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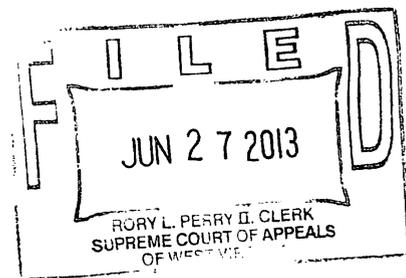
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0099

STATE OF WEST VIRGINIA,  
*Plaintiff below,*  
*Respondent,*

v.

GARY LEE ROLLINS,  
*Defendant below,*  
*Petitioner.*



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RESPONDENT'S BRIEF

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## ASSIGNMENTS OF ERROR

Petitioner asserts the following assignments of error in his Brief:

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.
2. THE TRIAL 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.
3. 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.
4. 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.
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

Gary Lee Rollins is serving a life sentence for the 2009 murder of his wife, Teresa Rollins. In September 2012, a Nicholas County jury found that Rollins—motivated by an extra-marital affair and a life insurance policy—strangled and drowned Teresa, placed her body in a pond on their vegetable farm, and staged it to look like a tree had collapsed on her and held her underwater in a bizarre accidental drowning. (J.A.-VII 276.)<sup>1</sup> Rollins is now challenging his murder conviction on appeal, claiming that misconduct by the Prosecuting Attorney and errors by the Circuit Court warrant its reversal. (Pet’r’s Br. 1-2.)

Rollins was indicted for Murder on September 13, 2011, (J.A.-VII 9),<sup>2</sup> and his case went to trial nearly a year later on August 14, 2012 (J.A.-I 1). At trial, the State contended that Rollins, who had a history of physically abusing his wife, ultimately murdered her to recover hundreds of thousands of dollars in life insurance proceeds and to continue his extra-marital relationship with a 28-year-old female employee. (J.A.-I 212-20.) Rollins, however, maintains his innocence and insists that Teresa’s death was simply an accident. He contends that Teresa was merely at the wrong place at the wrong time: she was feeding a loaf of bread to fish in the pond when a falling tree pinned her underwater and caused her to drown, which was what authorities first believed had happened. (J.A.-I 220-22.) Rollins argues that it was not until the Governor of West Virginia, at the request of Teresa’s family, became personally involved and exerted political pressure that medical examiners changed their opinions and declared Teresa’s death a homicide. (J.A.-I 223-26; J.A.-V 165-66.)

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<sup>1</sup> Citations herein to “J.A.-\_” refer to the seven-volume Joint Appendix filed in this case. For example, “J.A.-VII” refers to volume seven of the Joint Appendix.

<sup>2</sup> The crime of Murder is codified at West Virginia Code Section 61-2-1.

The jury heard these competing versions of the facts, and after a five-day trial, it found Rollins guilty of murder with a recommendation of no mercy. (J.A.-VII 276.) The Circuit Court sentenced Rollins to a term of life in prison without the possibility of parole. (J.A.-VII 139.)

**I. On October 5, 2009, Teresa Rollins Was Found Lying in a Pond, Covered by a Fallen Tree.**

The jury's guilty verdict was based on the following facts. In October 2009, Gary and Teresa Rollins had been married for ten years. (J.A.-I 322-23.) They lived in Nettie, West Virginia, where they owned and operated a vegetable farm. (J.A.-I 242.) Gary was 51 years old (J.A.-VII 242); Teresa was 54 (J.A.-VII 197).

On the morning of October 9, 2009, Gary was working on the farm with three employees. (J.A.-I 297.) Around lunch time, an employee remarked that she had not seen Teresa all morning. (J.A.-II 112-13.) Gary replied that he and Teresa "wasn't getting along," and that "he was going to do his thing that morning, and she was going to do hers, and that was it, and he was gonna go check on her." (J.A.-II 122.) Gary left to look for Teresa, and he later "came back running up over the hill yelling to call 911." (J.A.-II 115.)

Teresa was found submerged in a pond, face down, and with a tree lying on top of her. (J.A.-II 118, 132.)<sup>3</sup> Gary said that he tried to move the tree himself, but it was too heavy. (J.A.-I 272, 303.) So he used a tractor to push the tree aside. (*Id.*) With the help of an employee, Gary pulled Teresa out of the water, and they performed CPR on her for three to five minutes. (J.A.-I 272, 303-04, 309; J.A.-II 117.) Meanwhile, another employee, April Bailes, called 911 from her cell phone. (J.A.-III 213.) Despite the fact that she could not see Teresa's body from the location

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<sup>3</sup> The diameter of the base of the tree that was found atop Teresa Rollins was approximately 16 inches across. (J.A.-I 262.) It resembled a telephone pole, lacking any branches that could hold a person underwater. (J.A.-II 30.) Rollins estimated the pond to be approximately 12 feet deep. (J.A.-I 307.)

where she made the call, Bailes told the 911 operator that Teresa Rollins “was in the pond and she was under the tree, she wasn’t breathing.” (J.A.-III 214.)

**II. Authorities Initially Declared That Teresa’s Death Was an Accident.**

Teresa was dead when first responders arrived. (J.A.-I 245; J.A.-II 88-89.) David Sales, then a Nicholas County Deputy Sheriff, arrived approximately thirty minutes after the 911 call. (J.A.-I 242, 275.)<sup>4</sup> After taking several photographs, Sales took statements from witnesses, including Gary Rollins and April Bailes. (J.A.-I 266-67.)

In the days and weeks after she was killed, all indications were that Teresa’s death was an accident. Teresa’s autopsy was performed on October 6, 2009, by Dr. Zia Sabet, the West Virginia Deputy Chief Medical Examiner. (J.A.-II 140; J.A.-VII 197.) Dr. Sabet “originally presumed the tree pushed her into the water and then pinned her under the water.” (J.A.-III 138.) After Teresa’s initial death certificate said her cause of death was “pending investigation” (J.A.-VII 195), the medical examiner declared on October 28, 2009, that Teresa’s death was caused by a “bizarre” accidental drowning. (J.A.-III 133, 138; J.A.-VII 203-04.) An autopsy report issued on January 11, 2010, stated that Teresa “died as the result of drowning complicating compression asphyxia sustained when she was struck by a tree falling into a pond with subsequent entrapment under water.” (J.A.-VII 204.)

**III. After the Autopsy, New Information Emerged Suggesting That Teresa’s Death Was Not an Accident.**

Despite the initial conclusion that Teresa’s death was an accident, “suspicious circumstances” surrounding Teresa’s death came to light and altered that conclusion. (J.A.-II 147.) Authorities learned that just a month before Teresa’s death, Gary—by himself and over the

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<sup>4</sup> At the time, Sales was a relatively new deputy sheriff, having graduated from the West Virginia State Police Academy just 14 months earlier in August 2008. (J.A.-II 12.)

telephone—had taken out a \$300,000 accidental-death insurance policy on Teresa, adding to the \$200,000 policy that was already in place. (J.A.-II 244-45, 247-48.)<sup>5</sup> They also found out that Gary had been having a year-long extra-marital affair with April Bailes, his 28-year-old employee who called 911 the day of Teresa’s death. (J.A.-I 294; J.A.-III 49-50, 206-07.) It also emerged that Gary and April had purchased a new pickup truck together just two months before Teresa’s death. (J.A.-II 249; J.A.-III 9, 215.)<sup>6</sup> Gary financed over \$44,000 of the truck’s purchase price, and he told the salesman who sold him the truck that “[i]t wasn’t going to be very long” before he paid it off. (J.A.-III 13, 30) When he bought the truck, Rollins purchased another \$50,000 in life insurance on Teresa. (J.A.-III 28.) The salesman testified at trial that Rollins brought up life insurance early in the sales negotiations, and “a lot earlier than most people do.” (J.A.-III 10.) The salesman found the conversation so out of the ordinary that he told his finance and insurance manager that this was a “very odd deal.” (J.A.-III 24.)

