



**IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA**

**STATE OF WEST VIRGINIA,
Respondent**

**VS. W.Va. Supreme Court of Appeals No. 11-1674
(Raleigh County Circuit Court No. 10-F-142-H)**

**CHRISTOPHER WAYNE BOWLING,
Petitioner**

**BRIEF IN RESPONSE TO
PETITION FOR APPEAL**

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RESPONSE TO ASSIGNMENTS OF ERROR¹

I. WHETHER THE TRIAL COURT ABUSED IT'S DISCRETION BY "FAILING TO PROPERLY CONDUCT AN *IN CAMERA* HEARING REGARDING 404(b) EVIDENCE."

The Petitioner's Brief (hereinafter "the Brief") does not contend that the defense made a pre-hearing motion for closure of *in camera* proceedings. Moreover, pre-trial hearings are presumptively public proceedings.

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING DEFENSE MOTIONS TO STRIKE TWO JURORS FOR CAUSE.

The two jurors at issue initially made inconclusive statements requiring further inquiry, and such inquiry revealed that neither juror held a disqualifying bias or prejudice.

III. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING DEFENSE EVIDENCE.

After repeated *in camera* hearings during which the defense firearms witness testified that there was no malfunction that could have caused the murder weapon accidentally to discharge, the trial court properly disallowed the witness from offering testimony which was demonstrably false or speculative or irrelevant to the issue of accident.

IV. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING MANSLAUGHTER JURY INSTRUCTIONS.

There was no competent evidence to support a pertinent defense theory of the case other than a defense of pure accident, and the petitioner's own testimony foreclosed manslaughter instructions.

V. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING TESTIMONIAL STATEMENTS INTO EVIDENCE.

No testimonial statements were admitted for the truth of the matters asserted: accordingly, the Confrontation Clause was not implicated.

¹The Petitioner's Brief (at 6) does not enumerate the assignments of error. Accordingly, this Response will follow the enumeration in the Argument section of Petitioner's Brief.

VI. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WITH RESPECT TO RULE 404(b) AND HEARSAY EVIDENCE.

Before the jury heard Rule 404(b) evidence or statements of the deceased, the trial court held *in camera* hearings, made all requisite *McGinnis* findings and gave appropriate limiting instructions, including that statements of the deceased were not offered for the truth of the matters asserted.

VII. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING LT. BARE TO TESTIFY CONCERNING OTHER CASES, HIS CONCLUSIONS IN THIS CASE AND BOWLING'S ARREST.

(a). The factual testimony of Lt. Bare concerning other cases properly rebutted the defense inference that the petitioner's 911 call was evidence of accident. (b). The trial court properly ruled that Lt. Bare's re-direct testimony concerning his conclusions was an appropriate response to the defense cross-examination which repeatedly elicited his opinions, and the trial court gave a proper limiting instruction. (c). The petitioner was not in custody when he spoke by telephone with Lt. Bare, and a suspect's assertion of *Miranda* rights becomes relevant only when the suspect is in a custodial interrogation. Further, the Brief provides no factual support for the erroneous claim that the State drew any inference of the petitioner's "consciousness of guilt" in this regard.

STATEMENT OF THE CASE

Teresa Bowling, (hereinafter Tresa), a 34 year old mother of two, was pronounced dead on February 1, 2010. The manner of death was a "fatal firearm assault by a spouse in the setting of a reported history of domestic conflict." Appx. X 1054-1056.

On January 31, 2010 at 11:35 p.m., Raleigh County Emergency Operations Center received a 911 call from the residence of Christopher Wayne Bowling (hereinafter Bowling).² Bowling hung up before speaking, and EOC immediately called back. Appx. X 1177-1179, 1185-1186. Bowling said "I came in my house -- I carry a concealed weapon and I accidentally shot my wife." He added that he shot her "(i)n the head." Supp. Appx. 1-11.

Raleigh County Sheriff's Office Cpl. Redden was first on the scene at the Bowling residence at 110 Pilot Lane in Daniels, W.Va. Bowling was in the driveway. Appx. X 882-884. Tresa was on the living room sofa, "bleeding from her head." Cpl. Redden recovered a Kel-Tec pistol and the pistol's magazine from the floor by the sofa where Tresa's head had been bleeding, with one bullet in the chamber and five bullets in the magazine. Cpl. Redden also recovered an empty shell casing from "the right hand corner near the wall," to the right and rear of Tresa's head. Appx. X 886-900. After paramedics arrived Cpl. Redden returned to Bowling, who was in a Sheriff's Office cruiser. Because he noticed the odor of alcohol, Cpl. Redden asked Bowling to submit to a preliminary breath test: Bowling "refused to submit." Bowling then began name-dropping, referring to his friends in law enforcement: Bowling never shed a tear. Appx. X 892-894.

Emergency Room Dr. James Lewis testified that although Tresa was brain dead by the time she arrived at the hospital, he spent hours attempting to save her. Dr. Lewis confirmed that he never received a phone call or a visit or an inquiry of any kind from Bowling. Appx. X 933-937.

West Virginia State Police Cpl. Goodson entered Bowling's residence shortly after Cpl. Redden. Appx. IX 783-786.

² The Brief (at 7) describes Bowling as a "self-employed carpenter." He described himself as a "building contractor" whose company was "very successful," with some ten employees "on (his) payroll" and "30 subcontractors working" for him. Appx. XII 2180, 2211.

(I) walked straight through the living room and to the children's bedroom. There was no door going into the bedroom. The oldest daughter was sitting there on the bed with her knees clutched to her chest . . . rocking back and forth, crying and sobbing. The youngest child, girl, was still in bed asleep. Then I asked the oldest child, I was, like, honey, what happened, and she advised - - [] (S)he stated to me, I heard mommy and daddy fighting. I heard mommy say it wasn't my fault, gunshot. And I was like, have you been here the whole time? She said, yes, I haven't - - I haven't left the room. Appx. IX 787-788.

Cpl. Goodson confirmed that the child with whom he spoke was M.L., who was Tresa's daughter from a prior relationship. She was ten years old when her mother was killed. Her little sister, L.B., was Bowling's daughter by Tresa, and was four years old when Tresa was killed. Appx. IX 789, 797. At trial, M.L. testified that when Tresa and Bowling first became a couple they were "kind, sweet, loving and just caring about one another," but that their relationship "(l)ater changed" and became "hurtful, like yelling and cussing and just telling each other hateful things." When she would try to intervene to "tell them to stop, stop," Bowling would tell her to "shut up." She had heard Bowling threaten Tresa that "if you don't be quiet, I'm going to kill you and throw you in the creek" behind the family's residence. She described Bowling "dragging" Tresa and "banging her head on the car hood" and demonstrated how Bowling would grab Tresa, and that "he held her nose and gripped her mouth" until she could not breathe. Appx. IX 801-806.³ M.L. explained that Bowling carried a gun in his back pocket and that he had a habit with that gun: whenever he came home he "would take it out of his pocket and lay it on the entertainment center" next to the front door. She added that Tresa slept on the living room sofa, not in the master bedroom, and that M.L.'s bedroom door had been missing for "two years."⁴ Appx. IX 807-811.

³M.L. urged Tresa to leave with the children: Q: Would you tell us what advice you gave your mom? A: That this is not a safe environment for any of us and we need to get out. Q: Did your mom have any response; did she agree with you or say anything? A: She agreed with me. Appx. IX 807.

⁴M.L. testified that Bowling had claimed he'd "kicked down the door" because L.B. had locked herself inside the bedroom. Appx. IX 811.

M.L. described Tresa as being "sad" on January 31, 2010 because Tresa and Bowling were going to a funeral that day. Later, in the evening, Tresa picked up M.L. and L.B. from babysitting relatives and Tresa and the girls headed home. M.L. initially fell asleep but later got up and saw Tresa on the living room sofa and said "(g)ood night, I love you." L.B. was with M.L. in the door-less bedroom. L.B. stayed asleep, but M.L. remained awake to hear Bowling arrive home. Appx. IX 812-813.

A: He walked in the door, and then they started fighting about something.

Q: And then what were the last words you heard your mom say?

A: It's not my fault.

Q: It's not my fault?

A: Yes.

Q: After you heard your mom say "It's not my fault," would you tell the folks what you heard?

A: A gunshot.

Appx. IX 814-815.

M.L. testified that after the gunshot she stayed in her room and Bowling never spoke to her and never came into the room and never checked on her and L.B. M.L. and L.B. went to stay at Bowling's mother's home -- fifteen minutes away from 110 Pilot Lane. Bowling never contacted M.L. or L.B., even though he was not arrested until February 2, 2010. Appx. IX 815-817.

Tresa's father, Wayne Farley, testified that he and his wife were notified of the shooting by the Raleigh County Sheriff's Office on the night of January 31, 2010. Mr. Farley confirmed that Bowling knew the Farleys' telephone numbers and where they lived. He testified that Bowling never contacted Tresa's family after the killing. Appx. IX 859-861.⁵

⁵ As the administrator of Tresa's estate, Mr. Farley also testified: Q: In terms of the assets, the house, the boat, the multiple vehicles, all of the assets in that household, in whose name were those assets? A: Everything was in Chris's name, except the bills. Q: And in whose name were all the bills? A: Tresa's. Appx. IX 862.

Raleigh County Sheriff's Deputy Bircham was among the first responding officers and a tape recorder was placed in his cruiser, where Bowling sat. Appx. XI 1356-1357. Bowling continued his name-dropping references to his various law enforcement friends and insisted that his "fuckn' gun went off" after he'd been home for only "12 minutes" and that he was not a "shit bag." Supp. Appx. 21-38.

Raleigh County Sheriff's Office Lt. Bare testified that when he responded he found M.L. in her bedroom, "upset" and "busy gathering clothing." Lt. Bare related M.L.'s excited utterances:

A: She said that she had gotten up to go to the bathroom and was laying back down when Chris had got home. And that she heard them talking, couldn't tell me what she heard, until she heard her mother say "it's not my fault," and then she heard a gunshot.

