witnesses' perceptions, and/or not helpful to the jury's understanding.

To counter this evidence, the defense sought to offer evidence from a psychiatric expert, Dr. Bobby Miller that defendant suffered from "extreme emotional disturbance" at the time of the shooting. According to Dr. Miller, this mental condition prevented Mr. McKinley from being able to premeditate or deliberate. Despite this Court's recognition of this "diminished capacity" defense, the trial court excluded it denying the defendant his constitutional right to due process.

The combination of these errors, even if determined by this Court to be individually harmless had a cumulative effect that prevented the defendant from receiving a fair trial.

All of this was completely unnecessary as the trial court, in an abuse of its discretion, wrongfully refused a plea agreement that would have prevented the necessity of a trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to R. 18(a). Argument could be granted by the Court pursuant to R. 19(a)(1), R. 19(a)(2), or R. 19(a)(4). R. 20 applies if the Court considers the argument concerning "extreme emotional disturbance," supra, as one of first impression. The case is not appropriate for memorandum decision if R.20 applies.

ARGUMENT

STANDARD OF REVIEW

According to precedent from this Court, "[i]n reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We

review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." *Syl. Pt. 3, State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).

1. The trial court erred in admitting other bad act evidence.

Over objection by the defense, the trial court initially permitted the prosecution to introduce evidence of two incidents of domestic violence involving the defendant and the decedent. As a result of this ruling the defense felt obligated to provide the entire picture of the domestic violence between the parties. Then, the prosecution countered with even more evidence of domestic violence. Ultimately, the trial became more about the relationship difficulties between the parties than the homicide. Because the defendant had admitted shooting the decedent and did not assert self-defense, the only real questions related to the level of homicide committed. By bringing in all of the domestic violence evidence, the jury's focus shifted from the actions that day to irrelevant actions from weeks, months, or even a year before the date of Ms. Patton's death.

This Court has provided substantial guidance on the admittance of "other act" evidence. Other bad act evidence is governed by W.Va.R.Evid. 404(b) unless the evidence is "intrinsic." As this Court has stated:

In determining whether the admissibility of evidence of "other bad acts" is governed by Rule 404(b), we first must determine if the evidence is "intrinsic" or "extrinsic." *See United States v. Williams*, 900 F.2d 823, 825 (5th Cir.1990): "'Other act' evidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged." (Citations omitted). If the proffer fits into the "intrinsic" category, evidence of other crimes

should not be suppressed when those facts come in as *res gestae*— as part and parcel of the proof charged in the indictment. See *United States v. Masters*, 622 F.2d 83, 86 (4th Cir.1980) (stating evidence is admissible when it provides the context of the crime, "is necessary to a 'full presentation' of the case, or is . . . appropriate in order 'to complete the story of the crime on trial by proving its immediate context or the "res gestae'"). (Citations omitted).

State v. LaRock, 196 W. Va. 294, 312 n.29, 470 S.E.2d 613, 631 n.29 (1996). If not “intrinsic”

in nature, the trial court must continue with a R. 404(b) analysis. According to this Court,

[w]here an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

Syl. Pt. 2, State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994).

In the case at bar, the trial court specifically admitted “other act” evidence concerning two domestic violence incidents as intrinsic evidence because “[o]ne prior episode of domestic violence preceded the victim’s death by only a month, and another prior episode of

domestic violence occurred a few months prior to that, rendering the events close in time with the instant offense.” (A3).