Authorities also learned of recent domestic violence in the Rollins home. Teresa’s friend Jimmy Thompson testified that he had “seen Mr. Rollins grab Teresa by the arms and kind of shake her in the laundry room, and she was beggin’ for him to let her go, and then he smacked her upside the head.” (J.A.-II 220.) Thompson also witnessed another occasion when Gary shook Teresa and “swapped her upside the head.” (J.A.-II 223.) Thompson’s testimony was supported by photographs that Thompson had taken of Teresa, bruised and battered after she had been assaulted by Rollins on multiple occasions just months before her death. (J.A.-II 223-30.)

Discrepancies surrounding witness statements regarding Teresa’s death also arose. The evidence revealed that Teresa’s body was not actually visible from the place where April Bailes

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<sup>5</sup> Rollins “voice signed” the policy on September 4, 2009, and it became effective on September 8, 2009. (J.A.-II 247.)

<sup>6</sup> Rollins purchased the truck on August 29, 2009. (J.A.-III 12.)

called 911, indicating that she already knew Teresa was dead when she made the call. (J.A.-III 214.) And Gary's statement that he rushed into the pond to help save Teresa was undermined by witnesses who testified that Gary was dry just moments after Teresa's body had been recovered from the pond. (J.A.-I 274; J.A.-II 115; J.A.-III 214.) Authorities further noted that, just two days after her death, Gary cut down the tree that had allegedly fallen on Teresa. (J.A.-I 276, 279-80.) Yet a bag of bread that she had purportedly used to feed fish was left on the ground. (J.A.-I 272, 281.)

**IV. Based on Newly Discovered Evidence, The Medical Examiner Changed Teresa's Cause of Death to Possible Homicide.**

On January 19, 2010, after meeting with state police officials and hearing this new information, the medical examiner changed his determination of Teresa's death from accidental drowning to "Probable strangulation." (J.A.-III 134-35; J.A.-VII 197.) Seven months later, on July 19, 2010, the medical examiner revised the January 11 autopsy report and said that Teresa "died under circumstances suspicious for manual strangulation," and her official cause of death was "amended from Accident to Undetermined, *reflecting significant suspicion of homicidal assault.*" (J.A.-VII 209; J.A.-II 196 (emphasis added).) At trial the State's Chief Medical Examiner, Dr. James Kaplan, explained the change:

[I]t's very important that you look at where the decedent had to have been, and where the trunk of the tree was, because by the time that tree struck the decedent, it would have been moving very, very quickly and, thus, you would have had a very, very significant impact based on the speed of the tree and the weight of the tree, and so I would have expected in that type of a scenario to have really catastrophic injuries to the decedent, and clearly, it does not show that in autopsy.

(J.A.-III 139.) Dr. Kaplan testified that "to a reasonable certainty . . . this is a homicide, and that Ms. Rollins was fatally assaulted, death being due to an asphyxia cause of death and almost certainly in a setting of strangulation while her face was immersed in water." (J.A.-III 147-48.)

**V. Gary Rollins Admitted to April Bailes That He Killed Teresa.**

The day Teresa was killed, and several times thereafter, Rollins's mistress and employee April Bailes had told authorities that, as far as she knew, Teresa's death was an accident. (J.A.-III 215.) But on October 7, 2011, two years and two days after Teresa's death, Bailes was arrested and charged with being an accessory after the fact to Teresa's murder, and her story changed. Bailes told police that she had not been telling the truth all along, and that Gary Rollins had admitted to her that he had killed Teresa.

Bailes's trial testimony was this: At around 10 a.m. on October 5, Bailes told Gary Rollins that a tree was down in the pond. (J.A.-III 207.) After working some more, Rollins pulled Bailes aside. (J.A.-III 209.) According to Bailes, Rollins "took [her] by the arm to the other side of the tractor, and he just looked at [her] . . . and he just said, 'I – I killed Teresa.'" (J.A.-III 210.) Rollins instructed Bailes that she would "be the one to call 911 and tell them about her under the tree, and that if [she] didn't go along with it, that [she] and [her] daughter wouldn't be here." (*Id.*) Bailes did as she was told. (J.A.-III 213-14.) She got her cell phone from her vehicle, went to an area where she could call 911, and she reported to the 911 operator that Teresa "was in the pond and she was under the tree, she wasn't breathing." (J.A.-III 214.) As Bailes had not seen Teresa, and could not see her from her location 256 feet away (J.A.-III 260), Bailes testified that she knew Teresa was dead only "[b]ecause Gary said, 'I killed her.'" (J.A.-III 214) Bailes also said that Rollins "talked about when he got rid of Teresa" with Bailes, and that he had discussed someday marrying Bailes. (J.A.-III 215.)

Rollins's lawyer thoroughly cross-examined Bailes at trial. Bailes conceded that, in multiple interviews with police, she never told them that Rollins had threatened her or had admitted to killing Teresa. (J.A.-III 226.) She also admitted that she visited Rollins 43 times and accepted 215 telephone calls from him while he was in jail. (J.A.-III 247, 254-55.) And she

conceded that she never said anything to authorities about Rollins admitting to killing Teresa until she herself had been charged with a role in Teresa's murder. (J.A.-III 241.) Through this cross-examination, defense counsel pressed Bailes on her multiple versions of the facts and her possible motivation for her testimony. He argued to the jury that Bailes only changed her story after the couple had broken up, and Bailes, the mother of a five-year-old child, would say anything to get out of going to prison. (J.A.-III 238-43.) Throughout this trial examination, however, Bailes never recanted her testimony that on the morning of October 5, 2009, Gary Rollins admitted to her that he had killed Teresa.

**VI. Three Forensic Experts Agreed that Teresa's Death Was Not Caused by A Falling Tree.**

Three forensic-pathology experts testified for the State at Rollins's trial, and all three agreed that Teresa's death was not caused by a bizarre tree collapse. In addition to the two medical examiners involved in Teresa's official autopsy, a third forensic-pathology expert, Dr. Cyril Wecht, testified for the State. In May 2012, Dr. Wecht performed a second autopsy of Teresa Rollins. (J.A.-IV 23; J.A.-VII 42-44, 178-89.) In addition to re-examining the areas that had been addressed during the first autopsy, Dr. Wecht examined Teresa's spinal column and cord. (J.A.-IV 25-26.) He concluded that there were no injuries consistent with being struck by a tree. (J.A.-IV 36-37.) In his opinion, Teresa "died as a result of a forcible drowning." (J.A.-IV 38.)