Q: And then did she spontaneously add a remark to you?

A: Oh, she did. She said that Chris was saying it was an accident, but she knew it wasn't an accident.

Q: And did you ask her how she knew and what was her response?

A: From what she heard on the phone. Appx. X 957-958.⁶

Lt. Bare met with Bowling at the Raleigh County Sheriff's Office. Bowling used the telephone to call two friends but never attempted to reach M.L. or L.B. or any of Tresa's other family members, and never inquired as to Tresa's condition. Appx. X. 943-944. Bowling assured Lt. Bare that he -- Bowling -- "wasn't a shit bag." Bowling "kept saying they had a really good day" at the funeral of Gary Cox. Bowling "said that he went in the house, the gun went off, he didn't know what happened." Appx. X 965-966.

The State played the recorded interview for the jury. Supp. Appx. 41-45. Jurors heard Bowling's composed "tone" as he claimed he had no memory of what he and Tresa

⁶ The State introduced into evidence a video of the interior of 110 Pilot Lane, demonstrating the close proximity of M.L.'s door-less bedroom to the living room where Tresa was killed and Bowling was on the phone with EOC. In addition to M.L.'s missing door, the master bedroom door "looked like it had been kicked or hit" Appx. X 948-952.

were discussing right before he fired. Appx. X 968-971. When confronted with M.L.'s report that Tresa's last words were "it's not my fault," Bowling had no explanation.⁷ Although Bowling announced "I'm done" to stop the recorded interview, he continued to speak. He claimed Tresa was "hooked on pills" and "hung around with drug dealers" and that he "*didn't know if he was sitting or standing when it happened.*" Appx. X 972-973. Upon Bowling's request, Lt. Bare allowed Bowling to meet privately with State Police Sgt. Mark Painter.⁸ Bowling informed Sgt. Painter that when he arrived home immediately prior to the shooting, he "found Tresa lying on the couch, where he gave her a kiss and then . . . went to the garage and got a drink."

Mr. Bowling stated he returned to the living room and began to remove his pistol from his back pocket *and place it on the table where he always kept it*, and then he heard a noise, looked over at Tresa, saw she had been shot.

This officer then informed Mr. Bowling that the officers . . . had stated that the place that the empty shell casing was found in did not coincide with where he said *he was standing* when the gun went off. Mr. Bowling immediately stated that there was no way they could prove that due to the shell casing could have bounced off the furniture.

He stated that many times in the past that he wanted to kill her, and they had been in knock-down, drag-out fights, but not on this night; that they had had a really good day. . . and everything was fine. Appx. XI 1513-1519.⁹

⁷ Although he would later testify in intricate detail as to the events resulting in Tresa's death, Bowling offered the following two hours after shooting her: BOWLING: Like I said we've had our problems, but we were not having any problems, we were not having any problems. BARE: Okay. How close do you think you were to her? BOWLING: To who? BARE: In proximity do you think you were to her? BOWLING: To Tresa? BARE: Yeah. BOWLING: My wife? BARE: Yeah. BOWLING: Uh, like here we are, I mean, what are you asking me?

⁸ Sgt. Painter testified that he and other troopers had been Bowling's friends and often discussed firearms, with Bowling boasting about his proficiency. Until Tresa's death, Bowling never had claimed to have accidentally fired. Appx. XI 1510-1512.

⁹ Sgt. Painter testified that Bowling never "shed a tear" but instead asked if he was "acting like a man that accidentally shot his wife." After Lt. Bare advised Bowling that he was "not going to be arrested on this date," Bowling "immediately asked Lt. Bare when he could clean up the crime scene due to a large amount of blood and that he had cats in the house." Appx. XI 1520.

Bowling's "best friend" -- Phillip Jones -- picked Bowling up from the Raleigh County Sheriff's Office in the early morning hours of February 1, 2010. Appx. XI 1446, 1470-1471. He had been friends with Bowling for "twenty-plus" years and frequently had hunted and engaged in target shooting with Bowling. Phillip Jones confirmed that Bowling was proficient in handling firearms and that in over twenty years of hunting and target shooting, Bowling never accidentally discharged a firearm. Further, Bowling "always" carried the Kel-Tec pistol. Appx. 1446-1450.

Phillip Jones testified that on the night of January 31, 2010 he drove Bowling from the home of a friend – Tommy Moore – to Bowling's residence. He sat with Bowling for "15-20 minutes" in the driveway and a text message he sent his wife established that Bowling entered his residence at 11:10 p.m. on January 31, 2010. Appx. XI 1468-1469. This was 25 minutes before the 911 hang up call. Hours afterward, Bowling called Phillip Jones to pick him up from the Raleigh County Sheriff's Office. Appx. XI 1470-1471.¹⁰

The trial court conducted an *in camera* hearing concerning events at Hooters restaurant and bar in December, 2009. Phillip Jones testified that Bowling was intoxicated, got into an "altercation" and pulled out his Kel-Tec, causing his friends to "duck." Bowling then "accidentally knocked Tresa off the bar stool."¹¹ Later, Tresa and Phillip Jones' wife were in front of a truck in which Bowling was sitting, and Bowling repeatedly ordered the driver –Brian Keaton – to "run them over, kill them, get me out of here." Appx. XI 1423-1425. Phillip Jones and his wife drove Tresa to their home for the night, while Brian Keaton took Bowling to 110

¹⁰Phillip Jones testified that Bowling claimed that "Tresa had bought him a new holster and he pulled it out of his pocket and it went off." Phillips Jones also testified that in the 74 times that he had visited Bowling since Bowling's arrest, Bowling never provided any further details, but "just said it was an accident." Phillip Jones couldn't recall whether or not, during those 74 visits, Bowling ever mentioned Tresa. Appx. XI 1472-1474.

¹¹Tresa said nothing and "just look(ed) up" at Bowling after he "accidentally" knocked her to the floor. Appx. XI 1425.

Pilot Lane. Brian Keaton used his speaker phone to enable Phillip Jones and his wife and Tresa to hear Bowling:

A. And when Brian put it on speaker phone, well, that's when Tresa heard him say, you know, I hate my wife. And she wanted to know why. I mean, she was just crying, upset

Q: -- is that . . . one of the times that she cried and asked, why does he hate me, why does he hate me?

A: Yeah, she wanted to know why, what had she done to make him hate her so much. Appx. XI 1425-1426.

Phillip Jones testified *in camera* about other conversations with Bowling, when Bowling "never actually said kill his wife" but said "I can make her disappear." When Phillip Jones had suggested to Bowling that perhaps Bowling and Tresa should divorce, Bowling stated "she had basically come to the marriage with nothing and she was going to leave with nothing," and that he would "take" L.B. Appx. XI 1426-1428. The trial court made all requisite findings pursuant to *State v. McGinnis*, 193 W.Va. 147, 455 S.E. 2d 516 (1994) and read an appropriate limiting instruction before Phillip Jones testified for the jury. Appx. XI, 1436-1438, 1444-1445.¹² Brian Keaton corroborated Phillip Jones' testimony of Bowling's expressions about Tresa in December, 2009: Bowling "said he hated that bitch" and "wanted to get away from her." Appx. X 1194-1196.

Gina Jarrell, the psychotherapist for M.L. and L.B., also first testified *in camera*. Appx. IV 248-272. When asked whether her treatment of the children was "for court or . . . for

¹²Phillips Jones then testified before the jury concerning all matters covered in his *in camera* testimony. Appx. XI 1452-1494. Further, he testified that he had recommended divorce to Bowling, and that they had the following discussion: Q: And did he make a statement . . . to you about who owned all the assets in the marriage, the house, the vehicle, the boat, et cetera? A: Yes. Q: And who did he tell you owned it all? A: They were all in his or the company name. Q: I can't hear you. A: His -- his property. Appx. XI 1463-1464.

therapy,” she replied “It’s for therapy.” Appx. IV 254.¹³ Prior to Ms. Jarrell’s testimony for the jury, the trial court had reiterated its prior rulings concerning all Rule 404(b) and intrinsic evidence.

THE COURT: The objections made in the prior hearing are preserved and, for the record, it’s my belief that I made a finding with regard to each one of these witnesses that I allowed to testify that, in fact . . . the conduct about which they testified did occur, that the testimony was relevant, and that its probative value outweighed its prejudicial effect. I made those rulings on each of the witnesses that I previously allowed to testify and who went through a McGinnis hearing. *I’ll make those rulings right now. If you want to bring them back for any reason, I will obviously permit that.* Appx. VII 20-22.¹⁴

Immediately before Ms. Jarrell testified for the jury, the trial court read the appropriate portion of limiting instructions which were repeated before any Rule 404(b) evidence or even intrinsic evidence was offered and which were included in the trial court’s final charge to the jury. Appx. X 1107-1109, Appx. XIII 2767-2772. Ms. Jarrell testified that she had diagnosed both M.L. and L.B. with post-traumatic stress disorder. Appx. X 1112-1113. Ms. Jarrell described the fear both M.L. and L.B. expressed toward Bowling and the pervasive domestic violence that M.L. had witnessed. Appx. X 1129-1131. M.L. had described to Ms. Jarrell how, at the time of Tresa’s killing, M.L. “was in bed listening to them argue” and that “(i)t wasn’t my fault was the last thing she heard her mom scream, and then a gunshot.” Appx. X 1131-1132. The defense then introduced CPS progress notes and cross examined Ms. Jarrell concerning portions of them. Appx. X 1132, 1145-1150. The State without objection then

¹³ The State cited Syl. Pt. 5, *State v. Payne*, 225 W.Va. 602, 694 S.E. 2d 935 (2010) in support of the admissibility of the children’s statements to their psychotherapist for purposes of diagnosis and treatment under Rule 803, W.V.R.E. The trial court agreed. Appx. IV 246-247.

