

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 13-0099

NICHOLAS CO. CIRCUIT COURT CASE NO. 11-F-81

**STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent/Appellee,**

v.

**GARY LEE ROLLINS, Defendant Below,
Petitioner/Appellant.**

Appellant's Brief to Perfect Appeal

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ASSIGNMENTS OF ERROR

1. DURING HIS REBUTTAL ARGUMENT, THE PROSECUTING ATTORNEY MADE MATERIAL MISREPRESENTATIONS TO THE JURY WHEN HE EXPRESSED HIS LATER UNFULFILLED INTENTION TO INDICT THE STATE'S KEY WITNESS WHICH MISREPRESENTATION RESULTED IN SUBSTANTIAL PREJUDICE AND/OR MANIFEST INJUSTICE TO THE APPELLANT.
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5. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT CUMULATIVE EVIDENCE THROUGH THE TESTIMONY OF MULTIPLE EXPERT WITNESSES.
6. ONE OF THE STATE'S EXPERT WITNESSES CHANGED HIS OPINION ON THE STAND AND HAD NO REPORT TO SUPPORT HIS FINDINGS. THIS RESULTED IN UNFAIR SURPRISE TO DEFENSE COUNSEL AND AFFORDED THEM NO OPPORTUNITY TO PREPARE AN ADEQUATE CROSS-EXAMINATION OR A DEFENSE TO HIS TESTIMONY.

7. THE RECORD SHOWS THAT THE CUMULATIVE EFFECT OF NUMEROUS ERRORS PREVENTED THE APPELLANT FROM RECEIVING A FAIR TRIAL AND HIS CONVICTION SHOULD BE SET ASIDE.

STATEMENT OF THE CASE

This is a criminal appeal by Gary Lee Rollins, Appellant herein, upon his conviction by jury of murder in the first degree, without mercy. The trial court denied Appellant's Motion for a New Trial and imposed a sentence of life without mercy. (A. R. VII at 142-147, 250-255). On October 5, 2009, around noon, the body of Teresa Rollins, wife of the Appellant, was discovered at the Rollins' farm in Nettie, Nicholas County, West Virginia. (A.R. I at 242-243, 271).

When Deputy David Sales of the Nicholas County Sheriff's Department arrived at the Rollins' farm, ambulance personnel were already on the scene. (A.R. I at 242-243). Upon his arrival, Deputy Sales spoke with the Appellant and he was taken by the Appellant down to where the body of Teresa Rollins was located, which was near the pond, a fallen tree and a tractor. (A.R. I at 243). Deputy Sales took numerous photographs of this area, including the pond, tree, body, tractor and surrounding landscape. (A.R. I at 243-266). After taking these photographs, Deputy Sales took statements from the Appellant, Gary Rollins, and statements from all three farm workers: April Bailes¹, Kay Rudd and Tanya Wagner. (A.R. I at 266-267, A.R. II at 13). Everyone at the farm cooperated fully with Deputy Sale's investigation. (A.R. II at 14).

During his statement to Deputy Sales, the Appellant explained that the body of his wife was discovered after the Appellant and other farm workers became curious to Mrs. Rollins' whereabouts and he began looking around the farm for her. (A.R. I at 271-272). While searching, the Appellant saw something near a fallen tree in the pond and as he got closer to the pond, he noticed it was his wife. (A.R. I at 272). The Appellant jumped in the pond to try to

¹ April Bailes was formerly known as April O'Brien. (A.R. III at 205).

rescue his wife but he could not because the tree was on top of her. (A.R. I at 272). The Appellant ran toward the house and yelled for one of the workers to call an ambulance or call 911. (A.R. I at 272; A.R. II at 113, 124). The Appellant hurriedly jumped onto his tractor, headed toward the pond and Tanya Wagner ran behind him toward the pond. (A.R. II at 113-114). Using the tractor with a forklift attachment, the Appellant rammed and pushed the tree away from his wife for a distance of about twenty (20) yards. (A.R. I at 272; A.R. II at 24, 71, 114). The body of Teresa Rollins was submerged until the Appellant hit the tree with the tractor, which caused the body to come up out of the water. (A.R. II at 51, 118). It is noted that the decedent was about one to two feet from the bank. (A.R. II at 39). At one foot, the pond was about twenty-six (26) inches deep and at two feet the depth of the pond increased another foot or so. (A.R. III at 105-106).

Before the Appellant could get off of the tractor, Tanya Wagner was pulling Mrs. Rollins out of the water; however, the Appellant was able to help Wagner pull his wife up onto the bank. (A.R. I at 272; A.R. II at 114). CPR was attempted but it was too late to save Mrs. Rollins. (A.R. I at 272; A.R. II at 114). After examination by the coroner, the body of Teresa Rollins was sent to the State Medical Examiner's Office for an autopsy. (A.R. I at 275, A.R. II at 22-23).

Deputy Sales came back to the farm on October 7, 2009, two days later, with another deputy and took more photographs. (A.R. I at 276). Subsequently, Deputy Sales contacted the Appellant and requested to take another statement from the Appellant, which he complied with. (A.R. I at 281). It appears that Deputy Sales felt this action was necessary after he found out the Appellant was having an extra-marital affair with April Bailes. (A.R. Vol I at 294). The Appellant cooperated with Deputy Sales and gave him a lengthy statement that was consistent with his first statement. (A.R. II at 17; A.R. I at 290-349, A.R. I at 267-274). After conducting a

thorough investigation, Deputy Sales was of the opinion that a crime had not been committed. (A.R. II at 22-23, 61).

Likewise, the State Medical Examiner's Office concluded the death of Teresa Rollins was accidental. On October 5, 2009 (the date the alleged victim died), the State Medical Examiner's Office received the body of Teresa Rollins and Dr. Zia Sabet, Deputy Medical Examiner, conducted an autopsy on October 6, 2009 at 10:00 o'clock a.m. (A.R. II at 140, 164-165). The first death certificate at the time of the autopsy stated "pending investigation" for both cause and manner of death. (A.R. II at 167; A.R. VII at 195). On October 20, 2009, following an investigation by law enforcement, the State Medical Examiner's Office determined that the cause of death was "drowning complicated compression asphyxia" and that the manner of death was "accident." (A.R. II at 168). A new death certificate was issued reflecting these findings. (A.R. VII at 196). These findings by Dr. Sabet were discussed with and approved by a total of six pathologists at the Medical Examiner's office. (A.R. II at 146, 177, A.R. III at 156).

Now, enter Governor Joe Manchin into the equation. Following the conclusion of the investigation that determined the death of Teresa Rollins was accidental, the family of Teresa Rollins, the Lucente family, contacted the (then) Governor of the State of West Virginia, Joe Manchin. (A.R. III at 71). Although the extent of the relationship is unclear, there is evidence of some connection between the Lucente family of Clarksburg and Governor Manchin. (A.R. III at 71-72, 89). According to the testimony adduced at trial, Governor Manchin contacted Col. Pack of the West Virginia State Police (who serves at the Governor's will and pleasure) about the State Police getting involved in the investigation. (A.R. III at 71-72). In turn, Col. Pack called Sgt. Ron Lilly of the Summersville Detachment of the West Virginia State Police and Sgt. Lilly

was directed to provide assistance in the investigation. (A.R. III at 71-72). The exact dates of the foregoing are unknown. (A.R. III at 78).

On January 10, 2010, the State Medical Examiner's Office issued an autopsy report with the same findings as those contained in the amended death certificate- that the death of Teresa Rollins was accidental. (A.R. II at 167; A.R. VII at 199-204). This autopsy report was signed and approved by both Dr. Sabet and the Chief Medical Examiner, Dr. James Kaplan. (A.R. II at 172, 177; A.R. VII at 204). In the meantime, Sgt. Lilly had written a letter to the State Medical Examiner's Office, dated January 6, 2010, requesting a copy of Teresa Rollins' autopsy report. (A.R. III at 75). At this point, the State Police had officially "taken the reins" of this investigation. (A.R. III at 76). After the Governor and State Police became involved in this case, which had already been ruled an accidental death by the Nicholas County Sheriff's Department and the State Medical Examiner's Office, this case immediately changed into a homicide investigation and a concerted effort to convict Gary Rollins of murder.

Significantly, on January 14, 2010, Sgt. Lilly's designees met with Dr. Sabet and Dr. Kaplan at the State Medical Examiner's Office. (A.R. II at 193-194). It is noted that the Chief Medical Examiner is an ongoing appointment every five years and the appointment is made by the Governor. (A.R. III at 149-150). Less than twenty-four (24) hours after this meeting, Dr. Sabet amended his findings at the request of the State Police. (A.R. II at 193-194; A.R. III at 85; A.R. VII at 210). On January 19, 2010, an amended death certificate was filed stating that the cause of death was "asphyxia due to probable strangulation" and the manner of death "could not be determined." (A.R. II at 194-196; A.R. VII at 197). Seven months later, on July 19, 2010 an amended autopsy report was filed by the State Medical Examiner's Office changing the

manner of death to undetermined, reflecting significant suspicion of homicidal assault. (A.R. II at 155, 195-196; A.R. VII at 206).

It is noted that the State never contended that the tree in question was forced or cut down. (A.R. VI at 30). Also, during the course of the trial, the State never explained how the Appellant could have gotten the body of Teresa Rollins up under the tree in the pond. Rather, the State presented the testimony of three pathologists that testified the alleged victim's injuries were not consistent with being hit by a tree and two of the three pathologists testified that this was a homicide. (A.R. II at 154, 157, A.R. III at 141, 148, 174, 185-186, A.R. IV at 37-39). The theory presented by the State's pathologists was that the tree fell in a hammer like fashion and that the tree would have crushed the decedent had it struck her. (A.R. IV at 34-35, A.R. III at 141-144, A.R. II at 156-157.) The defense presented the testimony of an expert in the field of forestry, William Gillespie, who testified that the tree was rotten, fell naturally and that it may have "jumped off of the stump" about one-two feet before falling. (A.R. IV at 171-174, 219-220). Gillespie disagreed that the tree fell as theorized by the State. (A.R. IV at 179, 204-205). According to Gillespie, the tree was lower in elevation than the pond's dam and when the tree fell, it hit the edge of the dirt dam of the pond and the limbs went down in the water at the same time. (A.R. IV at 204-205). This would have lessened the tree's impact and prevented the tree from crushing the decedent. (A.R. IV at 179-180).

According to Dr. Cohen, the defense's pathology expert, based on the height and weight of the tree, the main trunk would not have struck the alleged victim and the medium and smaller tree branches would have made contact with her and entrapped her in the pond. (A.R. V at 47-49). As the alleged victim was wearing three layers of clothes that included a coat, she was protected against the branches of the tree and that would explain why her injuries were not more

severe. (A.R. V at 39-40,49). Dr. Cohen further testified that there was no evidence to support a finding of strangulation. (A.R. V at 40-41).

In September of 2011, over a year after the amended autopsy report was filed, the Nicholas County Grand Jury indicted Gary Rollins for Murder. (A.R. III at 237). This indictment was largely based on circumstantial evidence, such as the extra-marital affair the Appellant had with April Bailes, allegations of prior domestic abuse, increased life insurance policies, inadmissible hearsay and the amended autopsy report of the State Medical Examiner. (A. R. VI at 1-45). At this stage, April Bailes, the former mistress of the Appellant, had not yet joined the Prosecution's team when the Appellant was indicted. Without her testimony against the Appellant, the State's case was very suspect, as evidenced by the quality of evidence presented to the grand jury and the State's vigorous post-indictment efforts to secure April Bailes' testimony at trial. (A.R. VI at 1-45, A.R. II at 222-223). **Make no mistake about it, obtaining the testimony of April Bailes was crucial to the State's case.**

During the course of the investigation in this matter, Ms. Bailes gave a total of three to four statements to law enforcement officers and investigators that was consistent with the Appellant's innocence. (A. R. III at 208, 215-217). During her third statement, Trooper White of the West Virginia State Police interrogated Ms. Bailes on January 15, 2010 for over two hours, pressured her to change her statement, told her that she was lying and told that she would be arrested and charged with the crime of accessory after the fact to murder. (A. R. III at 225-227, 232, 235-236). Yet, despite all of the foregoing, Ms. Bailes did not implicate the Appellant in the death of Teresa Rollins. (A. R. III at 237).

On October 7, 2011, within one month of the indictment of the Appellant, Ms. Bailes was charged with accessory after the fact to murder. (A. R. III at 239). On October 13, 2011, Ms.

Bailes revised her prior statements and told law enforcement that on the morning of October 5, 2009, the Appellant told her that he killed Teresa Rollins. (A. R. III at 208, 241). *It is significant that Bailes has never been indicted by the Prosecutor, despite his representations to the jury in his closing argument that she would be indicted in September of 2012.* (A. R. V at 207-208).

During the course of pre-trial proceedings in the instant case, the State sought to admit various Rule 404(b) evidence against Mr. Rollins. This evidence included evidence of Appellant's affair with April Bailes and allegations concerning five prior instances of domestic violence between the Appellant and decedent. The trial court permitted the introduction of the foregoing 404(b) evidence at trial. (A.R. VI at 45, 98). In this appeal, the Appellant contends that various rulings by the trial court on pre-trial issues, jury selection and numerous evidentiary rulings at trial warrant reversal of his conviction. These issues are set forth more fully hereinbelow.