The incidents referred to by the trial court included: (1) an incident at the Knights Inn in Bluefield, West Virginia on or about March 11, 2011 in which the decedent claimed that Mr. McKinley had grabbed her by the neck, but defendant asserted he called police because decedent was suicidal (A45-A54); and (2) an incident on April 12, 2011 involving an argument over a car seat at a custody exchange which eventually resulted in both decedent and Mr. McKinley being arrested (A46-A48, A59-A65). Both incidents were discussed in depth at trial through testimony by both prosecution and defense witnesses. Witnesses Michael Ramsey and Marcus McKinley (on cross examination) testified about the first incident. (B124-B127, B436-440). Witnesses Sandra Dorsey, Thomas Reed, Jr., Jami Nunley, and Heather Walters testified about the second incident. (B35-36, B46-49, B97-99, B103-105, B134-138). The incidents were referenced in both opening and closing argument. (A488, B661-665, B686, B688).

In rebuttal, the prosecution offered evidence that Marcus McKinley had stabbed or cut the decedent in 2009, more than a year before the decedent was killed on May 19, 2011 from witnesses Stephanie Wright, Chelsey Richards, and Bobbi Tynes. (B577-582, B586-B587, B591-B592). Sandra Dorsey was allowed to testify about an incident related to her by Ms. Patton where defendant had put a gun to her head and threatened to kill her, and another incident where he had stabbed her. (B572). In addition, numerous witnesses (Jami Nunley, Cherice Calloway, Sandra Dorsey, Chelsey Richards, Bobbi Tynes, and Givanni Brown) were allowed to testify that the victim had expressed fear of the defendant or that he was going to kill her. (B109-B110, B569-B570, B572, B588, B594, B599-B602). Other witnesses discussed other incidents of domestic violence between the couple including: Terri Williams, Greg Arnold, and William

Rose. (B268-B269, B284-B295, B298-B304, B313-B319). Another incident was brought out through hearsay statements made by Ayanna to her mother, over defendant's objection. (B526-B531). This incident was from August of 2010. Ayanna had reported to her mother that she had to go to the hospital because defendant kicked her in the stomach while she was pregnant. (B531-B533). The prosecutor had already used the hitting, kicking, choking, and stabbing incidents to impeach the character witnesses offered by the defense and the defendant himself. (B309-B311, B326, B330, B420-B421, B424-B436, B457-460).

The central nature of the domestic violence aspect of the case is further evidenced by what can only be characterized as "testimony" by the prosecutor. In that "testimony," the prosecutor explains to the jury his opinion as to why the decedent did not report the alleged domestic violence to the police and why she stayed with the defendant. (B461). Such evidence was improper and should have been stricken or the subject of a limiting instruction.³ *E.g., State v. Sugg*, 193 W.Va. 388, 405, 456 S.E.2d 469, 486 (1995).

None of this evidence should have been admitted. These incidents offer little to explain the context of the crime because they are so ambiguous as to who was the aggressor. In each incident, both parties blamed the other. More importantly, in the May incident, both parties were arrested. The later incidents of alleged stabbing, and kicking the decedent while she was pregnant occurred a year or more before the shooting. These incidents are simply too distant in time to be "intrinsic." *E.g., State v. Bowling*, No. 11-1674 (W.Va. Supreme Court, October 8, 2013)(per curiam)(domestic violence incident six months before a homicide was not intrinsic as too distant in time). The date of occurrence of other incidents, like the gun to the head incident

³ Trial counsel did not object or seek a limiting instruction.

testified to by Ms. Dorsey, was never provided. Thus, the court could not find them to be “intrinsic.”

The trial court should have conducted the 404(b) analysis required by *McGinnis*. If the court had done so, all of the bad act evidence should have been excluded. First, there was insufficient evidence to determine by a preponderance of the evidence that the defendant committed any bad acts. The evidence to the incidents was ambiguous, based solely on hearsay reports, or otherwise unreliable. Even if the trial court found that the defendant had committed the acts. The balancing test should compel the court to suppress the evidence. Because of the fact that the victim had undoubtedly committed domestic violence against the defendant, the probative value of the evidence was very slight and massively outweighed by the danger of unfair prejudice.