¹⁴ Defense counsel made no motion to recall for further *McGinnis* hearings any of the witnesses who testified during the April 26-28, 2011 pre-trial hearings or during further June 8, 2011 *McGinnis* hearings. Appx. IV, Appx. VII 21-101. The trial court later reiterated: “. . . I will confirm . . . (f)or any 404(b) testimony . . . the probative value outweighs the prejudicial effect, and . . . following a McGinnis hearing in each case, I have made a finding, by a preponderance of the evidence, that the conduct . . . did, in fact, occur. Appx. IX 845.

questioned Ms. Jarrell concerning remaining portions of the defense exhibits, including multiple references to the fact that both M.L. and L.B. had witnessed Bowling's verbal and physical abuse of Tresa. Appx. X 1150-1153.

Robert Harmon, a fellow inmate with Bowling at the Southern Regional Jail, testified that his attorney and an assistant prosecutor had worked out a plea agreement concerning his pending property crimes. Mr. Harmon and his attorney confirmed that such agreement was independent of his trial testimony. Appx. X 1234-1236, 1285-1290. Mr. Harmon described Bowling's account of the night of the killing.

Yeah, he said he had sat in the driveway for 20 minutes because he knew his friend was going to eventually be called as a witness, so, he said he sat in his driveway . . . to make it appear that everything was fine with him. He even called his wife . . . and said I love you right in front of his friend. I said, why would you do that? He told me the reason why he did it is to -- because he knew his friend would be called because he was going to tell the police or whatever that he drove him home.

Appx. X 1250-1251.

Mr. Harmon testified that Bowling "thought (Tresa) was having an affair" and that "they were talking about" a divorce. Mr. Harmon testified that when Bowling spoke of Tresa, he referred to her as "(b)itch or cunt, one of the two." Appx. X 1252-1253.¹⁵

Dr. Haikal, Deputy Chief Medical Examiner, testified that the gunshot wound to Tresa's left temple was a "fatal firearm assault by a spouse in the setting of a reported history of domestic conflict." Appx. X 1054-1056. Dr. Haikal confirmed that "this . . . was not . . . an accidental death." Appx. X 1066.

Philip Kent Cochran, West Virginia State Police Laboratory firearm and tool mark examiner, testified about the pistol Bowling used to kill Tresa:

¹⁵ Mr. Harmon further testified as follows: Q: Then how did Bowling tell you he killed Tresa on the sofa? A: He said he sat next to her, she was laying down, sat at her hip, pulled his gun out of his front pocket, cocked it back and shot her in the head. Q: Did he say front pocket to you? A: Yes. Appx. X 1277-1278.

Kel-Tec Model P-3AT . . . was test fired and examined for mechanical function and safety. . . . (T)he double-action trigger . . . was found to hold seven-and-one half pounds of pressure and fire with seven-and-three quarters pounds of pressure. No problems were encountered during the examination and test-firing of the pistol and, based on those examinations, the Kel-Tec pistol, State's Exhibit 19, functioned as designed. Appx. XI 1735-1736.¹⁶

Mr. Cochran confirmed that he test-fired the pistol 48 times and that the defense firearms witness test fired the pistol an additional 117 times, and that "at no time did this firearm fire accidentally." Appx. XI 1761-1762.

The State introduced further evidence of the relationship between Bowling and Tresa as intrinsic evidence. As discussed above, the trial court held *in camera* hearings concerning all such evidence and gave repeated limiting instructions as each witness testified, as well as in the final charge to the jury. Appx. IV, Appx. VII 21-101, Appx. XIII 2767-2772.

Marilyn Smith testified that she knew Tresa through their children's sports events, and that she last spoke with Tresa two weeks before Tresa's death. Appx. XI 1535-1536. The trial court, pursuant to its limiting instruction, held that Ms. Smith's testimony was "not for the truth of the matter asserted, it is to explain the relationship." Appx. XI 1532-1534, 1537. Ms. Smith testified that Tresa expressed "sad" feelings about her marriage and expressed her fear that, if she tried to leave Bowling, "he would kill her" and that he "had friends that were state troopers." Ms. Smith was asked, "Did Tresa make it clear to you that she did not want what she was saying reported to the police?" Ms. Smith answered, "Yes." Appx. XI 1537-1539.

¹⁶Mr. Cochran also testified that during his test-firing before the Kel-Tec was delivered to the defense, there was no indication that the ejector was missing, but that after the gun was returned from defense testing, it was missing. Nevertheless, "the ejector is not part of the firing mechanism" and does not "control () the firing of the firearm." Appx. XI 1739. He testified that the pistol holds seven cartridges, so that -- with one bullet in Tresa's head -- the pistol was fully loaded at the time of the killing. Appx. XI 1758-1759.

Rebecca Jones, the wife of Phillip Jones, testified that in July, 2009, Tresa called her in an upset condition because "Chris had busted her in the head and she was bleeding."¹⁷ The trial court read the appropriate limiting instruction. Appx. XI 1548-1550. Rebecca Jones testified that Tresa was crying and "said that she was scared, but she wouldn't leave" because "she couldn't take L.B., and . . . she couldn't take her car." Rebecca Jones later saw the "scab in her head" from Bowling's assault. Tresa did not want anyone to report the assault: "(s)he was scared to tell the police" because "they are all Chris' friends." Rebecca Jones added that Tresa, at night, frequently called to try to find out where Bowling was and whether he was drunk. Tresa "would always say . . . *why is everything always my fault . . . why can't I do anything right; why does he hate me?*" Appx. XI 1550-1553.

West Virginia State Police Cpl. Palmateer testified that he had been friends with Bowling for years, and that he came upon Tresa in 2007 or early 2008, while she was sitting alone at P.J.'s Bar. Appx. XI 1570-1571. She "had been crying." Again, the trial court read a limiting instruction reflecting the prior *McGinnis* hearing. Appx. IV 119-125, Appx. XI 1571-1573. Additionally, the State offered a further limiting instruction, reiterating that Tresa's statements to Cpl. Palmateer were not for the truth of the matters asserted. Defense counsel objected to the additional limiting instruction, saying "I don't see any need for it." Appx. XI 1704-1707. Cpl. Palmateer testified that Tresa "did beg" him "not to tell" what she had to say. Cpl. Palmateer testified that Tresa confided "that Chris had been abusive to her and . . . he had actually pulled his weapon out and fired a round off in the house." Appx. XI 1574-1575¹⁸

¹⁷ On cross-examination, Ms. Jones confirmed that Tresa had called her when "the incident had just happened." Appx. XI 1564.

¹⁸ On cross-examination of Cpl. Palmateer, the defense elicited his opinion of Tresa's credibility. Q: Never went to Chris and said, hey, man, I don't know if this is true or not, but if it is, it's got to stop; right? A: Right. Q: And that's because you didn't even believe her; did you? MS. KELLER: Objection. THE COURT: He can answer the question if he has an answer; overruled. THE WITNESS: It wasn't a case of not believing her, it was a case of, you know, causing her more pain and anguish and possibly escalating

The trial court first heard the testimony of Beth Jones, Tresa's sister, in pre-trial hearings. Appx. IV 86-97. The trial court made requisite *McGinnis* findings. Appx. VII 20-22.¹⁹ Before Beth Jones testified for the jury the State offered a further limiting instruction. Appx. XI 1596-1598. Accordingly, in addition to the limiting instructions cited repeatedly above, the trial court added that Tresa's "*statements to Beth Jones and the Women's Resource Center documents concerning Christopher Bowling's actions, are not offered to show that he committed such acts or to prove his character.*" Appx. XI 1671-1673. Beth Jones then testified that Tresa had called her on July 5, 2009 and had described how, in L.B.'s presence, Bowling had "gashed her head open" with grilling tongs. Shortly thereafter, Beth Jones saw the "scarring . . . on her head." Tresa was "panicked, crying" but afraid to leave and afraid to contact law enforcement. Appx. XI 1675-1677.

Mary Ann Lilly's testimony first was heard by the trial court in pre-trial hearings and the trial court made all requisite *McGinnis* findings. Appx. IV 103-119, 327-329. Immediately before Ms. Lilly testified for the jury, the trial court read a limiting instruction and repeated it in the trial court's final charge to the jury. Appx. XI 1622-1624, Appx. XIII 2767-2772. Ms. Lilly, the wife of a Raleigh County Sheriff's Deputy, testified that she and her husband had socialized with Bowling and Tresa and that in the in the summer of 2008 she witnessed an incident about which M.L. also had testified. The two married couples were "(t)alking, watching the kids play, watching tv in the garage" at 110 Pilot Lane. Ms. Lilly was sitting "side by side" with Tresa and Bowling was standing a few feet behind them. Bowling threw a frozen margarita at Tresa's head and missed, and Ms. Lilly "got hit in the back of the head with his beverage." It was clear that Bowling had intended Tresa as his target.

the situation worse than what it was. Based on that and her not willing to cooperate with me, then I figured it was best to stand back. Appx. XI 1581-1582.

¹⁹ The Petitioner's Brief (at 36, n. 5) states that if such rulings were made, Bowling's attorneys are "unaware" of the fact. Now they are aware.

A: Right after I was hit, before I could even turn around, I heard him yelling to get out of my house right now, get the fuck out of my house, you know, yelling loudly.

Q: And would you tell the jury what M.L.'s reaction was?

A: She was screaming, she was screaming and crying, and she was hysterical. And she just ran to her mom and grabbed her mom and just screamed, you know, mommy I hate him, he does this all the time.

Q: And what was Tresa's reaction?

A: Crying, fear, shocked, embarrassed.

Appx. XI 1627-1630

Ms. Lilly testified that she last saw Tresa approximately one month before Tresa's death. Tresa showed Ms. Lilly a "large bruise on her calf" and told Ms. Lilly that Bowling had "hit her with a belt." Ms. Lilly testified that this was not the first injury that Tresa had shown her, and that in July of 2008 Tresa had a black eye and confided that she and Bowling "had gotten into an argument and that he hit her." Appx. XI 1631-1635.²⁰ Ms. Lilly, like Rebecca Jones, explained that Tresa frequently and at all hours would call, searching for Bowling and asking "how much had he been drinking," and "what kind of mood he was in and if he was okay or if he was angry. She just wanted to know what to expect . . . when he got home." Appx. XI 1635 -1636.

