

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. ¹²~~11~~-0075

STATE OF WEST VIRGINIA,

*Plaintiff Below
Respondent,*

v.

JAMES R. L.,

*Defendant Below
Plaintiff.*

**CORRECTED
BRIEF OF THE STATE OF WEST VIRGINIA**

**PATRICK MORRISEY
ATTORNEY GENERAL**

**SCOTT E. JOHNSON
SENIOR ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
Telephone: (304) 558-5830
State Bar No. 6335
E-mail: sej@wvago.gov**

Counsel for Respondent

TABLE OF CONTENTS

	Page
I. ASSIGNMENTS OF ERROR	1
II. STATEMENT OF THE CASE	2
III. SUMMARY OF ARGUMENT	6
IV. STATEMENT REGARDING ORAL ARGUMENT	8
V. ARGUMENT	8
A. The circuit court did abuse its discretion by granting the Petitioner’s motion for a change of venue.	8
B. The circuit court did not abuse its discretion in denying a mistrial when defense counsel elicited from a State witness on cross-examination that she had passed a polygraph test.	11
1. <i>Standard of Review</i>	13
2. <i>Invited error is not a basis for reversal of conviction or at least this conviction</i>	13
3. <i>Plain error does not apply here</i>	15
C. The Steve Ferris testimony did not affront either West Virginia Rule of Evidence 803(4) nor the Sixth Amendment confrontation clause.	21
D. The circuit court did not error in admitting the Ferris’ testimony under rule 404(b).	31
E. The circuit court did not abuse its discretion in admitting Isabella’s hospital photographs or autopsy photographs.	34
F. Ineffective assistance of counsel claims are generally not amenable to appeal and the claims raised here are not sufficiently articulated to be properly before this Court	39
VI. CONCLUSION	40

TABLE OF AUTHORITIES

	Page
CASES	
<i>Addair v. Bryant</i> , 168 W. Va. 306, 284 S.E.2d 374 (1981)	23
<i>Addair v. Majestic Petroleum Co., Inc.</i> , 160 W. Va. 105, 232 S.E.2d 821 (1977)	14
<i>Albrecht v. State</i> , 173 W. Va. 268, 314 S.E.2d 859 (1984)	24
<i>Bousley v. United States</i> , 523 U.S. 614 (1998)	17
<i>Bullcoming v. New Mexico</i> , 131 S.Ct. 2705 (2011)	30
<i>Butz v. Glover Livestock Commission</i> , 411 U.S. 182 (1973)	8
<i>Carter v. Armontrout</i> , 929 F.2d 1294 (8th Cir. 1991)	20
<i>Casaccio v. Curtiss</i> , 228 W. Va. 156, 718 S.E.2d 506 (2011)	24
<i>Chamberlain v. State</i> , 998 S.W.2d 230 (Tex. Crim App. 1988)	37-38
<i>ClearOne Communications, Inc. v. Bowers</i> , 643 F.3d 735 (10th Cir. 2011)	16
<i>Commonwealth v. McCutchen</i> , 454 A.2d 547 (Pa. 1982)	36, 37
<i>Dismuke v. State</i> , No. 05-04-01856-CR, 2006 WL 3200113 (Tex. Ct. App. Nov. 19, 2006)	38
<i>Estelle v. McGuire</i> , 502 U.S. 62 (1991)	33
<i>Giles v. California</i> , 554 U.S. 353 (2008)	30
<i>Gray v. State</i> , No. 05-04-01269-CR, 2005 WL 1670715 (Tex. App. July 29, 2005)	14-15
<i>Hereford v. McCaughtry</i> , 101 F.Supp.2d 742 (E.D. Wis. 2000)	11
<i>Hernandez v. Wainwright</i> , 634 F.Supp. 241 (S.D. Fla. 1986)	21

<i>Hopkins v. DC Chapman Ventures, Inc.</i> , 228 W. Va. 213, 719 S.E.2d 381(2011)	8
In re <i>A.S.</i> , 982 P.2d 1156, 1167 (Wash. 1999)	25
In re <i>Carlita B.</i> , 185 W. Va. 613, 408 S.E.2d 365, (1991)	31
In re <i>Plunkett</i> , 788 P.2d 1090, 1094 (Wash. Ct. App. 1990)	18
<i>Idaho v. Wright</i> , 497 U.S. 805 (1990)	22, 29
<i>Jones v. Cain</i> , 600 F.3d 527 (5th Cir. 2010)	17
<i>Liddle v. Brunzman</i> , No. 5:09-CV-00587, 2010 WL 4818522 (N.D. Ohio Nov. 19, 2010)	28-29
<i>Loveridge v. Dreagoux</i> , 678 F.2d 870 (10th Cir. 1982)	20
<i>Maldonado v. Wilson</i> , 416 F.3d 470 (6th Cir. 2005)	17-18
<i>Mullen v. Princess Anne Vol. Fire Co.</i> , 853 F.2d 1130 (4th Cir. 1988)	36
<i>Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.</i> , 998 F.2d 1224 (3rd Cir. 1993)	34
<i>Poe v. State</i> , 510 So.2d 852 (Ala. Ct. Cr. App. 1987)	13, 14
<i>State v. Acord</i> , 175 W. Va. 611, 336 S.E.2d 741 (1985)	20
<i>State v. Bowman</i> , 155 W. Va. 562, 184 S.E.2d 314 (1971)	14
<i>State v. Burnett</i> , 270 P.3d 1115 (Kan. 2012)	38
<i>State v. Corra</i> , 223 W. Va. 573, 678 S.E.2d 306 (2009)	17
<i>State v. Crabtree</i> , 198 W. Va. 620, 482 S.E.2d 605 (1996)	15
<i>State v. DeGraw</i> , 196 W. Va. 261, 470 S.E.2d (1996)	23
<i>State v. Derr</i> , 192 W. Va. 165, 451 S.E.2d 731 (1994)	36, 37
<i>State v. Dyer</i> , 514 P.2d 363 (Or. Ct. App. 1973)	8-9

<i>State v. Edward Charles L.</i> , 183 W. Va. 641, 398 S.E.2d 123 (1990)	27, 31
<i>State v. Flippo</i> , 212 W. Va. 560, 575 S.E.2d 170 (2002)	13
<i>State v. Frye</i> , 221 W. Va. 154, 650 S.E.2d 574 (2006)(per curium)	40
<i>State v. Guthrie</i> , 194 W. Va. 657, 461 S.E.2d 163 (1995)	22
<i>State v. Hassett</i> , 859 P.2d 955 (Idaho Ct. App. 1993)	33
<i>State v. Hatfield</i> , 169 W. Va. 191, 286 S.E.2d 402 (1982)	7, 37
<i>State v. Hereford</i> , 592 N.W.2d 247 (Wis. Ct. App. 1999)	10
<i>State v. Johnson</i> , 197 W. Va. 575, 476 S.E.2d 522 (1996)	14
<i>State v. LaRock</i> , 196 W. Va. 294, 470 S.E.2d. 613 (1996)	31
<i>State v. Lewis</i> , 207 W. Va. 544, 534 S.E.2d 740 (2000)	18-19
<i>State v. Mann</i> , 205 W. Va. 303, 518 S.E.2d 60 (1999)	13
<i>State v. Martucci</i> , 669 S.E.2d 598 (S.C. Ct. App. 1997)	33-34
<i>State v. Mayer</i> , 932 P.2d 570 (Or. Ct. App. 1997)	24
<i>State v. McGinnis</i> , 193 W. Va. 147, 455 S.E.2d 516 (1994)	31, 32
<i>State v. Mechling</i> , 219 W. Va. 366, 633 S.E.2d 311 (2006)	30
<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995)	passium
<i>State v. Mongold.</i> , 220 W. Va. 259, 647 S.E.2d 539 (2007)	33
<i>State v. Myers</i> , 204 W. Va. 449, 513 S.E.2d 676 (1998)	9, 16
<i>State v. Oswald</i> , 606 N.W.2d 207 (Wis. Ct. App. 1999)	10
<i>State v. Pettrey</i> , 209 W. Va. 449, 549 S.E.2d 323 (2001)	26-27
<i>State v. Pierce</i> , 488 S.E.2d 576 (N.C. 1997)	39
<i>State v. Porter</i> , 182 W. Va. 776, 392 S.E.2d 216 (1990)	18, 19

<i>State v. Redden</i> , 199 W. Va. 600, 487 S.E.2d 318 (1997)	17
<i>State v. Simons</i> , 201 W. Va. 235, 496 S.E.2d 185 (1997)	23
<i>State v. Smith</i> , 225 W. Va. 706, 696 S.E.2d 8 (2010)	22
<i>State v. Stapley</i> , 249 P.3d 572, 576 (Utah Ct. App. 2011)	37
<i>State v. Taylor</i> , 215 W. Va. 74, 593 S.E.2d 645 (2004)	38
<i>State v. Thornton</i> , 228 W. Va. 449, 720 S.E.2d 572 (2011)	13
<i>State v. Tommy Y.</i> , 219 W. Va. 530, 637 S.E.2d 628 (2006)	10
<i>State v. Triplett</i> , 187 W. Va. 760, 421 S.E.2d 511 (1992)	39
<i>State v. Wilson</i> , 658 P.2d 204 (Ariz. Ct. App. 1982)	14
<i>United State v. George</i> , 960 F.2d 97 (9th Cir. 1992)	22
<i>United States v. Abbott Labs</i> ; 505 F.2d 565, 572 (4th Cir. 1974)	11
<i>United States v. Andrews</i> , 409 Fed. Appx. 241, 243 n.2 (11th Cir. 2010)	20
<i>United States v. Artis</i> , 917 F.Supp. 347 (E.D. Pa. 1996)	21
<i>United States v. Fulford</i> , 980 F.2d 1110 (7th Cir. 1992)	16
<i>United States v. George</i> , 960 F.2d. 97, 100 (9th Cir. 1992)	22
<i>United States v. Greatwalker</i> , 356 F.3d 908 (8th Cir. 2004)	39
<i>United States v. Jernigan</i> , 341 F.3d 1273 (11th Cir. 2003)	16
<i>United States v. Lakich</i> , 23 F.3d 1203 (7th Cir. 1994)	16
<i>United States v. Marcello</i> , 280 F.Supp. 510 (E.D. La. 1968)	11
<i>United States v. Muskovsky</i> , 863 F.2d 1319 (7th Cir. 1988)	16
<i>United States v. Olano</i> , 507 U.S. 725 (1993)	9-10, 17

<i>United States v. v. Reyes</i> , 51 Fed. Appx. 488, 493 (6th Cir. 2002)	20
<i>United States v. Savard</i> , No. 37346, 2010 WL 4068964 (A.F. Ct. Crim. App. 19 Jan. 2010)	34
<i>United States v. Spivey</i> , 129 Fed. Appx. 856 (4th Cir. 2005)	16
<i>United States v. Stewart</i> , 185 F.3d 112 (3d. Cir. 1999)	16-17
<i>United States v. Undetermined No. of Unlabeled Cases</i> , 21 F.3d 1026 (10th Cir. 1994) . . .	24-25
<i>United States v. Walker</i> , 718 F.Supp.2d 576 (M.D. Pa. 2010)	21
<i>United States v. Yu-Leung</i> , 51 F.3d 1116 (2nd Cir. 1995)	16
<i>Warner v. State</i> , 144 P.3d 838 (Okla. Ct. Crim. App. 2006)	37, 38
<i>Wilcher v. State</i> , 863 So.2d 776 (Miss. 2003)	10
<i>Wilkett v. United States</i> , 655 F.2d 1007 (10th Cir. 1981)	10
<i>Wilson v. Lindler</i> , 8 F.3d 173 (4th Cir. 1993)	15
<i>Wilson v. Lindler</i> , 995 F.2d 1256 (4th Cir. 1993)	15
<i>Wilson v. State</i> , No. A-2550, 1989 WL 1595172 (Alaska Ct. App. Oct. 11, 1989)	10-11