SUMMARY OF ARGUMENT

First, during closing remarks, Appellant's trial counsel called into question the credibility of April Bailes, who was a key witness for the State at trial. Bailes had a long term extra-marital affair with the Appellant while he was married to the alleged victim. During the course of the investigation, Ms. Bailes gave a total of three statements to law enforcement officers that were consistent with the Appellant's innocence, even when law enforcement threatened to arrest her as an accessory after the fact to murder. Two years later, on October 7, 2011, Ms. Bailes was charged with the felony offense of accessory after the fact to the murder of Teresa Rollins. Six days after she was charged, Ms. Bailes changed her prior statements and told law enforcement that on the morning of October 5, 2009, the Appellant told her that he killed Teresa Rollins. At

the time of trial, Ms. Bailes was unindicted. During defense counsel's closing, he questioned whether Ms. Bailes had received some consideration in exchange for her trial testimony and speculated that her favorable testimony was the reason she had not been indicted.

In response, during rebuttal the Prosecutor told the jury ***"[y]ou can bet your behind that I'm going to indict her [April Bailes] next month"***. This statement was made on August 18, 2012. Importantly, April Bailes was not indicted by the Nicholas County Grand Jury in September 2012, January 2013 or May 2013. The Prosecutor simply lied to the jury to bolster the testimony of April Bailes and obtain a conviction. This statement by the Prosecutor was an improper statement to the jury that clearly prejudiced the Appellant or resulted in manifest injustice to the Appellant, pursuant to State v. Adkins, 209 W. Va. 212, 544 S.E.2d 914 (2001).

Second, the trial court erred in failing to excuse a certain juror for cause that was a former and current victim of domestic violence. This juror made clear statements during voir dire reflecting or indicating the presence of a disqualifying prejudice or bias, by stating multiple times that she did not know if she could be fair. The trial court clearly erred by attempting to rehabilitate the juror by subsequent questioning after she had repeatedly stated that she was unsure she could be fair. Syl. Pt. 5, O'Dell v. Miller, 211 W. Va. 285, 565 S.E.2d 407 (2002). State ex rel. Quinones v. Rubenstein, 218 W. Va. 388, 624 S.E.2d 825 (2005).

Third, after the jury was empaneled and sworn, it was discovered that one of the jurors was a former client of the Prosecuting Attorney. Counsel for the Appellant moved to strike the juror for cause and the trial court denied the motion to strike. The trial court failed to conduct a proper analysis and consider the factors set forth in syllabus points 3 and 4 of State v. Hatley, 223 W. Va. 747, 748, 679 S.E.2d 579, 580 (2009). However, in this case the error goes beyond failing to strike the juror for cause as this relationship between the juror and Prosecutor was

discovered after the Appellant had exercised his peremptory challenges and after the jury had been sworn and impaneled. The lack of candor displayed by the juror resulted in prejudice to the Appellant as it deprived him of a meaningful and effective voir dire of the jury panel, which is necessary to effectuate the fundamental right to a trial by an impartial, objective jury in a criminal case, as guaranteed by the Sixth and Fourteenth Amendments of the *United States Constitution* and Article III, Section 14, of the *West Virginia Constitution*. State v. Dellinger, 225 W. Va. 736, 740-43, 696 S.E.2d 38, 42-45 (2010). Even though the trial court gave the Appellant the option to renew his motion to strike this juror prior to closing and substitute the alternate juror and the Appellant declined without waiving his prior objection, it was plain error for the trial court to not remove this biased juror from the panel from the outset.

Fourth, the trial court erred in permitting the introduction of Rule 404(b) evidence against the Appellant concerning alleged acts of prior abuse against the decedent and the introduction of such evidence violated the *West Virginia Rules of Evidence* pertaining to hearsay and the Confrontation Clause in the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution. The trial court erred in admitting the evidence to show “absence of mistake or accident”, as the defendant did not rely upon a defense that he made a mistake or caused an accident.

The trial court further erred by concluding that three incidents of alleged domestic abuse involving photographs and statements made by Teresa Rollins were admissible and that they were not inadmissible hearsay. Specifically, the trial court found that each of the statements made by the decedent regarding the photographed injuries were admissible and concluded: (1) the statements are not hearsay, as they were not being offered for the truth of the matter asserted but rather to identify the bruises in the photographs; (2) If the statements are hearsay, they fall

within the present sense exception in Rule 803(1) and (3) If the statements are hearsay and no recognized exception applies, they are admissible under the “catch-all” exception in Rule 804(b)(5).

The trial court committed error in its analysis as: (1) the statements allegedly made by Teresa Rollins to Jimmy Thompson and Regina Lucente regarding her photographed injuries were offered to prove the truth of the matter asserted, i.e. that the Appellant caused the bruises depicted in the photographs of Teresa Rollins. If admitted for the limited purpose identified by the trial court (to identify the bruises seen in the photographs) the evidence would not be relevant. (2) The present sense impression set forth in Rule 803(1) does not apply as there is no reliable evidence concerning the lapse of time between the alleged events of abuse and the time the alleged statements were made. Syllabus Point 4, State v. Phillips, 194 W. Va. 569, 461 S.E.2d 75, (1995); (3) the catch-all exception in Rule 804(b)(5) does not apply as the notice requirements set forth in the rule were not followed.

The trial court also erred in concluding that the statements of the decedent regarding alleged domestic abuse were not testimonial and were not barred under the Confrontation Clause contained in the Sixth Amendment to the United States Constitution. State v. Kaufman, 227 W. Va. 537, 548, 711 S.E.2d 607, 618 (2011) (citations omitted). The statements in this case were testimonial. Syllabus Points 8 and 9, State v. Mechling, 219 W. Va. 366, 633 S.E.2d 311 (2006). Whether a statement is made to law enforcement is merely one factor to consider in determining whether a statement is testimonial. Other relevant factors that were met and not considered by the trial court include there was no ongoing emergency at the time the statements were made and the statements were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Even if the statements are non-testimonial, the statements should be still be deemed inadmissible under the Confrontation Clause as they do not bear adequate indicia of reliability. As discussed above, Teresa Rollins' statements are the very definition of hearsay because they were offered for the truth of the matter asserted and not for identifying the source of the bruises in the photographs. Further, the present sense impression in Rule 803(1) does not apply in this case, as there is no reliable evidence concerning the lapse of time between the alleged events of abuse and the time the alleged statements were made. As noted by the trial court, statements only being admitted under the general hearsay exception of Rule 804(b)(5), are considered to be presumptively unreliable.

Additionally, even if the statements were admissible under the rules governing hearsay and the Confrontation Clause, the trial court abused its discretion in admitting the alleged abuse under Rule 403, as its prejudicial effect substantially outweighed its probative value.

Fifth, prior to the trial below, Counsel for the Appellant filed a motion *in limine* to preclude the State from offering cumulative testimony on the issue of whether the decedent's injuries were consistent with being struck by a tree. The trial court deferred ruling on this issue pending presentation of the evidence at trial, but stated that the Appellant could raise this objection during trial and the Court would determine whether the evidence should be excluded.

As anticipated, Dr. Zia Sabet, the Deputy Medical Examiner, and Dr. James Kaplan, the Chief Medical Examiner, testified that the alleged victim's injuries were not consistent with being struck by a tree. Prior to the State's third pathologist, Dr. Cyril H. Wecht, taking the witness stand, the Appellant renewed his objection regarding cumulative evidence and sought to exclude, or at least limit the testimony of Dr. Wecht, as Drs. Sabet and Kaplan had already testified that the alleged victim's injuries were not consistent with being struck by a tree.

Further, in a surprise to everyone (including the State), Dr. Kaplan had already testified that the manner of death was a homicide. It was also contended that Dr. Wecht's testimony would be cumulative on these points. The trial court overruled the objection. As the indigent Appellant could only afford one expert witness to refute the State's trio of pathologists he was prejudiced by the cumulative evidence. The Appellant contends that the trial court abused its discretion in finding that the evidence was admissible under Rule 403 and it failed to even consider the prejudice to the Appellant.

Sixth, as alluded to above, Dr. James Kaplan, the Chief Medical Examiner, changed his opinion while on the witness stand. During the course of this matter, the State Medical Examiner's Office changed its opinion numerous times as to manner and cause of death. The final change occurred at trial when Dr. Kaplan testified that the manner of death was no longer undetermined and that this was a homicide and the cause of death was a combination of strangulation and drowning. It is contended herein that this change was an unfair surprise that warrants a new trial. State ex rel. Justice v. Trent, 209 W. Va. 614, 618, 550 S.E.2d 404, 408 (2001) (citations omitted).

Finally, the cumulative effect of biased jurors, improper remarks by the Prosecutor during closing arguments and admission of evidence in violation of the West Virginia Rules of Evidence and the Confrontation Clause, admission of cumulative expert testimony and undisclosed expert testimony resulting in unfair surprise, as set forth more fully herein, constitute sufficient error to have created a cumulative effect of denying the Appellant a fair trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Appellant submits that oral argument is necessary upon this appeal under Rule 19 of the *Revised Rules of Appellate Procedure*, as this appeal involves (1) assignments of error in the

application of settled law; (2) an unsustainable exercise of discretion where the law governing that discretion is settled; (3) insufficient evidence or a result against the weight of the evidence; and, (4) narrow issues of law. Thus, Appellant prays that this matter be scheduled for Rule 19 oral argument upon this appeal.

ARGUMENT

I. DURING HIS REBUTTAL ARGUMENT, THE PROSECUTING ATTORNEY MADE MATERIAL MISREPRESENTATIONS TO THE JURY WHEN HE EXPRESSED HIS LATER UNFULFILLED INTENTION TO INDICT THE STATE'S KEY WITNESS WHICH MISREPRESENTATION RESULTED IN SUBSTANTIAL PREJUDICE AND/OR MANIFEST INJUSTICE TO THE APPELLANT.

In this case, April Bailes was the star witness for the State of West Virginia. Ms. Bailes worked at the Rollins farm for three summers ('07-'09) and she had an extra-marital affair with the Appellant that started in July of 2008 and extended past the death of Teresa Rollins on October 5, 2009. (A.R. III at 205-207). Ms. Bailes was working at the Rollins farm the morning that Teresa Rollins' body was discovered and she was the person that called 911. (A.R. III at 207, 213).

During the course of the investigation in this matter, Ms. Bailes gave a total of three to four statements to law enforcement officers and investigators that were consistent with the Appellant's innocence.² (A.R. III at 215-217). Bailes' first statement was to Deputy Sales of the Nicholas County Sheriff's Department on October 5, 2009. (A.R. III at 208). Her second statement was to Deputy Silman of the Nicholas County Sheriff's Department on October 7, 2009. (A.R. III at 208). Her third statement was to Trooper White of the West Virginia State Police on January 15, 2010, approximately three months after the death of Teresa Rollins. (A.R.

² A fourth statement was given to Defense Counsel's private investigator that did not implicate the Appellant. (A. R. III at 238).

III at 208, 225). On the latter occasion, Ms. Bailes was interrogated for over two hours by Trooper White, who pressured her to change her statement, told her that she was lying and told her that she would be arrested and charged with the crime of accessory after the fact to murder. (A.R. III at 227-232, 235-236). Yet, despite all of the foregoing, Ms. Bailes did not implicate the Appellant in the death of Teresa Rollins and there was no mention in any of her prior statements that the Appellant confessed to killing his wife. (A.R. III at 237).

On October 7, 2011, within one month of the Appellant being indicted and just over two years from the date Teresa Rollins died, Ms. Bailes was charged with accessory after the fact to murder. (A.R. III at 239). On October 13, 2011, Ms. Bailes revised her prior four statements and she told law enforcement that on the morning of October 5, 2009, the Appellant told her that he killed Teresa Rollins. (A.R. III at 208, 241).

At trial, Ms. Bailes testified that on October 5, 2009, she had asked the Appellant questions regarding the tree that had fallen in the pond. (A.R. III at 207-208). She further testified as follows:

- Q. What happened at that point?
A. We unloaded the [metal] stakes, and he had took me by the arm to the other side of the tractor, and he just looked at me like –with this look like he was looking through me, and he just said, “I—I killed Teresa.” And I just looked at him, you know, like “What?” And he said it again. He said, “ I killed Teresa,” and he said I’d be the one to call 911 and tell them about her under the tree and that if I didn’t go along with it, that me and my daughter wouldn’t be here. (A.R. III at 209-210).³

Ms. Bailes was the only witness that testified that the Appellant admitted that he killed his wife. (A.R. III at 208). Ms. Bailes further testified that there were not any promises made to

³ Despite April Bailes’ assertions that she was afraid of the Appellant, she visited him 43 times in jail, bringing her infant daughter with her on 3 occasions; she had phone contact with the Appellant 215 times, wrote him letters and sent him pictures of her and her daughter. (A.R. III at 208, 247-255).

her in exchange for her testimony at trial. (A.R. III at 216). At the time of the trial, it had been about a year since Ms. Bailes was placed under arrest and she was not under indictment. (A. R. III at 257).

During closing arguments, Appellant's trial counsel called into question whether a deal had been made between the Prosecuting Attorney and April Bailes in exchange for her trial testimony. (A.R. V at 175-183). Mr. Van Bibber argued:

Now, this is their star witness. This is crucial. This woman, April Bailes, that was involved in an extramarital affair with my client, gave four statements. She gave four different statements. (A.R. V at 175).

After all that, after being lied to and threatened and yelled at for two hours, she said, "No. He didn't do it. I don't know what you're talking about," but that's going to change. (A.R. V at 178).

On October 7, 2011, they made good on their threats. They slap the handcuffs on her. They stuffed her in the back of a cruiser. They hauled her off to jail. Now, that's when she begins to change her story. Now, we're going to have a fifth statement. (A. R. V at 180).

