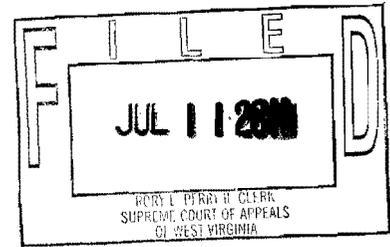


In the Supreme Court of Appeals

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 Brief

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ASSIGNMENTS OF ERROR

I. THE LOWER COURT ERRED BY ADMITTING STATEMENTS, TESTIMONIAL IN NATURE, OF THE VICTIM IN VIOLATION OF *CRAWFORD V. WASHINTON*. THE LOWER COURT ALSO COMMITTED ERROR BY ADMITTING OTHER HEARSAY STATEMENTS OF VICTIM UNDER THE CATCH-ALL PROVISION OF THE HEARSAY RULES WITHOUT A FINDING OF TRUSTWORTHINESS.

II. THE LOWER COURT COMMITTED ERROR BY ADMITTING THE PORTION OF THE "THIRD STATEMENT" OF APPELLANT TO POLICE AFTER HER STATUS CHANGED FROM NON-CUSTODIAL TO CUSTODIAL AND SHE WAS GIVEN NO FURTHER MIRANDA WARNINGS.

III. THE LOWER COURT ERRED IN REFUSING INSTRUCTIONS BASED ON *STATE V. HARDEN* BECAUSE IT REQUIRED A SHOWING OF ACTUAL PHYSICAL ABUSE AND THAT EMOTIONAL ABUSE WAS NOT SUFFICIENT.

IV. THE LOWER COURT COMMITTED ERROR IN REFUSING TO GIVE A GOOD CHARACTER INSTRUCTION AS PROFERED BY THE APPELLANT, WHEN NO INSTRUCTION ON CHARACTER WAS GIVEIN, GOOD CHARACTER WAS UNCONTESTED AND INTREGAL TO APPELLANT'S CASE.

STATEMENT OF THE CASE

A. *Introduction.* Appellant is Julia Surbaugh, a college educated woman of a peaceful, non-violent character, a good mother and community volunteer. The victim was her husband, Michael Surbaugh, who for a year prior to his death dated, outside the marriage, an admitted methamphetamine ("meth") addict. He was twice arrested for drug possession and forced to resign his position as a school teacher. Appellant asserted at trial that after a night of argument, victim confronted her with his pistol, that she took the pistol from him, and shot him twice in the face as he approached her. The victim then took the pistol, held it to his head and shot himself. The State contended that Appellant shot the victim in the head while he was asleep. Appellant complains of

several key rulings, which she contends, were in error and led to her to her being wrongly convicted of first degree murder without a recommendation for mercy.

B. *Good Character.* Julia Surbaugh's friends and neighbors testified she was a good neighbor and had a peaceful manner. (Vol. II, JT 215 and 266). The sheriff of Webster County, Jerry Hamrick, testified that Appellant was non-violent and safe. After arresting her on August 12, 2009, he felt no need to handcuff her. Prior to transporting Appellant to jail, he and Julia Surbaugh attended a birthday party for an employee of the Sheriff's office. (Vol. II, JT 339).

Julia Surbaugh had a good reputation in the community of Webster Springs. (Vol. II, JT 266). She was a good mother to her two young sons, Gavin and Rigel. (Vol. II, JT 269 and 381). Appellant supported victim despite his affair by allowing him to stay in the marital home (Vol. II, JT 214) and paid his fine for drug possession. (Vol. II, JT 379).

Appellant spent the weekend prior to the shooting incident of August 6, 2009, organizing and managing the "Back to School Bash" (Vol. II, JT 753), an event that gives out school supplies to impoverished children. (Vol. II, JT 753 to 754).

Despite the uncontested evidence concerning good character, the lower court refused a "good character" instruction. (Vol. II, JT 666 and 885 to 880).

C. *Shots Fired.* A 911 call was received at approximately 7:30 am, on August 6, 2009, from the Surbaugh residence. (Vol. I, AR 84, 139, and, Vol. II, JT 200). It was Appellant stating that her husband was trying to shoot himself (Vol. I, AR 139), and

later, that he had been shot. (Vol. I, AR 140).

Upon hearing a 911 call on the scanner and calling one another, two neighbors ran to the Surbaugh residence. (Vol. II, JT 222 and 260 to 261). Neighbor Deb White stayed with victim in the front of the Surbaugh residence (Vol. II, JT 222) while neighbor Ann Wilson attended to Appellant inside the house. (Vol. II, JT 261 to 262).

Despite having suffered three gunshot wounds to the head, victim was able to ambulate (Vol. II, JT 222) and speak. (Vol. II, JT 223 to 224). His speech was very slow (Vol. II, JT 234) and he appeared in a zombie-like state. (Vol. II, JT 235). While waiting for emergency personnel he called his girlfriend, Janet Morton, on his cell phone and told her he would be "running a little late." (Vol. I, 150, and, Vol. II, JT 226 to 227).

Victim made various statements to police and emergency medical responders prior to being taken to hospital. The following is a list of statements made by victim in chronological order:

1. "The gun didn't go off." (Vol. I, AR 149).
2. "Give me my pants." (Vol. I, AR 149).
3. Request to Deb White for the following: glasses, wallet, t-shirt; shorts, Copenhagen and two cell phones (did not want the first one offered). (Vol. II, JT 236 to 237).
4. "The boys don't need to see this." (Vol. II, 15 APR 26).
5. "What happened?" (Vol. II, JT 227).
6. "Was I shot or just hit in the head?" (Vol. II, JT 227).
7. "I'll be running a little late someone decided to shoot me in the fucking head. Um, okay, I'll just need to go to the hospital so I'll try to call you back later. Talk to you later bye." (Cell phone call to girlfriend.) (Vol. I, AR 150, and Vol. II, JT 226 to 227).
8. "Twice." (Response by victim

to question from Deputy Vandevender concerning how many times he had been shot.) (Vol. II, 15 APR 29, 42; JT 228, 241 to 242). 9. "The bitch shot me" and "My wife shot me." (Statement or statements heard by various people.) (Vol. II, 15 ARP 14 to 15, 22, 29, 51, 60 70; JT 228, 240, 270, 329,405, 456). 10. "How am I doing?" (Vol. II, JT 300) 11. "I didn't, she did." (In response to question what did you shoot yourself with?) (Vol. II, JT 297). 12. Victim was concerned about wife's safety and requests EMT, Dan Moran, to check on her. (Vol. II, JT 297, 301). 13. Speaks to Nurse, Sarah Wolverton about wanting to go fishing and camping after he gets out of hospital. (Vol. II, JT). 14. Asks Sarah Wolverton if he is going to die. (Vol. II, JT 306). 15. Victim asks Sarah Wolverton what happened to him. (Vol. II, JT 307). 16. Victim tells Sarah Wolverton he was asleep and felt "he had been hit in the head with a baseball bat." (Vol. II, JT 306). 17. Dr. Jamie Miller relates that victim reported that he was lying in bed asleep and he got hit with a baseball bat. Kind of stunned, felt like he got hit again, at that point he took off through the house. (Vol. II, JT 301). 18. Victim asks Dr. Miller if he could speak with a police officer and tell his story, tell them what happened. (Vol. II, JT 310). 19. "I'm not crazy. I didn't do this. The bitch shot me." (Vol. II, JT 356). 20. Victim is heard by Deputy Vandevender to ask, "how bad he actually was, if the bullet had hit his brain, wanted to know if he was going be (sic) okay because he was wanting to go on a camping and fishing trip the following day." (Vol. II, 15 APR 113).