She felt like she couldn't leave because she believed that the vehicle was his, and she couldn't take the vehicle, that he would report it stolen. She believed that she had no money. She believed that if she left, that she couldn't take L.B., because she was scared that if she left and took L.B., that he would kill her. So if she left, she would have to leave her daughter.

²⁰In both the black eye and bruised leg instances, Tresa's statements to Ms. Lilly were not made during or immediately after the injurious events so, pursuant to the trials court's limiting instructions, Tresa's statements were not introduced for the truth of the matters asserted. Additionally, the State offered yet another limiting instruction, emphasizing that Tresa's statements about her black eye and bruised leg were not for the truth of the matters asserted, but defense counsel objected to the instruction. Appx. XI 1704-1707.

Her words were that he said, I can kill you and get away with it, because I have cop buddies.

She would ask me, every time she spoke with me in confidence, to not tell anyone, specifically my husband. Appx. XI 1637-1638.

Janelle Brogan's testimony first was heard by the trial court in pre-trial hearings. Appx. IV 132. The trial court once again instructed the jury that Tresa's statements were not introduced for the truth of the matters asserted. Appx. XI 1663-1665, Appx. XIII. 2767-2772. Ms. Brogan then testified that when Tresa spoke of her marriage to Bowling, she was "shaking, crying" and "very unhappy" but afraid to leave him: "I can't, Janelle, he'll kill me; he will, he'll kill me." Appx. XI 1666-1668.²¹

Charles Richmond also testified during pre-trial hearings. Appx. IV 126-132. Before he testified for the jury, the trial court once again gave a limiting instruction informing the jury that Tresa's statements concerning her fears of what might happen were "*not admissible to show that such fears or beliefs were accurate or that what Tresa Bowling feared or believed would happen did, in fact, happen.*" Appx. XI 1604-1606, Appx. XIII 2767-2772. Mr. Richmond testified that for approximately fifteen years before Tresa's death, he had gone hunting and target shooting with Bowling, and that he had never known Bowling accidentally to point a firearm at a human being, never observed Bowling accidentally to discharge a firearm and never heard Bowling report an accidental discharge. Mr. Richmond testified that in the fall of 2009, Tresa had confided in him and had even asked him to promise that if she was shot in her sleep, he would "tell the police that it was no accident." Appx. XI 1608-1611.²²

²¹ Defense counsel then elicited that Ms. Brogan had seen a bruise on Tresa's face but that Bowling usually "hit her where nobody would see it." Appx. XI 1669-1670.

²² Mr. Richmond visited Bowling in jail in March of 2010. Q: And while you were there, did he discuss Tresa at all. . .? A: No, I don't think so. Q: And then what did he say respecting his memory of shooting Tresa? A: He just said he remembered everything that happened, like it just happened. Q: And

Thomas Moore testified that he had known Bowling for eight years before Tresa's death and that Tresa had been "romantically involved" with Gary Cox, the gentleman whose funeral Tresa and Bowling had attended hours before she was killed. Mr. Moore testified that Bowling and Tresa came to his home after the funeral. Tresa "was grieving . . . crying" but Bowling was "normal." Appx. XI 1498-1508.²³ On February 2, 1010, before his arrest, Bowling was "at a friend's house" with Mr. Moore and was "pacing the floor." Bowling never cried and offered no details of Tresa's killing except to say "the gun went off" and that Tresa's parents "would be mad." Appx. XI 1503-1504.

Christopher Burroughs testified that a few months before Tresa's death, Mr. Burroughs saw Bowling at P.J's Bar.²⁴ Bowling "punched" and "pushed" Mr. Burroughs, who then left the bar and went outside to his vehicle. Appx. IX 828-830. Bowling came out of the bar and approached Mr. Burroughs at his open driver's side window:

Q: And then once he got close, what did you see he had in his hand?

A: He had a gun in his hand, approximately 12 inches away from my face.

Q: Now, after you saw the gun pointed 12 inches from your face, what, if anything, did the defendant say to you?

A: I vividly remember him telling me, do you want to be a smartass now, do you want to run your mouth now. And after that, obviously, I sat pretty quietly. Appx. IX 830-831.²⁵

did he say something about the walls after he made that remark? A: I think he kind of indicated that, you know, the walls have ears or something, but he couldn't talk about it. Appx. XI 1608

²³Mr. Moore also testified that he regularly had engaged in hunting and target shooting and discussions about firearms with Bowling. As all other witnesses confirmed, Mr. Moore never knew of Bowling accidentally pointing a gun at a human being and never knew Bowling to have an accidental discharge and never heard Bowling claim that he'd accidentally fired a gun. Appx. XI 1499-1500.

²⁴Once again, the trial court first held a *McGinnis* hearing and made requisite findings, including that Mr. Burroughs' testimony was admissible pursuant to *State v. Winebarger*, 217 W.Va. 117, 617 S.E. 2d 467 (2005) and *State v. Scott*, 206 W.Va. 158, 522 S.E. 2d 626 (1999). Appx. VII 22-34, 81-88. And once again, the trial court read an appropriate limiting instruction. Appx. IX 846-847, Appx. XIII 2767-2772.

²⁵Mr. Burroughs confirmed that he had never threatened Bowling in any way, but that he did not report Bowling's action to police. Mr. Burroughs explained: "It was pretty well-known that the defendant had

Woodrow Brogan also had testified in *McGinnis* hearings, concerning another incident of Bowling brandishing his Kel-Tec. Appx. VII 52-58. The defense announced that it had “no objection” to evidence of this incident. Appx. VII 90. Nevertheless, the trial court made requisite *McGinnis* findings and read the appropriate limiting instruction. Appx. VII 90-91, Appx. IX 846-847, Appx. XIII 2767-2772. Mr. Brogan testified that in the fall of 2009 at P.J.’s Bar, Bowling fought and defeated another bar patron. The patron went to the parking lot and “started doing doughnuts” on his four-wheeler. Bowling then “stepped to the edge of the pavement and shot at the man,” firing two shots with his Kel-Tec pistol. Appx. IX 847-852.

Robin Pittman testified in pre-trial hearings and the trial court made requisite *McGinnis* findings. Appx. VII 59-69; 91-98. The trial court read an appropriate limiting instruction. Appx. XI 1648-1649, Appx. XIII 2767-2772. Ms. Pittman testified that in 2007, in Tresa’s presence, Bowling brandished a knife and threatened to “slit” Ms. Pittman’s throat. Appx. XI 1653-1655.

The trial court heard the testimony of Marshall Israel and West Virginia State Trooper White in pre-trial hearings and made requisite *McGinnis* findings. Appx. VII 69-81, 96-101.²⁶ Before both witnesses testified, the trial court read an appropriate limiting instruction and repeated it in the final charge. Appx. XI 1392, 1402-1403, Appx. XIII 2767-2772.

Mr. Israel testified that in October, 2004 he saw Bowling and Tresa in Dick’s Yacht Club. A man named Jeff Bishop went to Bowling’s table and spoke with him, “nothing hard, just talking.” Mr. Israel testified that “chairs started flying, Jeff was on the floor” and “Mr.

several friends in law enforcement and it obviously didn’t seem that it would do much good, and I did not want to have any more problems out of it.” Appx. IX 831-833.

²⁶ In his opening statement defense counsel had stated: “ You’ve heard that Ms. Keller is making a big issue out of (Bowling) requesting certain police officers. Ladies and gentlemen, those police officers live close to him. They knew Chris, they knew Tresa, they were their friends. He wanted something done and he wanted something done quickly.” Appx. IX 777.

Bowling was standing overtop of Jeff stomping him.” Appx. XI 1393-1398. Trooper White then testified that he was a new trooper and did not know Bowling when he was dispatched to the assault at Dick’s Yacht Club. When he arrived, Mr. Bishop “was being loaded up into an ambulance” and Bowling had left the premises, so Trooper White telephoned him. Appx. XI 1403-1408. Trooper White described Bowling’s response.

Mr. Bowling referred to me as a slick-sleeve trooper. At that time, he proceeded to tell me – he named several members of the Beckley . . . Detachment that he instructed me to go and talk to them, they would tell me what a good guy he was. That this was self-defense and he pretty much instructed me that he wasn’t going to give a statement to me.

Q: And did he list off more than one of your superior officers?

A: Yes ma’am, he did. He specifically named . . . Trooper Palmateer . . . Appx. XI 1408-1409.²⁷

The trial court also heard testimony of Marita Judy in pre-trial hearings and made requisite *McGinnis* finding. Appx. IV 273-285, 327-329. The trial court read to the jury the relevant portion of the limiting instructions repeatedly cited above. Appx. X 1078-1079, Appx. XIII 2767-2772. Ms. Judy testified that she had been married to Bowling until 2001, and that during that time he referred to her as “(s)tupid bitch or cunt.” Appx. X 1080-1083.²⁸ Ms. Judy demonstrated her final encounter with Bowling, using a duplicate curling iron, a Remington which heated to 360 degrees. Appx. X 1083-1085.

Bowling had been out all night and had returned home while Ms. Judy was getting ready for work. She was in the bathroom, and Bowling put his fist through the door. Appx. X 1085-1086.

Q: After the defendant punched the hole in the door, would you tell the jury what he did with you and with the curling iron?

²⁷Bowling went on to assure Trooper White – in Bowling’s words – that these troopers would attest that Bowling “wasn’t a shit-bag.” Appx. XI 1409-1410.

²⁸ Compare inmate Robert Harmon’s testimony regarding Bowling’s epithets for Tresa. Appx. X 1252-1253.

A: Yes. We were arguing back and forth, and he came into the bathroom and I was curling my hair, and he reached from behind and grabbed me, and grabbed the curling iron and held it against my face.

Q: Did it burn your face?

A: Yes, it did.

Q: And did you have the curling iron fully heated - -

A: Yes.

Q: - - at the time that the defendant grabbed it and held it against your face?