What does she gain from that 15 seconds of fabrication? She's joined their team. She's gotten on the-- the governor's freight train express. We're all going to railroad Gary Rollins, so now what does she get out of it? She's not in jail. She's not been indicted. You heard that she was arrested. She was taken before a magistrate, but she's not been indicted. You can't get convicted if you're not indicted. Who hands out the indictments? That man right there. (Indicated) P. K. Milam. **Is he going to indict his star witness, do you think? Is that what's really going to happen here? After all is said and done, he gets his conviction thanks to her lie, he's going to repay that by indicting her?** (A. R. V at 182-183). (emphasis added)

In his rebuttal, the Prosecutor responded to the defense's closing argument:

Mr. VanBibber wants you to believe that she's getting out of trouble for telling us the truth. Tpr. White, when he interviewed her, told her -- said you can either tell us the truth now or we'll

arrest you later, and he made good on that promise , because we knew from the very beginning, from that 911 call, that she could not have had that information. That's what broke this case wide open. Reviewing that tape shows that she could not have that information from the get- go, and we interviewed her again and again and again and gave her every opportunity in the world to help herself , and she didn't, and she got arrested for it, and she' s charged with accessory after the fact.

Now, he wants you to believe that she's getting some kind of consideration out of that. You can bet your behind that I'm going to indict her next month.⁴ (A. R. V at 207-208). (emphasis added)

The foregoing statement by the Prosecuting Attorney, “[y]ou can bet your behind that I'm going to indict her [April Bailes] next month”, bolstered the credibility of the State's star witness after it had been called into question by Appellant's trial counsel. Importantly, April Bailes was not indicted the next month by the September 2012 Nicholas County Grand Jury.⁵ Additionally, April Bailes was not indicted by the January 2013 Nicholas County Grand Jury or by the May 2013 Nicholas County Grand Jury that convened only one (1) day prior to this appeal being perfected. (See Footnote 4) No action whatsoever has been taken by the Prosecuting Attorney. This is tantamount to an undisclosed offer of leniency in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). Clearly, the State never intended to indict April Bailes and lied to the jury for the purpose of bolstering the credibility of a key witness and to obtain a conviction.

⁴ The Nicholas County Grand Jury meets on the second Tuesday of January, May and September. See West Virginia Trial Court Rules, Rule 2.28.

⁵ Simultaneously with the Appellant's brief, the undersigned filed a *Motion to take Judicial Notice, or in the Alternative, Motion to Supplement the Record*, with certain records on file in the Nicholas County Circuit Clerk's Office relating to the unindicted status of April Bailes' criminal charges. These documents show that April Bailes was never indicted by the Nicholas County Grand Jury in September 2012, January 2013 or May 2013.

This deliberate and outright lie to the jury by the State relating to the State's intention to indict April Bailes "next month" substantially prejudiced the Appellant and constitutes egregious and outrageous prosecutorial misconduct that rises to the constitutional level of denying the Appellant a fair trial. Further, this statement by the Prosecutor constitutes impermissible vouching. See United States v. Beasley, 102 F.3d 1440, 1449 (8th Cir.1996), *cert. denied*, Beasley v. United States, 520 U.S. 1246, 117 S. Ct. 1856, 137 L.Ed.2d 1058 (1997) ("Impermissible vouching may ... occur when **the government implies a guarantee of a witness's truthfulness, refers to facts outside the record**, or expresses a personal opinion as to a witness's credibility"). (emphasis added).

In State v. Adkins, 209 W. Va. 212, 544 S.E.2d 914 (2001), this Court restated its prior holding that "[a] judgment of conviction will be reversed because of improper remarks made by a prosecuting attorney to a jury that clearly prejudice the accused or result in manifest injustice." Id. at 216, 918 (citing State v. Stephens, 206 W.Va. 420, 425, 525 S.E.2d 301, 306 (1999) (citing Syl. pt. 5, State v. Ocheltree, 170 W.Va. 68, 289 S.E.2d 742 (1982))).

The Court in Adkins, *supra*, further observed that "[f]our factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters." Adkins 209 W. Va. at 216, 544 S.E.2d at 918. (citing Syllabus point 6, State v. Sugg, 193 W.Va. 388, 456 S.E.2d 469 (1995)).

(1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused

The Appellant submits that the prosecutor's outright misrepresentation and lie to the jury regarding his intention to indict April Bailes "next month" bolstered the credibility of April Bailes- the sole witness presented by the State that testified that the Appellant admitted to killing his wife. The Prosecutor's remarks were clearly not true, as April Bailes was not indicted the next month or subsequently. Had it been disclosed to the jury that the Prosecutor never intended to indict April Bailes, the jury would have had ample reason to question her motives in testifying and the truthfulness of her testimony. There can be no doubt this statement by the Prosecutor misled the jury and prejudiced the Appellant.

(2) whether the remarks were isolated or extensive

As cited above, the Prosecutor went to great lengths to explain to the jury why they should believe the testimony of April Bailes, stating twice that she was not receiving any consideration for her testimony and then stating that she would be indicted the very next month. (A. R. V at 207-208).

(3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused;

Absent the remark made by the Prosecuting Attorney, it is impossible to know how the jury would have evaluated the testimony of April Bailes if they knew she was never going to be indicted. Given the numerous changes to cause and manner of death by the State Medical Examiner's Office, the conflicting expert testimony presented at trial and the purely circumstantial evidence of guilt presented by the State at trial, it is extremely likely the jury placed much emphasis and reliance on the testimony of April Bailes, as she provided the only direct evidence or testimony concerning a "confession" by the Appellant.

(4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

This comment was made and deliberately placed before the jury in response to defense counsel's attack on the credibility of April Bailes. Insofar as the Prosecuting was talking about his plans to indict April Bailes "next month" he was diverting the attention of the jurors to extraneous matters that had not occurred and still have not occurred.

For the foregoing reasons, this Honorable Court should reverse Appellant's conviction, and grant him a new trial.

II. THE CIRCUIT COURT ERRED IN REFUSING TO DISQUALIFY A JUROR FOR CAUSE WHO WAS A PAST AND CURRENT VICTIM OF DOMESTIC VIOLENCE AFTER SHE INDICATED SHE DID NOT KNOW IF SHE COULD BE FAIR IN THE INSTANT CASE, WHICH INVOLVED ALLEGATIONS THAT THE APPELLANT PREVIOUSLY COMMITTED ACTS OF DOMESTIC VIOLENCE AGAINST THE DECEDENT.

The Appellant asserts that the trial court erred in failing to excuse a certain juror for cause. It should be noted at the outset that when jury selection began in this matter, the panel was considerably short and only 27 of the 40 summoned jurors had reported for jury duty. (A.R. I at 6). During the course of the morning, about six (6) of the missing jurors arrived for jury duty but the panel was still considerably lower than desired.⁶ This fact is relevant because at the time juror Susie Jordan was challenged by the Appellant for cause, the trial court had already excused eight (8) jurors for cause.⁷ Therefore, as the morning progressed, the trial court was forced to

⁶ This calculation is based on the fact that 20 jurors were empaneled, the alternate pool was reduced to 3 jurors at the time strikes were made and 10 jurors were excused for cause during the course of the venire. (A.R. Vol. I at 157). See footnote 7 below for the first 8 jurors stricken for cause. Juror Corbitt was No. 9. (A.R. Vol. I at 147) and Juror Mullen was No. 10 (A.R. Vol. I at 149-155)

⁷ (1) Prospective Juror Ward was stricken for cause because he had heard rumors about the case (A.R. Vol. I at 31); (2) Prospective Juror O'Dell was stricken for cause because a witness was married to her nephew (A.R. Vol. I at 40); (3) Prospective Juror Norman was stricken for cause because he was friends with the initial investigating officer (A.R. Vol. I at 65); (4) Prospective Juror Johnson's supervisor at work was one of the witnesses (A.R. Vol. I at 75-77); (5) Prospective Juror Elkins was stricken for cause because he "nauseous and nervous" (A.R. Vol. I at 92-95); (6) Prospective Juror Stevens was stricken for cause because she had an uncle that was a deputy sheriff (A.R. Vol. I at 89-90, 99); (7) Prospective Juror Richmond was stricken for cause because she had a case being prosecuted and the officer was a witness (A.R. Vol. I at 104); (8) Prospective Juror Ballard was excused because he had a vacation planned (A.R.

become more conservative in excusing jurors for cause. Regardless of the number of jurors that were present, the trial court committed error in failing to strike juror Susie Jordan for cause.

This Court has previously held that “[o]nce a prospective juror has made a clear statement during voir dire reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair.” Syl. Pt. 5, O'Dell v. Miller, 211 W. Va. 285, 565 S.E.2d 407 (2002). State ex rel. Quinones v. Rubenstein, 218 W. Va. 388, 624 S.E.2d 825 (2005).

This Court further has explained that “[b]ias, in its usual meaning, is an inclination toward one side of an issue rather than to the other, but to disqualify, it must appear that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality. Prejudice is more easily defined, for it means prejudgment and consequently embraces bias; the converse is not true.” O'Dell v. Miller, 211 W. Va. 285, 288, 565 S.E.2d 407, 410 (2002) (citations omitted).

During voir dire in the instant case, defense counsel inquired as to whether any of the prospective jurors had been affected by domestic violence in their personal lives. (A.R. I at 33). Prospective juror Susie Jordan raised her hand and was questioned at the bench as follows:

MR. VANBIBBER : And I was just wondering if you could elaborate on that a little bit now that we're in private.

POTENTIAL JUROR JORDAN: **When I was little, and sometimes with my husband now.**

THE COURT : I'm sorry . Speak up . I ' m -- I'm

POTENTIAL JUROR JORDAN : When I was little --

THE COURT : Um- hm.

POTENTIAL JUROR JORDAN : -- and then sometimes now.

MR. VANBIBBER: Okay . **You were the victim when you - - Did you say that you were the victim when you were small?**

Vol. I at 113.) It is also noted that the Court worked around calling Juror Dillard to the panel because he was a schizophrenic that could not be used. (A.R. Vol. I at 112-113.)

POTENTIAL JUROR JORDAN : Um-hm .

MR. VANDEVENDER: **And you're the victim of domestic violence occasionally now?**

POTENTIAL JUROR JORDAN : (Nodded .) Um-hm .

MR. VANBIBBER: And do you think that -- There's going to be evidence in this case, we believe, about domestic violence. You seem a little bit emotionally upset by it right now. **Do you think that would have an impact on your ability to be fair in this case?**

POTENTIAL JUROR JORDAN : **I'm not going to lie to you. It might.**

THE COURT : Well, the issue is -- I mean, I don' t know if they' re going to be able to prove that there's domestic -- domestic violence, but just because someone says it - -

POTENTIAL JUROR JORDAN : Right.

THE COURT : would you believe it or would you require it be proved to you that it happened?

POTENTIAL JUROR JORDAN: I require proof.

THE COURT: So just because somebody said domestic violence occurred, that doesn't mean to you that the man - -

POTENTIAL JUROR JORDAN : Right.

THE COURT: or the person, whoever it is, is automatically a bad person. They'd have to - - Somebody would have to prove it to you; is that -- is that right?

POTENTIAL JUROR JORDAN : **Well, it depends on what's said, I guess.**

THE COURT: Yeah.

MR . VANBIBBER : Well , you said that you had some hesitancy about it --

POTENTIAL JUROR JORDAN : Um-hm .

MR . VANBIBBER: **and if I were to tell you that the allegation would be that it was domestic violence by a man against a woman, and then the allegation would be that that man then subsequently killed that woman in a violent act, do you think that would be so close to home that it would affect your ability to be fair?**

POTENTIAL JUROR JORDAN: **I don't know.**

MR. VANBIBBER: **I notice that you have tears in your eyes,** and this is my guy's only day in court. I just want to make sure you're able to give him a fair shot.

POTENTIAL JUROR JORDAN : **I don't know.**

THE COURT : Okay. It's hard to say because I don't know what the evidence is, but let me give you the scenario.

POTENTIAL JUROR JORDAN : Okay .

THE COURT : Let's say that - - that - - that one side alleges there's domestic violence. Does that automatically -- Would that

automatically cause you to say yes, that happened, or would you listen to the proof and give him a fair hearing on that, whether it happened or whether it didn't happen.

POTENTIAL JUROR JORDAN : I'd **probably** give him a fair hearing.

THE COURT : Okay. Now, the next question, if you give him a fair hearing on that and you -- And I'm going to instruct you at the end of the trial that, just because he may have committed domestic violence doesn't mean he committed murder. They'll have to prove that to you separately.

POTENTIAL JUROR JORDAN : Okay.

THE COURT: Can you follow that instruction?

POTENTIAL JUROR JORDAN : (Nodded) I **should** be able to.

THE COURT: Huh?

POTENTIAL JUROR JORDAN : I **should** be able to.

THE COURT : Okay .

MR. VANBIBBER : I don' t have any other questions, but I'd like to make a comment.

THE COURT : Okay. Go ahead.

MR. VANBIBBER : **Your Honor , I would move to strike for cause.** I mean, she's crying as we're inter-- asking her these questions, and she has expressed -- her words to me express that she has doubt about her ability to do this , and I -- I understand that you followed up with her , but her demeanor and her tears and -- and her words of doubt . . .