These various statements in the context of accurate information were wrong, somewhat confused and/or incomplete. For example, the statement listed in number

17, states that victim "took off through the house." In fact the evidence at trial clearly showed that victim went to the bathroom (Vol. II, JT 302), washed up (Vol. II, JT 258), and went out the front door dropping the gun in the laundry basket. (Vol. II, JT 625). The gun obviously did go off (statement number 1) and he was shot three times and not twice (statement number 8).

D. *Resolution of Conflicting Statements of Victim.* The numerous and conflicting statements, as well as the condition of victim, led police to travel to the hospital to take a statement from the victim concerning what happened. (Vol. II, JT 406 to 407). Dr. Jamie Miller testified at trial that by the time victim was in the hospital he was calm and his normal self. (Vol. II, JT 314). Victim wanted to give his statement to the police. (Vol. II, JT 310). Police entered victim's room to take a statement from him. (Vol. II, JT 310). Thereafter police took what Appellant contends is a testimonial statement from the victim concerning what had happened. (Vol. I, AR 151 and, Vol. II, JT 407 to 409). The recorded statement was played for the jury at trial over objection. (Vol. II, JT 407 to 409). The following is the pertinent portion of the transcription aid also given to the jury:

DV: (Deputy Vandevender): Okay what happened this morning do you know?

MS: (Michael Surbaugh): I was sound asleep, I felt like somebody hit me up beside the head with a baseball bat.

DV: Who, Who do you think done it?

MS: ___happened again.

DV: Who do you think done it:

MS: I don't know.

DV: Don't know? You know where the gun was at or anything? Do you know where the gun was at?

MS: Yeah, I took it away from Julia.

DV: So you think Julia done this?

MS: I don't know.

DV: Okay where was you at whenever you got shot?

MS: Laying (sic) in bed asleep.

DV: In your bedroom?

MS: Yes sir.

...

DV: Alright. So you think it was twice, two times is all you know you got hit?

MS: That's what it felt like.

(Vol. I, AR 151).

E. *Three Statements from Appellant.* The police took three statements from Appellant concerning what happened. The first statement was taken on August 6, 2009, at approximately 9:30am. (Vol. I, AR 84). The second statement was taken several days later on August 11, 2009. (Vol. I, AR 155). And a third statement was taken on August 12, 2009. (Vol. I, AR 187). A part of the third statement was objected to on the basis that Appellant was told she was not under arrest and was free to leave. (Vol. I, AR 12). In fact, a State Police Officer arrived during the interview with a complaint and warrant for her arrest. (Vol. I, AR 90, 92, Vol. II, 15 APR 120). Further, during the third statement, Appellant felt uncomfortable and stated several times that she needed a lawyer. (Vol. I, AR 189 to 190, 192). Nevertheless, questioning continued and the lower court admitted the statement. (Vol. I, AR 90, 96 and 190).

F. *Resolution of Conflicting Statements of Appellant.* At trial Appellant admitted lying in her first two statements. (Vol. II, JT 745). She explained that she did this because she did not want her sons to know that she had shot their father. (Vol. II, JT 746). In the first two statements Appellant had told police that victim had shot himself

in the face when she deflected the gun away. (Vol. I, 154, 156). At trial Julia Surbaugh testified that after being threatened by the victim (Vol. II, JT 779), she took the gun away from him. (Vol. II, JT 779 to 780). As he came after her, she fired two shots before he was able to take the gun back (Vol. II, JT 781 to 782). These were the two shots that entered victims face below the left eye. (Vol. II, JT 783). At this point Appellant thought her husband was going to kill her and she covered her eyes. (Vol. II, JT 784). Michael Surbaugh stated, "You're not going to get me for this, bitch." (Vol. II, JT 784). Appellant heard a shot but did not feel any pain. (Vol. II, JT 784). She looked up and the victim said: "Why am I not dead?" (Vol. II, JT 784). Later, victim stated as he was going out the front door: "The gun didn't go off Julie." (Vol. I, AR 149).

The State's theory of the case relied on victim's statement to Deputy Vandevender that he (victim) was asleep, felt as though he were hit in the head with a baseball bat and that he took the gun away from his wife Julia.

G. Resolution of Conflicting Forensic Evidence. Dr. Hamada Mahmoud, Deputy Chief Medical Examiner, testified for the State as a forensic pathologist. (Vol. II, JT 515). He did not give an opinion as to which shot was fired first, second or third. (Vol. II, JT 552). He also did not give an opinion as to victim's position (upright or lying down) at the time of the near contact wound to the right side of the head. Nor did he give any opinion concerning blood spatter. Dr. Mahmoud did give an opinion that victim died of an air embolism from one of the shots to the face (Vol. II, JT 536, 570 to 572), and that the near contact wound to the right side of the head was, based on his experience, not

likely to have been self-inflicted because of its location near the ear. Dr. Mahmoud states:

... 99 percent of cases, gunshot wounds to the head, actually maybe 99.99, it's right, in the right temple here. When someone tries to shoot themselves, you put the gun here and shot them self (sic) here.

(Vol. II, JT 532).

Dr. Daniel Spitz testified on behalf of the Appellant. (Vol. II, JT 673). He is a nationally recognized expert. (Vol. II, JT 675 to 676). Dr. Spitz testified that victim was in an upright position when he was shot in the side of the head at near contact range. (Vol. II, JT 686 to 687). This was based upon blood spatter evidence. Dr. Spitz testified:

... [B]lood spatter evidence is very important. It indicates 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. And then as a result of that wound there was blood spattered which stuck the under surface of the wooden shelf, which is above the head of bed, and is also indicative of him being in an upright position because here's blood spattered on the ceiling above the bed. (Vol. II, JT 687).

Dr. Spitz opined that the contact shot to the head was self-inflicted because it would be unlikely that someone would be able to shoot victim without resistance if he were in an upright position or if two other shots had already been fired. (Vol. II, JT 688, 716). Dr. Spitz also testified that there were four locations that comprise the majority of suicidal shots (temple, heart, forehead and mouth, with the temple being the most frequent). The Doctor went on to state:

... There are suicidal gunshot wounds that involve the undersurface of the chin. There are suicidal gunshot wounds that involve the ear. There are suicidal gunshot wounds that involve the chest, and abdomen. So while

those are the most common, as listed there [referring to the four locations of temple, heart, forehead and mouth], that is not meant to be ... the only locations.
(Vol. II, JT 715).

Another significant conflict in the forensic evidence involved the expert's opinion on the "mechanism of death." (Vol. II, JT 688 to 689). Dr. Mahmoud testified that the victim died as a result of an air embolism from a gunshot to the face. (Vol. II, JT 536). Dr. Spitz testified that the victim died as a result of the progressive injury that resulted from seizure related to the near contact gunshot wound to the side of the head. (Vol. II, JT 680). Dr. Spitz testified that death from an air embolism is extremely rare (Vol. II, JT 694) and that Dr. Mahmoud's opinion was without any basis in scientific fact. (Vol. II, JT 692 to 694). It was also noted that Dr. Mahmoud failed to perform examinations that would have established an air embolism (Vol. II, JT 570 to 572) or seizure related to the near contact gunshot wound to the side of the head. (Vol. II, JT 707). (Diagnosis by looking for hemorrhage in the cortex.)