To counter the State's expert evidence, Rollins presented his own expert, Dr. Joseph Cohen, a forensic pathologist from California. (J.A.-V 13.) Before starting his own consulting company, Dr. Cohen had risen to be the Chief Forensic Pathologist in Riverside County, California, a county of 2.5 million people. (J.A.-V 15.) Moreover, Dr. Cohen had participated in Dr. Wecht's May 2012 autopsy of Teresa. (J.A.-V 28.) Contrary to the State's experts, Dr. Cohen

opined that “there are no findings to support strangulation” as Teresa’s cause of death. (J.A.-V 42.) He said, “I firmly believe that an accidental mechanism can – can explain the autopsy findings, and that’s where I disagree with Dr. Kaplan and Dr. Wecht on the nature and severity of the injuries with respect to a – a falling tree.” (J.A.-V 46.) And he explained his opinion that Teresa’s injuries were in fact “consistent with her being struck by this tree and being entrapped in a pond.” (J.A.-V 47.)

## **VII. Rollins Made Several Objections Before and During Trial.**

### **A. Before Trial, Rollins Challenged Two Jurors for Potential Bias.**

During the voir dire portion of jury selection, Rollins challenged two jurors, one of whom he removed with a peremptory strike and the other of whom remained on the jury.<sup>7</sup> The first juror, Potential Juror “S.J.,” was a woman who, in response to a voir dire question, responded that she had been a victim of domestic violence. (J.A.-I 138.)<sup>8</sup> She was visibly emotional while she answered the court’s and the lawyers’ questions. (J.A.-I 139.) When the court asked her whether she would automatically believe that domestic violence had happened or whether she would require proof, she replied, “I require proof.” (*Id.*) And then when she was asked whether she could give Rollins a fair hearing, and whether she could follow the court’s instruction that “just because he may have committed domestic violence doesn’t mean he committed murder,” she replied, twice, “I should be able to.” (J.A.-I 141.) After the court denied Rollins’s motion to remove this prospective juror for cause (J.A.-I 142, 157-58), Rollins ultimately removed Potential Juror S.J. with a peremptory challenge, and she did not serve on the jury (J.A.-I 164).

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<sup>7</sup> One juror was removed before she was chosen for the jury; the other was removed after he had been sworn and empaneled as a juror.

<sup>8</sup> This potential juror is referred to herein as “Potential Juror ‘S.J.’” to protect her identity as a domestic-violence victim.

The second juror to whom Rollins objected was Ronald Crislip, a man who informed the court that he had been a client of the Prosecuting Attorney five years earlier, when the Prosecuting Attorney was in private practice. (J.A.-I 204-11.) The Prosecuting Attorney explained to the court that in 2007 he had “appear[ed] at a hearing or two, scheduling hearings in the case” for Crislip. (J.A.-I 204.) During individual voir dire, the court asked Crislip, “Now, the fact that he represented you previously, would that in any way affect your judgment . . . in this case?” Crislip answered, “No, sir, it would not.” (J.A.-I 207.) Crislip ultimately served on the jury. (J.A.-I 164.)

**B. Rollins Objected to Substantive Evidence.**

**1. Rollins Objected to the Introduction of Evidence That He Had Physically Abused Teresa Rollins.**

Rollins also objected to several pieces of substantive evidence at trial that are pertinent to his appeal. The first piece was the evidence of prior acts of domestic violence that Rollins had committed just months before Teresa’s death. (J.A.-VII 166-74.) On March 1, 2012, the State filed a notice of its intent to introduce evidence under West Virginia Rule of Evidence 404(b), along with motion seeking to introduce the evidence. (J.A.-VII 169-70, 171-74.)<sup>9</sup> The Circuit Court held a *McGinnis* hearing on March 30, 2012, and heard testimony from two witnesses—Teresa’s friend Jimmy Thompson and her sister Regina Lucente—who said that they had each seen Gary Rollins physically abuse Teresa, and that they had seen injuries on Teresa that Teresa told them were caused by Gary. (J.A.-VI 187-243.) The State also proposed to introduce photographs that Thompson took of Teresa in July and August 2009, which showed bruises to her face and body that Teresa said were from Gary’s physical abuse. (J.A.-VI 193-201.) Rollins

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<sup>9</sup> The State filed an amended motion to introduce the 404(b) evidence on March 19, 2012. (J.A.-VII 169-70.)

opposed the admission of this evidence because, he argued, (1) it all violated West Virginia Rule of Evidence 404(a), and (2) because Teresa's statements that Gary caused her injuries constituted inadmissible hearsay and contravened the Confrontation Clause of the Sixth Amendment. (J.A.-VII 148-65.) On July 5, 2012, the Circuit Court rejected Rollins's arguments and granted the State's 404(b) motion. (J.A.-VII 45-72.)

In its July 5 order, the court first concluded that the State's evidence of domestic violence was admissible under Rule 404(b), in pertinent part, because it showed that Teresa's death was not caused by accident, as Rollins claimed it was. (J.A.-VII 52-54.) The court also ruled that Teresa Rollins's statements to Jimmy Thompson identifying the source of her injuries in the photographs were either non-hearsay because they were not used for the truth of the matter asserted, or they were admissible under the "present sense impression" or "catch all" exceptions to the hearsay rule. (J.A.-VII 57-60.) And the court explained that Teresa's statements did not violate Gary Rollins's confrontation rights because they were non-testimonial. (J.A.-VII 63-67.)

The State introduced this evidence of prior domestic abuse at trial. The jury heard evidence of five specific acts of prior abuse of Teresa by Gary Rollins: two were shown through Jimmy Thompson's testimony, and three were shown through photographs depicting injuries that Teresa said had been inflicted by Gary.<sup>10</sup> Thompson testified that he and Teresa Rollins had been best friends, and that he had personally witnessed two separate incidents of domestic violence between Gary and Teresa. (J.A.-VII 47.) Thompson also testified that he had taken photographs of a bruised and battered Teresa in July and August 2009, shortly after she had been beaten by Gary. (*Id.*) One photo showed Teresa's chest bruised after Gary had punched her (J.A.-II 224); another showed Teresa's bruised hip that was a result of Gary throwing a boot at her (J.A.-II

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<sup>10</sup> Teresa's sister Regina Lucente testified at the *McGinnis* hearing, but she did not testify at trial.

226); and the third showed a picture of Teresa after Gary had “got[ten] mad and punched her in the face and broke her glasses” (J.A.-II 226). Thompson’s knowledge that these injuries were a result of Gary’s abuse came only from what Teresa had told him. (J.A.-II 224-26.) After Rollins renewed, and the court overruled, his objections to the admissibility of this evidence, the court gave limiting instructions to the jury on this evidence, both at the time the evidence was introduced, (J.A.-II 240-41), and when the court gave the jury its general instructions at the close of trial, (J.A.-VII 131).

**2. Rollins Objected to the Testimony of Forensic Expert Dr. Wecht because He Claimed It Was Cumulative.**

Rollins also objected to the State’s third forensic expert, Dr. Wecht. (J.A.-IV 6.) Rollins argued that having three experts testify to this topic was unduly cumulative under West Virginia Rule of Evidence 403. (J.A.-VII 271.) Rollins maintained that “any testimony from Dr. Wecht is cumulative to the testimony that’s already been provided by two forensic pathologists in this case,” and he maintained that he would be prejudiced because, while the State would have three experts, he could only afford one. (J.A.-IV 6-7.) The Circuit Court rejected this argument, explaining that “the issue in this case is . . . the manner and cause of death, and from the beginning, the forensic pathology reports have been attacked, and. . . this is the State’s response[.]” (J.A.-IV 9.) The court thus concluded that “even though it may be somewhat cumulative, I think it’s probative of the issues in this case,” and it denied Rollins’s motion. (J.A.-IV 9-10.)