THE COURT : I'm going to deny that motion to strike. She can sit. (A.R. I at 138-142). (emphasis added)

As set forth above, prospective juror Jordan made clear statements during voir dire reflecting or indicating the presence of a disqualifying prejudice or bias. (A.R. I at 139-140). On multiple occasions, Jordan stated she did not know if she could be fair. (A.R. I at 139-140). The trial court clearly erred by attempting to rehabilitate the juror by subsequent questioning after she had repeatedly stated that she was unsure she could be fair. (A.R. I at 139-140). The Court in O'Dell, *supra*, explained that “[t]rial judges must resist the temptation to “rehabilitate” prospective jurors simply by asking the “magic question” to which jurors respond by promising to be fair when all the facts and circumstances show that the fairness of that juror could be

reasonably questioned. O'Dell v. Miller, 211 W. Va. 285, 290, 565 S.E.2d 407, 412 (2002) (citing Walls v. Kim, 250 Ga. App. 259, 260, 549 S.E.2d 797, 799 (2001)).

Regarding juror bias, this Court has also held:

Our standard for considering allegations of jury bias is found in Syllabus Point 4 of State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996), where we held: 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. Even though a juror swears that he or she could set aside any opinion he or she might hold and decide the case on the evidence, a juror's protestation of impartiality should not be credited if the other facts in the record indicate to the contrary. State v. Foster, 221 W. Va. 629, 642, 656 S.E.2d 74, 87 (2007).

Prospective juror Jordan had a past and present history as a victim of domestic violence and she was emotional and tearful during questioning. (A.R. I at 138-140). All the facts and circumstances as well as her answers to the questioned posed to her show that the fairness of this juror could be reasonably questioned and that she would be biased.⁸

Moreover, even when the trial court tried to rehabilitate Jordan, she never stated with any certainty that she could be fair. *See* A.R. I at 141 (“I **should** be able to [follow instructions].”), (“I’d **probably** give him a fair hearing). Every answer given by Jordan leads to the conclusion that she would not act with impartiality and was biased.

This scenario with prospective juror Jordan is extremely analogous to the one presented to this Court on appeal in State v. Phillips, 194 W. Va. 569, 461 S.E.2d 75 (1995). It is noted that Phillips was reversed on other grounds but this Court offered guidance on the issue of juror

⁸ The ability to hear evidence of prior domestic violence and be fair and impartial was especially important in this case, as domestic violence was a central theme for the State. The prosecuting attorney stated in his opening statement, “you’re also going to hear testimony that Teresa, during the last few months of her life, became the victim of domestic violence at the hands of the defendant in this case, and that domestic violence escalated and ultimately resulted in her death on October 5, 2009.” (A.R. Vol. I at 213). The prosecuting attorney was permitted to introduce 404(b) evidence at trial concerning prior acts of domestic violence between the Appellant and Teresa Rollins. (A.R. Vol.VII at 45). The introduction of such evidence is addressed below in a separate assignment of error.

bias. Id. at 588, 95. In Phillips, a juror admitted she would be prejudiced against the defendant if evidence of the defendant's infidelity was admitted at trial. Id. at 589, 95. When the juror in Phillips was asked "whether she 'could separate the fact you don't like what he was doing from the fact your deciding whether or not he murdered his wife[,]'" Ms. Mayle could only reply "I think [I] probably would. I would have to think about it." Then, "when asked whether she would listen to the remainder of the evidence before deciding upon the defendant's guilt, Ms. Mayle stated she would '[t]ry to.'" Id. Clearly, prospective juror Jordan stated multiple times she did not know if she could be fair. A.R. I at 139-140. Also, the juror's answers in Phillips are strikingly similar to the "probably" and "should" type of answers given in this case by prospective juror Jordan. A.R. I at 141. The Court in Phillips stated "when the juror can only say he or she would 'try to' render an impartial verdict, the trial judge should seriously question the juror's actual ability to do so." Id. The same should be said if a juror says he or she could "probably give someone a fair hearing" or if someone says they "should be able to follow the Judge's instructions".

This Court concluded in Phillips that "[t]he responses by this juror clearly indicated she had serious misgivings about her ability to separate her own assumptions regarding infidelity from the evidence of the case. If the juror was uncertain of her impartiality, we are also." Id. In this case, the trial court did not question prospective juror Jordan's impartiality and simply found "she can sit." (A.R. I at 142). This Court has repeatedly stated that "any doubt regarding a juror's impartiality must be resolved in favor of the party challenging the prospective juror." Id. (citing Davis v. Wang, 184 W.Va. 222, 400 S.E.2d 230 (1990))

Subsequently, the Appellant preserved his objection to prospective juror Jordan serving on the jury and ultimately ended up using a peremptory strike to remove prospective juror Jordan from the panel. (A.R. I at 157 and A.R. VII at 236). As this Court has observed:

. . . our State law does not make a specific qualification that peremptory challenges be used to cure a trial court's errors. In fact, pursuant to W.Va. Code, 62-3-3 (1949), **a defendant is entitled to a panel of twenty jurors, free from exception, before he or she is called upon to exercise peremptory challenges.** We have found 'if proper objection is raised at the time of impaneling the jury, it is reversible error for the court to fail to discharge a juror who is obviously objectionable.' Furthermore, in *State v. Wilcox*, and various cases, we **specifically noted that denying a valid challenge for cause of a jury panel member is reversible error "even if the disqualified juror is later struck by a peremptory challenge."** We reaffirm the rule in *Wilcox* and find that the language of W.Va. Code, 62-3-3, grants a defendant the specific right to reserve his or her peremptory challenges until an unbiased jury panel is assembled. **Consequently, if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court's error.** *State v. Phillips*, 194 W. Va. 569, 588, 461 S.E.2d 75, 94 (1995) (emphasis added)

In light of the foregoing, this Court should find that Appellant validly challenged prospective juror Jordan for cause and the trial court committed reversible error by failing to remove the juror.

III. THE TRIAL COURT COMMITTED PLAIN ERROR BY ALLOWING A JUROR TO CONTINUE TO SERVE ON THE JURY AFTER IT WAS DISCOVERED DURING THE COURSE OF THE TRIAL THAT THE JUROR WAS A FORMER CLIENT OF THE PROSECUTING ATTORNEY. BECAUSE THIS RELATIONSHIP WAS NOT DISCOVERED UNTIL AFTER THE JURY WAS IMPANELED, THE APPELLANT WAS DENIED HIS RIGHT TO A MEANINGFUL AND EFFECTIVE VOIR DIRE OF THE JURY PANEL, WHICH IS NECESSARY TO EFFECTUATE THE FUNDAMENTAL RIGHT TO A TRIAL BY AN OBJECTIVE AND IMPARTIAL JURY AS AFFORDED BY THE UNITED STATES CONSTITUTION AND BY THE WEST VIRGINIA CONSTITUTION.

During the course of voir dire, the trial court inquired “Has anyone been a client of any of the lawyers in this case?” (A.R. I at 51). No affirmative response was received. (A.R. I at 51). However, after the jury was empaneled and sworn, it was discovered that one of the jurors was a former client of the Prosecuting Attorney. (A.R. I at 203). Specifically, during a recess prior to opening statements, the Prosecutor performed some research and discovered he had represented Juror Crislip in a civil matter in 2007-2008, while he was an associate at Gregory A. Tucker, PLLC. (A.R. I at 203-204). Prosecutor Milam appeared at two hearings and at a deposition on juror Crislip’s behalf. (A.R. I at 203-204). Juror Crislip was called to the bench and the following dialogue ensued:

THE COURT: Mr. Crislip, I was trying to remember - - Were you - - Were you involved in that Gino's case, in a parking lot case or some- - -

JUROR CRISLIP: Yes, sir.

THE COURT: That's what I thought, and did--did -- **Who represented you in that?**

JUROR CRISLIP: **P.K. until he come over here.**⁹

THE COURT : Now, the fact that he represented you previously, would that in any way affect your judgment - -

JUROR CRISLIP: No, sir, it would not.

THE COURT : in this case?

JUROR CRISLIP: No, sir, it would not.

THE COURT : Okay. Do you owe him any money or does he owe you any money?

JUROR CRISLIP: Nope .

THE COURT : And you feel no loyalty toward him

JUROR CRISLIP : No, sir. (A.R. I at 207-208).

Counsel for the Appellant moved to strike Juror Crislip for cause. (A.R. I at 209-210).

The trial court denied the motion to strike for the following reasons: “I’m going to deny the motion to strike, and we’ll proceed, and-- and I do that, for the record, based upon the fact that

⁹ P.K. is the nickname of Prosecuting Attorney James R. Milam, II.

the representation was several years ago; that Mr. Milam was working for another firm when he represented him; and that there is no current connection between the two.” (A.R. I at 211).

The Appellant asserts that the trial court failed to conduct the proper analysis and consider the appropriate factors. In syllabus points 3 and 4 of State v. Hatley, 223 W. Va. 747, 748, 679 S.E.2d 579, 580 (2009), this Court held:

3. “When considering whether to excuse a prospective juror for cause, a trial court is required to consider the totality of the circumstances and grounds relating to a potential request to excuse a prospective juror, to make a full inquiry to examine those circumstances and to resolve any doubts in favor of excusing the juror.” Syllabus Point 3, O'Dell v. Miller, 211 W.Va. 285, 565 S.E.2d 407 (2002).

4. “Where a prospective juror is one of a class of persons represented by the prosecuting attorney at the time of trial, but there has been no actual contact between that juror and the prosecutor, the existence of the attorney-client relationship alone is not prima facie grounds for disqualification of that juror.” Syllabus Point 3, State v. Audia, 171 W.Va. 568, 301 S.E.2d 199 (1983).

Significantly, in Hatley this Court observed that “[i]t is apparent from our discussions in *Audia* and *O'Dell* that while an attorney-client relationship between a prospective juror and the prosecuting attorney does not per se disqualify that juror, **such a relationship merits the closest scrutiny by the trial court, and the more prudent course may be to excuse the juror.**” Hatley, 223 W. Va. at 752, 679 S.E.2d at 584 (2009) (emphasis added).

In Hatley, this Court found that the trial court committed reversible error in failing to excuse a juror for cause where the prosecuting attorney drafted a deed for the juror, the representation was only a couple of years prior to the defendant's trial and the juror indicated that he would again hire the prosecuting attorney in the future in the event he needed legal work done. State v. Hatley, 223 W. Va. 747, 752, 679 S.E.2d 579, 584, fn 7 (2009). It is noted that

like in the present case, the juror in Hatley also stated that he had no bias that would prevent him from acting impartially, but this assertion was not given any consideration by this Court. Id.

In the instant case, the attorney-client relationship between the juror and prosecutor was more prolonged and more substantial than the brief relationship described in Hatley. As in Hatley, the prior representation was only a short period prior to the Appellant's trial- just five years ago. (A.R. I at 203-204). However, unlike Hadley, the trial court did not inquire as to whether the juror would seek to have the Prosecutor represent him in the future if the need arose. It is clear from the questioning that Juror Crislip was not dissatisfied at all with the Prosecutor's prior representation of him. (A.R. I at 203-211). It is further noted that Juror Crislip identified the Prosecutor as his lawyer and identified him by his nickname "P.K.", which is indicative of a casual relationship. (A.R. I at 207-208).

However, the error in this case goes beyond the trial court failing to excuse Juror Crislip for cause. Unlike the scenario in Hatley, the relationship in this case between the Prosecutor and Juror Crislip was not discovered during voir dire- it was discovered after the Appellant had exercised his peremptory challenges and after the jury had been sworn and impaneled. The trial had already begun. This fact is extremely important because it is anticipated that the State will contend that the Appellant waived his objection to Juror Crislip when the trial court offered to reconsider the motion to strike and substitute the alternate juror at the close of evidence prior to deliberations. (A.R. V at 107-108).¹⁰ However, under the circumstances presented in this case, the Appellant was deprived of an important fundamental, constitutional right: the right to a trial by an impartial, objective jury.

¹⁰ The Appellant did not waive his prior objection and declined to substitute the alternate juror because the alternate juror had a prior social relationship with the Prosecutor. (A.R. Vol. I at 118-120), (A.R. Vol. V at 107-108).

This Court should strongly consider the fact that Juror Crislip displayed a complete lack of candor during voir dire regarding his past connections to the Prosecutor. During the course of voir dire, the trial court specifically inquired “Has anyone been a client of any of the lawyers in this case?” (A.R. I at 51). Juror Crislip did not raise his hand. (A.R. I at 51). This lack of candor by Juror Crislip resulted in prejudice to the Appellant and as a result he did not receive a fair trial. This Court considered a similar issue in State v. Dellinger, 225 W. Va. 736, 740-43, 696 S.E.2d 38, 42-45 (2010). “As we held in syllabus point four of State v. Peacher, 167 W.Va. 540, 280 S.E.2d 559, 563 (1981), The right to a trial by an impartial, objective jury in a criminal case is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article III, Section 14, of the West Virginia Constitution. **A meaningful and effective voir dire of the jury panel is necessary to effectuate that fundamental right.**” Dellinger, 225 W. Va. at 741, 696 S.E.2d at 43.