It is important to note the credentials of the conflicting experts. Dr. Daniel Spitz is a board certified forensic pathologist (Vol. II, JT 675 to 676), he is an editor and contributor to the accepted (Vol. II, JT 546) authoritative treatise: 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), and is an assistant professor of forensic pathology at Wayne State University School of Medicine. (Vol. II, JT 676). Dr. Mahmoud is board eligible to take his

anatomic pathology exam (Vol. II, JT 573) but has failed to pass said exam in three attempts. (Vol. II, JT 575). Dr. Mahmoud must pass anatomic pathology and then clinical pathology to be eligible to take his forensic pathology exam and become board certified as a forensic pathologist. (Vol. II, JT 573 to 574).

H. *Victim's Downward Spiral*. 1. *Affair with Meth Addict*. The victim, Michael Surbaugh, began an affair with another school teacher, Janet Morton, in July, 2008. (Vol. II, JT 359). Janet Morton testified at trial that she was a methamphetamine or meth addict and snorted "crank" five days a week for three to four years. (Vol. II, JT 369 to 370). She admitted this addiction through July 25, 2009 (Vol. II, JT 367) and that she was addicted to meth in 2008 when she first met victim. (Vol. II, JT 369).

Janet Morton stated that victim snorted crank only one time. (Vol. II, JT 367). Despite the victim having been cited or arrested for possession on two separate occasions, Janet Morton testified that Michael Surbaugh "may have" smoked pot three times (Vol. II, JT 365), and that he did not "abuse cannabis" around her. (Vol. II, JT 387). [Note: Crank is the street name for meth. Also, other evidence suggests that victim would "finish Janet Morton's lines" to help her with her addiction problem. (Vol. II, JT 769)]

2. *The "Up Williams" Citation*. On March 8, 2009, the victim, Michael Surbaugh, was a passenger in Janet Morton's car on Rock House Road up Williams River, an area within the Monongahela National Forest. (Vol. I, AR 88 and, Vol. II, JT 364). When Janet Morton and Michael Surbaugh arrived at Michael Surbaugh's car; National

Forrest Service Officers were waiting. A search was conducted on victim's car and he was cited for possession of marijuana, drug paraphernalia, and a pipe. (Vol. I, AR 88 and, Vol. II, JT 379). Victim pleaded guilty to the citation. (Vol. I, AR 88 and, Vol. II, JT 751).

3. *"When the Dogs Came to School" arrest*". 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).

4. *Victim's Problems with Neighbors and Friends*. Neighbor Ann Wilson testified that things "went into a tailspin" in the Surbaugh marriage in the year before August 6, 2009. (Vol. II, JT 267 to 268). She noted the victim during this time having mood swings from one moment to the next (Vol. II, JT 267); that his language degenerated ("verbal cussing"). She stated: "[Y]ou never knew from one moment to the next what kind of mood he was in." He had a temper and used foul language with his sons. (Vol. II, JT 268). Ms. Wilson further described victim's temper as "terrible" and that he verbally abused Appellant, Julie Surbaugh. (Vol. II, JT 265). She also described his temper as "explosive." (Vol. II, JT 265).

a. *The Big Hug Incident.* Ann Wilson and Gary Weir both describe a strange incident involving victim. Victim and long-time friend Weir had gone boating down the Elk River near Webster Springs. (Vol. II, JT 727). Victim had been drinking. Weir observed victim's demeanor to ascertain if victim were fit to drive. (Vol. II, JT 727). Weir decided that victim appeared to be "fine." (Vol. II, JT 728). During the one-half hour journey back to Webster Springs, victim's driving deteriorated and he had difficulty keeping his vehicle on the road. (Vol. II, JT 727). His speech was slurred. (Vol. II, JT 728). When Weir and victim arrived at victim's residence, victim staggered to the Wilson residence. (Vol. II, JT 728). Ann Wilson described his eyes as glassy, different. (Vol. II, JT 267). Victim gave Ann Wilson and her husband a big hug and thanked them for being so good to his sons. (Vol. II, JT 267). He was, "sobbing uncontrollably." (Vol. II, JT 267).

b. *The Card Game Breakup Incident.* Friend Gary Weir also described victim's unusual behavior at a poker game with friends. (Vol. II, JT 725). While the poker game was in progress, there was a news report on the television of a drug bust in Webster County. Michael Surbaugh became upset and said it was wrong to arrest these people and that they were only hurting themselves. (Vol. II, JT 725). Some of the other players disagreed commenting that children were not safe and users turned to crime. (Vol. II, JT 726). Weir testified that it was not uncommon to have give and take discussions but that victim became so angry and negative that the card game soon broke up. (Vol. II, JT 726). Weir cited the "big hug" and "poker game breakup" as two examples of

victim's personality changes that had occurred in the year preceding his death.

Neighbor Deb White was so concerned about the dramatic changes in the victim's personality over the course of the year (Vol. II, JT 243) that she took it upon herself to contact Women's Aid in Crises to ascertain services available to Appellant. (Vol. II, JT 246). This was based upon domestic abuse she had seen at the Surbaugh residence in the weeks prior to the shooting. (Vol. II, JT 246). Deb White noted that victim lost his temper more, slammed things, and drank excessively. She saw him yelling and cursing Appellant. (Vol. II, JT 243). He would accuse Appellant of things that were not true and would become mean and angry with her. (Vol. II, JT 252). Victim also screamed at Mrs. White's son, Clark White. (Vol. II, JT 245).

c. *"Ate the Varnish off the Table"*. Mrs. White also noted a change in victim's physical appearance. (Vol. II, JT 243). He seemed to lose body mass and sweated profusely. (Vol. II, JT 244). He had tremors and would shake. (Vol. II, JT 244). Deb White stated that victim, Michael Surbaugh, always sat in a certain seat at the dining room table during poker games. In the months before his death, the sweat from victim's body "ate the varnish off the table." (Vol. II, JT 244).

d. *"The Topix Incident"*. Mrs. White recalled that after victim's second arrest for drug possession ("when the dogs came to school" arrest above at p. 11) she went for a visit at the Surbaugh residence. (Vol. II, JT 253). Victim yelled at Appellant when she mentioned that the arrest was well-known in town. (Vol. II, JT 253). Deb White took Appellant's side and told victim that the subject had been widely discussed on "Topix."

(Vol. II, JT 253 to 254). (Topix is an on-line local community chat forum.) Deb White showed victim on the computer some of the Topix discussion thread. (Vol. II, JT 254). The victim became enraged screaming that he was not on drugs. (Vol. II, JT 254). Later, he retrieved a toxicology report and shoved it into Deb White's hands. (Vol. II, JT 254).

e. *Victim's "Celebration of Sobriety"*. Janet Morton testified that she and victim met with psychologist Mike Morrello on August 4, 2009. (Vol. II, JT 388). Victim was receiving counseling for his substance abuse issues. To reward themselves for the progress of their recovery, they rented a motel room and celebrated their success with a half-gallon of Vodka. (Vol. II, JT 375 to 378, 389).

I. *Victim's Psychological and Physical Abuse of Appellant*. Victim had been forced to resign from his employment as a teacher at Webster County High School. (Vol. I, AR 88 to 89). On August 5, 2009, Appellant had helped victim clean out his classroom. (Vol. II, JT 762 to 763). Victim was very loud and upset during the day. (Vol. II, JT 763). In the evening he began accusing Appellant of everything that had gone wrong in his life, (Vol. II, JT 761) including setting him up on his two arrests. (Vol. II, JT 761 to 762). That she was trying to turn their two sons against him. (Vol. II, JT 765).