Also, the evidence from the various witnesses concerning the victim’s state of mind that the defendant was going to kill her, should have never been allowed. This Court has stated that “[i]n criminal trials, hearsay evidence directly conflicts with the constitutional guarantees embodied in the Confrontation Clause of the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution.” *State v. Phillips*, 194 W.Va. 569, 575, 461 S.E.2d 75, 81 (1995), *overruled on other grounds*, *State v. Sutherland*, 745 S.E.2d 448 (2013). Both the United States and West Virginia Constitution guarantee that a defendant shall have a right to confront his accusers. U.S. Const., Sixth Amend., W.Va. Const. Article III, §14. In this case, the accuser was the hearsay declarant, Ayanna Patton. Her state of mind was wholly irrelevant to the trial as it was not at issue and, even if relevant, the admission could not survive a R. 403 balancing inquiry. *Id.* at 580-584, 86-90. Counsel for the defense objected to the introduction of this evidence with regard to witnesses Sandra Dorsey and Jami

Nunley. (B15-B22, B109-B110). As to the other witness, if those objections were not sufficient to preserve the error, admission of her state of mind evidence clearly violated defendant's substantial confrontation rights, and seriously affected the fairness of the proceedings by allowing the prosecution to buttress ambiguous domestic violence evidence with unconstitutional, inadmissible, and irrelevant hearsay, and was therefore plain error. *E.g. State v. LaRock*, 196 W.Va. 294, 316-317, 470 S.E.2d 613, 636-636 (1996).⁴

2. The trial court erred in admitting the testimony of witness Sandra Dorsey.

As described above in the Statement of Facts and the preceding section, Sandra Dorsey testified about the decedent's alleged state of mind in believing that the defendant was going to kill her. (B15-B23). Ms. Dorsey was then allowed to testify about her concerns for the decedent's safety. (B33). She was also allowed to read a letter she had written to the prosecutor. That letter contained substantial amounts of opinion evidence. (B36, B39-B46). The letter takes nearly five pages of the transcript and ends with her prediction that the decedent will become another statistic by "1. she may end up dead; 2. she probably will not testify based upon the fact that she obtained a restraining order which he violated; 3. she has left the situation, as society expects women to do; 4. she was arrested when he violated the restraining order and charge." (B46-B50). In rebuttal, Ms. Dorsey testified that the decedent had reported that defendant had previously put a gun to her head and threatened to kill her and had stabbed her. (B572).

As discussed above, this evidence should have been excluded as improper other bad act evidence or irrelevant state of mind evidence concerning the decedent's state of mind. In addition the vast amount of opinion evidence offered by this witness was clearly improper. Mrs. Dorsey was never offered as or qualified as an expert witness in this case. Thus, the opinions she

⁴ Notice of Appeal Assignments Nos. 2, 9, and 11 are combined in Assignment of Error No. 1 herein.

offered were lay opinion pursuant to R. 701. *E.g., State v. Reed*, No. 11-0502 (W. Va. Supreme Court, December 2, 2011)(memorandum decision). The opinions she provided as the decedent's advocate far surpassed those allowed by law. She opined that "[a]s professionals in domestic violence, we believe that Ayanna will be killed if the system continues to victimize her." (B47). She also explained that "[m]ost victims do return [to their abusing spouse], especially if their attackers end up with the children." (B48). She also offered a community assessment that the defendant was "very dangerous." (B49). She opined that the defendant had "manipulated the situation." (B49). She felt that "the baby has a good chance of being harmed." (B49). She discussed an ongoing CPS investigation. (B49). Ultimately she concluded with the dire predictions about the decedent and the parties' child quoted above. (B50). All of this was done over the objection of the defendant. (B39-B44, B46, B50).

In order for a lay witness to give opinion testimony pursuant to Rule 701 of the West Virginia Rules of Evidence (1) the witness must have personal knowledge or perception of the facts from which the opinion is to be derived; (2) there must be a rational connection between the opinion and the facts upon which it is based; and (3) the opinion must be helpful in understanding the testimony or determining a fact in issue. *Syl. pt. 2, State v. Nichols*, 208 W.Va. 432, 542 S.E.2d 310 (1999), *modified on other grounds by State v. McCraine*, 214 W.Va. 188, 588 S.E.2d 177 (2003). In the case at bar, none of the three criteria can be met.