A: Yes, ma'am. Appx. X 1086-1087.²⁹

The defense tactic was to attack Lt. Bare, the lead detective. Despite the claim in the Brief (at 11), there was *no* evidence that Lt. Bare was at the scene of the murder for only "16 minutes." Appx. XII 1862-1863. Defense counsel repeatedly elicited Lt. Bare's motivations and opinions concerning this case.

Q: I mean, you're the person who is supposed to figure these things out right?

Q: Regardless, is either of those amounts of times enough time to process a possible murder scene that might end up with somebody in jail for the rest of their life?

Q: You thought you had an open-and-shut case; didn't you?

Q: And then you chose to go back to the station house; right, thought you were going to do the interview and take care of it?

Q: Other than these witnesses about other things, there's not one thing that contradicts what he told you from the very beginning of this case when he waived his rights and made a statement to you; isn't that right? Appx. X 998-1018.

Q: And everything you're telling us is based upon your opinions; right?

A: Everything?

Q; Yeah, about the placing of the gun, where it should have been, that's your opinion; right?

Q: You did a 16 minute investigation and you've been trying to cover your butt ever - -

MS. KELLER: Objection, Your Honor.

²⁹ Ms. Judy confirmed that the burn left a permanent scar on her left cheek. Appx. X 1087.

MR. WESTON: - - since; haven't you?

Appx. X 1037-1038.

Q: Okay. You say that part of his guilt in your own mind is based upon the shell wasn't in the right place according to his testimony; right?

A: My belief goes a lot farther than just the positioning of a shell casing.

Q: Right, but that is part of your reasoning, yes or no?

A: Small part.

Q: Now, Mr. Harmon, basically you got up here and said he's telling the truth?³⁰

Q: Now, you said you know what happened, right?

A: Yes.

Q: There's no way you could know what happened that night based upon a 16-minute investigation?

MS. KELLER: Objection.

THE COURT: Overruled; he can answer.

THE WITNESS: I know what happened, because it's been a 17-month investigation, not 16 minutes. Appx. XII 1895-1902.

On redirect examination, because defense counsel had persistently and falsely accused Lt. Bare of an inadequate and biased "16-minute investigation" and had repeatedly elicited Lt. Bare's opinions, the trial court permitted the State to inquire of Lt. Bare concerning whether in the course of his 17-month investigation he had "found substantial evidence, beyond a reasonable doubt, that the defendant shot his wife with malice." The single defense objection was "calls for a legal conclusion, beyond a reasonable doubt." The objection was overruled. There was no objection when the State asked whether throughout his investigation, Lt. Bare had "obtained evidence beyond a reasonable doubt to prove that this was a premeditated murder." Appx. XII 1909-1910. The State "in an abundance of caution" offered a limiting instruction concerning Lt. Bare's testimony. The trial court ruled:

The testimony was appropriate in light of the challenges raised by the defendant to (Lt. Bare's) ability to have any knowledge regarding the case based upon what the defense believes to be an inadequate investigation. But it needs to be made clear that his investigation is

³⁰ Lt. Bare never vouched for Mr. Harmon's credibility until his opinion was elicited by the defense.

his investigation. The jury has the responsibility of making the legal determinations in this case.

I'll give the limiting instruction over your (the defense) objection.

Appx. XII 2023-2025.

The trial court then read to the jury the limiting instruction that ensured Lt. Bare's testimony did not invade the province of the jury, and repeated it in the final charge. Appx. XII 2114-2115, Appx. XIII 2771-2772.

After the State rested, the defense called Bowling's mother. She confirmed on cross-examination that she had visited Bowling in jail more than 182 times and that all he had ever told her was that Tresa's death was "just an accident" and that she never had asked her son for any details. Appx. XII 2141-2142.

Bowling then testified and summarized his life history. Appx. XII 2179-2187. He gave his version of burning Ms. Judy, after describing himself as a "smart ass that morning."

(W)e were arguing and I - - I had already made up my mind I was going to leave, so I walked by the bathroom and - and was going to be a smartaleck and *give her a kiss on the cheek*, and didn't see that she had the curling iron. Her hair was wrapped up, you know, I was on this side of her and the curling iron was on the other side of her. And I just - - when I reached around to - - I pulled it into her face and she - I mean, I'm sure it hurt. She got mad. Appx. XII 2189-2190.³¹

Bowling attempted to explain M.L.'s description of Bowling dragging Tresa to the car and banging her head on the hood, and confirmed that the event occurred after he and Tresa "had got in an argument."

And, on a few occasions, I covered Tresa's mouth up. I would tell her, you know, shut up, don't talk like that in front of the kids, or hush, and would cover her mouth up. I wasn't trying to keep her from breathing. And she got -- got her pocketbook, got her key, and I grabbed her around the waist and around the shoulders and pulled her back out of the office and turned her loose to deal with the door, because that door . . . I hadn't shimmed it out and got it right yet. . . . And I turned around, she was trying to get back in her vehicle. And I just grabbed

³¹ The Brief (at 15) reiterates Bowling's claim about the moments before he shot Tresa: "he . . . kisses his wife. . . ."

her, I turned her around, pushed her up on the hood of the vehicle, got her arms behind her back and took her key away from her. And I – I assume that’s what M.L. saw.

By MR. HOUCK (resuming):

Q: Okay. Was you beating her head into any part of the car?

A: No, but, I mean, she -- she was putting up a fight. You know, I was trying to hold onto her, hold her down and -- and get her key from her. Appx. XII 2230-2231.

Defense counsel then inquired about “an incident in July . . . 2009, where Mary Ann Lilly and maybe another witness saw Tresa with a black eye:”

A: I -- I wouldn’t call it a black eye, but we – we did have a instance where I hit her in the eyeball. Appx. XII 2233-2235.

Bowling then addressed the grilling tong assault. He had been grilling steaks and drinking beer. Tresa had put potatoes in the microwave but “she hadn’t hit the button.” Bowling testified that he “had been a smart-ass, yes.” Appx. XII 2237-2238.

And you know . . . I was drinking, too, don’t get me wrong, but I just wanted her to, you know, take care of what we had going on and -- and she got mad, and . . . grabbed the beer can and squashed it upside my head, and I just reacted. . . pushed her back away and I hit her with the tongs. And I didn’t even realize I had hit her at first. She went to the bathroom . . . and she had gotten a -- you know, she had got a little cut on her head. It was -- it was not a three or four-inch gash but

Q: Okay. Did you offer to take her to the doctor?

A: I don’t -- I don’t remember Appx. XII 2238-2239.³²

Bowling testified about his September 2, 2009 911 call. Supp. Appx. 46-48. He claimed that he and Tresa had “the best talk” they “ever had” after deputies departed.

³² Defense counsel also inquired about Bowling’s behavior at Hooter’s in December, 2009 when he angrily pulled out his Kel-Tec, knocked Tresa to the floor, repeatedly urged Brian Keaton to kill Tresa and expressed the fact that he hated “that bitch” and wanted to be rid of her. Bowling disputed none of the testimony of State’s witnesses concerning his December, 2009 conduct because, he claimed, he had no memory of the event, as he had consumed brandy with his beer. Appx. XII 2260.

Bowling then confirmed that by September 2, 2009, he knew that Tresa had been confiding in others about his conduct.

A: Well, I - I told Tresa. . . you've said some things about me that -- that are not true, and, at some point, you know, we're -- we're going to need to clear these up.

Q: She had -- she had told you that she had told some things to friends and police officers and even Charlie Richmond; is that correct?

A: Yes.

Q: And I think you told me, at first, you laughed about it?

A: We -- we -- you know, I told her, I said, Tresa, I said -- you know, I said, some of these things you said, I said they're going to think I'm a damn nut, you know. . . . Appx. XII 2256-2259.

Bowling then described in intricate detail the events of January 31, 2010, including going to P.J.'s Bar with Tresa after Gary Cox's funeral and then going to Thomas Moore's home, adding that "(e)verything was focused on Gary" before Tresa left alone to pick up the children and go home. Appx. XII 2263-2272. Bowling testified that he was "not drunk." Appx. XII 2278.

He described walking into his home shortly before shooting Tresa and added, "(t)he usual thing I done was took my watch off, my change, emptied my pockets, all that stuff on the entertainment center there in -- in front of the front door. Appx. XII 2282.³³ Although during his recorded statement to Lt. Bare, Bowling claimed no memory of his last conversation with Tresa or of how he shot her, he claimed for the jury a detailed memory of their discussion concerning Gary Cox's suicide as he pulled out his pistol.

I looked at the gun and the -- the first thing that I realized, that there was a gob of lint on the back of it. . . I seen some lint and realized the slide was out of battery.

I blew (demonstrating) -- blew the lint out of it. I pushed down on the slide . . . it felt funny, kind of like . . .if you were. . . slicing a piece of cheese off a block of cheese with a knife, it felt like it was digging into

³³ M.L. testified that Bowling's consistent habit was to place his pistol on the entertainment center with "all that stuff." Appx. IX 807-809.

something, but I pushed it and it went a little bit, and I pushed it again and that's when the gun discharged. . . . Appx. XII 2288-2292.³⁴

On cross-examination, when asked if his testimony was from his memory of killing Tresa or from his review of discovery materials, Bowling did not know. Appx. XII 2317-2319. Included in the letters written by fellow inmate Robert Harmon was Bowling's claim that he believed Tresa had been having an affair. Bowling testified that he never had made such a claim to Robert Harmon or to anyone else. Appx. XII 2326.

Bowling confirmed that by September, 2009, he knew that Tresa had disclosed their marital discord and her fears to others. Appx. XII 2363-2365.

Q: When you heard that your wife (had) said about you. . . if I'm found dead in my sleep, it's no accident, would you agree that sounds like an expression of fear on the part of Tresa . . . ?

A: I mean, I guess it could.

Q: And Tresa had good reason to fear you; didn't she?

A: No.

Q: Who ended up shooting her through the head as she was lying on the sofa?

A: I -- I did, but I didn't --

Q: And who ended up claiming and is still claiming, that it was an accident?

A: Me. Appx. XII 2366.