Appellant reported to the police during her second statement that victim had grabbed her to the point of leaving bruises. (Vol. I, AR 159). That he could become violent and throw things. (Vol. II, JT 854). She denied, however, that he hit her or had hurt her. (Vol. II, JT 853). This situation changed on the morning of August 6, 2009, when victim put a gun in Appellant's face, cocked the gun and came across the bed

toward her in a rage. (Vol. II, JT 779, 809, 814). Appellant feared for her life. (Vol. II, JT 779).

J. *Procedural History*. Appellant was arrested on August 12, 2009, and on August 13, 2009, was granted bail. (Vol. I, AR 1, lines 25 to 28). She was indicted January 12, 2010, (Vol. I, AR 6) and arraigned January 20, 2010. (Vol. I, AR 8). On February 19, 2010, the State filed a motion to rule on admissibility of statements made by victim. (Vol. I, AR 10). On March 10, 2010, Appellant's trial counsel, Dan James, filed a motion to suppress the third statement given to police. (Vol. I, AR 12). Defense counsel contested the admissibility of hearsay statements made by victim. (Vol. I, AR 18). A pretrial hearing was held on April 15, 2010, concerning the motions to rule on admissibility and to suppress. The lower court granted continuing objection status to its adverse rulings. (Vol. II, JT 9 to 10). The State and defense counsel entered into certain pre-trial stipulations again preserving objections. (Vol. I, AR 84 to 89).

Trial of the matter started on May 17, 2010. The trial lasted four days and on May 20, 2010, jury instructions were argued. The lower court denied Appellant's *Harden* instructions. (Vol. II, JT 632, 655 to 662). The jury reached a verdict on May 20, 2010, and Appellant was immediately sentenced to life imprisonment without the possibility of parole. (Vol. II, JT 947 to 948). Appellant was resentenced and the Order signed on March 3, 2011, so that she might timely file this appeal. (Vol. I, AR 211).

SUMMARY OF ARGUMENT

A conflict in the facts of the case, including certain conflicts in the forensic evidence, emphasized the hearsay statements made by the victim, Michael Surbaugh, prior to his death. Appellant argues the lower court committed error by admitting a testimonial statement taken by police from the victim at the hospital in violation of *Crawford v. Washington*. Appellant further argues that the lower court did not consider individually each of the many other hearsay statements made by victim and determine the basis of each as an exception to the hearsay rules. That the lower court in admitting all of victim's non-testimonial hearsay statements under the catch-all exception to the hearsay rule, committed error by failing to make a proper finding as to the trustworthiness of each statement.

The lower court also committed error in admitting a portion of a statement given to police by the Appellant after her custodial status changed from non-custodial to custodial. It was admitted that a police officer arrived with an arrest warrant for Appellant during the interrogation and she was not Mirandized.

The lower court abused its discretion and committed reversible error by refusing critical instructions relating to this Court's holding in *State v. Harden*. Specifically, the lower court while finding emotional abuse of Appellant by the victim noted that she did not put on evidence of physical threats. The lower court also refused Appellant's instruction on good character (and no other character instruction was given) despite uncontested evidence concerning good character from several of the State's witnesses

including the Sheriff of the County.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Appellant requests oral argument in this case. Appellant asserts that the lower court erred in its application of existing law but requests argument pursuant to Rule 20 because of the number of errors assigned. Appellant also believes that the case should be subject of a full opinion because of the *State v. Harden* issues raised.

ARGUMENT

I. THE LOWER COURT ERRED BY ADMITTING STATEMENTS, TESTIMONIAL IN NATURE, OF THE VICTIM IN VIOLATION OF *CRAWFORD V. WASHINGTON*. THE LOWER COURT ALSO COMMITTED ERROR BY ADMITTING OTHER HEARSAY STATEMENTS OF VICTIM UNDER THE CATCH-ALL PROVISION OF THE HEARSAY RULES WITHOUT A FINDING OF TRUSTWORTHINESS.

A. How Presented in the Court Below. 1. *Testimonial Statement.* Appellant filed a motion to suppress victim's statement given to Deputy Vandevender at Webster Memorial Hospital. (Vol. I, AR 18). The motion on page three specifically states that the Statement given to Deputy Vandevender violates *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), (Vol. I, AR 20). This statement was also brought to the lower court's attention in the States' motion to admit. (Vol. I, AR 10 to 11). The lower court heard evidence at the pretrial hearing concerning the taking of this statement on April 15, 2010. (Vol. II, 15 APR). The lower court ruled the statement admissible noting that *Crawford v. Washington*, was not violated, (Vol. I, AR 74) and granted a continuing objection the Appellant concerning the admission of said evidence. (Vol. II, JT 9 to 10). 2. *Other Hearsay Statements of Victim.* Appellant also filed

motions to suppress the other statements made by victim. (Vol. I, AR 18). The lower court considered all of the motions together and specifically ruled as follows:

Further, the Court does FIND and ORDER, in regards to the various statements made by Michael Surbaugh on August 12, 2009 (sic):

1. Based upon his actions, the Court does not believe that Michael Surbaugh was under the belief that his death was imminent at the time that he made the statements and, therefore, the statements are not dying declarations and are not admissible under *West Virginia Rules of Evidence*, Rule 804(b)(2). The State's objections are noted.

2. *West Virginia Rules of Evidence*, Rule 804(b)(5) relates to the admissibility of hearsay when the witness is unavailable. Michael Surbaugh is clearly unavailable.

3. The purpose for which the State seeks to admits (sic) Michael Surbaugh's statements are for a material purpose and are more probative than any other evidence the State could obtain through reasonable efforts.

4. The best interest of justice would be served to admit Michael Surbaugh's statements under *West Virginia Rules of Evidence*, Rule 804(b)(5).

5. The Court also believes Michael Surbaugh's statements would be admissible under *West Virginia Rules of Evidence*, Rule 803(2) as excited utterances because all of the statements were made within a short time frame after Michael Surbaugh received his injuries and he was still laboring under the stress of the events.

6. Admission of the statements does not violate the standards set forth in *Crawford v. Washington*.

7. The statements made by Michael Surbaugh on August 12, 2009 (sic), as testified to before this Court on this day shall be admissible at trial and the defendant's objection are noted.

(Vol. I, AR 73 to 74).

(Note. Although the lower court references statements by Michael Surbaugh on August 12, 2009, this is obviously a typographical error as the incident occurred on August 6, 2009, and victim died at approximately noon on August, 6, 2009.) (Vol. II, JT 543).

The lower court at the beginning of trial granted continuing objection status to hearsay statements of victim and statements of Appellant introduced during trial:

... [T]he Court will note the defendant's objections and preserved those objections involving all of the Court's prior rulings in everything in the case. And the Court would give to the defendant a continuing objection to those and to any line of evidence or testimony that comes in during the trial as a result of the Court's ruling, and note and preserve all parties' objections and exceptions to the Court's rulings ...

(Vol. II, JT 10).

B. *Standard of Review.* The standard of review for questions involving the admissibility of evidence is: "Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." Syl. Pt. 1, *State v. Shrewsbury*, 213 W.Va. 327, 582 S.E.2d 774 (2003); *State v. Louk*, 171 W.Va. 639, 643, 301 S.E.2d 596, 599 (1983); Syl. Pt. 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983).

C. *Factual Basis for Error.* The factual basis for this error as it pertains to *Crawford* is discussed in the Statement of Case section of this brief in paragraph "D" pp. 4 to 5, where the pertinent portion of the testimonial statement given to Deputy Vandevender is set out. (Vol. I, AR 151). The factual basis for this error as it pertains to other hearsay statements of victim is set out in this brief in paragraph "C" (Shots Fired.) p. 2. The specific statements are numbered and set forth on pp. 3 to 4.