Sandra Dorsey did not have adequate personal knowledge to support her opinions. Mrs. Dorsey admitted that she only had full facts from the decedent's point of view. In fact, she confirmed that she was a social worker "working with Ayanna" and owed no confidentiality to the defendant. (B47). Thus, all of her opinions were skewed by personal knowledge only of what the decedent had told her, not the full circumstances of the domestic turmoil between the

parties. As this Court has recognized, “[w]here a lay witness’s testimony is based upon perceptions, which are insufficient to allow the formation of an opinion but, instead, merely expresses the witness’ beliefs, then the opinion testimony should be excluded.” *Id.* at 438, 316 citing *United States v. Cortez*, 935 F.2d 135, 139-40 (8th Cir. 1991).

Sandra Dorsey’s opinions were not “rationally based on [her] perceptions...” *Id.* at 439, 317. Here, Mrs. Dorsey’s opinions far exceeded those that could be inferred from the facts she observed. Many of those opinions related to domestic violence victims in general and were not specifically related to the facts of the case at bar. The rest were outright conjecture based on her one-sided observations.

Finally, Mrs. Dorsey’s opinions were not helpful in understanding the testimony or determining a fact in issue. If a jury is capable of drawing its own conclusions from the proffered evidence, “the lay witness’s testimony is unhelpful and thus should not be permitted.” *Id.* at 440, 318 (citations omitted). If the opinions are made just in an effort to choose sides, they should be excluded. *Id.* In this case, Mrs. Dorsey was clearly choosing sides and her opinions do not offer anything that the jury was not capable of determining on their own. Mrs. Dorsey’s opinions were simply one last bit of advocacy for the decedent.

Even if the Court does not exclude the testimony under the above-cited precedent, the evidence should have been excluded pursuant to W.Va. R. Evid. 403. In this case, the limited probative value of the evidence is vastly outweighed by the danger of unfair prejudice.

3. The trial court erred in excluding the testimony of defendant’s psychiatric expert.

This Court has recognized that “the single most important factor in determining the degree of culpability attaching to an unlawful homicide” concerns whether the defendant was acting in the heat of passion. *State v. Starkey*, 161 W.Va. 517, 526, 244 S.E.2d 219, 225

(1978)(citation omitted) *overruled in part on other grounds State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Defense counsel sought to utilize psychiatric testimony, arising from a forensic psychiatric evaluation, from Dr. Bobby Miller to explain that Mr. McKinley was experiencing an “extreme emotional disturbance” at the time of the homicide and, therefore, could not have premeditated upon or deliberated on his actions. (A189, A193-A200, A203). Despite the fact that the psychiatrist identified that Mr. McKinley did possess a mental condition (admittedly not recognized by DSM- IV), the trial court, upon motion by the state, refused to allow this evidence to be presented at trial. (A9-A10, A194-A195, A205-A206, A211, A213).

In this case, the defense was attempting to offer a diminished capacity defense based on the extreme emotional disturbance suffered by the defendant at the time of the shooting. This defense would not relieve the defendant of all criminal responsibility, but would challenge the required elements of premeditation and deliberation. The trial court refused to allow the defense to offer the evidence based on a finding that Dr. Miller opined that defendant did not suffer from a mental disease or defect at the time of the offense. (A9-10). The trial court cited *State v. Joseph*, 590 S.E.2d 718 (2003), and *State v. Ferguson*, 662 S.E.2d 515 (2008), for the requirement that the defendant must have a mental disease or defect at the time of the offense. (A10). Defendant contends that the court’s factual finding that no opinion was offered to a mental disease or defect at the time of the offense is simply inaccurate. Dr. Miller expressly stated that the defendant was suffering from a mental condition that resulted in diminished capacity at the time of the offense. (A194-A195, A211-A213). In the defendant’s mental state, caused by the extreme emotional disturbance, premeditation and deliberation would not be possible. (A203).