The Court in Dellinger further observed that “[t]hus, we have held that ‘[t]he official purpose[] of voir dire is to elicit information which will establish a basis for challenges for cause and to acquire information that will afford the parties an intelligent exercise of peremptory challenges.’ Id. (citations omitted)

As in Dellinger, Juror Crislip’s lack of candor undermined the purpose of voir dire and deprived the Appellant of the ability to determine whether Juror Crislip harbored any prejudices or biases against him or in favor of the State. *See* Dellinger, 225 W. Va. at 741, 696 S.E.2d at 43. (“Simply put, Juror Hyre’s reticence during voir dire foreclosed any challenge for cause or use of a peremptory challenge by Appellant.”). Therefore, under the specific circumstances presented in this case, the trial court was obligated to do one of two things after learning of Juror Crislip’s relationship with the Prosecutor after the jury was sworn:

Option 1: Discharge Juror Crislip and substitute the alternate juror. *See State v. Brown*, 210 W. Va. 14, 21, 552 S.E.2d 390, 397 (2001) (“It is a long-held rule of this Court that it is within the sound discretion of the court in the trial of a felony case, if a juror, at any time after he is sworn, and before verdict, becomes, from any cause, unable to discharge his duties as such juror, to discharge such juror, and substitute another qualified juror in his place[.]”). The trial should have substituted the alternate juror on its own initiative. However, even this course of action would not have resolved the fact that the Appellant was deprived of a meaningful and effective voir dire of the jury panel to effectuate a fundamental constitutional right to an objective and impartial jury. Dellinger, 225 W. Va. at 741, 696 S.E.2d at 43.

Option 2: Declare a mistrial, as the disclosure of the relationship between Juror Crislip and the Prosecutor was not something that the trial court could have predicted. *See State v. Gibson*, 181 W. Va. 747, 751, 384 S.E.2d 358, 362 (1989) (“Whatever the circumstance which cause a trial court to declare a mistrial, if that circumstance is unforeseeable in nature and makes completion of the trial impossible, a manifest necessity will be found to exist and double jeopardy will not be found to bar retrial.”). Although inconvenient to everyone involved, the most prudent course of action for the trial court would have been to declare a mistrial so that the Appellant would have the opportunity to conduct a meaningful and effective voir dire of the jury panel, which is necessary to effectuate his fundamental constitutional right to an objective and impartial jury. Dellinger, 225 W. Va. at 741, 696 S.E.2d at 43.

In this case, the trial court did nothing except leave the biased juror on the panel. As a result the Appellant did not receive a fair trial and his constitutional rights were violated. The Appellant further asserts that the failure by the trial court to exercise one of the two options set forth above constitutes plain error. *See State v. Brown*, 210 W. Va. 14, 19-20, 552 S.E.2d 390,

395-96 (2001) (“In criminal cases, plain error is error which is so conspicuous that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant’s timely assistance in detecting the error.’ ‘To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” (citations omitted). In this case, all of the four elements of plain error are present and each have been discussed more fully above. For the foregoing reasons, the conviction should be reversed and the Appellant should be awarded a new trial.

IV. THE TRIAL COURT ERRED IN ALLOWING THE INTRODUCTION OF ACTS OF PRIOR DOMESTIC VIOLENCE BY THE APPELLANT AGAINST THE DECEDENT, AS THE INTRODUCTION OF SUCH EVIDENCE WAS IMPROPER UNDER STATE V. MCGINNIS, *THE WEST VIRGINIA RULES OF EVIDENCE* PERTAINING TO HEARSAY AND THE CONFRONTATION CLAUSE OF THE UNITED STATES CONSTITUTION AND WEST VIRGINIA CONSTITUTION.

The Appellant contends that the trial court erred in permitting the introduction of Rule 404(b) evidence against the Appellant concerning alleged acts of prior abuse against the decedent and further alleges that the introduction of such evidence violated the *West Virginia Rules of Evidence* pertaining to hearsay and the Confrontation Clause in the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution.¹¹

In Syllabus point two of State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994), this Honorable Court outlined the procedure that trial courts must follow in determining whether to admit Rule 404(b) evidence:

¹¹ During the course of pretrial proceedings in this matter, the State filed a *Motion for Admission of 404(b) Evidence* concerning alleged prior acts of domestic violence between the Appellant and his wife. (A. R. VII at 166-170). A hearing on this issue was conducted on March 30, 2012 and the Court permitted the parties to submit briefs on the admission of five (5) alleged acts of domestic violence pursuant to Rule 404(b). (A. R. VII at 148-159, 160-165, 171-174).

Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an in camera hearing as stated in State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence. Id. at 264-265; 544-545.

In Syllabus point one of McGinnis, *supra*, the Court further explained “[w]hen offering evidence under Rule 404(b) of the *West Virginia Rules of Evidence*, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose.” Based on the foregoing points of law, the trial court correctly concluded that that a four-part inquiry was necessary. (A.R. VII at 51). However, as discussed more fully below, the trial court erred in its application of law to the facts of this case.

“The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, this Court must review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, this Court must review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, this Court must review for an abuse of discretion the trial court's

conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.”
State v. LaRock, 196 W.Va. 294,470 S.E.2d 613 (1996).

1. Purpose for Which the Evidence is Being Offered

As, set forth above, the question of whether the trial court admitted evidence for a legitimate purpose is subject to a *de novo* review. State v. LaRock, 196 W.Va. 294,470 S.E.2d 613 (1996). In the instant case, the State sought to admit evidence of alleged prior abuse to Teresa Rollins to show "absence of mistake or accident". (A.R. VII at 51). In the proceedings before the trial court, Appellant's trial counsel argued that the "absence of mistake or accident" exception is not applicable under the facts and circumstances of this case and that evidence under this exception is only admissible where a defendant relies upon a defense that the defendant made a mistake or caused an accident. (A.R. VII at 51-52). In this case, the Appellant contended he did not have any involvement whatsoever in the death of Teresa Rollins. (A.R. VII at 52) Appellant further contended that in all of the West Virginia cases that have admitted evidence pursuant to the Rule 404(b) "absence of accident" exception, the evidence was used to rebut a defense of a defendant's mistake or accident; not of an accident or mistake that did not involve the defendant. (A.R. VII at 52)

In support of this position, the Appellant cited and relied on various cases where the alleged mistake or accident involved the defendant. (A.R. VII at 52). *See e.g.*, State v. Winebarger, 217 W. Va. 117, 617 S.E.2d 467 (2005) (admitting 404(b) evidence of prior brandishing charge to show absence of mistake or accident in voluntary manslaughter trial where defendant contended he attempted to fire a warning shot into the air and the bullet struck decedent in the neck and fatally wounded him); State v. LaRock, 196 W. Va. 294, 470 S.E.2d 613 (1996) (admitting 404(b) evidence of acts of continued violence against infant son to show

absence of mistake or accident where defendant's testimony established defenses of either accidental death or rage. *See also State v. Phillips*, 194 W.Va. 569, 461 S.E.2d 75 (1995) (defendant alleged that he accidentally killed his wife). Appellant's trial counsel argued that: "[t]he Phillips case is a textbook example of the type of accident that the Defendant would need to allege in order for the prosecution to bring in other crimes or bad acts under Rule 404(b). The defendant in Phillips was arguing that he accidentally killed his wife. That he was involved in and contributed to the accident. . . . Mr. Rollins is not asserting that any unintentional or accidental actions of his resulted in his wife's death." (A.R. VII at 52). However, the trial court concluded otherwise:

The Court does not find any support for the Defendant's narrow interpretation of the "absence of accident" exception in either the cases cited by the Defendant or in any other case law. To the contrary, in *State v. Mongold*, 220 W. Va. 259, 647 S.E.2d 539 (2007), the West Virginia Supreme Court found evidence of prior abuse to be admissible to rebut a defendant's theory that the victim's death was caused accidentally. . . . The facts in *Mongold* are analogous to the facts in the present case where evidence of the Defendant's prior abuse of Teresa Rollins is admissible to rebut the Defendant's theory that Teresa Rollins death could have occurred accidentally. (A.R. VII at 52)

The trial court erred in its application of *Mongold* to the facts of this case. Key differences include that during Mr. Mongold's case-in-chief, Mongold presented witnesses who testified as to his overall good character and that he was not a violent person. *State v. Mongold*, 220 W. Va. 259, 265, 647 S.E.2d 539, 545 (2007). In this case, there was no such good character evidence presented by the Appellant for the State to rebut. Additionally, the direct testimony of Mr. Mongold and other witnesses suggested that the child's fatal injuries could have been caused accidentally while, among other things, he was playing the game of airplane with her. *Id.* Thus,

in Mongold, the evidence was apparently used to rebut a defense of a defendant's mistake or accident. The trial court erred in concluding that the evidence was offered for a proper purpose.

2. *Whether Court Is Satisfied by Preponderance of the Evidence that the Acts Occurred and that Defendant Committed the Acts*

Following the March 30, 2012 Rule 404(b) hearing, the Court permitted the parties to submit briefs on the admission of five (5) alleged acts of domestic violence pursuant to Rule 404(b).¹² In the trial court's subsequent Order finding these incidents of domestic violence were admissible under Rule 404(b), the trial court analyzed the five incidents in two separate categories: (1) *Two incidents that were witnessed* and (2) *Three incidents proven by photographs and statements made by Teresa Rollins*. (A.R. VII at 55-56). In this appeal, the Appellant does not contend that the Court erred in finding by a preponderance of the evidence that the two (2) incidents that were allegedly personally witnessed by Jimmy Thompson occurred and that the defendant committed the acts.¹³ However, the Appellant contends that the trial court clearly erred by concluding that the other three (3) incidents involving photographs and statements allegedly made by Teresa Rollins were admissible. It is necessary to review the testimony relied upon by the trial court for each of the three photographs and statements that were admitted.

1. Photo of bruise to chest and statement. A neighbor, Jimmy Thompson testified that Teresa Rollins had a bruise on her chest in July 2009. (A.R. VI at 195-197). Thompson testified that he photographed the bruise and that Teresa Rollins told him that it was from where the

¹² The five (5) alleged acts of domestic violence were: (1) The Defendant shaking Teresa in the spring of 2009, as witnessed by Jimmy Thompson; (2) The Defendant slapping Teresa in the laundry room of their home in May 2009, as witnessed by Jimmy Thompson; (3) The incident resulting in a bruise to Teresa's chest in July 2009, as evidenced by the photograph of the bruise; (4) The incident resulting in an injury to Teresa's nose in July 2009, as evidenced by the photograph of the bruise; and (5) The incident resulting in the bruise to Teresa's thigh in August 2009, as evidenced by the photograph of the bruise. (A.R. VII at 45).

¹³ As set forth hereinbelow, the Appellant contends that admission of any of the five (5) allegations of domestic violence were inadmissible under a Rule 403 balancing test.

Appellant hit her. (A.R. VI at 195-196). The testimony of Regina Lucente was similar in that she testified that she observed a bruise on Teresa's chest in July 2009 and Teresa told her that it was from the Appellant being abusive to her. (A.R. VI at 222).

2. Photo of injury to nose and statement. Similarly, Jimmy Thompson testified that he photographed the injury to Teresa Rollins' nose in early July 2009. (A.R. VI at 197). He further testified that Teresa said that the Defendant “lost control and cracked her one.” (A. R. VI at 198).

3. Photo of bruise to thigh and statement. Jimmy Thompson also testified that he also photographed a bruise on the side of Teresa's thigh from August 2009, which Teresa told him was from the Defendant's boot. (A.R. VI at 198-199).

At the hearing on March 30, 2012 and in his brief, Counsel for the Appellant contended that even if the evidence was admissible under a Rule 404(b) analysis, such evidence was inadmissible because it was hearsay. (A.R. VI at 63-65, 70, 72-73, 91 and A.R. VII at 57).¹⁴ “All evidence must be relevant under Rules 401, 402, and 403 (relevancy), Rule 602 (firsthand knowledge), Rule 701 (lay-opinion testimony), and Rule 802 (hearsay). If the evidence fails under any of these rules, it should be excluded.” Meadows v. Meadows, 196 W. Va. 56, 63, 468 S.E.2d 309, 316 (1996) *See also*, 3 JONES ON EVIDENCE § 17:38.50 (7th ed.) (“Evidence that satisfies Fed. R. Evid. 404(b) as to substance is nevertheless inadmissible if it is in the form of inadmissible hearsay.”).

The trial court found that each of the statements made by the decedent regarding the photographed injuries were admissible and concluded: (1) the statements were not hearsay, as “the statements are not being offered for the truth of the matter asserted, but are, rather, being admitted solely for the purpose of identifying the bruises seen in the photographs.” (A.R. VII at

¹⁴ It is noted that the State of West Virginia never made any argument in its brief concerning hearsay. (A. R. VII at 171). Instead, the Circuit Court conducted its own analysis and concluded that the evidence was admissible. (A. R. VII at 45).

58). (2) “[E]ven if the statements were ‘hearsay’, they fall within recognized hearsay exceptions”, namely the present sense hearsay exception set forth in Rule 803(1). (A.R. VII at 58-59). (3) If the statements are hearsay and no recognized exception applies, they are admissible under the “catch-all” hearsay exception in Rule 804(b)(5). (A.R. VII at 60-61).

Regarding the appropriate standard of review, this Court has held: “[i]n cases that involve the interpretation of the *West Virginia Rules of Evidence* and the admissibility of evidence, two standards of review are applied. . . ‘There are two interrelated standards that apply First, an interpretation of the *West Virginia Rules of Evidence* presents a question of law subject to de novo review. Second, a trial court's ruling on the admissibility of testimony is reviewed for an abuse of discretion, “but to the extent the [circuit] court's ruling turns on an interpretation of a [West Virginia] Rule of Evidence our review is plenary.” State v. McDaniel, 211 W. Va. 9, 12, 560 S.E.2d 484, 487 (2001) (citing State v. Sutphin, 195 W.Va. 551, 466 S.E.2d 402 (1995), Gentry v. Mangum, 195 W.Va. 512, 518 n. 4, 466 S.E.2d 171, 177 n. 4 (1995)).