D. *Points of Law and Argument.* "The Confrontation Clause contained in the Sixth Amendment to the *United States Constitution* provides: 'In all criminal prosecutions, the accused shall ... be confronted with the witnesses against him.' This clause was made applicable to the states through the *Fourteenth Amendment* to the *United States Constitution.*" *State v. Kaufman*, No. 35691, ____ S.E.2d ____ (June 22, 2011). Syl. Pt. 1,

State v. James Edward S., 184 W.Va. 408, 400 S.E.2d 843 (1990), overruled on other grounds by, *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006). “Pursuant to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2000), the Confrontation Clause contained within the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.” Syl. Pt. 6, *Kaufman*, *supra*. Syl. Pt. 6, *Mechling*, *supra*. “... [A] testimonial statement is, generally, a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Syl. Pt. 8, *Kaufman*, Syl. Pt. 8 *Mechling* (in pertinent part). “... [A] witness’s statement taken by a law enforcement officer in the course of an interrogation is testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the witness’s statement is to establish or prove past events potentially relevant to later criminal prosecution. A witness’s statement taken by a law enforcement officer in the course of an interrogation is non-testimonial when made under circumstances objectively indicating that the primary purpose of the statement is to enable police assistance to meet an ongoing emergency.” Syl. Pt. 9 *Kaufman*, Syl. Pt. 9, *Mechling* (in pertinent part).

1. *Testimonial Statement taken at Hospital.* Appellant contends that the statement taken by Deputy Vandevender at the hospital was testimonial. There were systematic

questions concerning the sequence of events that had transpired. (Vol. I, AR 151). Victim had stated that he wanted to talk to a police officer. (Vol. II, JT 310). The police officer asked permission from the attending physician to take a statement. (Vol. II, JT 407 to 408). The statement was recorded for future use. (Vol. II, JT 408). Although there was ongoing medical treatment being provided, Deputy Vandevender was not responding to an ongoing emergency. (Vol. II, JT 407). Deputy Vandevender was responding to the suggestion or direction that he go to the hospital and obtain a statement from the victim. (Vol. II, JT 407).

Appellant further argues that the admission of the testimonial statement of the victim was a fundamental Constitutional error. The lower court found the statement given by victim to Deputy Vandevender admissible under the catch-all exception of Rule 804(b)(5). Even though the lower court did not mention how the statement was reliable, reliability is not at issue in the present context of testimonial statements in violation of the Confrontation Clause. That is because:

... [I]t is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. . . . Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

Crawford v. Washington, 541 U.S., 36, at 61-62, 124 S.Ct. 1354, 158 L.Ed.2d 177. See also, *Kaufman*, Slip Op., at p. 23.

2. Other Hearsay Statements Admitted under the Catch-All Provision of the Hearsay

Rules. Further Points of Law and Argument. "The two central requirements for admission

of extrajudicial testimony under the Confrontation Clause contained in the Sixth Amendment to the *United States Constitution* are: (1) demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness's out-of-court statement." Syl. Pt. 3, *Kaufman, supra*. Syl. Pt. 2. *James, supra*. "For purposes of the Confrontation Clause found in the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution*, no independent inquiry into reliability is required when the evidence falls within a firmly rooted hearsay exception." Syl. Pt. 4 *Kaufman, supra*, Syl. Pt. 6, *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995), overruled on other grounds by *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006). "Generally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules." Syl. Pt. 3., *State v. Morris*, 705 S.E.2d 583 (2010); Syl. Pt. 1., *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990).

In the present case the lower court primarily relied upon the residual exception rule, also referred to as the "catch-all exception." See, 2 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, Section 8-7, p. 8-207 (2000). Rule 804(b)(5), *W.Va.R.Evid.* (1994), states in pertinent part:

... A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence ...

Id.

The lower court ruling complicates the analysis by stating "...the Court also believes ..." the statements would qualify "... as excited utterances." This complication arises obviously because the "catch-all" rule cited above starts with the proviso that the rule only applies if the statement is not "specifically covered by any of the foregoing exceptions ..." An excited utterance pursuant to Rule 803(2), *W.Va.R.Evid.*, (1994), would qualify as such an exception. The unusual use of the word "believes" concerning the excited utterance exception and the fact that the lower court primarily relied on a provision which does not apply if a finding that the excited utterance does apply, leaves counsel wondering if the excited utterance comment is in fact a ruling of the lower court or can be considered as such.

The lower court prior to entering the above quoted Order observed at the conclusion of the pre-trial hearing:

... The Court would note that under 804(b)(5) ... Mr. Surbaugh is not an available witness to come to court and testify in this matter. The Court would note that there were only two people that know what occurred at the time of the events charged in the indictment ... and only one is living ... The Court, in weighing, just like the jury has to weigh, the testimony of what occurred, but the defendant must determine self-interest in the matter (sic).

...

In fact, I don't know that the State could procure or obtain any other evidence

through reasonable efforts involving the matter. And I believe the best interest of justice would be served to allow such statements under 804(b)(5), in the Court believes it's admissible under 804(b)(5) of the Rules. The Court also believes that under 803(2) of the Rules that the statement of the decedent could come in as excited utterances. *Albeit, I can appreciate that the excited utterance wasn't something that was spontaneous from the mere point of his receiving the injury, but it was within the parameter and timeframe shortly thereafter that he made such statements.* So I believe it could come in under either of those. Albeit, the Court believes that the greater of the two is 804(b)(5), and the Court is going to admit the defendant's (sic) statement in the matter.

(Vol. II, 15 APR 204 to 205) Emphasis added. (Note. Typographical error in last sentence. Should read "admit the decedent's statement" in the matter.)

The portion of the above noted comment emphasized appears to be a finding that the statements were not excited utterances. "[T]he basis for admitting an excited utterance is that it is the instinctive result of the startling event. Therefore, the test for whether evidence is admissible as a spontaneous declaration is *spontaneity*, not contemporaneity." 2 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, Section 8-3(b)(2)(c), at p. 8-111 (2000). (Emphasis in the original.)

In the present case Appellant stands convicted of murder in the first degree and is sentenced to life imprisonment without the possibility of parole based upon hearsay statements of the victim and a testimonial statement given to Deputy Vandevender noted above. Appellant admits that she has some culpability insofar as she lied to the police about shooting her husband twice in the face (because she did not want her sons to know she had shot their father and perhaps not wanting to be arrested). But the main point of contention is whether the shot to the right side of the head was self-inflicted and whether the shots to the face were in self-defense or were some lesser

degree of culpability due to Appellant's state of mind based upon prior domestic abuse as noted in Argument III of this brief. The hearsay statements are critical because each statement adds weight to the State's argument that Appellant, and exclusively Appellant, shot victim. They also suggest that victim was shot while he was still asleep.

The lynchpin of Appellant's case lost in the confusion of hearsay statements is the uncontested blood spatter evidence rendered by forensic pathologist Dr. Daniel Spitz. As noted in this brief on pp. 8 to 9, Dr. Spitz testified that blood spatter evidence showed that victim was in an upright position, and not lying down, when he was shot in the right side of the head at near contact range. (Vol. II, JT 687 to 688). As Dr. Spitz noted in his testimony: "... [T]he scene evidence, you know, is often times more reliable since witness statements can be somewhat misleading, and often not, potentially not accurate. The scene evidence is what it is and doesn't, doesn't lie." (Vol. II, JT 711). Dr. Spitz concluded that the contact wound to the right side of the head was self-inflicted (Vol. II, JT 687 to 688) because victim was awake, unless he sleeps sitting up (Vol. II, JT 716), and because it may be assumed that one would not sit still and let another put a gun to one's head and fire. (Vol. II, JT 688).