STATUTES

W. Va. Code § 61-8D-2a(a)	7, 37
W. Va. Code § 61-8D-3(a)	7, 37
W. Va. Code 61-8B-1(9)	7, 37

OTHER

1 Steven A Satzberg, et al., Federal Rules of Evidence Manual § 403.02[19] at 403-43 (8 th ed.2002)	32
--	----

3 Mark S. Rhodes, *Orfield's Criminal Procedure under the Federal Rules* § 26:315 13-14

Barbara Kuhn Timby, *Essentials of Nursing: Care of Adults and Children* 210 (2005) 24

Parrish, Robert N., *Response to State vs. Teuscher, The 'Exception' Swallows the Rule,* 9 Utah B.J. 8 (1996) 33

Woolley, Jacqueline D., *Thinking About Fantasy: Are Children Fundamentally Different Thinkers and Believers from Adults?*, 68 Child Development 991-1011 (1997) 22

RULES

W. Va. R. Evid. 803(4) 24

W. Va. R. Evid. 403 38

W. Va. R. Evid. 404(b) 31

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0075

STATE OF WEST VIRGINIA,

Plaintiff Below
Respondent,

v.

JAMES R. L.,

Defendant Below
Plaintiff.

CORRECTED
BRIEF OF THE STATE OF WEST VIRGINIA

I. ASSIGNMENTS OF ERROR

A. The transfer of James R.L.'s trial to Monroe County without the attendant finding of good cause shown for the transfer violated W. Va Code, West Virginia Constitution, Article 3, Section 14, Rule of Criminal Procedure 21 and Code § 62-3-13.

B. The act of mentioning three times that a witness "passes" a polygraph test required the trial court to grant a mistrial and even if a mistrial were not required a cautionary jury instruction must be given. The conclusion that the mentioning invited error on each occasion is not supported by the record.

C. The trial court erroneously permitted child psychologist Steve Ferris, M.A. to offer his opinions as bases upon his "interpretations" which do not properly fall within Rule 803(4) of the Rules of Evidence as they were not statements or utterances made for purposes of therapy and diagnosis. Further, Mr. Ferris' testimony was not based on a reasonable degree of certainty.

D. The trial court erroneously admitted psychologist Steve Ferris' testimony under Rule 404(b) of the Rules of Evidence.

E. The trial Court erred by admitting 27 photographs of the injured child which included both cumulative evidence of the same injuries and gruesome photos taken at the autopsy.

F. The record below established the ineffective assistance of counsel during the proceedings.

II. STATEMENT OF THE CASE

On Wednesday night, November 3, 2010, Isabella H., 17 months old, was at her mother's (Cristen) trailer, where she, her brother Isaiah, Cristen, and Cristen's boyfriend (the Petitioner) lived. App. vol. I, 17 at 114, 115. Isabella had a few bruises on her forehead and lip. *Id.* at 116. Early the next morning, Cristen called her mother (Alice M.), to say that she (Cristen) was going to Ms. M.'s to shower since she had a meeting at the welfare office that morning. *Id.*, 18 at 180. While on the telephone with Cristen, she overheard Isabella talking and playing. *Id.* Around 8:30 and 8:45 a.m., the Petitioner carried Isabella to Melissa Gill's house. *Id.*, 17 at 117. According to Ms. Gill, Isabella was "unconscious and not responsive[,]" *id.*, "[b]arely" breathing, her breath being "[r]aspy." *Id.* at 118. Although the Petitioner had not called 911, Ms. Gill did. *Id.* at 117. Ms. Gill, who lived directly opposite from Cristen and the Petitioner's the trailer, did not see Cristen when the Petitioner brought Isabella over, *id.* at 126, nor was she able to see their vehicle, *id.*, nor did anyone other than the Petitioner bring Isabella over. *Id.* at 127.

When Paramedic Matt Stalnaker arrived, he entered Ms. Gill's residence and determined, even with minimal light, that Isabella was "totally unresponsive" and was "really, really gravely ill." *Id.*, 18 at 164. She had "[n]o crying, no movement, no spontaneous response[,]" [n]o motor, neuro function, such as able to grasp a finger. No neurological responses at all. She was just totally limp."

Id. at 170. She had half the normal pulse rate and less than half the normal respiratory rate for a child her age, and Paramedic Stalnakar was unable to obtain a blood pressure. *Id.* at 171.

Paramedic Stalnakar assessed Isabella and saw bruising patterns ranging from opaque yellow (indicating a very old bruise) to “very dark, very purplish color” which indicated “very new bruises[.]” *Id.* at 167. He determined the cause of the injury was child battering and the mechanism of injury was blunt force trauma. *Id.* at 168. Stalnakar and the other responding paramedic took Isabella to the Summers County Appalachian Regional Hospital in Hinton. *Id.* at 166. (The Petitioner directed Ms. Gill to ride in the ambulance with Isabella and stated that “everyone would believe he beat [Isabella].” *Id.*, 17 at 118.)¹ Doctor Chabra, the SCARH Emergency Room physician ordered Stalnakar to take Isabella to Charleston Area Medical Center, *id.*, 18 at 166-67, 174-75, which could afford Isabella a higher level of care. *Id.*, 17 at 131. During the transport, Isabella became “very, very unstable.” *Id.*, 18 at 167. The paramedics stopped at Raleigh General Hospital in Beckley where the attending Emergency Room physician assessed Isabella, told the paramedics there was nothing RGH could do, directed them to continue to CAMC, and wished them Godspeed and good luck to make it. *Id.* The paramedics reached CAMC, but for naught, Isabella died on Sunday. *Id.* 17, at 68.

State Police Sgt. Melissa Clemons investigated Isabella’s injuries and death. *Id.* at 53. Because the Petitioner claimed Isabella had fallen off the couch, Sgt. Clemons measured the floor to the couch cushion, which was 24 inches and the floor to the top of the couch which was 30 inches—the maximum height from which Isabella could have fallen under the Petitioner’s story. *Id.*

¹Ms. Gill followed the ambulance to SCARH: App. vol. I, 17 at 119, it is not clear if she rode in the ambulance when it went to CAMC. *Id.*

at 60. The Petitioner also claimed some of Isabella's facial injuries were due to Isabella falling off the bed twice earlier in the week. *Id.* at 61.

Chief Medical Examiner James A. Kaplan, M.D., testified Isabella's brain injury was the most likely cause of death, *id.*, 18 at 235, an injury he called an "abusive closed-head injury, where there is—there's violent shaking of the brain which causes internal laceration of the brain tissue[,]" *id.* at 235-36, in other words, there "was a violent acceleration/deceleration force that was applied to Isabella's brain, almost certainly in the setting of a repeated impact of her head to a surface." *Id.* at 235. He explained each bruise on Isabella was "almost certainly a separate impact. So, this obviously takes it—this takes this sort of injury out of the realm of an accidental occurrence, unless there is a bizarre story." *Id.* at 237. He identified at least eight probably separate impacts, *id.*, and testified that a fall of 24 to 30 inches would not cause the injuries. *Id.* at 238-39. He identified numerous internal injuries, including a "very severe injury to her large—to her colon[,]" *id.* at 241, as well to the pancreas and liver, *id.*, all of which were caused by "powerful impacts to her tummy" as a result of being kicked or punched "in the stomach very, very hard." *Id.* He concluded "the histologic appearance of injuries noted at autopsy is consistent with investigational findings indicating fatal assault occurred close to the time of initial hospitalization." *Id.* at 243.

This was not the first time the Petitioner had exhibited anger and violence toward Isabella. In fall 2009, Isabella was playing with Amanda Patrick's daughter. *Id.* at 218-19. Isabella went to grab a toy and started to cry because the children were fighting over it. *Id.* at 218. The Petitioner picked Isabella up "called her a bitch and said, I'm the mother-fucker that you'll remember. And, then, he tossed her on the couch." *Id.* at 218-19.

Moreover, after a 404(b) hearing, Steve Ferris, a licensed psychologist, App. vol. II, 19 at 334, who treated Isabella's brother Isaiah, (the Department of Health and Human Resources referred Isaiah to him for treatment, due to Isabella's death and the transition of Isaiah moving to live with his biological father, *id.* at 347), testified. *Id.* at 338. As part of therapy, Mr. Ferris let Isaiah play with toys. *Id.* Isaiah's therapy displayed two themes, one, Isaiah's missing his sister, and the other being that "Ro-Ro," which Mr. Ferris heard as "R.L." when Isaiah speech became clearer, *id.* at 339, (and when he spoke to Isaiah, Isiah talked about Ro-Ro being a person living with his mother and being around his mother quite a bit, *id.* at 349), as being violent in the home. *Id.* at 339. In one of the early sessions, Isaiah used the term "pistol whipped[.]" *Id.* at 340. Isaiah would talk about beating up "mommy" and "Ro-Ro," *id.* at 340, which Mr. Ferris explained was not true, but which was consistent with a child's response to feeling powerless in an abusive situation and was "fairly normal or typical . . . four-year-old behavior." *Id.* at 342. He also testified Isaiah said "Ro-Ro" would sometimes hit him in the face and "being mean and kicking him in the back." *Id.* at 340. Isaiah's voice would also change when Isaiah talked about a little female toy figure, "whispering" and "almost tearful[.]" *Id.* at 340-41. Isaiah later identified the figure as his "Sissy," and spontaneously told Mr. Ferris that "Ro-Ro" knocked Sissy out, and Isaiah "made a quick hitting motion with his arm and used the word—very loud, he said, pow. And then [Isaiah] said, Sissy going to sleep." *Id.* at 341. Mr. Ferris explained that where, as here, the stories coming from a child are very consistent, there is "probably some significant element of truth in that." *Id.* at 343. Indeed, at one session with Mr. Ferris, Isaiah wanted to keep the toy figure he named Ro-Ro away from the toy figure he named Sissy, "about as far away in the room as he could." *Id.* at 344. Isaiah talked about "Ro-Ro whipping Sissy's butt." *Id.* at 344-45. Mr. Ferris testified in response to the question, "is

it your opinion to a reasonable degree of psychological certainty that young Mr. Isaiah [sic] witnessed and maybe even experienced violence meted out at the hands of James R.L. in his home[,]" App. vol. I, 18 at 197, "I do believe with the consistency that he's talked about it, that he's witnessed some violence, maybe experienced violence. But that's been -- if there's been a consistent theme in the sessions that's been outside the grieving of his sister, that has been the second most consistent theme." *Id.* And in his cross-examination at the in camera hearing, Mr. Ferris testified that his testimony was based upon "psychological certainty." *Id.* at 200.