When testifying about why he had no communication with M.L. or L.B. or the rest of Tresa's family after the killing, Bowling reiterated that he "didn't know what to say" from January 31, 2010 through his February 2, 2010 arrest.

Q: The reason you did not know what to say is you had not yet come up with the story that you have just demonstrated to the jury, that's why you didn't know what to say; isn't it true?

A: No, this totally -- this is what I told that night.

Q: So you're testifying that what you told on January 31, 2010 and February 1, 2010 is exactly what you just demonstrated; is that right?

³⁴ The defense employed a couch and a mannequin to have Bowling demonstrate how he claimed to have killed Tresa. When defense counsel asked Bowling to step to the couch and "arrange the pillows" and show "where Tresa was," Bowling inquired, "Could -- could I look at a crime scene photograph of the couch and stuff?" Appx. XII 2286.

A: I'm not saying it's exactly, no.

Appx. XII 2396.³⁵

Bowling agreed that he was not acting out of anger or in the "heat of passion" or as a result of provocation when he killed Tresa. He agreed that he did not act in "reckless disregard of Tresa's well-being and safety" when he killed her and confirmed that his defense was that this was "purely an accident." Appx. XII 2405-2406.

Q: You agree with me that there is a possibility that Tresa was aware of the muzzle of the gun . . . pointed at her head?

A: I mean, I don't - - I don't think so.

Q: Well, then, would it be your testimony that Tresa was unconscious of you taking out the gun and pointing it at her head and noticing it was out of battery and blowing it and trying to get it back into battery; she very well could have noticed all of that, couldn't she?

A: I mean, I - - I guess she could have.

Q: And, (at)no time, according to you, did your wife say, what are you doing with a gun, don't point the gun at me; she said nothing about it?

A: That's - - that's what I'm saying. I don't - - I wasn't pointing the gun at her in a threatening way. Appx. XII 2411-2412.

Bowling's final witness was Amy Driver, who had testified in pre-trial *Daubert* hearings.

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed. 2d 469 (1993). Ms. Driver recognized the Kel-Tec Safety Instruction and Parts Manual as an authoritative document. Appx. IV 175-176. Rule 803(18), W.V.R.E. She agreed that the hammer block is a safety feature in the Kel-Tec, and that the gun used to kill Tresa was equipped with this feature. She also agreed that "(o)nly by deliberately pulling the trigger can the hammer block be disengaged." Appx. IV 178. She prepared two computer-generated images of the possible positions of Bowling and Tresa when Bowling fired. She agreed that the first image "looks like a man intentionally killing a woman." In the second image, the man

³⁵In fact, Bowling admitted that *never* in any of his statements after the killing did he tell the story of seeing lint on the gun, noticing it was out of battery, and then accidentally shooting Tresa as he was attempting to get the gun back into battery. Appx. XII 2397.

holding the gun was looking away from the woman: she agreed that if the man's head was turned toward the woman, the image "could be" of a murder. Ms. Driver conceded that her reconstructions were not based upon any information from Bowling, since "what (he) says is he doesn't know what happened." Appx. IV 196-213.

In repeatedly confirming that if the Kel-Tec is "jammed" or is out of battery for any reason, *it will not fire*, Ms. Driver also agreed that the shooter must have his finger on the trigger and must apply "deliberate pressure" in order to shoot. She agreed that this is otherwise known as "*pulling the trigger.*" Appx. IV 201.

Ms. Driver confirmed that nothing about the springs in the Kel-Tec would cause an accidental discharge. Appx. IV 206-208. She also confirmed that she had test fired the Kel-Tec used to kill Tresa 117 times.

Q: And would you agree that, in your 117 test fires of the alleged murder weapon, you could never get it to fire unless your was finger on the trigger and you applied deliberate pressure?

A: Correct.

Q: And, you also agreed in your reports that, when we're talking about deliberate pressure, we're talking about between 7 ½ and 7 ¾ pounds trigger pull; correct?

A: Correct.

Appx. IV 214.

Moreover, Ms. Driver testified that the ammunition used by Bowling did not cause an accidental discharge. Appx. IV 219. Nevertheless, defense counsel later argued:

MR. HOUCK: . . . I mean our whole defense is he was drunk,³⁶ he had a gun that was malfunctioning and he's sitting there fooling with it around his wife's head and, while fooling with it, trying to get it back into place, it goes off. Appx. V 12.

In a later *Daubert* hearing Ms. Driver confirmed her earlier testimony, that nothing about the condition of the Kel-Tec would cause it to fire without the shooter's finger on the

³⁶ Actually, the defense already had announced that Bowling would not claim a defense of intoxication or any other diminished capacity and that his sole "contention (was) that this was an accident." Appx. IV 334-336.

trigger, applying deliberate pressure. Appx. IX 712-718. Based upon her *in camera* testimony, the trial court ruled that there was no evidence that a malfunction of the Kel-Tec caused it accidentally to fire.³⁷ Later, based upon Ms. Driver's further *in camera* testimony, the trial court ruled that the Kel-Tec's springs "had nothing to do with an accidental discharge." Accordingly, testimony about the springs was irrelevant and of no probative value and inadmissible under Rules 402, 403 and 702, W.V.R.E. Appx. XIII 2453.

Ms. Driver testified for the jury that she had worked for the Los Angeles Police Department. Appx. XIII 2461-2462.³⁸ Defense counsel elicited that her "theory of this firearm and what . . . happened" had "come from" defense counsel, rather than from her own analysis. Appx. XIII 2466. Ms. Driver began to testify about a mark on the casing, to which the State objected. Appx. XIII 2490-2492. Ms. Driver opined that the mark on the cartridge case "indicat(ed) that there may have been some sort of malfunction" but she could not testify with a reasonable degree of scientific certainty as to what the "possible" malfunction might have been. Accordingly, the trial court suppressed such speculative testimony. Appx. XIII 2496-2499.

Ms. Driver then was asked by defense counsel:

³⁷ "Ms. Driver is not going to - - and you're not going to, from the defense side, be able to argue to the jury . . . that this weapon, because it was malfunctioning in some way, that it would discharge without someone pulling that trigger. That trigger had to have been pulled, either partially or fully, before it would discharge. At the prior proceeding, it was clear that the defendant wanted to argue that simply by slamming it back into battery, that the gun discharged. That is, in fact, not her opinion."

³⁸ On cross-examination, Ms. Driver admitted that she had been "constructively discharged" from LAPD. She also agreed that in her subsequent lawsuit she asserted that her "employment background" with LAPD caused her job application to be rejected by the Los Angeles Sheriff's Department and that she was refused membership in the California Association of Criminalists. She confirmed that the LAPD accused her of "neglect of duty and making false statements," with the charges sustained after investigation, "preclud(ing) her from employment as a criminalist at any law enforcement agency." She agreed that her LAPD experience and subsequent rejections caused her to "continue to suffer . . . depression and anxiety" as well as "a loss of earnings." Appx. XIII 2592-2596. She estimated her billings in Bowling's case as being in the "high" end of \$60,000 to the "low" end of \$70,000. Appx. XIII 2533-2534.

Q: And did we ask you to examine this firearm and did we tell you what we believed happened?

A: Yes, you did.

Q: Were you able to duplicate what we told you happened?

Defense counsel then gave Ms. Driver an opportunity to “duplicate” for the jury the defense lawyers’ theory of how the Kel-Tec possibly could have fired. However, when counsel handed the murder weapon to Ms. Driver, she found it impossible to “duplicate” the “out-of-battery condition” necessary for the theory to be demonstrated to the jury, and counsel aborted the failed demonstration. Appx. XIII 2501-2504.³⁹

On cross-examination Ms. Driver was asked if he had ever heard of the version of Tresa’s killing demonstrated by Bowling for the jury. Ms. Driver testified that she “didn’t know that” version. Appx. XIII 2530. Ms. Driver agreed that between her 117 test fires and C.I.B.’s test fires, there were at least 158 to 160 test fires, and that the Kel-Tec never accidentally discharged. Appx. XIII 2537-2538. She agreed that the Kel-Tec, which holds seven rounds, was fully loaded when Bowling shot Tresa. Appx. XIII 2553. She confirmed her *in camera* testimony, that the “deliberate pressure” by Bowling’s finger on the trigger, required to cause the Kel-Tec to fire, is known as “pulling the trigger.” Appx. 2566-2567.⁴⁰

After the defense rested, the State called Capitol Police Department Officer Ellie Jarrett, formerly Deputy Jarrett, concerning Robert Harmon’s account of Bowling believing that Tresa had an affair and Bowling’s testimony denying that he ever expressed such belief.

³⁹ In “real time,” Ms. Driver’s multiple failed attempts went on so long that defense counsel cautioned “You’d better not have tore up our exhibit,” referring to the Kel-Tec, State’s Exhibit 19.

⁴⁰ Because Ms. Driver had opined about “short strokes,” the State recalled firearms expert Eddy Hatcher, who demonstrated a “short stroke” of the trigger and explained that it was impossible that Bowling employed a “short stroke” when he fired, because the Kel-Tec was fully loaded. A: Right, it’s irrelevant. The gun fired, so there was -- you know -- there was -- that was the only trigger pull. You know, there’s no short stroke involved. Appx. XIII 2655.

Officer Jarrett confirmed that in August, 2009 Bowling expressed his belief that Tresa was having an affair. Appx. XIII 2648-2651.

After jury instructions and closing arguments, the jury on July 15, 2011 returned a verdict finding Bowling guilty of first degree murder by use of a firearm. Appx. XIII 2853. The trial court earlier had granted the defense bifurcation motion, so jurors returned the next day to decide the issue of mercy. On July 16, 2011, the jury returned its unanimous verdict declining to recommend mercy. Appx. XIII 2936-2937. On October 31, 2011, the trial court sentenced Bowling to life in the penitentiary without possibility of parole.

STATEMENT REGARDING ORAL ARGUMENT: Oral argument is unnecessary.