Did victim have any motivation to be deceitful? He was on bond for the criminal offense of possession of marijuana second offense. (Vol. I, AR 88). Did he have to be careful concerning making statements about his use of a firearm? His primary focus seemed to be going on a camping trip with his girlfriend. (Vol. II, 15 APR 113, JT 306). Could admissions to police of bizarre behavior with a gun interfere with his planned

trip?

The foregoing questions were not addressed by the lower court in its finding concerning the trustworthiness of the hearsay statements. *Rule 804(b)(5)* speaks of “equivalent circumstantial guarantees of trustworthiness.” In fact, the lower court does not address in its findings what circumstantial guarantees of trustworthiness are present to warrant introduction of the hearsay statements. Further, the lower court did not address each statement to determine if it were in fact hearsay, and if it were what if any exception to the hearsay rule may apply. As this Court held recently in *Kaufman*, No. 35691, _____ S.E.2d _____ (June 22, 2011), “When ruling upon the admission of a narrative under Article VIII (Hearsay) of the West Virginia Rules of Evidence, a trial court must ...determine the separate admissibility of each single declaration or remark. . .” (Slip Op., at p. 33, pertaining to narratives.) This Court also noted that the trial court must first determine whether the statement is hearsay and “if it is, whether it falls within a firmly rooted hearsay exception or has a particularized guarantee of trustworthiness.” *Kaufman*, Slip Op., at 33, ft. note 37 (citing 2 Franklin Cleckley, *Handbook on Evidence for West Virginia Lawyers*, Sections 8-3 and 8-7 (2000)). Although *Kaufman* speaks of a narrative, Appellant argues the same logic applies, and perhaps more obviously so, to a series of statements. Each statement should be analyzed separately and its admissibility determined. Appellant urges that the rulings with regard to hearsay statements by the lower court constitute an abuse of discretion because they were all lumped together and no analysis of the reliability of each was

made.

II. THE LOWER COURT COMMITTED ERROR BY ADMITTING THE PORTION OF THE "THIRD STATEMENT" OF APPELLANT TO POLICE AFTER HER STATUS CHANGED FROM NON-CUSTODIAL TO CUSTODIAL AND SHE WAS GIVEN NO FURTHER MIRANDA WARNINGS.

A. How Issue Presented Below. Appellant filed a pre-trial motion to exclude a portion of a statement given by her to police on August 12, 2009, referred to as her "third statement." The motion was filed on March 10, 2010. (Vol. I, AR 12). The State filed a response. (Vol. I, AR 21). The matter was taken up, and evidence adduced pertaining thereto at a pretrial hearing held on April 15, 2010. The lower court ruled that the part of the third statement up until Trooper Jordan walked into the room with an arrest warrant was admissible. (Vol. I, AR 75). The lower court however reserved ruling on the admissibility of the third statement after Trooper Jordan walked into the room and requested additional briefing on the issue. (Vol. I, AR 75 to 76). After receiving briefing, the lower court ruled the portion of the third statement after Trooper Jordan entered the room with the arrest warrant was admissible. (Vol. I, AR 90). The lower court ruled in pertinent part as follows:

It is clear that the Defendant initiated the conversation when after the officers attempted to end the interview, she instructed the officers to wait and she began giving more information about the shooting.

...

The Defendant could conceivably be considered to be under de facto arrest at the time when Trooper Jordan arrived with the arrest warrant. However, it is after Trooper Jordan arrived that the Defendant stopped the deputies from ending the interview. (Vol. I, AR 95 to 96).

B. *Standard of Review.* “This Court is constitutionally obligated to give plenary, independent, and *de novo* review to the ultimate question of whether a particular confession is voluntary and whether the lower court applied the correct legal standard in making its determination. The holdings of prior West Virginia cases suggest deference to this area continue, but the deference is limited to factual findings as opposed to legal conclusions.” Syllabus Point 2, *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994); Syl. Pt. 3, *State v. Singleton*, 218 W.Va. 180, 624 S.E.2d 527 (2005).

C. *Factual Basis for Error.* Appellant, Julia Surbaugh, voluntarily went to the Sheriff’s office on August 12, 2009, to give further statements concerning the death of her husband, victim Michael Surbaugh. (Vol. I, AR 91). Prior to taking any statement, Appellant was Mirandized and told that she was not under arrest and free to leave. (Vol. I, AR 133). The statement was recorded and a redacted version played for the jury. (Vol. I, AR 193 and, Vol. II, JT 598) (Note. The redacted version left out requests for counsel.) The statement was also transcribed and the transcription used as an aid to the jury without objection. (Vol. II, JT 598) (Note. This transcription referred to below is the unredacted version where Appellant does make requests for counsel.) At page 3 of the Transcription, Deputy Clayton (referred to as “DC”) responded to a question from Julia Surbaugh (referred to as “JS”) and the following colloquy took place:

JS: Where was he shot?

DC: Right here, here, and here. So I mean, if, if it’s ruled a homicide by the Chief Medical Examiner and only two people in the house.

JS: I need to get a lawyer.

(Vol. I, AR 189) (unredacted version).

The Deputy explains that she has a right to a lawyer, Appellant Julia Surbaugh asks if she is being arrested and is told: "... it's going to come. I mean I'm not sure." Appellant begins to talk about arrangements for care for her children. (Vol. I, AR 189). There is a short discussion as to whether there were three or four shots and who might have heard the shots. (Vol. I, AR 190). Then Trooper Jordan enters the room. *The significance of Trooper Jordan entering the room is that he had in his possession a warrant for the arrest of Julia Surbaugh.* (Vol. I, AR 190). His entry is announced. *Appellant is not advised that she is under arrest and no Miranda warnings are given.* (Vol. I, AR 190). Deputy Clayton makes several statements designed to elicit a response concerning motive. Then there is a long pause (as noted in the transcript, the recording reflects the pause is almost two minutes in duration). (Vol. I, AR 190). After the pause, the following colloquy takes place:

DC: ...Um, as I told you I'm not going to lie to you. We haven't got back the gunshot residue kits yet. You've already told me that your (sic) going to have it on you.

JS: I will have it on me. He will not, he washed.

DC: So how do we want to go with this?

JS: I need to talk to a lawyer.

DC: Okay like I said that's, that's.

JS: I need to go down and get things in place with DHHR.

DC: You know if you need to speak to a lawyer that's, that's your right. You have every right to do that. I just sa (sic), I wanted to let you know where we stood on this. I wanted to let you know where we were at and that's fine. That will conclude this statement.

JS: Wai (sic), wait a minute, wait a minute.

(Vol. I, AR 190 to 191) (unredacted version).

Thereafter Appellant begins another interview and series of statements with

Trooper Jordan joining in the questioning. The statements were later used in the State's case in chief to discredit Appellant. (Vol. I, AR 190 and, Vol. II, JT 598) (redacted version).

What was not stated to Appellant is that Trooper Jordan entered the room with a warrant signed by a magistrate for the arrest of Appellant for first degree murder. (Vol. I, AR 190). The fact that this is not stated is significant because it changed the status of Appellant from non-custodial to custodial. She was not in fact free to leave. *She was not informed of this change of status and signed no further waiver of rights reflecting this change of status.* The questions under this misapprehension continued until Appellant asked for an attorney a third time. (Vol. I, AR 192). Immediately thereafter she was arrested. (Vol. II, 15APR 120). Appellant contends the lower court committed error in admitting the statements she made after Trooper Jordan entered the room.