While the Petitioner asserted that it was Cristen H. that inflicted the blows, *see, e.g.*, App. vol. I, 19 at 483, 489, and that the most he was guilty of was "not protecting this child from her mother[,]" *id.* at 484, the jury returned a verdict of guilty of second degree murder, death of a child by a parent or custodian, and child abuse resulting in injury. *Id.* at 589.

III. SUMMARY OF ARGUMENT

A. The Petitioner originally requested the change of venue and did not object when the change of venue motion was granted by the circuit court. Further, the Petitioner has not shown—or attempted to show—any prejudice.

B. The Petitioner's counsel's cross-examination was the cause of introduction of polygraph evidence and constituted invited error. Invited error should not be rectified under plain error for invited error constitutes a waiver. Even if plain error would apply, introduction of polygraph evidence does not violate a fundamental right or cause a manifest injustice.

C. The Petitioner has failed to preserve all but one of the issues he now raises because he objected on different grounds below. In any event, none of the grounds—either those made by objection below or those raised here entitle him to relief. The evidence was admissible under West

Virginia Rule of Evidence 803(4) as statements pertinent to diagnosis or treatment. The one ground that is apparently preserved is an objection to the testimony on confrontation clause grounds. Evidence that falls within Rule 803(4) is not testimonial and is not barred by the confrontation clause.

D. The circuit court properly conducted a Rule 404(b) admissions hearing. The circuit court found that the State met its burden of showing the prior acts of abuse by the Petitioner on both the victim and the victim's brother occurred. The circuit court also balanced the evidence under Rules 401 and 403 and issued limiting instructions.

E. The photographic evidence was admitted only after the circuit court conducted an on the record 401-403 balancing test. The circuit court's decision was well within its discretion as the photographs depicting the nature and extent of the victim's injuries were relevant (1) under West Virginia Code § 61-8D-2a(a), to prove the Petitioner "maliciously and intentionally inflict[ed]" upon the victim, "substantial physical pain, illness or any impairment of physical condition by other than accidental means, thereby caus[ed]" the victim's death; (2) to prove murder in that they showed a specific intent to kill, *State v. Hatfield*, 169 W. Va. 191, 198, 286 S.E.2d 402, 408 (1982) ("intent to kill or malice is a required element of both first and second degree murder"); and (3) they helped prove "bodily injury" under West Virginia Code § 61-8D-3(a) (i.e., that Isabella suffered "substantial physical pain, illness or any impairment of physical condition" *Id.* § 61-8B-1(9)).

F. Ineffective assistance of counsel claims are generally not amenable to appeal. Here, the allegations of ineffectiveness may have been elements of trial strategy. At the very least defense counsel is entitled to tell his side of the story. This Court should not address ineffective assistance on appeal.

IV. STATEMENT REGARDING ORAL ARGUMENT

There is no need for oral argument as this is not a case of fundamental public importance—it “involves no more than the application of well-settled principles to a familiar situation, and has little significance except for the respondent.” *Butz v. Glover Livestock Comm’n*, 411 U.S. 182, 189 (1973) (Stewart, J., dissenting).²

V. ARGUMENT

A. The circuit court did abuse its discretion by granting the Petitioner’s motion for a change of venue.

The Petitioner alleges the circuit court erred by granting his change of venue motion without a showing of good cause. Pet’r’s Br. at 17. This is no ground for relief.

The Petitioner asked for a change of venue. App. vol. I at 12. The circuit court took the motion up but denied it pending the outcome of jury *voir dire* in Summers County when—if a jury could not be seated—the case would be moved to Monroe County. App. vol. II. at 73. Subsequently, the circuit court, before conducting *voir dire* in Summers County, “reconsidered that motion and . . . determined that it would seem appropriate to grant the motion.” *Id.* at 76. The Petitioner did not object to his motion being granted.

“It is well-established law in this state that ‘[a] party cannot invite the court to commit an error, and then complain of it.’” *Hopkins v. DC Chapman Ventures, Inc.*, 228 W. Va. 213, ___ 719 S.E.2d 381, 387 (2011) (quoting *Lambert v. Goodman*, 147 W. Va. 513, 519, 129 S.E.2d 138, 142 (1963)). Thus, the “first assignment of error is without merit as defense counsel, who requested the change of venue, expressed no objection to having the trial moved[.]” *State v. Dyer*, 514 P.2d 363,

²This is not to say that child abuse in general is not of fundamental public importance. It is to say that this matter presents a straightforward case.

364 (Or. Ct. App. 1973). And, in any event, the circuit court did not abuse its discretion in granting the change of venue. In the instant case, during *voir dire* in Monroe County, the trial court stated:

this is a case that was transferred to Monroe County from Summers County . . . [T]he reason that the case was transferred to Monroe County was that we anticipated there would be some difficulty in selecting a jury in Summers County. And it was felt that it would be prudent to transfer the case to Monroe County for trial purposes so that we could have a panel of jurors to pick from who probably knew little or nothing about this case. This case had publicity in Summers County. And it was transferred here so that we have a pool of people who . . . hopefully don't know anything about this case.

App. vol. I, 17 at 10-11. While the Petitioner invokes plain error, he claims the burden is upon the State to negate prejudice. Pet'r's Br. at 19-20. The case he cites for this proposition, *State v. Myers*, 204 W. Va. 449, 513 S.E.2d 676 (1998), is inapposite. *Myers* dealt with a plea agreement the State violated. In such circumstances, this Court presumes prejudice and the controlling rule is, not plain, but harmless, error. Syllabus Point. 7, in part *State v. Myers*, 204 W. Va. 449, 513 S.E.2d 676 (1998) ("For the purposes of plain error analysis, when there exists a plea agreement in which the State has promised to remain silent as to specific sentencing matters and the State breaches such agreement by advocating specific matters at a sentencing hearing, prejudice to the defendant is presumed. In this situation, the burden then shifts to the State to prove beyond a reasonable doubt that its breach of the plea agreement did not prejudice the outcome of the proceeding."). Outside presumptive prejudice cases, the general rule of plain error obtains, the burden rests upon the defendant to meet the plain error criteria. *United States v. Olano*, 507 U.S. 725, 735 (1993) ("Nor need we address those errors that should be presumed prejudicial if the defendant cannot make a specific showing of prejudice. Normally, although perhaps not in every case, the defendant must make a specific

showing of prejudice to satisfy the ‘affecting substantial rights’”). The Petitioner had made no such showing justifying plain error.

First, “when we consider, in the context of a jury trial, whether a feature of a criminal trial is bottomed on a fundamental right or whether it has lesser underpinnings, we consider the function that that feature performs in a jury trial and how that function affects the purpose of preventing the oppression of the accused by the State.” *State v. Hereford*, 592 N.W.2d 247, 252 (Wis. Ct. App. 1999). “Venue is, of course, unlike the substantive facts which bear on guilt or innocence in the case. Venue is wholly neutral; it is a question of procedure, more than anything else, and it does not either prove or disprove the guilt of the accused.” *Willett v. United States*, 655 F.2d 1007, 1011-12 (10th Cir. 1981), *cited with approval on other grounds by State v. Tommy Y.* 219 W. Va. 530, 537, 637 S.E.2d 628, 635 (2006). “Even though venue has constitutional implications, ‘the standard for finding a waiver of venue is less rigorous than that for finding a waiver of the rights to trial by jury, to confront one's accusers and to be free from self-incrimination.’” *Tommy Y.*, 219 W. Va. at 536 n.16, 637 S.E.2d at 634 n.16 (quoting *United States v. Perez*, 280 F.3d 318, 328 (3rd Cir.2002)).³ Thus, “[w]hether a case necessitates a change of venue request is such a tactical decision that a criminal defendant has delegated to counsel[,]” *State v. Oswald*, 606 N.W.2d 207, 224 (Wis. Ct. App. 1999), so “the decision to obtain a venue change is within the realm of strategy.” *Wilcher v. State*, 863 So.2d 776, 811 (Miss. 2003). Consequently, the right to venue traditionally “need not be

³For example, while West Virginia Rule 11(c)(3) provides that a court must address a defendant in open court and ensure he understands the defendant has a right to plead not guilty, to be tried by jury with the assistance of counsel, to call, confront and cross-examine witnesses, and the right not incriminate one’s self, the rules does not provide that the court must also advise the defendant that he has a right to these rights in the constitutionally proper venue.

personally waived by the defendant.” *Wilson v. State*, No. A-2550, 1989 WL 1595172, at *1 n.1 (Alaska Ct. App. Oct. 11, 1989).

Second, the Petitioner does not assert any prejudice—he does not claim that he was denied an impartial jury, or that the change of venue impeded his ability to obtain evidence or to secure witnesses. *See Hereford v. McCaughtry*, 101 F. Supp.2d 742, 749 (E.D. Wis. 2000) (citation omitted) (“the state court's determination that Hereford made no showing that this deprived him of a fair []trial, must stand. Hereford’s submissions to the state court are devoid of any meaningful evidence of prejudice[.]”).

The Petitioner claims affirming this case would mean venue could be changed at the “whim of a judge.” Pet’r’s Br. at 20. However, there are checks in the system to prevent this. Like here, for example. The change of venue was made upon the Petitioner’s motion, W. Va. R. Crim. P. 21(a), and “[a]bsent the request, a change of venue may not be ordered.” *United States v. Abbott Labs*; 505 F.2d 565, 572 (4th Cir. 1974). Had the Petitioner either withdrawn his motion or objected at some point to the granting of his motion, the Petitioner could have stopped the circuit court. “[E]ven if this were a case where the defendant’s own personal knowledge of his rights was in doubt, it would make no difference because his attorneys’ choice would be binding upon him as an effective waiver.” *United States v. Marcello*, 280 F. Supp. 510, 521 (E.D. La. 1968). The circuit court’s actions were not “whim” like at all.

The circuit court should be affirmed.

B. The circuit court did not abuse its discretion in denying a mistrial when defense counsel elicited from a State witness on cross-examination that she had passed a polygraph test.

During his cross-examination of Cristen H., defense counsel elicited the following:

Q Is there anyway for us to tell in your statement which--what is truthful and what wasn't?

A Is there any way?

Q Yes, ma'am. You gave a lot of different versions of everything.

A I've already took a polygraph to it, and I passed.

App. vol. I, 18 at 315. Later in cross-examination the following transpired:

Q Did [Sgt. Clemons] take a statement from you about that or when was that, you gave--

A Actually, they took a second statement when I took my polygraph. I told them then.

Id. at 316.⁴ Subsequently, the following exchange occurred during cross-examination:

Q Ms. H., you say that, now, you're being truthful. I mean, how do we know that? Do we just -- do you wave some kind of magical wand and, all the sudden, you tell the truth after you've admitted to lying numerous times? You lied to Tammy Wegman, according to her testimony. You say that you didn't make these statements that the State Police attributed to you. You looked at the statement, and you read it. It's got your name beside it, saying that you said it. You say, no, I didn't say -- I lied when I said it or, in another instance, you said, no, I didn't say that.

Do you see my quandary? Do I suddenly now say that, okay, she's telling the truth here today? She'd decided to finally to fully come through, she's an honest person, and she's going to tell the truth? How can I not look at you with some skepticism?