State v. Joseph contemplates exactly the type of defense proffered in this case.

Here, the mental state of deliberation/premeditation is required for the state to meet its burden. A diminished capacity defense “is available in West Virginia to permit a defendant to introduce expert testimony regarding a mental disease or defect that rendered the defendant incapable, at the time the crime was committed, of forming a mental state that is an element of the crime charged.” *State v. Joseph*, 214 W.Va. 525, 527, 590 S.E.2d 718, 720 (2003). The terms “mental disease or defect” are not defined in the decision, but are interchanged with “mental condition” in the support for recognizing the diminished capacity defense. *Id.* at 530, 722. The principal rationale for allowing the defense comes from the “violation of due process [that would arise] to require the prosecution to establish the culpable mental state beyond a reasonable doubt while, at the same time, [prohibiting] a defendant from presenting evidence to contest the issue.” *Id.* at 723, 530. As acknowledged by a case discussed in the opinion, not every mental condition will qualify for the defense, but those that pertain to the “existence or nonexistence of a state of mind prescribed by the code” should be allowed to serve as a basis for the defense. *State v. Nataluk*, 316 N.J. Super 336, 344, 720 A.2d 401, 405 (1998); *see also State v. Ferguson*, 222 W.Va. 73, 80, 662 S.E.2d 515, 522 (2008)(allowing testimony regarding extreme anxiety coupled with schizoaffective disorder to serve as a basis for diminished capacity). In this case, defendant’s expert identified a mental condition that would undermine deliberation and premeditation. The trial court erred in not admitting the evidence.

4. The trial court erred in rejecting defendant’s plea agreement.

In the case at bar, a potential plea to second degree murder was rejected by the trial court because the plea had only been offered because the trial court refused to release the prosecutor after the prosecutor’s discovery of a conflict of interest and because the prosecutor

represented to the court that the victim's family opposed the plea. (A6-A7, A26-A27, A157-A159, B720-B722). Unfortunately not all of the discussions concerning the plea were on the record. In fact, the only mention of the plea on the record is in the form of a summary of events that took place before the hearing. At the time that the information was put on the record, the trial court had already reached a decision and informed trial counsel of it. (A157-A159).

This Court has enunciated how a trial court should justify its decision or use its discretion concerning plea bargains in *Syl pts. 4, 5, 6, Myers v. Frazier*, 173 W.Va. 658, 319 S.E.2d 782 (1984):

4. A court's ultimate discretion in accepting or rejecting a plea agreement is whether it is consistent with the public interest in the fair administration of justice.
5. As to what is meant by a plea bargain being in the public interest in the fair administration of justice, there is the initial consideration that the plea bargain must be found to have been voluntarily and intelligently entered into by the defendant and that there is a factual basis for his guilty plea. Rule 11(d) and (f). In addition to these factors, which inure to the defendant's benefit, we believe that consideration must be given not only to the general public's perception that crimes should be prosecuted, but to the interests of the victim as well.
6. A primary test to determine whether a plea bargain should be accepted or rejected is in light of the entire criminal event and given the defendant's prior criminal record whether the plea bargain enables the court to dispose of the case in a manner commensurate with the seriousness of the criminal charges and the character and background of the defendant.