The Appellant contends the trial court erred in its interpretation of the *West Virginia Rules of Evidence* and is entitled to a *de novo* review by this Court. The Appellant will address each hearsay issue in turn.

1. *Non-Hearsay*

Although the trial court accurately states the applicable law regarding the definition of hearsay, it erred in its analysis. The trial court correctly observed that:

“[the West Virginia Supreme [sic] has held that: Generally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless:

1) **the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action;**

2) the statement is not hearsay under the rules; or

3) **the statement is hearsay but falls within an exception provided for in the rules.** Syl. Pt. 1, *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990). *State v. Kaufman*, 227 W. Va. 537, 552, 711 S.E.2d 607, 622 (2011); Syl. pt. 1, *State v. Phillips*, 194 W.Va. 569,461 S.E.2d 75 (1995) (emphasis in original).” (A.R. VII at 58).

The trial court concluded that “the statements are not being offered for the truth of the matter asserted, but are, rather, **being admitted solely for the purpose of identifying the bruises seen in the photographs.** Accordingly, and so long as the statements are only used for identification purposes, they do not constitute inadmissible hearsay.” (A.R. VII at 58). (emphasis added).

Clearly, the statements allegedly made by Teresa Rollins to Jimmy Thompson and Regina Lucente regarding her photographed injuries are being offered to prove the truth of the matter asserted, i.e. that the Appellant caused the bruises depicted in the photographs of Teresa Rollins. If admitted for the purpose identified by the trial court, to identify the bruises seen in the photographs, the evidence would not be relevant unless accompanied by evidence of causation. “There is no provision excusing hearsay evidence from meeting the basic requirement of relevancy for admission.” *State v. Phillips*, 194 W. Va. 569, 575, 461 S.E.2d 75, 81 (1995) In other words, from his own observations, Jimmy Thompson could have identified the bruises as being on the body of Teresa Rollins without testifying to the cause of the bruises. To allow the witness to testify to the cause of the bruises amounts to statements being offered for the truth of the matter asserted and is hearsay. The Court erred in concluding otherwise.

2. *Hearsay- Present Sense Exception*

The trial court goes on to state that “even if the statements were “hearsay”, they fall within hearsay exceptions provided for in the West Virginia Rules of Evidence” and specifically

finds the statements fall within the present sense impression of Rule 803(1). (A. R. VII at 59-60). Syllabus Point 4 of State v. Phillips, 194 W. Va. 569, 461 S.E.2d 75, (1995) holds:

It is within a trial court's discretion to admit an out-of-court statement under Rule 803(1), the present sense impression exception, of the West Virginia Rules of Evidence if: (1) The statement was made at the time or shortly after an event; (2) the statement describes the event; and (3) the event giving rise to the statement was within a declarant's personal knowledge.

Once again, the trial court correctly identified the applicable law by citing Phillips; however, the trial court erred in its application of the law to the facts of this case. (A. R. VII at 59). Specifically, the Court erred in finding that “Teresa Rollins made the challenged statements shortly after the occurrence of the incidents of domestic violence, **as evidenced by the bruises visible on her body**, which she was explaining in her statements. As such, ‘the proximity in time is sufficient to reduce the hearsay dangers of faulty memory or insincerity.’” . (A. R. VII at 59-60) (emphasis added).

It is common knowledge that a bruise can be visible for days and even weeks. The trial court had no basis to conclude Teresa Rollins made the challenged statements shortly after the occurrence of the incidents of domestic violence. The testimony on which this finding is based should be considered. Regarding the bruise to the chest, Jimmy Thompson testified on direct examination as follows:

Q. Could you tell us—Could you give us a date when you took this photograph?

A. This one here—I think it was around in August or July. It was in between there because there were two incidents that happened right there together. (A.R. VI at 196-197).

Thereafter, the Prosecutor unsuccessfully tries to get Thompson to be more specific on the dates he took the photographs in question but he cannot do so. (A.R. VI at 199-200). Notably, no testimony was given on direct regarding the date the alleged injury to the chest

occurred- only the dates the photographs were taken. (A.R. VI at 196-200). The testimony of Regina Lucente does not aid in establishing any time frame between the date the alleged injury to the chest occurred and date the photograph was taken. (A. R. VI at 219-223).

Regarding the injury to the nose, Jimmy Thompson testified on direct examination as follows:

- Q. Could you tell us what the exhibit is first, please?
A. It's a picture of where she was punched in the nose.
Q. Who took the photograph?
A. Me.
Q. And where did you take that photograph at?
A. That was at my home.
Q. And is that an accurate depiction of what you saw on that day?
A. Yes.
Q. And when was the date of that?
A. That was in July. That was before the party, the 4th of July.
(A. R. VI at 196-197).

Again, no testimony was given on direct regarding the date the alleged injury occurred- just the date the photograph was taken. On cross-examination, Thompson testified as follows regarding the nose injury and bruise to the chest:

- Q. You say these incidents occurred in July of 2009?
A. Yes.
Q. Do you have a specific day that that occurred?
A. It was like right before the 4th of that week me and her was planning on having a barbeque at her house.

Q. Sir, do you know what day of the week this occurred when you say that you took this photograph of the injury to her nose?
A. It was between the 2nd and the 3rd.

Q. And the injury to her chest, you took on what date?
A. It was the same day, I took both.
Q. Oh, they happened on the same day?
A. That one of her nose. The one on her hip was in August.
Q. So the injury to her chest was photographed at the same time?
A. Yes, sir. (A.R. VI at 205-207).

Taken as a whole and at the very most, the testimony of Jimmy Thompson only establishes that he took the pictures of Teresa Rollins' prior to July 4th, on either July 2nd or July 3rd. There is no clear indication of when the injuries occurred in relation to when Thompson took the pictures. As to the bruise to the hip, Thompson once again cannot provide an accurate time frame. Thompson testified:

- Q. And the injury that you say you photographed to her hip, what date and time did you take that photograph?
- A. That was in August. I don't really know specific . I don't remember the day actually that was on. All I know is that she came there and give me a haircut that day.
- Q. What's the closest estimation of the date you have?
- A. I'm not really for sure. I was--
- Q. You don't have any idea of what day in August it was?
- A. No, I don't. (A. R. VI at 207).

Based on the foregoing, the trial court clearly erred in finding that "Teresa Rollins made the challenged statements **shortly after the occurrence of the incidents of domestic violence**, as evidenced by the bruises visible on her body, which she was explaining in her statements. As such, 'the proximity in time is sufficient to reduce the hearsay dangers of faulty memory or insincerity.'" (A. R. VI at 59-60). (emphasis added) The circuit court abused its discretion by simply relying on the presence of bruises in making the determination that Teresa Rollins' alleged statements were made shortly after the incidents of domestic violence and this Court should require further evidence concerning the lapse of time between the alleged acts and the photographs before the same can be admitted under Rule 803(1).

In State v. Phillips, 194 W. Va. 569, 572-73, 461 S.E.2d 75, 78-79 (1995), this Court considered the necessity of the spontaneity of a statement in relation to a event. Id. at 572-573, 78-79. The Court in Phillips declined creating a bright line time limit beyond which a statement would be deemed presumptively unreliable. Id. Nevertheless, the Court found that "there must

be some evidence concerning the lapse of time or there is no foundation for the admission of this evidence.” *Id.* (citing State v. Williams, 395 A.2d 1158, 1163 (Me.1978)) (“victim's statement ... coming as it did after an undetermined lapse of time from the triggering event, does not possess the indicia of trustworthiness to qualify as a present sense impression”).

In this case, as evidenced by the testimony cited above, there was no reliable evidence concerning the lapse of time between the alleged events of abuse and the time the statements were made; therefore, there was no foundation for the admission of this evidence; therefore, the trial court erred in admitting the evidence.¹⁵

3. *Hearsay- Catch-All Exception*

The trial court further erred in finding that that Teresa Rollins’ statements were also admissible under Rule 804(b)(5). (A. R. VI at 60-61). Assuming *arguendo* that the trial court was correct in its analysis of the Rule 804(b)(5) factors, the trial court clearly failed to enforce the notice requirements set forth in Rule 804(b)(5):

However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

It is apparent from a review of the Court file that the State did not seek to introduce this evidence under the catch-all exception in Rule 804(b)(5). (A.R. VII at 1-8). Instead, it was the trial court that concluded, *sua sponte*, that the catch-all exception in Rule 804(b)(5) was applicable. There was no notice to the Appellant of the State’s intention to offer the statements, the particulars of the statements were not provided and the name and address of the declarant

¹⁵ For purposes of this appeal, the Appellant does not address whether the trial court erred in analyzing the other two factors for the present sense impression: that the statement describes the event; and the event giving rise to the statement was within a declarant's personal knowledge.

was not provided in any notice. Without adherence to these formalities, the Court erred in admitting evidence under Rule 804(b)(5).

As stated by the Court in State v. Smith, 178 W. Va. 104, 114, 358 S.E.2d 188, 198-99 (1987), “[w]e emphasize in closing that Rules 803(24) and 804(b)(5) cannot be viewed as an open door to thrust hearsay statements into a trial.”

Unlike the scenario in Smith, *supra*, where the error was deemed to be harmless, admission of the hearsay statements in this case constitutes reversible error under Syllabus Point two of State v. Atkins:

Where improper evidence of a non-constitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury. State v. Atkins, 163 W.Va. 502, 261 S.E.2d 55 (1979), *cert. denied*, 445 U.S. 904, 100 S. Ct. 1081, 63 L.Ed.2d 320 (1980) (“ (citations omitted).

Under the analysis adopted in Atkins, even assuming there was sufficient evidence absent the improperly admitted evidence to sustain a conviction, the jury was prejudiced by the admission of this hearsay evidence due to its inflammatory nature and the nature of the allegations that the Appellant previously abused his deceased wife.

4. *Confrontation Clause*

The Appellant asserts that the trial court abused its discretion in ruling that admission of the statements allegedly made by the decedent do not violate the Confrontation Clause. “It is well settled that a trial court's rulings on the admissibility of evidence, “including those affecting constitutional rights, are reviewed under an abuse of discretion standard.” State v. Kaufman, 227

W. Va. 537, 548, 711 S.E.2d 607, 618 (2011) (quoting State v. Marple, 197 W.Va. 47, 51, 475 S.E.2d 47, 51 (1996)). Regarding the Confrontation Clause, this Court has observed:

Under the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution, an accused is guaranteed the right to confront and cross-examine the witnesses against him. As this Court held in syllabus point one of State v. James Edward S., The Confrontation Clause contained in the Sixth Amendment to the United States Constitution provides: ‘In all criminal prosecutions, the accused shall ... be confronted with the witnesses against him.’ This clause was made applicable to the states through the Fourteenth Amendment to the United States Constitution. 184 W.Va. 408, 409, 400 S.E.2d 843, 844 (1990), overruled on other grounds by, State v. Mechling, 219 W.Va. 366, 633 S.E.2d 311 (2006). See Syl. Pt. 3, State v. Martisko, 211 W.Va. 387, 388, 566 S.E.2d 274, 275 (2002). “

State v. Kaufman, 227 W. Va. 537, 548, 711 S.E.2d 607, 618 (2011).

In Kaufman, *supra*, this Court further explained that “pursuant to Crawford, ‘testimonial’ out-of-court statements are barred from admission under the Confrontation Clause: “‘Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.’ ” Mechling, 219 W.Va. at 372, 633 S.E.2d at 317 (quoting Crawford v. Washington, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L.Ed.2d 177 (2004)); State v. Kaufman, 227 W. Va. 537, 549-50, 711 S.E.2d 607, 619-20 (2011). The definition of a “testimonial statement” is found in Syllabus Points 8 and 9 of State v. Mechling, 219 W. Va. 366, 633 S.E.2d 311 (2006):

8. Under the Confrontation Clause contained within the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution, 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.**

9. Under the Confrontation Clause contained within the Sixth Amendment to the United States Constitution and Section 14 of

Article III of the West Virginia Constitution, a witness's statement taken by a law enforcement officer in the course of an interrogation is testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the witness's statement is to establish or prove past events potentially relevant to later criminal prosecution. A witness's statement taken by a law enforcement officer in the course of an interrogation is non-testimonial when made under circumstances objectively indicating that the primary purpose of the statement is to enable police assistance to meet an ongoing emergency. (emphasis added).

The trial court further erred in concluding that “the statements made by Teresa Rollins to Jimmy Thompson and Regina Lucente were not ‘testimonial’”. (A.R. VII at 65). First, in making this determination, the trial court narrowly interpreted the foregoing syllabus points in Mechling and held: “[f]irst, [the statements] were not made to a law enforcement officer or in any other formal capacity. To the contrary, Teresa Rollins had no contact with law enforcement about the prior incidents of abuse.” (A.R. VII at 65). While this finding by the trial court was factually accurate, under the trial court’s narrow analysis, a statement made to a non-law enforcement officer can never be considered testimonial. However, this interpretation by the trial court is in direct conflict with this Court’s statement in Footnote 10 of Mechling that “[u]ntil the U.S. Supreme Court holds otherwise, we interpret the Court's remarks to imply that **statements made to someone other than law enforcement personnel may also be properly characterized as testimonial.**” State v. Mechling, 219 W. Va. 366, 379, 633 S.E.2d 311, 324 (2006) (emphasis added).