A Because, actually, when I took my polygraph, they asked me if I had ever whipped my daughter. And I said no. I actually passed it. And had I done any bodily harm to my daughter, and I said no. And I passed it. I mean, right there's the truth.

Id. at 326-27.

⁴Prior to trial, the Petitioner moved to exclude reference by the State to any polygraph or lie detector the Petitioner might have been administered. App. vol. I at 16.

After the witness was excused, the Petitioner's counsel sought a mistrial based on the answers to his questions which referenced a polygraph. *Id.* at 330. The circuit court denied the motion finding that even though there was a pretrial ruling prohibiting polygraph testimony that the witness's answers were not made in response to the State's questioning, in response to the defense's questioning and that the "manner in which [the Petitioner's counsel] asked the question invited the response. . . . I mean, it was your question that brought the response . . . [a]nd, [], we're talking about [the witness's] polygraph examination as opposed to [the Petitioner's] polygraph examination." *Id.* at 330-31. The circuit court then ruled, "[s]o to the extent that there's any prejudicial error, it was invited by counsel for the [Petitioner]. So [the] motion for a mistrial is denied." *Id.* at 331.

1. Standard of Review

"We review the circuit court's decision to grant or deny a motion for mistrial is reviewed [sic] under an abuse of discretion standard." "To prevail, the appellant must show that the circuit court abused its discretion by failing to grant the requested mistrial." *State v. Thornton*, 228 W. Va. at ___, 720 S.E.2d at 585. Whether counsel invited the error is reviewed for abuse of discretion. *Poe v. State*, 510 So.2d 852, 854 (Ala. Ct. Cr. App. 1987) ("the trial court did not abuse its discretion in ruling that the defense counsel was inviting error by asking such open-ended questions[.]").

2. Invited error is not a basis for reversal of conviction or at least this conviction.

"Where inadmissible evidence is introduced as a result of the rigorous examination of the complaining party, the error is deemed invited error." *State v. Mann*, 205 W. Va. 303, 312, 518 S.E.2d 60, 69 (1999). *Accord State v. Flippo*, 212 W. Va. 560, 588 n.44, 575 S.E.2d 170, 198 n.44 (2002) ("Where inadmissible evidence is introduced as a result of the examination by the complaining party, the error is deemed invited error."). Likewise, broadly phrased or open-ended

questions invite error. *See, e.g.*, 3 Mark S. Rhodes, *Orfield's Criminal Procedure under the Federal Rules* § 26:315 (quoting *United States v. Apuzzo*, 245 F.2d 416, 421 (2d Cir. 1957)) (noting the “fundamental principle of evidence that a party by asking a broad question of the kind here involved may not object to the admission of the response he draws.”); *Poe v. State*, 510 So.2d 852, 854 (Ala. Ct. Cr. App. 1987) (“the trial court did not abuse its discretion in ruling that the defense counsel was inviting error by asking such open-ended questions”); *State v. Wilson*, 658 P.2d 204, 209 (Ariz. Ct. App. 1982) (“Berry was attempting to stress that documents entered as exhibits were not illegal on their face. He thus got a reasonable answer to his open-ended question. Again, we find that this constitutes invited error.”). Here, any error was invited.

The Petitioner’s questions were broad, open-ended, and elicited during a rigorous cross-examination—“Is there anyway for us to tell in your statement which -- what is truthful and what wasn’t?”, “Ms. H., you say that, now, you’re being truthful. I mean, how do we know that? Do we just -- do you wave some kind of magical wand and, all the sudden, you tell the truth after you’ve admitted to lying numerous times?”, “How can I not look at you with some skepticism?” The Petitioner’s counsel sought to know from Ms. H. why she is truthful, and she told him—because I passed a lie detector test. “A judgment will not be reversed for any error in the record introduced by or invited by the party seeking reversal.” Syl. Pt. 4, *State v. Johnson*, 197 W. Va. 575, 476 S.E.2d 522 (1996) (quoting Syl. Pt. 21, *State v. Riley*, 151 W. Va. 364, 151 S.E.2d 308 (1966)). *See also* Syl. Pt. 2, *State v. Bowman*, 155 W. Va. 562, 184 S.E.2d 314 (1971) (““An appellant or plaintiff in error will not be permitted to complain of error in the admission of evidence which he offered or elicited, and this is true even of a defendant in a criminal case.”). Here, the “evidence was adduced on cross-examination and defendant cannot complain about it.” *Addair v. Majestic Petroleum Co.*,

Inc., 160 W. Va. 105, 112, 232 S.E.2d 821, 825 (1977). See *Gray v. State*, No. 05-04-01269-CR, 2005 WL 1670715, at * 9 (Tex. App. July 29, 2005) (citations omitted) (“Defense counsel elicited the first response by asking an open-ended question and cannot complain of error he invited. Additionally, defense counsel asked the question again and after receiving a similar answer, made no objection. As a result, Gray failed to preserve any error for our review.”).

3. Plain error does not apply here.

The Petitioner attempts to avoid the impact of invited error by relying on the doctrine that plain error may be applied when a “fundamental right is involved” or when a “manifest injustice or a miscarriage of justice” would occur or when failing to address the issue would be inimical to the judicial process[.]” Pet’r’s Br at 22-23. None of the cases the Petitioner cites support his position.

The Petitioner’s strongest case is *State v. Crabtree*, 198 W. Va. 620, 628, 482 S.E.2d 605, 613 (1996) where this Court said that “[d]eviation from the doctrine of invited error is permissible when application of the rule would result in a manifest injustice.” However, none of the cases that *Crabtree* cited for this proposition supports it. First, neither *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) nor *Hormel v. Helvering*, 312 U.S. 552 (1941) deal with invited error. Second, *Crabtree* relied on *Wilson v. Lindler*, 995 F.2d 1256, 1262 (4th Cir.1993), but *Wilson* was vacated in an en banc decision that held “no exception to the invited error doctrine has ever been adopted by this circuit[.]” *Wilson v. Lindler*, 8 F.3d 173, 175 (4th Cir. 1993). Finally, *Crabtree* did not address whether invited error is a waiver or a forfeiture—a crucially important distinction because a waiver means that there is no error at all so that plain error is unavailable.

West Virginia follows the United States Supreme Court case of *United States v. Olano*, 507 U.S. 725 (1993) in addressing plain error. *State v. Myers*, 204 W. Va. 449, 457 n.3, 513 S.E.2d 676,

684 n.3 (1998). “Under the ‘plain error’ doctrine, ‘waiver’ of error must be distinguished from ‘forfeiture’ of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined.” Syl. Pt. 8, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). In other words, “[i]f it is found that the defendant waived his/her right, the analysis terminates.” *Myers*, 204 W. Va. at 457 n.5, 513 S.E.2d at 684 n.5. “The distinction between forfeiture and waiver brings our plain error analysis to a grinding halt.” *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995).

Miller, 194 W. Va. at 18, 459 S.E.2d at 129, cited *United States v. Lakich*, 23 F.3d 1203, 1207 (7th Cir.1994) as support for the statement that “when there has been such a knowing waiver, there is no error and the inquiry as to the effect of the deviation from a rule of law need not be determined[,]” and the Seventh Circuit has found that “[i]t is well-settled that where error is invited, not even plain error permits reversal.” *United States v. Fulford*, 980 F.2d 1110, 1116 (7th Cir. 1992). *See also United States v. Muskovsky*, 863 F.2d 1319, 1329 (7th Cir. 1988) (“Where error is invited, not even plain error permits reversal.”). Such a rule derives from the recognition that “[i]nvited error is a form of waiver, i.e., “the intentional relinquishment or abandonment of a known right.”” *ClearOne Communications, Inc. v. Bowers*, 643 F.3d 735, 771 (10th Cir. 2011) (quoting *United States v. Teague*, 443 F.3d 1310, 1314 (10th Cir.2006) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993))). As the Fourth Circuit has observed, “[i]nvited errors are by definition waived errors, and under *Olano*, not reviewable on appeal.” *United States v. Spivey*, 129 Fed. Appx. 856, 859 (4th Cir. 2005). *See also United States v. Jernigan*, 341 F.3d 1273, 1289 (11th Cir. 2003) (quoting *Ford v. Garcia*, 289 F.3d 1283, 1294 (11th Cir.2002) (quoting *United States v. Davis*, 443

F.2d 560, 564–65 (5th Cir.1971)) (“Where invited error exists, it precludes a court from “invoking the plain error rule and reversing.””); *United States v. Stewart*, 185 F.3d 112, 127 (3d Cir. 1999) (“Stewart has waived all of these issues on appeal, and we would reverse only if the court committed plain error in instructing the jury on the counts where Stewart did not invite the error.”).

The Petitioner also cites *State v. Redden*, 199 W. Va. 600, 487 S.E.2d 318 (1997), which this Court has interpreted to stand for the proposition that the “plain error doctrine will be applied to errors involving a fundamental right notwithstanding that the error was invited[.]” *State v. Corra*, 223 W. Va. 573, 582 n.10, 678 S.E.2d 306, 315 n.10 (2009). It is unclear how far *Redden* should be read as an invited error case. As *Redden* itself acknowledges, “[t]he state d[id] not contend that [this Court] should not review the appellant’s assignments of error.” 199 W. Va. at 665, 487 S.E.2d at 323. Rather than reading *Redden* as an invited error case, *Redden* could equally be read for the proposition that the State on appeal waived reliance on invited error. See *Jones v. Cain*, 600 F.3d 527, 540 (5th Cir. 2010) (holding the State waived reliance on invited error). But, in any event, the Petitioner cannot meet the manifest injustice or fundamental rights exceptions.

Introduction of polygraph test results do not affect fundamental rights or result in a manifest injustice.⁵

⁵Fundamental rights and manifest injustice, in this context, must mean something more than substantial rights, for plain error extends to correcting substantial rights. If fundamental rights did not mean something more than substantial rights, then, perforce, invited error would always be subject to plain error analysis. Likewise, manifest injustice should be read as imposing a higher threshold in invited error-plain error review cases for, again, if it does not, the invited error becomes synonymous with simple plain error. Such a manifest injustice approach should be seen as a requirement that the defendant prove himself actually innocent, cf. *Olano*, 507 U.S. at 736 (emphasis deleted) (“The court of appeals should no doubt correct a plain forfeited error that causes the conviction or sentencing of an actually innocent defendant, see, e.g., *Wiborg v. United States*, 163 U.S. 632, 16 S. Ct. 1127, 41 L. Ed. 289 (1896), but we have never held that a Rule 52(b) remedy is *only* warranted in cases of actual innocence.”), which is consistent with the Supreme Court’s direction in dealing with defaulted claims in post-conviction proceedings. *Bousley v. United States*, (continued...)

The Supreme Court has never held that statements implying the results of a polygraph or similar test render the defendant's trial fundamentally unfair, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments. Further, we are aware of no federal court of appeals that has found a due process violation warranting a grant of habeas relief under these facts. Indeed, three circuits have rejected habeas petitioners' claims that testimony about truth testing violated the petitioners' due process rights.

Maldonado v. Wilson, 416 F.3d 470, 477 (6th Cir. 2005). "The admission of the polygraph evidence, with or without proper foundation, does not raise a 'manifest error affecting a constitutional right.'" *In re Plunkett*, 788 P.2d 1090, 1094 (Wash. Ct. App.1990) (quoting Wash. R. App. P. 2.5(a)(3)).