In this case, the trial court did not undertake the detailed analysis called for by the above-cited precedent. Instead, the trial court's decision was based solely on the victim's family being opposed to the plea and the circumstances that caused the plea to be made. Finally, it is exceptionally difficult to deal with the trial court's decision in this matter because the core discussions were not on the record. This Court has previously recognized the need for such

important decisions to be made on the record and the failure to do so in this case is error. *E.g. Call v. McKenzie*, 159 W.Va. 191, 198, 220 S.E.2d 665, 671 (1975) (“When there is a plea bargain, the terms of the plea bargain should be set forth on the record...”), *see also State ex rel. Roark v. Casey*, 169 W.Va. 280, 283-284, 286 S.E.2d 702, 704 (1982).

5. The trial court erred in permitting opinion evidence from a factual witness without sufficient foundation to support said opinions.

As explained in the Statement of Facts herein, Trooper Ellison of the West Virginia State Police testified to blood splatter evidence and to his opinion as to where the gun was or where the shooter was at the time based upon the shell casings final positioning. This was all lay opinion evidence because the Trooper was not qualified as an expert and expressed that he was giving a lay opinion. (A575-A577, A601-604).

As the trooper was not qualified as an expert, this evidence should once again be analyzed using the standard enunciated in *Syl. pt. 2, State v. Nichols*, 208 W.Va. 432, 542 S.E.2d 310 (1999), *modified on other grounds by State v. McCraine*, 214 W.Va. 188, 588 S.E.2d 177 (2003). Here, the evidence should also have been excluded. Although the witness did have personal knowledge or perception of the facts from which the opinion is to be derived, the trooper’s speculative opinions demonstrated that there was not a rational connection between the opinion and the facts upon which it is based. Further, the opinion was not helpful in understanding the testimony or determining a fact in issue because the jury was easily capable of drawing its own conclusions from the proffered evidence.

6. The trial court erred concerning potential evidence not properly disclosed to the defendant.

In this case, defendant had timely requested discovery. (A34, ln. 15). As described in the statement of facts herein, new evidence, not previously disclosed to the defense, appeared at trial in the form of Facebook evidence pre-marked as State's Exhibit Number 41. (B230-233). Out of fear of what doors might be opened by any questioning concerning Facebook, defense counsel changed trial strategy and severely damaged his relationship with his client by not using any Facebook evidence, even that which he had obtained earlier. (A28, B245-B257, B264-266). Defendant recognizes that pretrial discovery in a criminal case is within the sound discretion of the trial court." *State v. Audia*, 171 W.Va. 568, 579, 301 S.E.2d 199, 210 (1983) *citing Syl. pt. 1, State v. Dudick*, 158 W.Va. 629, 213 S.E.2d 458 (1975), *in part*. Here, the trial court abused that discretion because of the significant prejudice the late disclosure of the evidence had on the defense in having to change trial strategy and in creating a rift with defendant that continued throughout the trial. (B704-B705).

7. Defendant should be granted relief based on the cumulative effect of the errors cited herein.

The large number of errors in this case overwhelms any possibility of the defendant receiving a fair trial. This Court has held that "[w]here the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error." *Syl. pt. 5, State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972). Here, defendant's opportunity to challenge that he had premeditated or deliberated, as required for a first degree murder conviction, was wholly undermined by wrongful

admittance of evidence supporting the state's argument as to those elements and the prevention of the defendant from offering countervailing evidence. Prior bad act evidence, opinion evidence on domestic violence, and evidence of the victim's state of mind coupled with the exclusion of defendant's proffered evidence to explain why he could not have deliberated or premeditated due to his mental condition ensured that defendant simply could not mount an effective defense and receive a fair trial.

CONCLUSION

For all these reasons, petitioner respectfully requests that this Court grant his appeal and provide that relief which is deemed just and appropriate, including, but not limited to, vacating the conviction in this matter and instructing the trial court to accept the plea agreement offered in this case, or alternatively, granting the petitioner a new trial.

RESPECTFULLY SUBMITTED,
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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have on this the 23rd day of December, 2013 served a true copy of the foregoing "Petitioner's Brief" and "Appendix" upon the following

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by placing a true copy thereof in the United States Mail, postage prepaid.



Paul R. Cassell