**VIII. The Jury Found Rollins Guilty of Murder.**

Rollins’s murder trial lasted five days, and after considering all of the evidence, the jury found Gary Rollins guilty. (J.A.-V 223; J.A.-VII 276.) In its verdict, the jury made a

recommendation of no mercy. (*Id.*) Rollins was sentenced to life in prison without parole for the murder of his wife, (J.A.-VII 138-39), and this appeal ensued.

## SUMMARY OF ARGUMENT

Each of Rollins's claims on appeal lack merit and must be rejected. *First*, Rollins has waived his claim that the Prosecuting Attorney failed to disclose a cooperation agreement with April Bailes and made misleading statements to the jury regarding his intention to prosecute her, as Rollins failed to timely object to these statements in the Circuit Court. But if this Court considers this argument, the claim is wholly unsubstantiated: there is no evidence of any prosecutorial misconduct here. And even if the Prosecuting Attorney's statements to the jury were improper, Rollins cannot show that they were so prejudicial as to invade the proceedings and deprive him of due process.

*Second*, the Circuit Court did not abuse its discretion when it rejected Rollins's motion to strike two jurors—one a domestic-violence victim and the other a prior client of the Prosecuting Attorney—from the jury panel.<sup>11</sup> The Circuit Court conducted a thorough individual voir dire of these jurors, during which the jurors explained that they had no prejudice or bias that would cause them to favor either party at trial. The court thus properly denied Rollins's motions to strike.

*Third*, the Circuit Court did not abuse its discretion when it allowed the jury to hear 404(b) evidence that Rollins had a history of physically abusing Teresa, which rebutted Rollins's claim that Teresa's death was an accident. As the Circuit Court properly concluded, the introduction of this evidence did not violate Rule 404(b), the hearsay rule, or the Confrontation Clause.

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<sup>11</sup> Rollins separates this into two separate assignments of error. (Pet'r's Br. 1.) But they are combined here for ease of reference and discussion.

*Fourth*, the Circuit Court did not abuse its discretion in allowing the State to present the testimony of a third forensic expert who explained to the jury that Teresa Rollins was killed by homicide and not a falling tree. A major theme of Rollins's defense was that the authorities, including the medical examiner, had fabricated evidence to satisfy the orders of the Governor of West Virginia. The complained-of third expert was not prejudicially cumulative because he offered different testimony from the State's other experts: he was not an employee of the State of West Virginia and thus not subject to the Governor's purported undue influence, and he completed a second autopsy of Mrs. Rollins that uncovered additional evidence not found during her first autopsy. Dr. Wecht's expert testimony was therefore admissible under West Virginia Rule of Evidence 403.

*Fifth*, Rollins was not denied the opportunity to prepare an adequate cross-examination of the State's Medical Examiner on Mrs. Rollins's cause of death. Rollins had fair warning of Dr. Kaplan's opinion that Mrs. Rollins was killed by homicide, as well as ample opportunity to test that opinion through cross-examination.

*Sixth*, there were no errors that cumulatively warrant reversal of Rollins's murder conviction. Rollins has failed to identify any error at all, let alone so many errors that cumulatively denied him the right to a fair trial.

## **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is not necessary in this case. The briefs and records on appeal adequately present the facts and legal arguments. Oral argument would not significantly aid the decisional process, and a memorandum decision affirming Rollins's conviction would appropriately dispose of this appeal.

## ARGUMENT

### **I. The Prosecuting Attorney Did Not Materially Misrepresent Facts to the Jury During Closing Argument.**

During his closing argument, Rollins's lawyer suggested to the jury that April Bailes had falsely testified in exchange for leniency from the State. Challenging the truthfulness of Bailes's testimony, defense counsel remarked, "What does she get from that 15 seconds of fabrication? She's joined their team. . . . Is [the prosecutor] really going to indict his star witness, do you think? . . . After all is said and done, he gets his conviction thanks to her lie, he's going to repay that by indicting her?" (J.A.-V 182-83.) In response to the defense's attempt to discredit him and paint him as a liar, the Prosecuting Attorney said to the jury, "Mr. VanBibber wants you to believe that [Bailes is] getting out of trouble for telling us the truth. . . . [H]e 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." (J.A.-V 207-08.) "She's being prosecuted as accessory after the fact in this case," he continued. (J.A.-V 208.) Rollins claims that this statement to the jury by the Prosecuting Attorney—that he intended to seek April Bailes's indictment the following month—was both a "deliberate and outright lie" and an instance of improper vouching to bolster Bailes's testimony, and that his conviction should be reversed as a result. (Pet'r's Br. 18.)

Rollins's claim of prosecutorial misconduct must be rejected for three reasons. First, Rollins waived this objection by failing to timely object to the Prosecuting Attorneys statements at trial. Second, Rollins has not identified any evidence that would support his claim that the Prosecuting Attorney intentionally misled the jury or was vouching for Bailes. And third, in light of his opportunity to cross-examine Bailes, as well as the overwhelming evidence against him, Rollins cannot prove any prejudice from the Prosecuting Attorney's statement.

**A. Rollins Waived His Prosecutorial Misconduct Claim by Failing to Timely Object in the Circuit Court.**

“The rule in this State has long been that ‘[i]f either the prosecutor or defense counsel believe the other has made improper remarks to the jury, a timely objection should be made coupled with a request to the court to instruct the jury to disregard the remarks.’” *State v. Davis*, 205 W. Va. 569, 586, 519 S.E.2d 852, 869 (1999) (alteration in original) (quoting Syl. pt. 5, in part, *State v. Grubbs*, 178 W. Va. 811, 364 S.E.2d 824 (1987)). Furthermore, “[t]his Court has long held that ‘[f]ailure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of the case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court.’” *Id.* (quoting Syl. pt. 6, *Yuncke v. Welker*, 128 W. Va. 299, 36 S.E.2d 410 (1945)).

Rollins waived his claim of prosecutorial misconduct and improper vouching by failing to timely object at the time the Prosecuting Attorney made his statements before the jury. Although there was no way for Rollins’s lawyers to know whether the Prosecuting Attorney would actually seek to indict Bailes after the trial was over, they still knew that there was no guarantee that the indictment would actually occur. In other words, if the Prosecuting Attorney’s statements were in fact objectionable, then Rollins’s lawyers had the same reason and the same opportunity to object to them at trial as they do now, nearly a year later on appeal. Hindsight has given Rollins no advantage. A timely objection would have allowed the Circuit Court to address the propriety of the Prosecuting Attorney’s statement and timely correct any error. Indeed, Rollins’s lawyers made a sidebar objection to a separate portion of the Prosecuting Attorney’s rebuttal after he had finished, and notably, they said nothing about his statements concerning his intent to indict April Bailes. (J.A.-V 211-12.) By failing to timely object in the trial court, Rollins

waived his right to object to the Prosecuting Attorney's statements now on appeal, and this claim must be rejected.