The Petitioner faults the circuit court for not *sua sponte* issuing a curative instruction. Pet'r's Br. at 21-22. The cases upon which the Petitioner relies do not support his claim.

The Petitioner cites *State v. Porter*, 182 W. Va. 776, 392 S.E.2d 216 (1990). In *Porter*, both the State and the defendant elicited evidence regarding polygraph results. It was only "when the State elicited evidence regarding polygraph test results . . . [that] the circuit court instructed the jury to disregard such evidence." *Porter*, 182 W. Va. at 782, 392 S.E.2d at 222 (emphasis in original). The appellant in *Porter* introduced polygraph evidence, (admittedly as a matter of trial strategy). *Id.* at 782 and n.6, 392 S.E.2d at 222 and n.6. This Court concluded,

[u]nder these circumstances, while the evidence as to the polygraph tests was inadmissible, the admission thereof was not reversible error because the defendant was responsible for the admission of most of this evidence and because the circuit court's instruction cured the error of the admission of the polygraph evidence by the State.

Id. at 782, 392 S.E.2d at 222. Further the Petitioner relies on *State v. Lewis*, 207 W. Va. 544, 549, 534 S.E.2d 740, 745 (2000)(per curiam). In *Lewis*, the Court stated:

⁵(...continued)
523 U.S. 614, 624 (1998) ("It is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency.").

In view of the fact that in *State v. Porter, supra*, we recognized that where a defendant or defense counsel is responsible for admission of evidence relating to a polygraph examination, and where a cautionary instruction has, in fact, been given relating to such testimony, the admission of the evidence does not necessarily constitute reversible error, and in view of the further fact that the polygraph examination testimony in the present case related only to an examination administered to a witness rather than the defendant himself, the Court does not see that it was manifestly necessary for the trial court to discharge the jury, or that the refusal of the trial court to grant a mistrial constituted an abuse of discretion.

The problem is that *Lewis* misstates what actually occurred in *Porter*. A somewhat lengthy citation from *Porter* is necessary to fully address this issue:

On direct examination, Officer Brooks testified as follows:

Q And during this investigation did you have many suspects?

A Yes.

Q And during the course of your investigation did you clear all those persons that were suspects from the initial time?

A Yes.

....

Q In other words, you are not telling the jury you cleared the Altizer boys on your own decision, whim or fancy; is that right?

A No.

Trial Tr. 182, 200.

During *defense counsel's* recross examination, counsel for the appellant asked Officer Brooks why a particular "Altizer boy" was not charged, to which Officer Brooks replied that most of the "Altizer boys" were cleared by the use of polygraph tests. At this point, trial counsel for the appellant persisted, asking Officer Brooks about individual "Altizer boys," and whether each was cleared by the use of polygraph tests.

Officer Gill was then recalled by the State to testify. During direct examination by the State, Officer Gill confirmed what Officer Brooks had testified to during *defense counsel's* recross examination, that several "Altizer boys" were cleared by the use of polygraph tests. The State then asked Officer Gill if a particular "Altizer boy" had been cleared by the use of polygraph testing, and following an affirmative response by Officer Gill, defense counsel objected. The circuit court instructed the jury to disregard Officer Gill's answer. Trial counsel for the appellant then moved for a mistrial and the circuit court overruled trial counsel's motion.

Porter, 182 W. Va. at 780-81, 392 S.E.2d at 220-21.

In *Porter* the circuit court's curative instruction was as a result of defense counsel's objection to a State's question; the curative instruction was not offered (as least directly) as a result of defense questioning nor was it issued *sua sponte*. *Lewis*, a per curiam opinion, simply misstated the facts recited in *Porter*, a signed opinion. A "court is not obligated to perpetuate a known misstatement." *Loveridge v. Dreagoux*, 678 F.2d 870, 874 (10th Cir. 1982).

Finally, the Petitioner cites *State v. Acord*, 175 W. Va. 611, 336 S.E.2d 741 (1985). However, in *Acord*, the mentioning of the polygraph was unsolicited and the objectionable statement apparently came during the State's examination of its witness. "At one point during the trial, a State witness, Robert Bolen, made an unsolicited remark indicating that he had passed a polygraph examination." *Id.* at 613, 336 S.E.2d at 744. And it is not clear if the request for a curative instruction came from the appellant after his motion for a mistrial was denied. But, if the instruction was given *sua sponte* by the circuit court, such action should not be seen as automatically required. The decision to give a curative instruction *sua sponte* is "within the court's discretion." *United States v. Andrews*, 409 Fed. Appx. 241, 243 n.2 (11th Cir. 2010). "A trial court does not commit plain error merely because it fails to give curative instructions *sua sponte*." *United States v. Reyes*,

51 Fed. Appx. 488, 493 (6th Cir. 2002). Indeed, such action “could interfere with the defendant’s trial strategy.” *Carter v. Armontrout*, 929 F.2d 1294, 1297 n.2 (8th Cir. 1991).

Indeed, the Petitioner here could have had a reasonable strategy in not asking for a curative instruction, especially the case in light of the “‘strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance[.]’” *State v. Miller*, 194 W. Va. 3, 15, 459 S.E.2d 114, 126 (1995) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). *See, e.g., United States v. Walker*, 718 F. Supp.2d 576, 588 (M.D. Pa. 2010) (citation omitted) (“trial counsel testified that he did not request a curative instruction because it likely would have drawn more attention to the shooting incident than if nothing were said. This is the sort of strategic decision made by trial counsel that falls well within the wide range of reasonable professional assistance.”); *United States v. Artis*, 917 F. Supp. 347, 351 n.7 (E.D. Pa. 1996) (“No doubt, Artis’ attorney did not want a curative instruction as a matter of strategy—i.e., he did not want to highlight testimony that he believed to be objectionable.”); *Hernandez v. Wainwright*, 634 F. Supp. 241, 249 (S.D. Fla. 1986) (“The conduct of Fath in not requesting the trial judge to give a curative instruction to the jury is again within the presumption of sound trial strategy.”).

The circuit court should be affirmed.

C. The Steve Ferris testimony did not affront either West Virginia Rule of Evidence 803(4) nor the Sixth Amendment confrontation clause.

In this Court, the Petitioner argues that Mr. Ferris’s testimony was inadmissible because “there were no real ‘statements’ by Isaiah, rather these were ‘interpretations’ of the child’s activities on the part of Mr. Ferris[.]” Pet’r’s Br. at 25, that there was “no meaningful testimony about diagnosis or treatment or about a treatment plan for Isaiah was provided . . . just conclusions which

were themselves not reasonably certain[.]” *id.*, and Mr. Ferris’s testimony “amounted to little more than suppositions and naked interpretations.” *id.* These were not the grounds asserted below.

At trial, the Petitioner argued that: (1) Isaiah’s age barred the testimony;⁶ (2) Isaiah was not an unavailable witness;⁷ (3) the testimony was unreliable because Isaiah “talks about someone named Ro-Ro, that [Mr. Ferris] is not sure who that is, but he thinks that that’s R.L.”;⁸ (4) Isaiah’s statements to Mr. Ferris were unreliable because Isaiah “mixes up reality and fact [sic]; that he has a lot of imaginary friends; that he gets confused about who his mother is,”⁹ and that introduction of

⁶This is, of course, legally unsupported. “As a general matter, the age of the child and her other personal characteristics go to the weight of the hearsay statements rather than their admissibility.” *United State v. George*, 960 F.2d 97, 100 (9th Cir. 1992).

⁷This is incorrect. Availability or unavailability is immaterial under West Virginia Rule of Evidence 803(4) since statements reasonably pertinent to diagnosis or treatment “are not excluded by the hearsay rule, even though the declarant is available as a witness.”

⁸This would be incorrect. Syllabus Point 3, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995) (“An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution.”). Mr. Ferris testified in camera he thought Ro-Ro was, based upon the phonetics of a four year old’s speech, the Petitioner, R.L. App. vol. I, 18 at 194. During his cross-examination before the jury, Mr. Ferris further testified that “when I tried to clarify who this was [i.e., Ro-Ro], [Isaiah] talked about this person living with his mother and being around his mother quite a bit.” App. vol. II, 19 at 349. It was a reasonable extrapolation based on the evidence for the jury to conclude Ro-Ro was the Petitioner “R.L.”

⁹This argument is wrong as well. First, Isaiah simply spoke of both his biological mother and his biological father’s girlfriend as mother. App. vol. I, 18 at 201-02. Second, there was no evidence that Isaiah had imaginary friends. App. vol. II, 19 at 353. Third, “By the age of 3, children can distinguish a mental entity, such as a thought or an image, from the real physical object it represents. At about this same age, children, in their everyday talk, discuss the contrasts between reality and pretense, reality and toys, and reality and pictures. By the age of 4, children also have a fairly solid understanding of the distinction between reality and deceptive appearances. Despite these impressive achievements, the view of children as ‘fantasy bound’ still persists, not only in popular media, but in the scientific literature as well.” Jacqueline D. Woolley, *Thinking About Fantasy: Are Children Fundamentally Different Thinkers and Believers from Adults?*, 68 Child Development 991-1011, 992 (1997). And, most importantly, reliability goes to weight not admissibility. “Assuming it otherwise meets the requirements of admissibility, the reliability of a child’s testimony is properly a matter for assessment by the trier of fact who is charged with making determinations regarding the weight and credibility of such testimony.” Syllabus Point 3, *State v. Smith*, 225 W. Va. 706, (continued...)

Isaiah’s statements violated the Confrontation Clause. App. vol. I at 211-13. Save the Confrontation Clause issue, none of the issues raised below are in the Petitioner’s Brief in this Court and are not, therefore, properly before it:

“It is well established that where the objection to the admission of testimony is based upon some specified ground, the objection is then limited to that precise ground and error cannot be predicated upon the overruling of the objection, and the admission of the testimony on some other ground, since specifying a certain ground of objection is considered a waiver of other grounds not specified.”

State v. DeGraw, 196 W. Va. 261, 272, 470 S.E.2d 215, 226 (1996)(quoting *Leftwich v. Inter–Ocean Casualty Co.*, 123 W. Va. 577, 585–86, 17 S.E.2d 209, 213 (1941) (Kenna, J., concurring)). A party may not raise a different argument in an appellate court to exclude evidence when that argument was not raised below, *see, e.g., State v. Simons*, 201 W. Va. 235, 239-40, 496 S.E.2d 185, 189-90 (1997) (per curiam) (refusing to consider argument that Rule of Evidence 803(8)(B) was violated when this was not the rule the appellant relied on at trial), nor is this Court required to address arguments not raised in a brief. *E.g., Syl. Pt. 6, Addair v. Bryant*, 168 W. Va. 306, 284 S.E.2d 374 (1981) (“Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.”).