ARGUMENT

I. THE DEFENSE WAIVED ANY CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION BY HOLDING PRE-TRIAL HEARINGS IN THE COURTROOM

The defense filed no motion for closure of *in camera* proceedings. Moreover, the Brief relies upon *Blacks Law Dictionary* as authority: West Virginia case law trumps the dictionary. This Court has recognized “an independent right in the public and press to attend criminal proceedings,” including *in camera* hearings. Syl. Pts. 1 and 2, *State ex rel. Herald Mail Co. v. Hamilton*, 165 W.Va. 103, 267 S.E. 2d 544 (1980).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REFUSING TO GRANT DEFENSE MOTIONS TO STRIKE TWO JURORS FOR CAUSE.

The Brief (at 20-21) relies upon misleading recitations of the record to argue that “jurors Long and Collins made . . . clear statement(s) of bias during voir dire.”⁴¹ Ms. Collins initially gave a vague response to the trial court’s inquiry as to whether she could base her

⁴¹The Brief (at 20) erroneously contends that “near the end of the voir dire, the Court abused its discretion and denied motions to strike jurors . . .” In fact, the record demonstrates that the trial court repeatedly granted defense motions to strike jurors for cause throughout “the end of the voir dire.” Appx. VIII, Appx. IX 432-677.

verdict “only on the evidence that you hear in the courtroom and only on the law.” Appx. VIII 387. Pursuant to Syl. Pt. 4, *O’Dell v. Miller*, 211 W.Va. 285, 565 S.E. 2d 407 (2002), the trial court conducted “further probing.” Ms. Collins then repeatedly confirmed that she would put aside whatever she had gleaned from the media and that she would base her verdict solely on the evidence at trial and that she understood that all defendants are “innocent until they’re proven guilty.” Appx. VIII 387-394.⁴²

Juror Long’s only information about this case came from what she’d heard at her former job: “Just that this man shot his wife in front of their child.” She confirmed that she would “put aside” what she had heard and “make a decision based solely on what (she) hear(d) in the courtroom.” Appx. VIII 412. She confirmed that Bowling was presumed innocent and that she would acquit him if the State did not prove him guilty beyond a reasonable doubt. She also advised that defense counsel’s questions were “confusing” and repeated that Bowling was “not guilty.” Appx. VIII 418-421.⁴³

The standard of review of a trial court’s rulings on juror disqualification is an abuse of discretion. *State v. Miller*, 197 W.Va. 588, 476 S.E. 2d 535 (1996). In Syl. Pt. 4 of *Miller*, this Court confirmed that the “relevant test for determining whether a juror is biased is whether the juror had such a *fixed* opinion that he or she could not judge impartially the guilt of the defendant.” (Italics added). The responses of Ms. Collins and Ms. Long established that they

⁴²In denying the defense motion to strike Ms. Collins for cause, the trial court found: “She indicated that . . . her opinion was that it looked bad, based upon what she had read and seen in the newspaper, but she also understood that she hadn’t heard the entire case and that she would have to hear the whole thing, and that she clearly and repeatedly indicated that she understood that they have to prove them guilty, and they are innocent until they are proven guilty, so she will be seated over the objection of the defendant.” Appx. VIII 395.

⁴³The trial court, denying the defense motion to strike Ms. Long, found: “She clearly indicated that she was confused by counsel’s question. Upon questioning by the Court with regard to the fact that there’s no evidence against him, now, no legal evidence against him, and I asked her specifically, based on your knowledge that there is no evidence against him, is he guilty or not guilty, and she said he’s not guilty. So she’s in.” Appx. VIII 422-423.

had no such fixed opinions, and also that the trial court was correct in finding that both jurors understood that Bowling was presumed innocent.⁴⁴

III. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY PROHIBITING THE DEFENSE FIREARMS WITNESS FROM OFFERING TESTIMONY THAT VIOLATED RULES 402, 403 AND 702, W.V.R.E.

As discussed above, Ms. Driver repeatedly testified that none of the purported “problems” recited in the Brief (at 24-27) could have caused the Kel-Tec to fire in the absence of Bowling’s finger on the trigger and his application of deliberate pressure: a.k.a. “pulling the trigger.” In *Gentry v. Mangum*, 195 W.Va. 512, 520, n.6, 466 S.E. 2d 171, 179 n.6 (1995), this Court set forth the abuse of discretion standard applicable to the review of a trial court’s rulings on the admissibility of expert testimony. The Brief fails to identify how any of the trial court’s rulings regarding Ms. Driver ignored a material factor or relied upon an impermissible factor or resulted from an error in weighing such factors. No one quarrels with the fact that a criminal defendant has a “fundamental constitutional right to a fair opportunity to present a defense.” But none of the cases cited in the Brief (at 22-23) hold that such “fair opportunity” means that Rules of Evidence operate only against the prosecution, and are suspended when the defense takes its turn. Further, the United States Supreme Court in *Crane v. Kentucky*, 476 U.S. 683 at 690, 106 S.Ct. 2142 at 2146-2147, 90 L.Ed. 2d 636 at 645 (1986) held that a defendant’s right to “a meaningful opportunity to present a complete defense” would be violated if “the State were permitted to exclude competent, reliable evidence” The trial court in this case excluded no “competent, reliable” testimony of Ms. Driver, and properly

⁴⁴The Brief (at 12, 20) makes the claim in passing - - but does not assign as error - - that jurors supposedly “heard about this case . . . while sitting in the courtroom . . . (during) . . . individual voir dire.” The citations in the Brief are to the record of the first trial, not the instant trial. The Brief abandons any claim of error in this regard. “(I)ssues which are mentioned only in passing . . . are not considered on appeal.” *State v. Lilly*, 194 W.Va. 595, 605 n.16, 461 S.E. 2d 101, 111 n. 16 (1995).

exercised its discretion and its gatekeeping function by preventing her from offering testimony in violation of Rules 402, 403 and 702, W.V.R.E.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING MANSLAUGHTER INSTRUCTIONS

As discussed, above, the defense was an “all or nothing” claim of accident.⁴⁵ The Brief cites *State v. McGuire*, 200 W.Va. 824, 490 S.E. 2d 912 (1997), in which the appellant sought reversal of her voluntary manslaughter conviction because the trial court’s instruction on voluntary manslaughter “failed to inform the jury on the ‘elements’ of gross provocation and in the heat of passion.” This Court affirmed the conviction, finding that the “exclusion of these factors does not warrant reversal *under the facts of this case.*” (Italics added). The facts were that the defendant “intentionally killed (her) baby when she placed her in the woodstove.” The facts also were sufficient for the jury to find that she “did not kill the baby maliciously; rather, she killed the baby because she believed it was the best thing to do under the circumstances.” *McGuire* is wholly inapplicable to this case: there was no evidence that Bowling, without malice, intentionally fired a bullet into Tresa’s head because he “believed it was the best thing to do under the circumstances.”⁴⁶

In Syl. Pt. 1, *State v. Leonard*, 217 W.Va. 603, 619 S.E. 2d 116 (2005), this Court affirmed a first degree murder conviction in a case in which no voluntary manslaughter instruction was given:

Jury instructions on possible guilty verdicts must only include those crimes for which *substantial evidence* has been presented upon which the jury might justifiably find the defendant guilty beyond a

⁴⁵ The Brief (at 24) confirms that: “(a)t the very onset of the case, the defense theory of this case was this was an accidental discharge relating to the poor condition of the gun. . . . That because of the improper functioning of the gun, the gun accidentally discharged. . . .”

⁴⁶ There is, however, a haunting claim made in passing in the Brief (at 8), that Bowling was “prevented from offering justification evidence” and that the killing was “in response to her . . . abuse (of) prescription medication.”

reasonable doubt. Syl. Pt. 5, *State v. Demastus*, 165 W.Va. 572, 270 S.E. 2d 649 (1980). (Italics added).

In *State v. Smith*, 198 W.Va. 441, 481 S.E. 2d 747 (1996), a case in which the appellant acted in concert with her son to murder the appellant's husband, the trial court refused to instruct the jury on voluntary manslaughter. This Court affirmed the conviction because there was no evidence that the appellant acted in anger or the heat of passion. "The evidence, therefore, did not warrant the giving of an instruction concerning voluntary manslaughter." Similarly, in *State v. Beegle*, 188 W.Va. 681, 686, 425 S.E. 2d 823, 828 (1992) this Court held that a defendant was not entitled to a voluntary manslaughter instruction when "the defendant's own testimony shows that he was not acting in anger or the heat of passion" In the instant case there was utterly no evidence – much less the requisite "substantial evidence" – to warrant a voluntary manslaughter instruction: Bowling's own testimony was that he did not shoot Tresa because he was provoked or angry or in the heat of passion. Appx. XII 2405-2406.

The Brief (at 27) emphasizes that Bowling "has contended from day one that this was an accidental discharge" caused not by any act of Bowling but by "this gun's poor condition." Nevertheless, the Brief (at 28-30) then attempts to convert a defense of pure accident into a case of involuntary manslaughter. There was no "pertinent theory" of the defense that Bowling committed any unlawful act, as is required for a conviction of involuntary manslaughter. "Inadvertent acts of negligence . . . while giving rise to civil liability, will not suffice to impose criminal responsibility." *State v. Vollmer*, 163 W.Va. 711, 259 S.E. 2d 837, 840 (1979). Bowling's own testimony was that he did not act in reckless disregard of Tresa when he killed her. Appx. XII 2405-2406.

Similarly, in *State v. Davis*, 205 W.Va. 569, 519 S.E. 2d 852 (1999) the defendant was convicted of murdering her child by caffeine poisoning. This Court found no error in the trial

court's refusal to give an involuntary manslaughter instruction because the "defendant foreclosed this option by presenting evidence that the caffeine was due to coke syrup Therefore . . . no evidence was presented to support a verdict of involuntary manslaughter." The Brief fails to demonstrate that the trial court abused its discretion by refusing to give an involuntary manslaughter instruction when the only "pertinent theory" offered by the defense was one of pure accident, by which the defense denied that any unlawful conduct by Bowling caused Tresa's death.