Nowhere in Mechling or Kaufman does this Court hold that a statement made to someone other than law enforcement personnel cannot be a testimonial statement. Whether a statement is made to law enforcement is merely one factor to consider in making this determination. Other relevant factors that were not considered by the trial court was there was no ongoing emergency

at the time the statements were made. (A.R. VII at 65). As discussed above, each alleged statement was made well after the alleged event occurred. Additionally, assuming Teresa Rollins ever made the statements, the likely primary purpose for her explaining the bruises in the manner they were explained and documenting the bruises by having photographs taken was to preserve evidence in order to establish or prove past events potentially relevant to later criminal prosecution. For this reason, the trial court erred in finding that “the statements were not ‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’” (A. R. VII at 65).

The trial court further erred in its interpretation of Kaufman, finding that the statements at issue are “more analogous to entries in a personal diary, such as the ones at issue in *Kaufman*, because they were made to Teresa's close friend and confidant, Jimmy Thompson, and to her sister, Regina Lucente.” (A. R. VII at 65). Statements are not analogous to entries in a personal diary. It is common knowledge that entries in a personal diary or journal are private by their very nature and these sort of writings are generally not intended for any other person or for publication.

In this case, it was alleged that the decedent told Jimmy Thompson and Regina Lucente that her husband inflicted physical abuse on her and the alleged abuse was further documented by photographs while the statements were being made. Under these particular circumstances, the statements would lead an objective witness to believe that the statements made by Teresa Rollins would be available for use at a later trial date. Since the Teresa Rollins is unavailable, the Appellant did not have the opportunity to cross-examine her with regard to these statements. Thus, the Confrontation Clause should have barred her testimony because it was testimonial for the following reasons (1) it not given during an ongoing emergency; (2) the statements were

given under circumstances that would lead an objective witness to believe that they would be available for use at a later trial date.

However, even if this Court finds the statements are non-testimonial, the statements should be still be deemed inadmissible under the Confrontation Clause as they do not bear adequate indicia of reliability. The trial court correctly noted that:

As non-testimonial statements, the Confrontation Clause analysis of Teresa Rollins' statements to Jimmy Thompson and Regina Lucente still follows the pre-Crawford and pre-Mechling cases. See, *State v. Kaufman*, 227 W.Va. 537, 551 n.31, 711 S.E.2d 607, 621 n.31 (2011). Specifically, unlike testimonial out-of-court statements, nontestimonial statements may be admissible in a criminal trial if it is shown that the witness was unavailable for trial, and that the witness's statement bore adequate indicia of reliability. See *Mechling*, 219 W.Va. at 371, 633 S.E.2d at 316. (A. R. VII at 65-66).

The trial court cited syllabus point five of *State v. James Edward S.*, 184 W. Va. 408, 410, 400 S.E.2d 843, 845 (1990) for the proposition that “Even though the unavailability requirement has been met, the Confrontation Clause contained in the Sixth Amendment to the United States Constitution mandates the exclusion of evidence that does not bear adequate indicia of reliability. Reliability can usually be inferred where the evidence falls within a firmly rooted hearsay exception. *Id.*, *holding modified by State v. Kennedy*, 205 W. Va. 224, 517 S.E.2d 457 (1999) *and overruled on other grounds by State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006).

In this case, the trial court erred in finding the statements made by Teresa Rollins bear adequate indicia of reliability. (A.R. VII at 66-67). As discussed above, Teresa Rollins' statements are the very definition of hearsay because they were offered for the truth of the matter asserted and not for identifying the bruises in the photographs. Further, for the reasons discussed

above, the present sense impression in Rule 803(1) does not apply in this case. As noted by the trial court, statements only being admitted under the general hearsay exception of Rule 804(b)(5), are considered to be presumptively unreliable. (A.R. VII at 66). Based on the foregoing, even if the statements were non-testimonial in nature, the trial court erred in admitting the statements because they were inadmissible under the Confrontation Clause as they do not bear adequate indicia of reliability.

3. Relevancy of the Evidence Under Rules 401 and 402

The third part of the trial court's analysis was a determination of whether the prior incidents of domestic violence are relevant for a purpose other than proving the character of the Defendant. Even if the incidents of domestic violence are relevant under Rules 401 and 402, Appellant's trial counsel contended below that the alleged incidents were too remote in time to the alleged murder but the trial court did not address this argument in its Order. (A.R. VII at 45-72). Specifically, Appellant contended that the evidence should be excluded for remoteness pursuant to State v. Gray, 217 W. Va. 591, 619 S.E.2d 104 (2005). In Gray, the husband was convicted of killing his wife and evidence of his prior threats and bad acts was admitted. The Supreme Court upheld the conviction because the past acts were contemporaneous and in close in time related to the murder. Gray, 217 W. Va. at 601, 619 S.E.2d at 114. However, Appellant's trial counsel argued that "the language of Gray suggests that the prior bad acts would not have been admissible had they occurred even months in the past". (A.R. VII at 156-157). As such, the acts in this case were remote in time and should have been excluded by the trial court.

4. Balancing Under Rule 403- Probative Value vs. Prejudicial Effect

Lastly, the trial court abused its discretion in finding that the five (5) acts of alleged abuse are admissible under Rule 403. "[T]his Court must review for an abuse of discretion the trial

court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403." State v. LaRock, 196 W.Va. 294,470 S.E.2d 613 (1996). Rule 403 of the *West Virginia Rules of Evidence* provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

As recognized by the trial court, there is no standard set of factors to be considered by a court when conducting its balancing under Rule 403, but the Court in McGinnis set forth in a footnote certain factors that should be considered:

- (a) The need for the evidence
- (b) The reliability and probative force of the evidence
- (c) The likelihood that the evidence will be misused because of its inflammatory effect
- (d) The effectiveness of limiting instructions
- (e) The availability of other forms of proof
- (f) The extent to which admission of evidence will require trial within trial, and
- (g) The remoteness and similarity of the proffered evidence to the charged crime. McGinnis, 193 W.Va. at 156 n. 11,455 S.E.2d at 525 n. 11. (A. R. VII at 69).

In the instant case, the trial court clearly erred in its analysis of the foregoing factors.¹⁶

As to (a), the need for the evidence was low, as the State had secured the testimony of April

¹⁶ The circuit court found that: "In the present case, (a) the State argues that the probative value of the prior incidents of domestic violence is extremely important for the trier of fact to see the continuous domestic violence that demonstrates the "absence of mistake or accident" regarding the murder of Teresa Rollins. Second, (b) as the evidence will be presented through an eye witness, photographs and testimony, the Court finds that it is reliable and highly probative of the relationship between the Defendant and Teresa Rollins. The Court does acknowledge that (c) the evidence of prior abuse may be inflammatory, but finds that it is not being used for any improper purpose. Additionally, the Court will give the required limiting instruction, and (d) believes that such instruction will be effective in guiding the jury to only consider the evidence for purposes of showing that Teresa Rollins' death was not an accident. With respect to other forms of proof, (e) it appears that there is other evidence to show that Teresa Rollins' death was not accidental, but the evidence of prior abuse is the best proof of the nature of the relationship

Bailes who testified at trial that the Appellant admitted to her that he had killed his wife. (A. R. III at 208-210). As to (b), the reliability of at least three of the five alleged incidents was low as it was based on inadmissible hearsay. Regarding (c), the trial court even acknowledged that the evidence of prior abuse may be inflammatory. (A.R. VII at 70). Additionally, as to (d), the standard limiting instruction given by the Court cannot be considered to be effective, due to the inflammatory nature of the evidence. As to (e), the trial court concluded that there was other evidence to show that Teresa Rollins' death was not accidental but the evidence of prior abuse was the best proof. (A.R. VII at 70). Again, this is even though April Bailes testified that the Appellant admitted to her that he had killed his wife. (A. R. III at 208-210). As to (f), admission of this evidence certainly required a trial within a trial, as multiple witnesses were called to attack Jimmy Thompson's character for truthfulness. (A. R. IV at 121,129,139,149). Lastly, as to (g), the alleged acts of prior abuse introduced by the State in this case range from 3-6 months old and are unrelated to the alleged murder. As such, they were remote in time and should have been excluded. To the extent that the trial court concluded otherwise, it abused its discretion.

V. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT CUMULATIVE EVIDENCE THROUGH THE TESTIMONY OF MULTIPLE EXPERT WITNESSES.

Prior to the trial below, Counsel for the Appellant filed a motion *in limine* to preclude the State from offering cumulative testimony on the issue of whether the decedent's injuries were

between the Defendant and Teresa Rollins. Based on the *in camera* hearing held by this Court regarding the evidence of prior abuse, (f) the admission of the evidence will not require a trial within a trial, but will only require testimony from the two witnesses, Jimmy Thompson and Regina Lucente, plus admission of the photographs. Finally, (g) the proffered evidence bears similarities to the crime charged. The proffered evidence shows that the Defendant previously (i) smacked his wife "up the side of the head" in the presence of a neighbor; (ii) grabbed her by the arms and physically shook her, also in the presence of a neighbor; (iii) punched her in the chest, leaving knuckle marks; (iv) "cracked her one" in the nose because she spent too much money; and (v) kicked her with his boot. This evidence demonstrates the Defendant's complete disregard for Teresa Rollins and lack of spousal affection. When conducting the balancing required by Rule 403, and weighing those factors in favor of admissibility, this Court finds that the probative value of the evidence outweighs any danger of unfair prejudice." (A. R. VII at 69-70).

consistent with being struck by a tree. (A.R. VII at 268-273). In essence, the motion *in limine* alleged that the State intended to offer testimony at trial through three separate pathologists that the decedent's injuries were not consistent with being hit by a tree. (A.R. VII at 268-273). It further alleged that the testimony of the State's experts would be cumulative and unfairly prejudicial to the Appellant, under Rule 403, particularly because the Appellant was indigent and could only afford one expert in the field of pathology. (A.R. VII at 268-273). The trial court deferred ruling on this issue pending presentation of the evidence at trial, but stated that the Appellant could raise this objection during trial and the Court would determine whether the evidence should be excluded. (A.R. VII at 112).

This Court has held that “[a]pplication of Rule 702 necessarily involves the determination of whether the evidence is relevant under Rule 401 and whether it withstands the balancing of interests set forth in Rule 403. Under the provisions of Rule 403, a trial court may exclude evidence because ‘its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.’” Kominar v. Health Mgmt. Associates of W. Virginia, Inc., 220 W. Va. 542, 557, 648 S.E.2d 48, 63 (2007) (citations omitted).

At trial, the State presented the testimony of Dr. Zia Sabet, the Deputy Medical Examiner and the pathologist who performed the first autopsy of the alleged victim. (A.R. II at 136-217). Dr. Sabet testified that the alleged victim's injuries were not consistent with being struck by a tree. (A.R. II at 154, 157). He further testified that the manner of death was undetermined but “with significant suspicion of homicidal assault.” (A.R. II at 155, 196).

The State further presented the testimony of Dr. James Kaplan, the Chief Medical Examiner and the pathologist who reviewed and signed off on the first autopsy of the alleged victim performed by Dr. Sabet. (A.R. III at 130-133). Dr. Kaplan testified that the alleged victim's injuries were not consistent with being struck by a tree. (A.R. III at 141). Dr. Kaplan further testified that the manner of death was no longer undetermined and that this was a homicide.¹⁷ (A.R. III at 148, 174, 185-186).

In light of the foregoing, prior to the State's third pathologist, Dr. Cyril H. Wecht, taking the witness stand, the Appellant renewed his objection regarding cumulative evidence and sought to exclude, or at least limit the testimony of Dr. Wecht. (A.R. IV at 5-7). At this point in the trial, the State had presented the testimony of two pathologists that testified that the alleged victim's injuries were not consistent with being struck by a tree and the testimony of one pathologist that testified that the manner of death was a homicide, based a theory of drowning and strangulation. (A.R. II at 154,157;A.R. III at 141). The Appellant asserted that the testimony of Dr. Wecht would be cumulative on these points and that his testimony on these issues should be excluded or limited. (A.R. IV at 5-7). The State acknowledged that Dr. Wecht's testimony would be partially cumulative but asserted that his testimony would be different in some respects as Dr. Wecht performed a second, more extensive and thorough autopsy on the decedent. (A.R. IV at 7-8). The Appellant responded that he did not have any issue with the State presenting evidence of additional injuries found by Dr. Wecht during the second autopsy, but objected to a third pathologist rendering an opinion that the decedent's injuries were not consistent with her being struck by a tree because the Appellant had only one pathologist and the Appellant would be prejudiced by the cumulative testimony. (A.R. IV at 9). The trial court overruled the objection, stating:

¹⁷ This will be the subject of a separate ground for appeal discussed below.

Well, the issue - - the issue in this case is - - of course, is the manner and cause of death, and from the beginning, the forensic pathology reports have been attacked from the beginning, the forensic pathology reports have been attacked, and the - - and I - - This is the State's response and, I guess, in - - to those attacks; so even though it may be somewhat cumulative, I think it is probative of the issues in this case so I'll deny the motion to - - to limit his testimony. (A.R. IV at 9-10).

Regarding the appropriate standard of review for the trial court, this Court has held: "The evaluation of the probative weight versus prejudicial weight of evidence is left to the sound discretion of the trial court and its judgment will not be overturned absent an abuse of discretion. Gable v. Kroger Co., 186 W.Va. 62, 410 S.E.2d 701 (1991); *State v. Dillon, supra*. Additionally, "[t]he balancing necessary under Rule 403 must affirmatively appear on the record." *State v. McGinnis*, 193 W.Va. 147, 156, 455 S.E.2d 516, 525 (1994)." State v. Phillips, 194 W. Va. 569, 581, 461 S.E.2d 75, 87 (1995)

Therefore, even though both the State and trial court both acknowledged that the testimony of Dr. Wecht would be "somewhat cumulative", the trial court permitted the State to call Dr. Wecht as a witness. Notably, the trial court did not conduct a balancing test on the record as required in McGinnis, supra., as the Court never considered the prejudice to the Appellant. As anticipated, Dr. Wecht testified that the decedent died as a result of forcible drowning and that a tree did not strike the decedent. (A.R. IV at 37-39).