In this Court the Petitioner asserts that: (1) the Ferris testimony did not fall within the ambit of Rule 803(4) since “there were no real ‘statements’ by Isaiah, rather these were ‘interpretations’ of the child’s activities on the part of Mr. Ferris . . . no meaningful testimony about diagnosis or

⁹(...continued)
696 S.E.2d 8 (2010). Among other factors to be considered in determining reliability is spontaneity, consistency of repetition, use of terms unexpected from a child of a similar age, mental state of the declarant, and lack of motive to fabricate. *Idaho v. Wright*, 497 U.S. 805, 821 (1990). Here, the statements were spontaneous, *see, e.g., App. vol II*, 19 at 341, at least one was inconsistent with Isaiah’s age, App. Vol. I, 18 at 194 (use of word “pistol-whip”), and consistent overall, *id.* at 195-96.

treatment or about a treatment plan for Isaiah was provided[;]” (2) “Mr. Ferris did not indicate that the child Isaiah was competent to be a witness—in fact his testimony appears to be to the contrary[;]” (3) “Mr. Ferris failed to testify that his conclusions were based upon a reasonable degree of certainty[;]” (4) Mr. Ferris’s conclusions “were speculative and full of conjecture[.]” Pet’r’s Br. at 24,¹⁰ (5) Mr. Ferris’s testimony violated the Confrontation Clause.

First, statements made by a declarant that are “reasonably pertinent to diagnosis or treatment” are admissible even though they are hearsay. W. Va. R. Evid. 803(4). This is the case here.

Rule 803(4) is written disjunctively so that statements made either diagnosis or treatment are admissible. “We have traditionally held that where the disjunctive ‘or’ is used, it ordinarily connotes an alternative between the two clauses it connects.” *Albrecht v. State*, 173 W. Va. 268, 271, 314 S.E.2d 859, 862 (1984).¹¹ “If there is evidence in the record from which the trial court could have found by a preponderance of the evidence that a child’s statements were made for the purposes of medical diagnosis or treatment, we affirm the court’s ruling.” *State v. Mayer*, 932 P.2d 570, 575 (Or. Ct. App.1997).

Here, Mr. Ferris testified that one of the purposes of his play therapy was “just trying to pick up on what are the themes of things that are going on in their life that might be creating distress for them or upsetting them.” App. vol. I, 18 at 193.¹² This is, by definition, “[a] diagnosis . . . ‘the art

¹⁰Trial counsel did object based on speculation and conjecture, but this objection was not made to Mr. Ferris’s testimony, but only to his treatment the summaries he wrote to Sgt. Clemons and the Prosecuting Attorney. App. vol. II, 19 at 347. These letters were apparently not admitted into evidence. App. vol. I, 17 at ix.

¹¹The same principles and canons governing statutes govern court rules. Syl. Pt. 2, *Casaccio v. Curtiss*, 228 W. Va. 156, 718 S.E.2d 506 (2011).

¹²“Distress” in psychology is excessive, ill-timed, or unrelieved stress. Barbara Kuhn Timby, *Essentials of Nursing: Care of Adults and Children* 210 (2005).

or act of identifying a disease from its signs and symptoms’ or alternatively an “*investigation or analysis of the cause or nature of a condition, situation, or problem.*” *United States v. Undetermined No. of Unlabeled Cases*, 21 F.3d 1026, 1028 (10th Cir. 1994) (quoting *Webster’s Third New International Dictionary* 622 (1981) (emphasis added)). Here, Isaiah was angry and Mr. Ferris testified that when he explored what Isaiah’s perception of mean was, to find the source of that anger, Isaiah talked about how Ro-Ro “knock [] [Sissy] out,” App. vol. I, 18 at 196, of Ro-Ro kicking him in the “butt,” *id.*, of keeping the “Sissy” figure away from Ro-Ro, sometimes putting the Sissy figure into a desk to hide it from the Ro-Ro figure, *id.*, and saying that Ro-Ro “whipped Sissy’s butt[,]” *Id.* It was Mr. Ferris’s opinion, that based on the “consistency that he’s talked about it, that he witnessed some violence, maybe experienced violence.” *Id.* at 196-97.¹³ Mr. Ferris testified:

So my interpretation of [Isaiah], and it was a consistent theme, this was many, many sessions, that he—I felt like he had seen some violence, maybe quite a bit of violence. I don’t know the exact extent of the violence but I think he’d seen violence from Ro-Ro either towards his mother, but probably towards himself and also towards his sister. And I think that was the source of his anger.

¹³At two points Mr. Ferris was asked if he could testify to a reasonable degree of *medical* certainty. App. vol. I, 18 at 199, 200. But, as the circuit court observed, Mr. Ferris was not testifying as medical doctor but a psychologist. *Id.* at 200. Whether Mr. Ferris could testify to a reasonable degree of medical certainty is beside the point, he testified to a reasonable degree of *psychological* certainty. *Id.* at 197, 200. The standard for admission of an expert opinion is that the testimony is to a reasonable degree of professional certainty within the field within which the expert opinion is offered. *See, e.g., In re A.S.*, 982 P.2d 1156, 1167 (Wash. 1999) (“A social worker is not obliged to testify to a reasonable medical or psychological certainty as to a mental disorder, but only to reasonable professional certainty.”). That standard was met here.

Id. In other words, Mr. Ferris testified, to a reasonable degree of psychological certainty, about his diagnosis. *Id.* at 200. (“Q Your testimony wasn’t based upon a medical certainty then, just -- A . . . I don’t know that -- I would say psychological certainty.”).

Further, Mr. Ferris testified repeatedly that he *treated* Isaiah. Mr. Ferris testified that he treats children, App. vol. II, 19 at 336, and that the Department of Health and Human Resources referred Isaiah to him, “for treatment because of the death of his sister” and to adjust to him returning to live with his biological father. *Id.* at 338. He also testified that when he “treats” a three to four year old child, he lets them play with toys, *id.*, and he will “occasionally ask them questions, but sometimes just respond to how they play and some of the themes that might come out during their play.” *Id.* at 339. Mr. Ferris also testified that Isaiah was coming to him for therapy, *id.* at 347, that these were ongoing therapeutic sessions, *id.*, and that he was actually treating Isaiah. *Id.* Mr. Ferris who was qualified as an expert in psychology without objection by the Petitioner’s trial counsel, App. vol. I, 18 at 191, testified that he was engaged in a course of treatment and therapy. Indeed, Mr. Ferris testified that it was his “treatment pattern” to “primarily let them play with toys, let them sit in the floor, play with some toys . . . occasionally ask them questions, but sometimes just respond to how they play and some of the themes that might come out during their play.” App. vol. II, 19 at 338-39. And these themes included how the Petitioner behaved toward Isaiah and Isabella, *id.* at 343, and his anger toward the Petitioner talking about what went on in the home and his anxiety and his fear. *Id.* at 348. Perhaps most directly, Mr. Ferris testified that when he learns what was upsetting a child or creating distress that he “approach[ed] them in different ways to help them.” App. vol. I, 18 at 193.

This Court has recognized repeatedly that play therapy falls within the ambit of Rule 803(4). This case is no different. Syllabus Point 9, *State v. Pettrey*, 209 W. Va. 449, 549 S.E.2d 323 (2001) (“When a social worker, counselor, or psychologist is trained in play therapy and thereafter treats a child abuse victim with play therapy, the therapist's testimony is admissible at trial under the medical diagnosis or treatment exception to the hearsay rule, West Virginia Rule of Evidence 803(4), if the declarant’s motive in making the statement is consistent with the purposes of promoting treatment and the content of the statement is reasonably relied upon by the therapist for treatment. The testimony is inadmissible if the evidence was gathered strictly for investigative or forensic purposes.”). *Accord* Syl. Pt. 4, *Misty D.G. v. Rodney L.F.*, 221 W. Va. 144, 650 S.E.2d 243 (2007) (per curiam). Mr. Ferris testified that his conduct with Isaiah—play therapy—was to discover what was causing distress or upsetting him and to correct it through a treatment pattern. Consequently, it was “reasonably pertinent to diagnosis or treatment[,]” and being commenced at DHHR’s behest to treat Isaiah, it had nothing to do with the criminal case. App. vol. I, 18 at 191-92. *See State v. Edward Charles L.*, 183 W. Va. 641, 654, 398 S.E.2d 123, 136 (1990) (“we conclude that the statements made by the children to their treating psychologist, Trainor, were properly admitted at trial . . . we find that not only was the motive behind the statements made by the children consistent with promoting treatment, since the mother brought the children to the psychologist for the purpose of treatment at a time prior to any criminal action even being contemplated; but also, the statements were such that they would have been reasonably relied upon by Trainor in his diagnosis and treatment of the children.”).

The Petitioner contends that all of Mr. Ferris’s testimony was supposition and naked interpretation. Pet’r’s Br. at 25. However, the record refutes this.

Mr. Ferris testified as to personal knowledge of the following:

- He heard Isaiah use the term “pistol whipped,” App. vol. I, 18 at 194, which Mr. Ferris (whose primary treatment population is children, *id.* at 190, and who has treated over 100 four year olds, App. vol. II, 19 at 353), considered to be an unusual word for a four year old to use, App. vol. I, 18 at 194;

- He heard Isaiah said Ro-Ro hit him in the face, and kicked him in the back and was mean. App. vol. II, 19 at 340.

- He heard Isaiah name a figure “Sissy,” and heard Isaiah’s voice change and whisper or be tearful when Isaiah would talk about the figure, *id.* at 340-41, and heard Isaiah “spontaneously” say, “Ro-Ro knocked her out.” *Id.* at 341. He saw Isaiah make a “quick hitting motion with his arm[,]” *id.* and heard Isaiah say “pow” and then “Sissy going to sleep.” *Id.*

- Isaiah always wanted to keep the Sissy figurine away from th Ro-Ro figurine, including hiding the Sissy figurine in Mr. Ferriss’s desk. App. vol. I, 18 at 196.

- He heard Isaiah talk about “Ro-Ro whipping Sissy’s butt.” App. vol. II, 19 at 345.

Furthermore, Mr. Ferris testified that Isaiah would talk about he and his sister beating up his mommy and Ro-Ro, and Isaiah knocking Ro-Ro out of bed and kicking Ro-Ro’s teeth out. App. vol. I, 18 at 194. Mr. Ferris further testified:

The way I interpreted that -- before I go on to interpretation, he said Ro-Ro would get him out of bed. And he said Ro-Ro would kick his butt. And he would get made when Sissy would cry sometimes. The way I interpreted that -- I’ve seen this hundreds, if not thousands of times in little boys in particular. Sometimes they want to imagine they are really powerful. When bad things happen, they talk about beating this person up or hitting this person, driving over them with a motorcycle or a car or something like that.

So his behavior, his description of beating up Ro-Ro was fairly typical of a four-year-old, who, I think, was angry at someone. Rarely do you see that talk except when they're really angry at someone.

Id. at 195. Mr. Ferris's testimony regarding his interpretations was in reality an opinion, an opinion based on his interactions with Isaiah as well as Mr. Ferris's experience with boys behaving similarly "hundreds, if not thousands of times[.]" *Id.* See *Liddle v. Brunsman*, No. 5:09–CV–00587, 2010 WL 4818522, at *4 (N.D. Ohio Nov. 19, 2010) ("The physician offered testimony which was derived from his experiences with hundreds of sexually abused children, a family history report, and his observation of R.B's interview with a counselor. While necessarily somewhat subjective, the Court finds the physician's opinions grounded in experience and observation."). The two quotations that the Petitioner quotes do not support his claim. See Pet'r's Br. at 25.