D. *Points of Law and Argument.* "Where police have given Miranda warnings outside the context of custodial interrogation, these warnings must be repeated once custodial interrogation begins. Absent an effective waiver of these rights, interrogation must cease." Syl. Pt. 4, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995). "The Sixth Amendment right to counsel attaches at the time judicial proceedings have been initiated against a defendant whether by way of formal charges, preliminary hearing, indictment, information, or arraignment." Syl. Pt. 3, *State ex rel. Sims v. Perry*, 204 W.Va. 625, 515 S.E.2d 582 (1999).

Appellant argues that although she may not have been entitled to *Miranda*

warnings when she voluntarily arrived at the Sheriff's office and began giving a statement, she was entitled to such warnings at the time Trooper Jordan arrived with a warrant for her arrest. The lower court committed error by failing to observe the holding of Syllabus point 4 of *Bradshaw*. The *Miranda* warnings given initially to Appellant were of no further force or effect when Trooper Jordan arrived with the formal arrest warrant because her status changed from non-custodial to custodial. The fact that she was not advised of her change of status does not inure to the State's benefit under the facts of this case.

Appellant further argues that there is no ambiguity or doubt that formal charges had been brought by the time Trooper Jordan appeared in the room with the arrest warrant. This Court in *State v. Boyd*, 209 W.Va. 90, 543 S.E.2d 647 (2000), clearly answered the question of when a criminal proceeding commences. *Boyd* cites Rule 3 of the *Rules of Criminal Procedure*, and *W.Va. Code*, §50-4-2 (1997) (Commencement of criminal prosecutions). *Id.*, 543 S.E.2d at 650. The conclusion is that "Undoubtedly, the complaint ... is the initial step in the prosecution, ... [and] it commences the action." *Id.*, 543 S.E.2d at 650, (internal quotation marks omitted). Appellant was therefore "charged" at some point prior to Trooper Jordan entering the room. *West Virginia Code* §62-1-1 and 2 (1965) make it clear that a person is "charged" with a crime once a written complaint has been filed and a judicial officer signs the complaint. *State ex rel. Burdette v. Scott*, 163 W.Va. 705, 259 S.E.2d 626 (1979).

As noted above, the lower court ruled that Appellant stopped the police officers

from ending the interview. This conclusion fails to take into account that Appellant was not advised that she was under arrest and was not thereafter given her *Miranda* warnings clearly indicating that she was charged with a crime as required by this Court's holding in *Bradshaw*. Appellant urges this Court to find the third statement after Trooper Jordan entered the room to be inadmissible as a violation of her Sixth Amendment rights.

III. THE LOWER COURT ERRED IN REFUSING INSTRUCTIONS BASED ON *STATE V. HARDEN* BECAUSE IT REQUIRED A SHOWING OF ACTUAL PHYSICAL ABUSE AND THAT EMOTIONAL ABUSE WAS NOT SUFFICIENT.

A. *How Presented in the Court Below.* Appellant timely filed with the lower court instructions based upon this Court's decision in *State v. Harden*, 223 W.Va. 796, 697 S.E.2d 628 (2009). These instructions were set forth in pertinent part as follows:

[Defendant's Instruction No. 1.] Evidence that Michael Surbaugh had previously abused or threatened the life of Julia Ann Surbaugh is relevant evidence of her state of mind at the time deadly force was used and her assertion of self-defense.

(Vol. I, AR 48 and, Vol. II, JT 655, 658). And,

[Defendant's Instruction No. 2.] If you, the jury, find beyond a reasonable doubt that Julia Ann Surbaugh was not acting in self-defense, evidence that Michael Surbaugh had abused or threatened the life of Julia Ann Surbaugh is nonetheless relevant and may negate a necessary element of the offense charged, such as malice or intent.

(Vol. I, AR 49 and, Vol. II, JT 658 to 659).

Defense counsel argued that there was evidence of abuse, and that the abuse was consistent with the type of abuse defined in the domestic violence statute. (Vol. II, JT 656). The State objected stating that Appellant was trying to sneak in the battered-

spouse defense without the necessary psychological testimony. (Vol. II, JT 657). The lower court stated that Appellant's case was not within the scope of the *Harden* decision and denied the instructions on the following grounds:

... There was never any physical violence or threats of physical violence. I did hear some testimony involving emotional abuse, and certainly emotional abuse is abuse. ... I don't believe I'm going to give it. I don't believe that the instruction is consistent with the facts that I've heard in the case. However, I don't believe that that precludes the defendant from arguing emotional abuse to the jury.
(Vol. II, JT 657 to 658).

Appellant's objection was noted. (Vol. II, JT 658). The lower court then ruled after further argument that the facts of the *Harden* case do not comport with the facts of this case and denied the instruction mitigating criminal intent (Defendant's Instruction No. 2). (Vol. II, JT 884). The lower court preserved objections and exceptions. (Vol. II, JT 884).

B. *Standard of Review*. The standard of review in the denial of a jury instruction is as follows: "As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*." Syl. Pt. 1, *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996); Syl. Pt. 1, *State v. Brooks*, 214 W.Va. 562, 591 S.E.2d 120 (2003). "A trial court's refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's

ability to effectively present a given defense.” Syl. Pt. 11, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

C. Factual Basis for Error. The factual basis for this error is previously discussed in the Statement of Facts section of this brief in paragraphs H. (Victim’s Downward Spiral) and I. (Victim’s Psychological and Physical Abuse of Appellant) at pp. 10 to 15.

D. Points of Law and Argument. “Where a defendant has asserted a plea of self-defense, evidence showing that the decedent had previously abused or threatened the life of the defendant is relevant evidence of the defendant’s state of mind at the time deadly force was used. In determining whether the circumstances formed a reasonable basis for the defendant to believe that he or she was at imminent risk of serious bodily injury or death at the hands of the decedent, the inquiry is two-fold: First, the defendant’s belief must be subjectively reasonable, which is to say the defendant actually believed, based upon all the circumstances perceived by him or her at the time deadly force was used, that such force was necessary to prevent death or serious bodily injury. Second, the defendant’s belief must be objectively reasonable when considering all of the circumstances surrounding the defendant’s use of deadly force, which is to say that another person, similarly situated, could have reasonably formed the same belief. Our holding in Syllabus Point 6 of *State v. McMillion*, 104 W.Va. 1, 138 S.E. 732 (1927), is expressly overruled.” Syl. Pt. 3, *State v. Harden*, 223 W.Va. 796, 697 S.E.2d 628 (2009). “Where it is determined that the defendant’s actions were not reasonably made in self-defense, evidence that the decedent had abused or threatened the life of the defendant

is nonetheless relevant and may negate or tend to negate a necessary element of the offense(s) charged, such as malice or intent.” Syl. Pt. 4, *Harden, supra*. “The act of domestic violence defined in *West Virginia Code* 48-27-202(3) (2001) as ‘creating fear of physical harm by harassment, psychological abuse or threatening acts’ provides that fear of physical harm may be established with (1) proof of harassment, (2) proof of psychological abuse, or (3) proof of overt or covert threatening acts.” Syl. Pt. 6, *Thomas v. Morris*, 224 W.Va. 661, 687 S.E.2d 760 (2009).