**B. Rollins Has Not Identified Any Evidence of Prosecutorial Misconduct.**

Rollins's claim that the Prosecuting Attorney lied to the jury and improperly bolstered April Bailes's testimony also fails because it lacks any evidentiary support whatsoever. The State has a duty to produce any favorable evidence to the defendant in a criminal trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). This includes the duty to "disclose any and all inducements given to its witnesses in exchange for their testimony[.]" Syl. pt. 1, *State v. James*, 186 W. Va. 173, 411 S.E.2d 692 (1991). This duty exists because "in some cases the jury may decide that the deal has created an incentive for the witness to lie." *Id.* at 175, 695. It is also well settled that "[a] prosecutor must not vouch for a witness's credibility because it implies that the prosecutor has additional personal knowledge about the witness or circumstances garnered through extrajudicial investigation." *United States v. Washington*, 44 F.3d 1271, 1278 (5th Cir. 1995). "The government may not vouch for the credibility of witnesses, either by putting its own prestige behind the witness, or by indicating that extrinsic information not presented in court supports the witness' testimony." *United States v. Rudberg*, 122 F.3d 1199, 1200 (9th Cir. 1997). But for a defendant to obtain a new trial based on a claim of undisclosed leniency, the defendant must show "[c]lear evidence of a deal directly linking leniency for . . . [a witness] with testimony lending to convict . . . [the defendant] that was not disclosed[.]" *Id.*

Rollins cannot carry his burden of proving an undisclosed agreement of leniency in exchange for favorable testimony. He alleges that the State violated its *Brady* obligations and improperly bolstered the testimony of April Bailes when the prosecutor told the jury during rebuttal, "You can bet your behind that I'm going to indict her next month." (Pet'r's Br. 17-18

(quoting J.A.-V 207-08.) But there is simply *no evidence* here that the prosecutor made *any* misrepresentation to the jury concerning *any* leniency agreement with Bailes, let alone that he “lied to the jury for the purpose of bolstering the credibility of a key witness and to obtain a conviction.” (*Id.* at 17.)<sup>12</sup>

When—or whether—the Prosecuting Attorney intended to indict Bailes for her role as an accessory after the fact in Mrs. Rollins’s murder was an issue of prosecutorial discretion. *See State ex rel. Skinner v. Dostert*, 166 W. Va. 743, 752, 278 S.E.2d 624, 631 (1981) (“The duty to prosecute is qualified, however, in that the prosecuting attorney is vested with discretion in the control of criminal causes, which is committed to him for the public good and for the vindication of the public interest.”). As this Court has explained, “The prosecuting attorney, in his sound discretion, may refrain from prosecuting a cause or, having commenced a prosecution, may move the dismissal of a cause, when in good faith and without corrupt motivation or influence, he thinks that the guilt of the accused is doubtful or not capable of adequate proof.” *Id.* At its core, “[t]he responsibility of a prosecutor is to seek justice, not merely to convict.” *Id.*; *see also State ex rel. Hamstead v. Dostert*, 173 W. Va. 133, 313 S.E.2d 409 (1984) (outlining scope of prosecutorial discretion); W. Va. R. Prof’l Responsibility 3.8 (providing that a prosecutor must “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause”).

The Prosecuting Attorney did not legally commit himself to prosecute Bailes simply because he told the jury that he would. Rather, what matters is that the Prosecuting Attorney was

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<sup>12</sup> Rollins’s Brief relies solely on the absence of an indictment of April Bailes by the Nicholas County grand jury in the months since Rollins’s murder conviction. (Pet’r’s Br. 17 n.5.) In support of this allegation, Rollins attempted to include the indictments that were returned during this time in the appellate record; however, this Court denied that attempt by Order on June 25, 2013.

not misrepresenting facts to the jury or implying that he had personal knowledge of Bailes's veracity. Absent such evidence, Rollins's prosecutorial misconduct claim must be rejected.

**C. Rollins Cannot Show That the Prosecuting Attorney's Statements to the Jury Were Prejudicial.**

Alternatively, even if the Prosecuting Attorney's statements to the jury during closing arguments were somehow improper, Rollins is still not entitled to relief. This Court has explained that "[a] judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." *State v. Sugg*, 193 W. Va. 388, 405, 456 S.E.2d 469, 486 (1995). To warrant reversal, the remarks must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). This Court considers four factors in this inquiry:

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.

*Id.*

Here, all four factors lead to the conclusion that the Prosecuting Attorney's remarks did not "so infect[] the trial with unfairness" as to compel the reversal of Rollins's conviction. First, Rollins had ample opportunity to cross-examine April Bailes and to question her about why her recollection of events changed over time. Bailes admitted that she never implicated Gary Rollins until she was herself charged with a crime in October 2011, two years after Teresa's death, and after she and Rollins had ended their relationship. She conceded that she visited Gary in jail 43 times and accepted over 200 telephone calls from him while he was imprisoned. The defense thus had ample opportunity to attempt to impeach Bailes in front of the jury.

Second, the Prosecuting Attorney's remark was isolated and consisted of a single comment during closing argument. In fact, the remark was so isolated that it did not even warrant a timely objection from defense counsel at trial.

Third, even absent that remark, there was overwhelming evidence that Rollins murdered his wife and that her death was not caused by a slow-falling tree trapping Teresa in a pond, as Rollins claims. The jury heard not only April Bailes testify that Rollins admitted killing Teresa, but they also heard descriptions and saw pictures of the physical violence that Gary had imposed on Teresa; they learned that, just months before Teresa's death, Gary had taken out hundreds of thousands of dollars in extra life insurance on Teresa; they heard Gary admit to having a year-long extra-marital affair with the woman who had called 911; and they received testimony from three forensic experts that Teresa's injuries were not consistent with being struck by a tree. So even without Bailes's testimony, there was ample evidence for a reasonable jury to convict Rollins of murder.

And fourth, there is no evidence that the Prosecuting Attorney's remarks were "deliberately placed before the jury to divert attention to extraneous matters." Considering these factors, Rollins was not prejudiced by the Prosecuting Attorney's remark, and this claim must be rejected.

## **II. The Trial Court Did Not Abuse Its Discretion When It Denied Rollins's Motions to Strike Two Jurors.**

### **A. Standard of Review.**

A circuit court's denial of a defendant's motion to strike a juror for cause is reviewed for an abuse of discretion. *State v. Knotts*, 187 W. Va. 795, 805, 421 S.E.2d 917, 927 (1992). Merely identifying a perceived bias does not disqualify a juror: "The true test to be applied with regard to [the] qualifications of a juror is whether a juror can, without bias or prejudice, return a verdict

based on the evidence and the court's instructions and disregard any prior opinions he may have had." Syl. pt. 1, *State v. Harshbarger*, 170 W. Va. 401, 294 S.E.2d 254 (1982).