In stark contrast, the indigent Appellant could only afford one expert witness to refute the State's trio of pathologists. At trial, the Appellant presented the testimony of his sole pathologist, Dr. Joseph Cohen, who testified that the decedent's injuries were consistent with her being struck by the smaller to medium sized branches of the tree and being entrapped in a pond. (A.R. V at 47-49). Dr. Cohen further testified that the cause of death was drowning, the manner

of death was undetermined and there was not sufficient evidence to rule the manner of death as a homicide. (A.R. V at 45-46; 76-77).

In this appeal, the Appellant contends that the trial court abused its discretion by: (1) permitting the State to offer the testimony of three experts that the decedent's injuries were not consistent with her being struck by a tree and (2) permitting the State to offer the testimony of two experts that the manner of death was a homicide. It is noted that Dr. Sabet testified that the manner of death was undetermined with significant suspicion of homicidal assault. (A.R. II at 155,196). Nevertheless, the trio of expert witnesses presented by the State resulted in substantial prejudice to the indigent Appellant, who could only afford one expert pathologist.

The prejudice is apparent when considering the celebrity status of the State's third expert witness, Dr. Wecht, who testified or was consulted in a number of high profile cases, such as: the assassination of President John F. Kennedy, the assassination of Senator Robert F. Kennedy, the assassination of Reverend Martin Luther King, Elvis Presley, Chandra Levy, JonBenet Ramsey, Laci Peterson, O.J. Simpson, Michael Jackson, Whitney Houston, Anna Nicole Smith and numerous others. (A.R. IV at 21). As a result of his work in such high profile matters, Dr. Wecht appears on television shows, such as 20/20 and has authored numerous books. (A.R. IV at 72-75, A.R. VII 256.). It is further noted that the attorney and/or family of Teresa Rollins that is pursuing a wrongful death claim against the Appellant are the ones that initially retained Dr. Wecht. (A.R. IV at 99-103). Notwithstanding the representations of the State, it is unclear who actually ended up footing the bill for Dr. Wecht's trial testimony, which is believed to be substantial. (A.R. IV at 104-105).

In this case, the trial court was required to make a determination as to whether the probity of the objected to evidence was substantially outweighed by its prejudice. State v. Guthrie, 194 W. Va. 657, 682-83, 461 S.E.2d 163, 188-89 (1995). As stated in Guthrie:

To perform the Rule 403 balance, we must assess the degree of probity of the evidence, which, in turn, depends on its relation to the evidence and strategy presented at trial in general. The mission of Rule 403 is to eliminate the obvious instance in which a jury will convict because its passions are aroused rather than motivated by the persuasive force of the probative evidence. Stated another way, the concern is with any pronounced tendency of evidence to lead the jury, often for emotional reasons, to desire to convict a defendant for reasons other than the defendant's guilt." Id.

However, the concern is not limited to the scenario that a jury might convict because its passions are aroused. As explained in the advisory committee's note to Federal Rule of Evidence 403, unfair prejudice has many forms and "within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Federal Rule of Evidence 403*; see also State v. Taylor, 215 W. Va. 74, 79, 593 S.E.2d 645, 650 (2004). In this case, the concern becomes that the jury made a decision on an improper basis and simply "jumped onto the bandwagon" of the State's trio of experts. When the State presents the testimony of three expert witness, one of which is of national fame, and they all that testify that an act did or did not occur, a jury is extremely likely to be persuaded by the sheer number of experts and the risk of unfair prejudice is compounded. There is much truth to the old adage, "there is strength in numbers."

The trial court's decision to admit this cumulative evidence because the Appellant attacked the State's forensic pathology reports was an abuse of discretion. Further, in its ruling, the trial court did not perform a balancing test or even consider the resulting unfair prejudice to the Appellant in (1) allowing three expert witnesses to testify that the decedent's injuries were

not consistent with her being struck by a tree and (2) allowing two experts to testify that the manner of death was a homicide. (A.R. IV at 9-10). As a consequence, the Appellant was substantially prejudiced and a new trial should be awarded.

VI. ONE OF THE STATE'S EXPERT WITNESSES CHANGED HIS OPINION ON THE STAND AND HAD NO REPORT TO SUPPORT HIS FINDINGS. THIS RESULTED IN UNFAIR SURPRISE TO DEFENSE COUNSEL AND AFFORDED THEM NO OPPORTUNITY TO PREPARE AN ADEQUATE CROSS-EXAMINATION OR A DEFENSE TO HIS TESTIMONY.

Following the trial in this matter and prior to sentencing, the Appellant filed a Motion for a New Trial. (A.R. VII at 250). One of the grounds raised by the Appellant was that Dr. James Kaplan, the Chief Medical Examiner, materially changed his opinion while on the witness stand. (A.R. VII at 250). During the course of this investigation, the State Medical Examiner's Office changed its opinion numerous times as to manner and cause of death.

The final change of opinions occurred at trial when Dr. Kaplan testified that the manner of death was no longer undetermined and that this was a homicide and the cause of death was a combination of strangulation and drowning. (A.R. III at 148, 174, 185-186). It is contended herein that this change was an unfair surprise that warrants a new trial. It is helpful to review a summary of the changes made by the State Medical Examiner's Office up to and including the time of trial regarding the cause and manner of the alleged victim's death:

1. On October 5, 2009 (the date the alleged victim died), the State Medical Examiner's Office received the body of Teresa Rollins and Dr. Sabet conducted an autopsy on October 6, 2009 at 10 a.m. (A.R. II at 140, 164-165). The first death certificate issued on October 6, 2009 at the time of the autopsy stated "**pending investigation**" for both cause and manner of death. (A.R. II at 167; A.R. VII at 195).
2. On October 20, 2009, following an investigation by law enforcement, the State Medical Examiner's Office determined that the cause of death was "drowning complicated compression asphyxia" and the manner of death was "**accident.**" (A.R. II at 168). A death certificate was issued reflecting these findings. (A.R. VII at 196). On January 10, 2010, the State Medical Examiner's Office issued an autopsy report containing these same findings. (A.R. II at 167; A.R. VII at 199). This report was

signed and approved by Dr. Sabet and Dr. Kaplan. (A.R. II at 172, 177; A.R. VII at 204).

3. On January 14, 2010, law enforcement officers met with Dr. Sabet and Dr. Kaplan. (A.R. II at 193-194). Less than 24 hours after this meeting, Dr. Sabet amended his findings. (A.R. II at 193-194; A.R. VII at 210).
4. On January 19, 2010, an amended death certificate was filed stating that the cause of death was “asphyxia due to probable strangulation” and the manner of death was “**could not be determined.**” (A.R. II at 194-196; A.R. VII at 197).
5. Seven months later, on July 19, 2010 an amended autopsy report was filed changing the manner of death to **undetermined, reflecting significant suspicion of homicidal assault.** (A.R. II at 155, 195-196; A.R. VII at 206). At this time, Dr. Kaplan concurred with the manner of death being undetermined. (A.R. III at 174, 185, A.R. VII at 209).
6. **Two years later, at trial,** Dr. Kaplan testified that the manner of death was no longer undetermined and that this was a **homicide** and the cause of death was a combination of strangulation and drowning. (A.R. III at 148, 174, 185-186).

At trial, Dr. Sabet testified in accordance with the amended autopsy report signed and approved by himself and Dr. Kaplan on July 19, 2010- that the manner of death was undetermined but with significant suspicion of homicidal assault. (A.R. II at 155, 196). Thus, Dr. Sabet’s testimony was not a surprise to anyone. On the other hand, the testimony presented by Dr. Kaplan went much further than contained in his amended autopsy report signed on July 19, 2010. Dr. Kaplan testified that the manner of death was no longer undetermined and that this was a homicide and that the cause was a combination of drowning and strangulation. (A.R. III at 147-148, 174, 185-186). This opinion by Dr. Kaplan was rendered for the very first time while he was on the witness stand at trial and no written report was presented to support his opinion. (A.R. III at 186).¹⁸ This resulted in unfair surprise to the Appellant, as he did not anticipate Dr. Kaplan to testify that the manner of death was a homicide. (A.R. VI at 425-427).

¹⁸ The undersigned has filed a Motion to Supplement the Record because an amended death certificate dated August 20, 2012 was filed after the trial in this matter. The amended death certificate states that the

During the hearing on the Appellant's Motion for a New Trial, the Prosecutor even acknowledged that he was surprised Dr. Kaplan testified this was a homicide; however the State contended that the Appellant had knowledge of Dr. Kaplan's new opinion a week prior to trial. (A.R. VI at 426). In response, Counsel for the Appellant denied any prior knowledge that Dr. Kaplan would testify this was a homicide. (A.R. VI at 427). The trial court denied the Appellant's Motion for a New Trial for the following reason:

I mean, Dr. Kaplan testified as to what Dr. Kaplan testified to, I don't know if he changed his mind while on the stand, if he changed his mind in the witness room, or he changed his mind the week before. I don't know but that was his testimony, and he was subject to full and vigorous cross-examination during the trial. (A.R. VI at 429).

Rule 33 of the *West Virginia Rules of Criminal Procedure* states that: "[t]he court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." The Appellant contends that the trial court abused its discretion in denying his Motion for a new trial on this ground, as this surprise testimony by Dr. Kaplan affected the fairness of the trial and having the opportunity cross examine Dr. Kaplan is meaningless as the Appellant could not prepare an adequate cross examination. As a result, the Appellant was prejudiced. Regarding discovery violations and unfair surprise, this Court has stated:

In *State ex rel. Rusen v. Hill*, 193 W.Va. 133, 454 S.E.2d 427 (1994), the Court stated: While discovery has not been elevated to a constitutional dimension, it is clear that constitutional rights of a criminal defendant are implicated when a discovery system has been put in place and the prosecution fails to comply with court ordered discovery. We believe that it is necessary in most criminal cases for the State to share its information with the defendant if a fair trial is to result. Furthermore, we find that complete and reasonable discovery is normally in the best interest of the public. The Court also said: The purpose of Rule 16(a) [of the West Virginia Rules of Criminal Procedure], our basic discovery rule in

manner of death was homicide and the cause of death was fatal asphyxia assault. **It is further noted that the date of injury is changed to a different date than in all prior death certificates.**

criminal cases, is to protect a defendant's right to a fair trial. The degree to which that right suffers as a result of a discovery violation cannot be determined by simply asking would the non-disclosed information enhance or destroy the State's case. A significant inquiry is how would the timely access of that information have affected the success of the defendant's case. Finally, in *State ex rel. Rusen v. Hill*, *id.*, the Court indicated that **whether prejudice results from the failure of the State to comply with a discovery order is determined by asking whether the non-disclosure results in a surprise and whether it, hampers the preparation and presentation of the defendant's case.**

State ex rel. Justice v. Trent, 209 W. Va. 614, 618, 550 S.E.2d 404, 408 (2001) (citations omitted)

In the instant case, everyone, including the Prosecutor, was surprised by the testimony of Dr. Kaplan. (A.R. VI at 426). This non-disclosure by Dr. Kaplan hampered the preparation and presentation of the Appellant's case as he did not have time to prepare for an adequate cross-examination on this change of opinion. Additionally, had the Appellant known the State would have two pathologists testifying that the manner of death was a homicide, it could have moved the trial court for funding to hire an additional pathologist. The end result of Dr. Kaplan's surprise testimony was substantial prejudice to the Appellant. The trial court abused its discretion in denying the Appellant's Motion for a New Trial on this ground. This Honorable Court should reverse the judgment of conviction and a new trial should be awarded to Appellant.

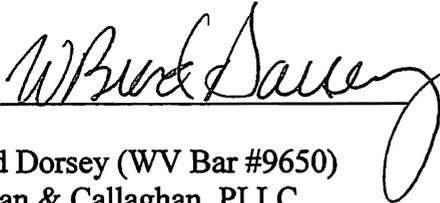
VII. THE RECORD SHOWS THAT THE CUMULATIVE EFFECT OF NUMEROUS ERRORS PREVENTED THE APPELLANT FROM RECEIVING A FAIR TRIAL AND HIS CONVICTION SHOULD BE SET ASIDE.

This Court has held on numerous occasions that the cumulative effect of numerous errors can prevent a criminal defendant from receiving a fair trial, and in such case his conviction should be set aside. *See, e.g.*, Syllabus Point 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550

(1972). In the instant case, the cumulative effect of biased jurors, denial of the right to to an impartial and objective jury, improper remarks by the Prosecutor during closing arguments and admission of evidence in violation of the West Virginia Rules of Evidence and the Confrontation Clause, admission of cumulative expert testimony and undisclosed expert testimony resulting in unfair surprise, as set forth more fully herein, constitute sufficient error to have created a cumulative effect of denying the Appellant a fair trial.

CONCLUSION

Based upon the foregoing, the judgment of conviction should be reversed and a new trial should be awarded.

Signed: 

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 13-0099

NICHOLAS CO. CIRCUIT COURT CASE NO. 11-F-81

STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent/Appellee,

v.

GARY LEE ROLLINS, Defendant Below,
Petitioner/Appellant.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2013, true and accurate copies of the foregoing **Appellant's Brief** and **Appendix** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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