Appellant argues that this case does comport with this Court’s decision in *Harden*. Appellant admits that if the State’s theory is wholly accepted, ie., that victim was shot in his sleep, then there is no argument that the *Harden* instructions enumerated above apply. However, Appellant argues that her defense theory is entitled to instruction and that there was sufficient evidence to instruct. Appellant testified that victim came across the bed at her with a gun, that she grabbed the gun and shot victim twice in the face. (Vol. II, JT 779 to 782) The prior abuse affected her thinking in using deadly force. (Vol. II, JT 784) The second instruction quoted above concerning negating malice or intent is particularly necessary in this case to counteract the inference of malice by use of a firearm. (Vol. II, JT 901) It is also important to counteract any claim that she used excessive force in her confrontation with victim. *Harden*, 223 W.Va. at 809 to 810, (actions proportionate to danger).

The lower court in the present case indicated that there was no evidence of prior physical violence or threats of physical violence. (Vol. II, JT 657 to 658). This Court in

Thomas v. Morris, 224 W.Va 661, 687 S.E.2d 760 (2009), ruled that the clear statutory intent of the domestic violence statute in establishing abuse and fear therefrom, “does not limit such acts to verbal or other overt threats to impose physical harm.” This Court went on to state: “[F]ear of physical harm may be established with (1) proof of harassment, (2) proof of psychological abuse, or (3) proof of overt or covert threatening acts.” *Morris*, 244 W.Va. at 669. See also, *W.Va. Code*, Sections 48-27-202 and 204 (2001); and, *Harden*, 223 W.Va. at 804, nt. 5.

In the present case, under the Appellant’s theory, the use of the gun to shoot her husband was based on her knowledge of the victim’s violent mood swings, his crazy downward spiraling behavior and his abuse of her. The jury was instructed that it could infer malice from the use of a firearm. Appellant was denied the *Harden* instructions set forth above to back up and explain her argument concerning fear of victim. Allowing Appellant only arguments on these points without a legal instruction to back up the argument was an abuse of discretion under the circumstances and deprived Appellant of a fair trial.

IV. THE LOWER COURT COMMITTED ERROR IN REFUSING TO GIVE A GOOD CHARACTER INSTRUCTION AS PROPERED BY THE APPELLANT WHEN NO INSTUCTION ON CHARACTER WAS GIVEN, GOOD CHARACTER WAS UNCONTESTED AND INTREGAL TO APPELLANT’S DEFENSE.

A. *How Presented in the Lower Court.* Appellant tendered the following instruction to the lower court:

(Defendant’s proposed Instruction No. 10) ... Julia Surbaugh has

introduced evidence of her good character. Good character is a circumstance to be considered by the jury with all other facts and circumstances in the case on the question of the guilt or innocence of Julia Surbaugh, and can, alone, give rise to a reasonable doubt of her guilt on your part; but if you believe Julia Surbaugh is guilty beyond a reasonable doubt, her good character cannot be taken in to consideration to mitigate, justify or excuse the commission of the crime.

AR 202 (Vol. II, JT 665)

There was some confusion about the lower court's general charge concerning character evidence. A review of the instructions given to the jury, however, shows that no instruction on character was given. (Vol. II, JT 886 to 905). Defense counsel desired an instruction to the effect that good character "in and of itself can create reasonable doubt." The State noted the following objection: "I don't like that instruction at all, Your Honor." (Vol. II, JT 666). And the lower court ruled: "Yeah. I don't think I'm going to give it. I'm going to refuse it, but I'll note your objection." (Vol. II, JT 666). The record is later supplemented on this point, and reads as follows:

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). (Note. On the previous page the court reporter indicates the above was from her handwritten notes as the audio failed to record. The reference to *State v. Cobb*, appeared from earlier argument to pertain to the involuntary instruction and not the character instruction. However, insofar as this reference in the official court transcript pertains to the character instruction and appears to explain the same, it is included.)

B. *Standard of Review.* The standard of review in the denial of a jury instruction is as follows: "As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is de novo." Syl. Pt. 1, *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996); Syl. Pt. 1, *State v. Brooks*, 214 W.Va. 562, 591 S.E.2d 120 (2003). "A trial court's refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense." Syl. Pt. 11, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

C. *Factual Basis for Error.* The factual basis for good character is set for in the Statement of Case portion of this brief, at p. 2, (A. Good Character). Appellant also refers to the State's theory of the case as set out in the second paragraph of "E. Resolution of Appellant's Conflicting Statements" at p. 6. Appellant refers to the State's closing argument where the State argues: "She walked in, she leaned over and she put one right in his ear." (Vol. II, JT 905) And the States closing argument that: "she premeditated this." (Vol. II, JT) According to the State, the motive was to collect on life insurance and to prevent victim from running off with his girlfriend Janet Morton. (Vol. II, JT 912 to 913)

D. *Points of Law and Argument.* The law pertaining to good character is long enduring and well established. *State v. Brown*, 107 W.Va. 60, 146 S.E. 887 (1929), *State v. McDermott*, 99 W.Va. 220, 128 S.E. 108 (1925); *State v. Padgett*, 93 W.Va. 623, 117 S.E. 493 (1923); *State v. Moyer*, 58 W.Va. 146, 52 S.E. 30 (1905); and, *State v. Morrison*, 49 W.Va. 210, 38 S.E. 481 (1901); *See also*, 1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, Section 4-4(D), pp. 4-76 to 4-77 (2000).

The Court in *Brown* found it reversible error to refuse to give an instruction on character. This was because the good character of the defendant was uncontested, constituted a vital theory of the defense case and was not otherwise covered in the instructions. *Brown*, 107 W.Va. at pp. 63 to 65. The Court in *Brown* went so far as to hold in the Syllabus Point that a trial court should modify an instruction if necessary on such an important and crucial point to prevent a miscarriage of justice.

The lower court did not find that the instruction as proffered in the present case was improperly drafted or that it was a misstatement of the law. (Vol. II, JT 886). Appellant contends that under the facts of the present case the lower court abused its discretion in not allowing a good character instruction. The evidence related to Appellant's peaceful and law-abiding nature. The majority of the character witnesses testifying on behalf of the Appellant testified as State witnesses. The State did not contest by cross-examination any assertion as to Appellant's character for having a good reputation, peaceful, safe, non-violent, a good mother and a supportive wife despite problems with her husband.

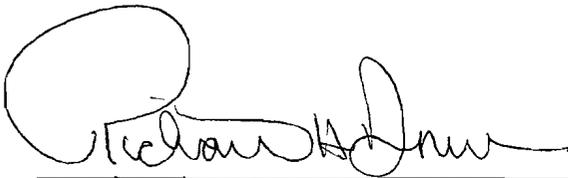
This case is perhaps unusual because the Sheriff of the County testified as to Appellant's non-violent character. (Vol. II, JT 331). Accordingly, it is difficult to understand the lower court stating there was no evidence to support such an instruction. (Vol. II, JT 886). Appellant's character traits were an essential part of the defense of the case and wholly inconsistent with the theory of the State's case. Appellant argues that given the nature of the State's argument in this case and the disparity of the evidence on crucial facts, the refusal to give a good character instruction in the present case was an abuse of discretion.

CONCLUSION

Appellant requests that based upon the foregoing error she did not receive a fair trial and that her conviction should be reversed and the matter remanded with appropriate directions to ensure a fair trial on remand.

Respectfully submitted,

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By Counsel



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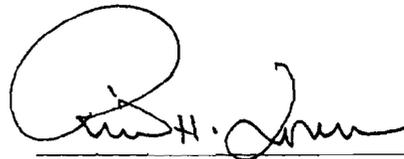
CERTIFICATE OF SERVICE

I, Richard H. Lorensen, counsel of record for Julia Surbaugh, hereby certify that on this **11 day of July, 2011**, true and accurate copies of the foregoing **Appellant's Brief** and **Appendix** Record 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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