To determine whether a perceived bias disqualifies a person from jury service, the trial court "shall question or permit the questioning of the prospective jurors individually, out of the presence of the other prospective jurors, to ascertain whether the prospective jurors remain free of bias or prejudice." Syl. pt. 1, *State v. Finley*, 177 W. Va. 554, 355 S.E.2d 47 (1987). This past term, this Court restated that "when a juror makes an inconclusive or vague statement that only indicates the possibility of bias or prejudice, the prospective juror must be questioned further by the trial court and/or counsel to determine if actual bias or prejudice exists." Syl. pt. 2, *State v. Sutherland*, \_\_ W. Va. \_\_, \_\_ S.E.2d \_\_ (2013) (quoting Syl. pt. 8, *State v. Newcomb*, 223 W. Va. 843, 679 S.E.2d 675 (2009)). In that circumstance, "an initial response by a prospective juror to a broad or general question during voir dire will not, in and of itself, be sufficient to determine whether a bias or prejudice exists. In such a situation, further inquiry by the trial court is required." *Id.* The court must consider the "totality of the circumstances," and "where there is a probability of bias the prospective juror must be removed from the panel by the trial court for cause." *Id.*

But even if the trial court does not remove a juror who has shown potential for bias, the defendant's use of a peremptory strike may cure the error. This Court recently held that "[a] trial court's failure to remove a biased juror from a jury panel, as required by W. Va. Code § 62-3-3, does not violate a criminal defendant's right to a trial by an impartial jury if the defendant removes the juror with a peremptory strike." *Id.* at Syl. pt. 3. "In order to obtain a new trial for having used a peremptory strike to remove a biased juror from a jury panel, a criminal defendant must show prejudice." *Id.*

**B. The Circuit Court Did Not Abuse Its Discretion in Denying Rollins’s Motions to Strike Two Jurors.**

Rollins claims that the Circuit Court erred when it denied Rollins’s motions to strike two individuals from serving on the petit jury panel after learning that those jurors had potential bases for bias.<sup>13</sup> Specifically, Rollins maintains that Potential Juror S.J. should have been stricken because she has been a victim of domestic violence, and that Juror Crislip should have been stricken because he had been a client of the Prosecuting Attorney five years prior in a personal injury lawsuit when the Prosecuting Attorney was in private practice. Both of these allegations lack merit. With regard to both jurors, the Circuit Court conducted a proper voir dire, and the jurors explained that they could return a verdict based on the evidence and the court’s instructions, and that they would disregard any prior opinions they might have had.

**1. The Circuit Court Did Not Abuse Its Discretion in Denying the Motion to Strike Potential Juror S.J.**

Potential Juror S.J. explained to the Circuit Court that she had been a victim of domestic violence as a child and as an adult. (J.A.-I 138.) She was visibly emotional while she answered the court’s and the lawyers’ questions. (J.A.-I 139.) The Circuit Court asked her whether she would automatically believe that domestic violence had happened or whether she would require proof, Potential Juror S.J. replied, “I require proof.” (*Id.*) And then when she was asked whether she could give Rollins a fair hearing, and whether she could follow the court’s instruction that “just because he may have committed domestic violence doesn’t mean he committed murder,” she replied, twice, “I should be able to.” (J.A.-I 141.) This was sufficient to show that she could serve on the jury without bias or prejudice.

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<sup>13</sup> Rollins’s Brief identifies this claim as separate assignments of error; however, they are addressed together here for ease of reference.

Furthermore, Rollins's claim fails because he eliminated any potential bias when he removed Potential Juror S.J. from the jury with a peremptory challenge. In challenging the Circuit Court's ruling with regard to Potential Juror S.J., Rollins relies heavily on language from this Court's decision in *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75 (1995). Rollins argues that he "preserved his objection to [Prospective Juror S.J.] serving on the jury and ultimately ended up using a peremptory strike to remove [her] from the panel." (Pet'r's Br. 26.) In support of this assertion, Rollins cites *Phillips*'s language that "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." 194 W. Va. at 588, 461 S.E.2d at 94. But that language was expressly overruled by this Court during its most recent term. *See* Syl. pt. 3, *State v. Sutherland*, \_\_ W. Va. \_\_, \_\_ S.E.2d \_\_ (2013) ("The holding in Syllabus point 8 of *State v. Phillips*, 194 W. Va. 569, 461 S.E.2d 75 (1995), is expressly overruled.").<sup>14</sup> Under this Court's rule in *Sutherland*, Rollins must prove that he was actually prejudiced by the Circuit Court's refusal to strike Potential Juror S.J. Since Rollins used a peremptory strike to remove her, he cannot show prejudice, and his claim falls flat.

## **2. The Circuit Court Did Not Abuse Its Discretion in Denying the Motion to Strike Juror Crislip.**

Rollins's claim regarding Juror Crislip is likewise without merit. After voir dire, Crislip explained to the court that the Prosecuting Attorney, P.K. Miliam, had been his attorney when Miliam was an associate attorney in private practice. (J.A.-I 204-11.) Miliam explained to the court that in 2007 he had "appear[ed] at a hearing or two, scheduling hearings in the case" for Crislip. (J.A.-I 204.) During individual voir dire, the court asked Crislip, "Now, the fact that he

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<sup>14</sup> *Sutherland* was issued on June 5, 2013.

represented you previously, would that in any way affect your judgment . . . in this case?” Crislip answered, “No, sir, it would not.” (J.A.-I 207.) And Rollins’s claim that there must have been a “casual relationship” between Crislip and Miliam because Crislip referred to Miliam by “P.K.” during voir dire is overblown. (Pet’r’s Br. 29) By that point in jury selection, Miliam had already introduced himself to the prospective jury as “P.K.” (J.A.-I 120). And as the elected Nicholas County Prosecuting Attorney, it is not outrageous to think that county residents would know Miliam’s nickname. Regardless, simply being a former client of the Prosecuting Attorney and referring to him by his well-known nickname did not automatically disqualify Crislip from jury service. Rollins is required to show actual prejudice or bias, and there is simply no evidence of that in the record.

Both Potential Juror S.J. and Juror Crislip adequately showed that they were able to consider the facts fairly without bias, and that they could follow the trial court’s instructions. As such, the Circuit Court did not abuse its discretion in denying Rollins’s motion to strike those individuals from serving on the jury.

### **III. The Trial Court Did Not Err When It Allowed Evidence of Prior Acts of Domestic Violence to be Introduced against Rollins.**

Rollins also challenges two separate aspects of evidence introduced at trial that showed he had a history of physically abusing Teresa. First, he challenges the evidence of prior domestic abuse against him generally, arguing that it is character evidence that fails to meet the “other acts” exception of West Virginia Rule of Evidence 404(b). Notably, Rollins does not argue that there was insufficient evidence that he had actually committed the prior acts of domestic violence. Nor does he contend that the Circuit Court failed to have an *in camera* hearing under *State v. McGinnis*, 193 W. Va. 147, 159, 455 S.E.2d 516, 528 (1994). Rather, he simply challenges the Circuit Court’s legal conclusions regarding the admissibility of this evidence

under Rules 404(b) and 403. (Pet'r's Br. 33.) Second, Rollins argues that specific aspects of the prior-domestic-violence evidence are independently objectionable; namely, statements that Teresa Rollins made to her friend Jimmy Thompson identifying bruises on Teresa's body that appeared in photographs Thompson took of Teresa were inadmissible hearsay, and that they violate his confrontation rights.

The Circuit Court held a proper pre-trial *McGinnis* hearing, considered both sides' arguments, and ruled that the State could introduce these prior acts of domestic violence. The court also gave the jury a proper limiting instruction, both when the evidence was introduced and in its final instructions. The court correctly determined that the evidence of Rollins's prior domestic violence was relevant to show that Teresa's death was not an accident, that the evidence was admissible under the hearsay rules, and that the introduction of the evidence did not contravene the Confrontation Clause. These rulings should be affirmed.