The Petitioner quotes the following from Mr. Ferris's testimony, "I think there's *probably some significant element of truth . . .*" App. vol. II, 19 at 343 (emphasis added) and "I think this was a story or imagination. *Maybe it had some truth to it. I could never figure it out with Isaiah.*" *Id.* at 345 (emphasis added).

In reference to the first quote, Mr. Ferris was addressing how he distinguished between imagination and reality with a four year old. *Id.* at 343. And his testimony was that if there was a consistent theme, "what they talk about over and over and over again and give explanations in various ways to where it's pretty much consistent, I generally think that's probably pretty consistent with reality[.]" *id.*, a view with which the Supreme Court would likely agree. See *Idaho v. Wright*, 497 U.S. 805 at 821 (among other factors to be considered in determining reliability is spontaneity and consistency of repetition).

The Petitioner's second quotation to the record needs to be read in context.

He talked about -- in a session on, I think, May 2nd-or, no excuse me, June 15th -- Ro-Ro whipping him. Again, wanted to keep Sissy figure away from Ro-Ro. Again, I think this was a story or imagination. Maybe it had some truth to it. I could never figure it out with Isaiah. He talked about Ro-Ro stealing him out of the car and sitting him up on the gas tank all day. When I tried to get some understanding of what he meant by that, I think maybe he was thinking about on the gas pump f or where -- where you pump your gas or something like that.

App. vol. II, 19 at 345.

The reference to “I think this was a story or imagination. May be it had some truth to it. I could never figure it out with Isaiah” referenced not the preceding anecdote (Ro-Ro whipping Isaiah) but the following anecdote, that Ro-Ro stole him and left him on a gas tank. And being left on the gas tank was not a consistent theme like being abused by Ro-Ro. Indeed, such an innocuous story is at worst harmless error and, at best, helpful to the Petitioner because it certainly implied that Mr. Ferris could find that Isaiah could not distinguish fantasy from reality.

Lastly, the Petitioner contends that the introduction of Mr. Ferris’s testimony affronted the confrontation clause. Pet’r’s Br at 26. “[T]he Confrontation Clause . . . bars the admission of a testimonial statement by a witness who does not appear at trial, unless the witness is unavailable to testify and the accused had a prior opportunity to cross-examine the witness.” Syl. Pt. 6, in part, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006). “[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.” *Id.* Syl. Pt. 8. “[O]nly testimonial statements are excluded by the Confrontation Clause.” *Giles v. California*, 554 U.S. 353, 376 (2008). Where evidence fits within Rule 803(4), it is not testimonial because it is made for a reason other than use in a prosecution. *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2722 (2011) (quoting *Michigan v. Bryant*, 131 S. Ct. 1143, 1157 n.9 (2011)) (“Statements for Purposes of

Medical Diagnosis or Treatment’ under Federal Rule of Evidence 803(4) [are] an example of statements that are ‘by their nature, made for a purpose other than use in a prosecution”).

The circuit court should be affirmed.

D. The circuit court did not error in admitting the Ferris’ testimony under rule 404(b).

As an adjunct to his Rule 803(4) argument, the Petitioner also asserts that the evidence from Mr. Ferris is inadmissible under West Virginia Rule of Evidence 404(b).

Under Rule 404(b) “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as . . . identity, or absence of mistake or accident[.]” Rule 404(b) “is an ‘inclusive rule’ in which all relevant evidence involving other crimes or acts is admitted at trial unless the sole purpose for the admission is to show criminal disposition.” *State v. Edward Charles L.*, 183 W. Va. 641, 647, 398 S.E.2d 123, 129 (1990). And, indeed, “[a] rather permissive approach has been taken toward evidence challenged under Rule 404(b) within the child abuse or neglect context.” *In re Carlita B.*, 185 W. Va. 613, 631 n.21, 408 S.E.2d 365, 383 n.21 (1991). “In reviewing the admission of Rule 404(b) evidence, we review it in the light most favorable to the party offering the evidence, in this case the prosecution, maximizing its probative value and minimizing its prejudicial effect.” *State v. McGinnis*, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994). “The balancing of probative value against unfair prejudice is weighed in favor of admissibility[.]” *State v. LaRock*, 196 W. Va. 294at 312, 470 S.E.2d 613 at 631 (1996).

Before admitting evidence under Rule 404(b), a circuit court must hold an in camera hearing and (1) be satisfied that the proponent has shown by a preponderance of the evidence the acts or

conduct occurred and the defendant committed them; (2) find the evidence relevant under Rules of Evidence 401 and 402; (3) find the evidence's probative value is not substantially outweighed by its prejudicial effect; and, (5) issue a limiting instruction when the evidence is offered, and advisably in the court's jury charge. Syl. Pt. 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994). "[O]n this appeal . . . the inquiry [i]s . . . whether the trial court acted in a way that was so arbitrary and irrational that it can be said to have abused its discretion." *McGinnis*, 193 W. Va. at 159, 455 S.E.2d at 528. A ruling is "arbitrary and irrational" only if it "cannot be supported by reasonable argument." 1 Stephen A. Satzberg, et al., *Federal Rules of Evidence Manual* § 403.02[19] at 403–43 (8th ed.2002). Hence, "Appellate Courts will check to see that the Trial Court has *conducted* a balancing process. The *result* of a careful balancing process will not itself be second-guessed." *Id.* § 403.02[19] at 403–44 (footnotes omitted). Here, the circuit court conducted an on the record in camera hearing, made the requisite findings, conducted the appropriate balancing test, and issued instructions at the time the evidence was offered and in the general charge.

First, it found, after listening to Mr. Ferris, that the State had shown by a preponderance of the evidence that prior child abuse had occurred to both Isaiah and Isabella, i.e., that the Petitioner would "kick his butt," App. vol. I, 18 at 195, 196, that Isaiah would try to keep the Sissy figure away from the Ro-Ro figure, *id.* at 196, and that Ro-Ro would get mad when Sissy would cry. *Id.* at 195. Mr. Ferris also testified to a "reasonable degree of psychological certainty" that Isaiah "witnessed some violence, maybe even experienced some violence[,]" *id.* at 197; *see also id.* at 200, and that the source of Isaiah's anger was violence "probably towards himself and also towards his sister." *Id.* at 197. *See Id.* at 214 ("The Court listened to the evidence, the testimony of Mr. Ferris, and finds that the State has met its burden, in proving that, by a preponderance of the evidence, that the acts

occurred.”).¹⁴ The Petitioner contends “[i]t is impossible to determine what act, wrong or crime is being relied upon.” Pet’r’s Br at 27. But the issue is not a single, discreet act; the issue is the ongoing pattern of physical abuse. “The chance that a child who has been suffering from a long pattern of torture and physical abuse just happened to die from accidental causes is much less likely than that a healthy and non-abused child might.” Robert N. Parrish, *Response to “State vs. Teuscher, The ‘Exception’ Swallows the Rule,”* 9 Utah B.J. 8, 9 (1996).

Second, as the circuit court found, there were legitimate reasons for introduction of the evidence, specifically to show that Isabella’s injuries were not the result of mistake and to show the identity of the perpetrator. App. vol. I, 18 at 214.¹⁵ “[I]t has been established that the government offered the evidence to prove intent and refute [the defendant’s] claim of mistake or accident. These purposes are permissible under [Rule] 404(b)[,]” *State v. Mongold*. 220 W. Va. 259, 265-66, 647 S.E.2d 539, 545-46 (2007) (quoting *United States v. Sanders*, 343 F.3d 511, 518 (5th Cir.2003)) and “is well established, particularly in child abuse cases.” *State v. Hassett*, 859 P.2d 955, 960 (Idaho Ct. App. 1993) (quoting *United States v. Harris*, 661 F.2d 138, 142 (10th Cir.1981)). See also *Estelle v. McGuire*, 502 U.S. 62, 68 (1991) (“evidence demonstrating battered child syndrome helps to prove that the child died at the hands of another and not by falling off a couch, for example; it also

¹⁴Admittedly not part of the in camera hearing, prior to the in camera hearing, the trial court heard during the State’s case to the jury (before the in camera hearing) Paramedic Stalnaker’s testimony that Isabella exhibited bruising that went all the way from opaque yellow—indicating a very old bruise—to very dark, very purple bruises indicating new bruises. App. vol. I, 18 at 167. This certainly helped establish prior beatings. And during his direct examination at trial, Mr. Ferris testified that Isaiah told him during their sessions that Ro-Ro would whip Sissy’s butt, *id.* at 345, and that Isaiah “spontaneously” said, “Ro-Ro knocked her out[.]” App. vol. II, 19 at 341, while making a “quick hitting motion with his arm[.]” *id.* and then heard Isaiah say “pow” and then “Sissy going to sleep.” *Id.*

¹⁵In the cautionary instructions, the court added absence of accident. App. vol. II, 19 at 366, 459. Absence of mistake or accident are part and parcel of the same idea.

tends to establish that the ‘other,’ whoever it may be, inflicted the injuries intentionally.”). And, “[i]n order to identify [defendant] as the likely perpetrator of Child’s injuries, the prior abuse or neglect at issue was relevant to establish his identity as the person or one of the persons who fatally abused Child.” *State v. Martucci*, 669 S.E.2d 598, 610 (S.C. Ct. App. 2008).

Third, the circuit court made an on the record finding that “the probative value outweighs the prejudicial effect.” App. vol. I, 18 at 215.¹⁶

And, fourth, the circuit court gave instructions to the jury on the limited use of the evidence. App. vol. II, 19 at 366, 459.

The circuit court should be affirmed.

E. The circuit court did not abuse its discretion in admitting Isabella’s hospital photographs or autopsy photographs.

The Petitioner argues the number and the “gruesomeness” of the photographs of Isabella admitted into evidence unfairly prejudiced him and was an abuse of discretion. Pet’r’s Br. at 28.

Admitted at trial were two sets of photographs, the first set consisting of 22 photographs taken of Isabella at CAMC (State’s Exhibits 7 through 28) App. vol. II at 23-33, and a second set of 5 autopsy photographs (State’s Exhibits 32 through 36). *Id.* at 49-51. State’s Exhibits 7 through 15

¹⁶The circuit court’s legal analysis here is backward and much more pro-defendant than required. The circuit court made the test whether the probative value outweighs the prejudicial effect. The circuit court put its thumb on the scale on the side of prejudicial effect, when it is the other way around, probative value need not outweigh prejudicial effect; rather, prejudicial effect must substantially outweigh probative value. *See, e.g., Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc.*, 998 F.2d 1224, 1237 (3d Cir. 1993) (“For testimony to be excluded under Rule 403, its probative value must be ‘substantially outweighed’ by the listed dangers, rather than simply ‘not more probative than prejudicial.’”). The Petitioner’s brief is actually legally wrong on this point as well since it claims that the Ferris “evidence, or the suggestion of such evidence, was more prejudicial than probative.” Pet’r’s Br. at 27-28. But the standard is not whether the evidence is simply more prejudicial than probative, it is whether it is *substantially* more prejudicial than probative. “[R. Evid. 403 provides relevant evidence may be excluded if the probative value of the evidence is ‘substantially outweighed,’ not ‘simply ‘outweighed[.]’” *United States v. Savard*, No. 37346, 2010 WL 4068964, at *4 n.2 (A.F. Ct. Crim. App. 19 Jan. 2010).

were photographs of Isabella at SCARH. App. vol. I, 17 at 62-63, 67-68. State's Exhibits 16 through 28 were a series of photographs take during the course of Isabella's admission to CAMC until she dies, which were taken every 12 hours at the direction of Chiel Medical Examiner Kaplan. *Id.* at 65, 68. State's Exhibits 32 through 36 were autopsy photographs. *Id.*, 18 at 236, 239-40. Exhibits 32, 33, and 34 showed numerous contusions under the scalp, *id.* at 237, which Dr. Kaplan explained helps a forensic pathologist determine that such injuries were inflicted as opposed to accidental. *Id.* Exhibit 35 showed, again, the lack of accidental injury. *Id.* at 240.