V. NO TESTIMONIAL STATEMENTS WERE INTRODUCED INTO EVIDENCE

The Brief (at 30-32) relies upon *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004) and *State v. Mechling*, 219 W.Va. 366, 633 S.E. 2d 311 (2006) in claiming that the trial court allowed the introduction of evidence of Tresa's statements in violation of the Sixth Amendment and W.Va. Const. Art. III, § 14. The fatal flaw in the Brief is that the reader would be misled into believing that the statements at issue were admitted for the truth of the matters asserted. The Brief ignores the fact, discussed at length above, that the trial court repeatedly instructed the jury to the contrary whenever Tresa's statements were introduced into evidence and again in the final charge to the jury. Appx. XIII 2767-2772

This Court in *State v. Reed*, 223 W.Va. 312 n. 34, 674 S.E. 2d 18 n. 34 (2009) confirmed that the Confrontation Clause is implicated only when a statement of an unavailable witness is admitted for the truth of the matter asserted.

The decision in *Crawford* made clear that the Sixth Amendment right of confrontation "*does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.*" (Citation omitted). (Italics added).

Further, the Brief errs in describing Tresa's statements to Trooper Palmateer, Marilyn Smith and Beth Jones as "testimonial."⁴⁷ As discussed above, these witnesses all testified that Tresa was adamant that she did not desire a law enforcement investigation. Tresa's statements were of the kind which the United States Supreme Court has recognized as *not* "testimonial," such as "(s)tatements to friends and neighbors about abuse and intimidation." *Giles v. California*, 554 U.S. 353, 373, 128 S.Ct. 2678, 2692-2693, 171 L. Ed 2d 488,____ (2008).

Except when Tresa asked Charles Richmond to tell police, in case of her death, that it was "no accident," the evidence established that Tresa did not want police involved because she feared that Bowling would retaliate against her. The trial court repeatedly instructed the jury that Tresa's requests to Charles Richmond were not admitted into evidence to show that her fears or belief were accurate or that what she feared would happen did, in fact, happen. Accordingly, evidence of such expressions was not for the truth of the matters asserted and was not prohibited by *Crawford*. Appx. XIII 2767-2772.⁴⁸

VI. THERE WAS NO INADMISSIBLE HEARSAY EVIDENCE AND NO EVIDENCE ADMITTED IN VIOLATION OF RULE 404(b) W.V.R.E.

As discussed above, the jury repeatedly was instructed that evidence of Bowling's prior conduct was not to prove his character and that Tresa's statements were not introduced for the truth of the matters asserted. Appx. IX 846, Appx. X 1078, 1107, Appx. XI 1392, 1402, 1436, 1532, 1548, 1571, 1604, 1622, 1648, 1663, 1671, Appx. XIII 2767-2772. Evidence of Bowling's threats and violence against Tresa was admissible as intrinsic evidence.

⁴⁷ The Brief (at 34-35) indicates that the defense was surprised by Marilyn Smith's trial testimony. The defense made no such claim at trial, presumably because the content of her testimony in the first trial was the same as in the instant trial. Appx. VI 897-902, Appx. XI 1535-1542.

⁴⁸ The Brief (at 37-39) then argues that the "medical records" of psychotherapist Gina Jarrell were improperly admitted into evidence. The State withdrew the records from evidence in the guilt phase of the trial. Appx. XIII 2725-2726.

After carefully reviewing the record, we cannot say that the trial court abused its discretion in finding that the prior acts constituted intrinsic evidence, not subject to Rule 404(b) analysis. While the acts were not part of a 'single criminal episode' or 'necessary preliminaries' to the charged offense, it is difficult to conclude that the evidence was not necessary to 'complete the story of the crimes on trial' or otherwise provide context to the crimes charged. [] *This is especially true in light of the domestic violence overlay to the pattern of behavior. State v. Dennis*, 216 W.Va. 331, 607 S.E. 2d 437, 458 (2004).⁴⁹

Also as repeatedly discussed above, the Brief (at 43-44) simply misstates the record in claiming that the trial court did not make requisite *McGinnis* findings as to all Rule 404(b) W.V.R.E. testimony. In *McGinnis*, 193 W.Va. at 159, 455 S.E. 2d at 528, this Court confirmed that "(i)n 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." The record demonstrates that the trial court did not abuse its discretion in admitting such evidence for the specified limited purposes. Appx. XIII 2767-2772.

VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING TESTIMONY OF LT. BARE CONCERNING OTHER CASES, HIS CONCLUSIONS IN THIS CASE AND BOWLING'S ARREST

In opening remarks defense counsel characterized Bowling's conduct:

When the gun goes off, he immediately realizes his wife has been shot. He grabs her up in his arms. He is frantic. Does he run; does he try to hide the body? No, he calls 911. He calls them immediately Appx. IX 776.

The State, after a defense objection, offered to "rephrase" a question concerning Bowling's 911 call and the inferences drawn by Lt. Bare in his investigation. In fact, the State withdrew the question entirely. Appx. X 981-982 The State then briefly inquired about three investigations in which Lt. Bare participated, in which defendants called 911 after killing their victims. The only point at which the defense objected was:

⁴⁹ This Court in *Dennis* reviewed the discussion of intrinsic evidence in *State v. La Rock*, 196 W.Va. 294, 470 S.E. 2d 613 (1996).

BY MS. KELLER (resuming):

Q: What was the last case in which you testified in the Raleigh County Circuit Court?

A: Rodney Berry.

Q: Objection, relevancy.

THE COURT: I'll let her go and she'll tie it up or I'll sustain your objection. Appx. X 982.

It was apparent that the defense believed Lt. Bare's testimony had been "tied up" with this case, because there was no renewed objection, no motion to strike the testimony and no request for a limiting instruction. The Brief (at 45) for the first time claims that Lt. Bare's testimony was objectionable because it was elicited to show "other criminals did this, so did appellant." This was not the "specific ground" identified by the defense, required by Rule 103, W.V.R.E. in order to preserve the issue for appeal.⁵⁰

Next, the Brief complains that Lt. Bare's testimony of his investigation in this case included "opinion(s)" or "legal conclusion(s)." As discussed above, this was upon redirect examination *only* after the defense repeatedly elicited Lt. Bare's opinions. The trial court did not abuse its discretion in ruling that such redirect examination was a permissible response to the defense cross-examination. Appx. XII 2023-2024. Moreover, the Brief ignores the fact that the trial court twice gave a limiting instruction to ensure that Lt. Bare's testimony did not invade the province of the jury. Appx. XII 2114-2115, Appx. XIII 2771-2772.

Finally, the Brief (at 47) erroneously charges that the trial court abused its discretion by "allowing (Lt. Bare) to impermissibly comment on appellant's Fifth Amendment right to silence." Lt. Bare made no such "comment."⁵¹ Bowling was not under arrest or even arguably

⁵⁰ "When evidence has been received under a promise that it will . . . become linked up so as to become relevant . . . and the promise has not been kept, *a motion to strike out such evidence must be made to preserve the point for appeal.*" Cleckley, Franklin D., *Handbook on Evidence*, Vol. 1, §4-1(F)(1), (4th ed. 2000).

⁵¹ Lt. Bare's direct testimony was: Q: On February 2, 2012, did you have a telephone conversation with the defendant? A: Yes. Q: And did you ask him to do something? A: I asked him to come in and speak with me, to give me – I needed some additional information. Q: And did he do that? A: No.

in custody or under interrogation at the time Lt. Bare telephoned him. In Syl. Pt 3, *State v. Bradshaw*, 193 W.Va. 519, 457 S.E. 2d 456 (1995), this Court made clear: "To the extent that any of our prior cases could be read to allow a defendant to invoke his *Miranda* rights outside the context of custodial interrogation, the decisions are no longer of precedential value." It was the defense -- not the State -- which chose to belabor the fact that Bowling declined to come into the Raleigh County Sheriff's Office.⁵² Accordingly, the claim that the State elicited any improper "comment" concerning Bowling's Fifth Amendment rights is without merit.⁵³

CONCLUSION

The record of this trial demonstrates that there was no reversible error, and that Bowling received a fair trial and a just conviction and sentence. Accordingly, his Petition for Appeal should be refused.

⁵² The cross-examination by the defense included the following. Q: Well, you talked to him on the phone Monday, right, several times? A: I think twice. I've spoken to him -- I spoke to him. I'm sorry. Q: And you'd already had one statement; right? A: Yes. Q: And you wanted him to come in and make another statement, right? A: Yes. Q: And would you acknowledge that's the police interrogation technique to trip somebody up; right? A: No. I wasn't interested in tripping him up, I was trying to get to the facts of the case. Q: He voluntarily, when you called him, came in; right? A: Voluntarily, I don't know. It was come in or I'm coming to get you, basically, and he came in. Q: Involuntary is against your will; right? A: Yes. I asked him to come in and he wouldn't, that would be involuntary. Q: But he came in? A: Knowing that he was going to be arrested, yes. Appx. X 1016-1017.

⁵³ The Brief (at 6) mentions in passing three additional claims of error but includes no development or argument of the claims that the trial court "precluded (Bowling) from moving for a change of venue" or "improperly failed to appoint counsel" or that "the jury's verdict is against the weight of the evidence." Accordingly, these claims have been abandoned. *La Rock, supra*, 196 W.Va. at 302, 470 S.E. 2d at 621. Indeed, the Brief (at 28) concedes that "the evidence could support" the conclusion that Bowling "intentionally killed his wife" or "maliciously shot his wife." The record demonstrates that there was sufficient "evidence . . . from which the jury could find guilt beyond a reasonable doubt" pursuant to Syl. Pts. 1 and 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E. 2d 163 (1995).

Respectfully submitted by:

A handwritten signature in black ink, appearing to read "Kristen Keller", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Brief in Response to Petition for Appeal* has been served upon counsel for the Petitioner, Todd Houck, Attorney at Law, 105 Guyandotte Avenue, Mullens, West Virginia 25882, by United States Mail, postage pre-paid, this 5th day of September, 2012.



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