**A. The Admission of Prior Acts of Domestic Violence by Rollins Did Not Violate Rule 404(b).**

This Court has long-recognized that "events, declarations, and circumstances which are near in time, causally connected with, and illustrative of the transactions being investigated are generally considered *res gestae* in a criminal proceeding." *State v. Ferguson*, 165 W. Va. 529, 270 S.E.2d 166 (1980), *overruled on other grounds by State v. Kopa*, 173 W. Va. 43, 316 S.E.2d 412 (1983). In this vein, West Virginia Rule of Evidence 404(b) provides that while "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith," evidence of prior acts may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evidence of prior domestic violence is admissible to rebut a defendant's theory that the victim's death was accidental. *State v. Mongold*, 220 W. Va.

259, 266, 647 S.E.2d 539, 546 (2007). Evidence of prior abuse is also relevant to show the nature of the relationship between the defendant and his alleged victim. *State v. LaRock*, 196 W. Va. 294, 311-12, 470 S.E.2d 613, 630-31 (1996) (collecting cases).

**1. Standard of Review.**

Rule 404(b) evidence must be considered “in the light most favorable to the party offering the evidence . . . maximizing its probative value and minimizing its prejudicial effect.” *McGinnis*, 193 W. Va. at 159, 455 S.E.2d at 528. “As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court’s discretion will not be overturned absent a showing of clear abuse.” Syl. pt. 10, in part, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994).

**2. The Evidence of Prior Domestic Violence Was Admissible under Rule 404(b).**

The Circuit Court allowed the State to introduce evidence that Gary Rollins had beaten Teresa Rollins—as recently as August 2009—to show that Teresa’s death was not accidental and that it was a result and continuation of the physical violence that he imposed on her. (J.A.-VII 51.) As the Circuit Court explained, prior acts of abuse are relevant to rebut a defendant’s claim that the alleged victim’s death was an accident. (J.A.-VII 52 n.8 (collecting cases).) Gary Rollins’s defense was that Teresa’s death was an accident and that he was not a murderer. Clearly, whether Gary had a history of physically abusing Teresa was relevant to the issue of whether Teresa’s death was caused by a bizarre accidental drowning, or whether she was murdered by her husband in a final act of domestic violence. The first-hand testimony of Jimmy Thompson and the illustrative photographs of a battered and bruised Teresa Rollins cleared the Rule 404(b) hurdle, and this argument must be rejected.

**B. Teresa Rollins's Statements Regarding Gary Rollins's Prior Acts of Domestic Violence Were Not Inadmissible Hearsay.**

Next, Rollins challenges the admissibility of statements that Teresa made to her best friend, Jimmy Thompson, that visible bruising on her body was a result of Gary hitting her. Thompson testified that Teresa Rollins had come to him after she had been beaten by Gary Rollins, and he described Teresa's injuries as shown in three separate photographs. One showed Teresa's chest bruised after she told Thompson that Gary had punched her (J.A.-II 224); another showed Teresa's bruised hip that was a result of Gary throwing a boot at her (J.A.-II 226); and the third showed a picture of Teresa after Gary had "got[ten] mad and punched her in the face and broke her glasses" (J.A.-II 226). Thompson's knowledge of the source of the photographed injuries came solely from what Teresa told him. (J.A.-II 224-26.) After a hearsay objection from Rollins's lawyer, the Circuit Court properly allowed the evidence. (J.A.-II 224; J.A.-VII 57.) As explained below, Rollins's claim that these statements are inadmissible hearsay must be rejected.

**1. Standard of Review.**

Circuit courts enjoy "broad discretion in making evidentiary rulings." *State v. Beard*, 194 W. Va. 740, 461 S.E.2d 486 (1995). Accordingly, a trial court's ruling that an out-of-court statement is admissible under the Rules of Evidence is reviewed for an abuse of discretion. Syl. pt. 2, *State v. Perolis*, 183 W. Va. 686, 398 S.E.2d 512 (1990). "An appellate court should find an abuse of discretion only when the trial court has acted arbitrarily or irrationally." *Beard*, 194 W. Va. at 748, 461 S.E.2d at 494.

**2. Teresa's Statements Were Not Hearsay Because They Were Not Offered to Prove the Truth of the Matter Asserted.**

The purpose of the hearsay rule is to prevent unreliable or untrustworthy evidence from being admitted. *State v. Boyd*, 167 W. Va. 385, 280 S.E.2d 669 (1981). A statement being offered not for the truth but for some other purpose, "such as motive, intent, state-of-mind,

identification or reasonableness of the party's action" does not invoke reliability concerns and is admissible as non-hearsay. *State v. Whittaker*, 221 W. Va. 117, 650 S.E.2d 216 (2007). The Circuit Court ruled that Teresa's statements were not offered for the truth of the matter asserted. Rather, the court concluded, they were offered "solely for the purpose of identifying the bruises seen in the photographs." (J.A.-VII 58.) The statements were thus not hearsay and were admissible.

**3. In the Alternative, Teresa's Statements Were Admissible under Exceptions to the Hearsay Rule.**

Alternatively, the Circuit Court ruled that even if Teresa's statements were hearsay, the statements nevertheless fell within the "present sense impression" exception to the hearsay rule. (J.A.-VII 59.) West Virginia Rule of Evidence 803(1) provides that "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or conduction, or immediately thereafter" is admissible. The court explained that Teresa made the statements "shortly after the occurrence of the incidents of domestic violence, as evidenced by the bruises on her body, which she was explaining in her statements." (J.A.-VII 59.)

The Circuit Court also alternatively ruled that Teresa's statements were admissible under the general catch-all hearsay exception, West Virginia Rule of Evidence 804(b)(5). That exception permits hearsay to be admitted if it is offered as evidence of a material fact, it is more probative than other generally available evidence, and if the general purpose of the Rules of Evidence and interests of justice will be served by its admission. The Circuit Court correctly ruled that Teresa's statements were material; that they were the only evidence that could identify the source of her bruises in the photos; and that they are "trustworthy as they are documented by the photographs and the similar testimony of two, unrelated witnesses." (J.A.-VII 60-61.) If Teresa's statements were in fact hearsay, then the Circuit Court correctly ruled that they were

nevertheless admissible under the present-sense-impression and catch-all exceptions to the hearsay rule.

**4. Even Assuming the Circuit Court Erred, Any Purported Error Was Harmless.**

The Circuit Court's ruling on the admissibility of Teresa's statements was correct. But even assuming (without conceding) that the court's ruling was wrong, Rollins's claim for relief must nevertheless be rejected because any error was harmless. In Syllabus Point 2 of *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979), this Court held the following:

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.

Here, even if the photographs of Teresa Rollins and her corresponding statements regarding the source of her injuries were removed from the evidence, the jury had sufficient evidence to convict Gary Rollins of murder beyond a reasonable doubt. Even on the prior domestic violence alone, the State introduced sufficient evidence to prove that Gary Rollins had physically abused Teresa in the months prior to her death and that her death was not an accident. Jimmy Thompson testified that he watched Gary physically abuse Teresa on two separate occasions during which Gary beat Teresa in the head. The photographs of an abused Teresa were simply corroborative of this testimony. And this domestic-violence evidence was only a piece of the evidence that was presented at trial. In addition to the prior acts of domestic violence, the jury heard about the multiple life insurance policies that Gary had recently taken out on Teresa, his extra-marital affair with April Bailes, his admission to Bailes that he had killed Teresa,

inconsistencies in Gary's story of what happened on the day Teresa died, and two separate and independent autopsies that disproved an accidental death. Therefore, even if the Circuit Court's evidentiary ruling was incorrect, the error was harmless, and Rollins's claim must fail.