Prior to trial the Petitioner's counsel objected to introduction of any of the photographs arguing they were not relevant and that their probative value was far outweighed by their prejudicial effect. App. vol. I, 17 at 32-33. (The Petitioner on appeal here contests the admissibility of only the 27 photographs of Isabella. Pet'r's Br. at 28). The circuit court denied the motion finding that the pictures taken after Isabella was in the hospital "showed extensive injuries. And the Court feels that there would be a great deal of probative value here because of that, because they would show the child was initially uninjured, and then later was injured. So, there's a great deal of probative value." App. vol. I, 17 at 34. The Court then went on to recognize that while "there's also some prejudicial effect of those photographs . . . it would seem to me the probative value would outweigh the prejudicial effect. So, the motion to keep out the photographs will be denied." *Id.* at 34-35.

However, at trial, when pictures labeled as State's Exhibits 7 through 15 were offered for admission, the circuit court asked if the Petitioner's trial counsel had any objection, to which he answered "No, Your Honor." *Id.* at 68. Likewise, when the photographs labeled 16 through 28 were offered for admission, the circuit court asked "Any objection?" and counsel again responded, "No, Your Honor." *Id.* at 69. The only objections made during trial were to the autopsy photographs

State's Exhibits 32-36. App. vol. I, 18 at 254. Therefore, it appears as if the only objection that may be preserved is to the autopsy photographs. But, since the circuit court did not abuse its discretion and since there was at least one point where objections were raised to all the photographs, the State will accept for purposes of this appeal that the Petitioner preserved objections to the photographs on the grounds raised here.

“The admissibility of photographs over a gruesome objection must be determined on a case-by-case basis pursuant to Rules 401 through 403 of the West Virginia Rules of Evidence.” Syl. Pt. 8, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994).

Rule 401 of the West Virginia Rules of Evidence requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the West Virginia Rules of Evidence. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse.

Syl. Pt. 10, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994). Because “[j]ury trials are not antiseptic events . . . upsetting facts may well emerge. The general policy of the . . . Rules, however, is that all relevant material should be laid before the jury as it engages in the truth-finding process.” *Mullen v. Princess Anne Vol. Fire Co.*, 853 F.2d 1130, 1135 (4th Cir. 1988). “In assessing the intent of the actor in a case of criminal homicide, be it to inflict serious bodily injury or to kill, the fact finder who deals in such an intangible inquiry must be aided to every extent possible.” *Commonwealth v. McCutchen*, 454 A.2d 547, 549 (Pa. 1982). “For this reason, in reviewing a decision under Rule 403, the court must ‘look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.’” *Mullen*, 853 F.2d

at 1135 (quoting *Koloda v. Gen'l Motors Parts Div.*, 716 F.2d 373, 377 (6th Cir.1983)). And, “[g]ruesome photographs simply do not have the prejudicial impact on jurors as once believed by most courts. ‘The average juror is well able to stomach the unpleasantness of exposure to the facts of a murder without being unduly influenced [G]ruesome or inflammatory pictures exists more in the imagination of judges and lawyers than in reality.’” *Derr*, 192 W. Va. at 177 n.12, 451 S.E.2d at 743 n.12 (quoting *People v. Long*, 113 Cal. Rptr. 530, 537 Ct. App. 1974)). “[T]he State is not required to downplay the visual effects of a particular crime.” *Warner v. State*, 144 P.3d 838, 887 (Okla. Ct. Crim. App. 2006). “A criminal homicide trial is, by its very nature, unpleasant, and the photographic images of the injuries inflicted are merely consonant with the brutality of the subject of inquiry.” *McCutchen*, 454 A.2d at 549.

Under West Virginia Code § 61-8D-2a(a), the State had to prove beyond a reasonable doubt, *inter alia*, that the Petitioner “maliciously and intentionally inflict[ed]” upon Isabella “substantial physical pain, illness or any impairment of physical condition by other than accidental means, thereby caus[ing]” Isabella’s death. The State also had to prove murder by proving a specific intent to kill. *State v. Hatfield*, 169 W. Va. 191, 198, 286 S.E.2d 402, 408 (1982) (“intent to kill or malice is a required element of both first and second degree murder”). And the State had to prove “bodily injury” to prove child abuse under West Virginia Code § 61-8D-3(a) (i.e., that Isabella suffered “substantial physical pain, illness or any impairment of physical condition” *Id.* § 61-8B-1(9)). This is what the photographs did here, they proved intent and bodily injury. *State v. Stapley*, 249 P.3d 572, 576 (Utah Ct. App. 2011) (“Exhibits 11, 12, and 13 show the nature and extent of J.E.’s wounds, which are relevant to establishing the ‘intent to kill’ element of the attempted murder charge as well the ‘serious bodily injury’ element of the lesser included aggravated assault charge.”).

In determining relevance, it should be noted that “[v]isual evidence accompanying testimony is most persuasive and often gives the fact finder a point of comparison against which to test the credibility of a witness and the validity of his conclusions.” *Chamberlain v. State*, 998 S.W.2d 230, 237 (Tex. Crim. App.1988). Here, “[t]he photos were relevant in showing the nature and location of the victim’s injuries.” *Warner v. State*, 144 P.3d 838, 887 (Okla. Ct. Crim. App. 2006). “[B]ecause the State has the burden to prove every element of the crime charged, photographs used to prove the elements of the crime, including the fact and manner of death and the violent nature of the crime, are relevant even if the cause of death is not contested.” *State v. Burnett*, 270 P.3d 1115, 1125-26 (Kan. 2012). Further,

[b]y demonstrating the severity of her injuries, the photographs supported the testimony of witnesses who told the jury that [the] injuries were not caused by some household accident. Although some of the photographs were graphic and explicit, they were far more probative than unfairly prejudicial. The photographs depicted bruising, swelling, and fracturing on the underside of [the] scalp, brain, skull, and optic nerves that is not visible externally. Some bruising can be seen on the external surface of Olivia’s head, but the full extent of her injuries was not apparent until the scalp was opened

Dismuke v. State, No. 05-04-01856-CR, 2006 WL 3200113, at *8 (Tex. Ct. App. Nov. 19, 2006).

Furthermore, the probative value of the photographs is not substantially outweighed by their prejudicial effect. W. Va. R. Evid. 403. “[T]here is a higher tolerance for the risk of prejudice in cases where the evidence is ‘particularly probative.’” *State v. Taylor*, 215 W. Va. 74, 85, 593 S.E.2d 645, 656 (2004) (per curiam) (Davis, J., dissenting) (quoting *United States v. Rivera*, 6 F.3d 431, 443 (7th Cir.1993)). In a case similar to this one, the North Carolina Supreme Court held:

[T]he State introduced twenty-six photographs of the victim’s body to illustrate the testimony describing [the victim’s] injuries. This testimony established that [she] had been severely beaten and that she had bruises, grab marks, pinch marks, scratches, nicks, bumps, and other injuries on almost every inch of her body.

The State's witnesses described distinct injuries to [her] head, her shoulders, her chin, her mouth, her legs, her back, her torso, and other portions of her body . . . Each of the photographs illustrated testimony presented by the State, and the testimony relating to [her] injuries was unquestionably relevant. Given the number, nature, and extent of the victim's injuries, we conclude that the trial court did not abuse its discretion by admitting twenty-six photographs of the victim's body.

State v. Pierce, 488 S.E.2d 576, 585-86 (N.C. 1997). See also *United States v. Greatwalker*, 356 F.3d 908, 912-13 (8th Cir. 2004) ("The photographs were relevant in this case. . . . Photographs of the autopsy and the murder scene were also used to corroborate other evidence. The district court did not abuse its discretion in concluding the photographs' probative value was not substantially outweighed by the risk of unfair prejudice.").

The circuit court should be affirmed.

F. Ineffective assistance of counsel claims are generally not amenable to appeal and the claims raised here are not sufficiently articulated to be properly before this Court.

"[I]t is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal." *State v. Triplett*, 187 W. Va. 760, 771, 421 S.E.2d 511, 522 (1992). "In cases involving ineffective assistance on direct appeals, intelligent review is rendered impossible because the most significant witness, the trial attorney, has not been given the opportunity to explain the motive and reason behind his or her trial behavior." *State v. Miller*, 194 W. Va. 3, 15, 459 S.E.2d 114, 126 (1995). "To the extent that a defendant relies on strategic and judgment calls of his or her trial counsel to prove an ineffective assistance claim, the defendant is at a decided disadvantage. Lacking an adequate record, an appellate court simply is unable to determine the egregiousness of many of the claimed deficiencies." *Id.* at 14-15, 459 S.E.2d at 125-26. "It is apparent that we intelligently cannot determine the merits

of this ineffective assistance claim without an adequate record giving trial counsel the courtesy of being able to explain his trial actions.” *Id.* at 17, 459 S.E.2d at 128. “When the critical component of a fully developed record is missing, an ineffective assistance claim is all but guaranteed to be denied[.]” *State v. Frye*, 221 W. Va. 154, 158, 650 S.E.2d 574, 578 (2006) (per curiam).¹⁷

VI. CONCLUSION

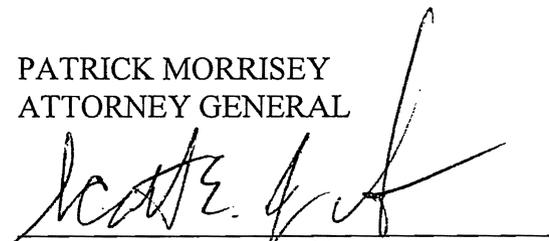
For the above reasons, the circuit court should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



SCOTT E. JOHNSON¹⁸
SENIOR ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, WV 25301
State Bar No: 6335
Telephone: 304-558-5830
E-mail: sej@wvago.gov
Counsel for Respondent

¹⁷Such a “decision does not foreclose further development of the ineffectiveness of counsel issue on a post-conviction collateral attack, if that procedure is available to the defendant” nor would such a course reflect any judgment as to the merits of such a claim. *Miller*, 194 W. Va. at 17, 459 S.E.2d at 128.

¹⁸This brief was prepared with the assistance of W. Austin Smith, II, a Judith A. Herdon Fellow assigned to the Attorney General’s Office.

CERTIFICATE OF SERVICE

I, SCOTTE E. JOHNSON, Senior Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the "*CORRECTED BRIEF OF THE STATE OF WEST VIRGINIA*" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 14 day of February, 2013, addressed as follows:

James M. Cagle, Esq.
1018 Kanawha Blvd., East
Ste. 1200
Charleston, WV 25301



SCOTT E. JOHNSON, ESQUIRE