**C. The Introduction of Testimony Regarding Gary Rollins's Prior Acts of Domestic Violence Did Not Violate the Confrontation Clause.**

Rollins also argues that the admission of Teresa's statements violated his Confrontation Clause rights. Three separate levels of scrutiny apply to Confrontation Clause claims. The Circuit Court's final order is reviewed for abuse of discretion; its factual findings are reviewed for clear error; and its legal rules are reviewed *de novo*. *State v. Mechling*, 219 W. Va. 366, 371, 633 S.E.2d 311, 316 (2006). An erroneous ruling on a Confrontation Clause claim implicates a defendant's constitutional rights; so if error is found, it must be reversed unless the State proves the error was harmless beyond a reasonable doubt. *Id.*

A criminal defendant's right to "be confronted with the witnesses against him" is enshrined in both the U.S. and West Virginia constitutions. U.S. Const. amend VI; W. Va. Const. art. III, § 14. But the right does not preclude the introduction of every out-of-court statement. Historically, "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford v. Washington*, 541 U.S. 36, 50 (2004). The Confrontation Clause thus precludes only the introduction of testimonial hearsay. The State does not violate the Confrontation Clause when it introduces out-of-court statements that are either (1) "non-testimonial," *id.* at 68, or (2) used "for purposes other than establishing the truth of the matter asserted," *id.* at 59 n.9. A testimonial statement is one "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Mechling*, 219 W. Va. at Syl. pt. 8.

Teresa's statements to Jimmy Thompson were neither testimonial nor hearsay and their introduction at trial thus did not violate Gary Rollins's confrontation rights. Teresa made these statements to Thompson as her friend and neighbor. Jimmy Thompson testified that he and Teresa would "discuss Teresa's marriage to Gary during [their] friendship." (J.A.-II 219.) There is no indication in the circumstances surrounding the statements, or in the statements themselves, that Teresa ever believed that these statements would be used as testimony in court. The statements were not testimonial, and therefore their introduction to the jury did not violate Rollins's rights under the Confrontation Clause. Alternatively, as stated with regard to Rollins's hearsay argument, even if these statements violate the Confrontation Clause, the error was harmless beyond a reasonable doubt, and Rollins's claim for relief must be denied.

**IV. The Trial Court Did Not Abuse Its Discretion by Allowing the State to Present a Third Forensic Expert to Opine on Mrs. Rollins's Cause of Death.**

**A. Standard of Review.**

A trial court's admission of evidence over a defendant's argument that the evidence is cumulative is reviewed for an abuse of discretion. *State v. Browning*, 199 W. Va. 417, 424, 485 S.E.2d 1, 8 (1997). "The purpose of expert opinion testimony is to allow witnesses possessing the requisite training, skill, or knowledge in a particular area to enlighten the fact finder." *State v. Dietz*, 182 W. Va. 544, 552, 390 S.E.2d 15, 23 (1990). This Court also "reviews disputed evidence in the light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effects." *Id.*

**B. The Circuit Court Did Not Abuse Its Discretion in Allowing Dr. Wecht to Testify.**

Rollins's primary theory at trial was that Teresa Rollins's death was an accident, and it was not until Teresa's family and ultimately the Governor of West Virginia got involved that this turned from a freak accident to a premeditated murder. Part of Rollins's strategy at trial was to

try to impeach the State's medical examiners by suggesting that their report of Teresa's death was a result of pressure by the Governor, rather than a conclusion based on scientific fact.

In response, the State presented not just the two medical examiners that determined Teresa's official cause of death, but also a third expert, Dr. Wecht, who conducted an independent autopsy of Teresa and who also concluded that Teresa's death was a homicide. Having introduced his theory that the medical examiners were subject to internal pressure to declare Teresa's death a homicide, Rollins now complains that the State should have been precluded from presenting Dr. Wecht's testimony to the jury. This claim is without merit and must be rejected. Notably, Rollins does not challenge the qualifications of any of the State's three expert witnesses. Nor does Rollins attack the scientific methodology that underscores any of their opinions. Instead, he only claims that he was prejudiced because the State presented the testimony of three experts, while he presented just one. (Pet'r's Br. 54.) This "too many experts" argument is not supported by the law, and this claim must be rejected.

In his Appellate Brief, Rollins contends that "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." (Pet'r's Br. 54.) This is inaccurate. The Circuit Court rejected Rollins's objection to Dr. Wecht only after weighing the probativity of Dr. Wecht's testimony against the potential prejudice to Rollins. The court explained,

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 attached, 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[.]

(J.A.-IV 9-10.) The Circuit Court clearly conducted a proper Rule 403 balancing test, and Rollins's argument must be rejected.

A primary focus of Rollins's defense was the medical examiner's revised opinion on what caused Mrs. Rollins's death. Rollins attempted to use these revisions to his advantage and create a theme that the State got it right the first time, and to show that it was not until the Governor got involved in the case that the State's opinion repeatedly changed. Certainly it was proper—as the Circuit Court recognized—for the State to present the expert opinions of the two medical examiners who signed off on Mrs. Rollins's death certificate and who could explain why the evidence showed that she died by her husband's hand and not by a falling tree. (J.A.-IV 9-10.) Dr. Sabet's testimony was necessary because he was the medical examiner that autopsied Mrs. Rollins. Similarly, Dr. Kaplan's testimony was needed because he was the person who ultimately signed off on Mrs. Rollins's death certificate, and his testimony was helpful to the jury for understanding why Mrs. Rollins's injuries were not consistent with being struck by a tree.

But it was also proper for the Circuit Court to allow Dr. Wecht's testimony. Dr. Wecht's testimony further helped the jury because he performed a second, independent, and more extensive, autopsy of Mrs. Rollins that specifically checked for injuries consistent with being struck by a falling tree. While Dr. Wecht's testimony may have been cumulative in its conclusion (*i.e.*, that Teresa's death was not accidental), it was not cumulative in its foundation. Dr. Wecht reached his conclusion independently and in a different manner than Drs. Sabet and Kaplan. Furthermore, Dr. Wecht's testimony not only supported the medical examiners' conclusions, but it also rebutted Rollins's argument that the medical examiners' testimony had been unduly influenced. Unlike Drs. Sabet and Kaplan, Dr. Wecht was not a state employee serving at the will and pleasure of the Governor. It was thus proper for the Circuit Court to allow

the State to present Dr. Wecht's testimony, in addition to the testimony of the two medical examiners.

**V. The Circuit Court Did Not Abuse Its Discretion in Allowing the State's Chief Medical Examiner to Testify that Teresa Rollins's Death Was a Homicide.**

Similarly, the Circuit Court did not abuse its discretion in allowing Dr. Kaplan to testify that Teresa's death was a homicide. First, Rollins waived this claim on appeal by failing to timely object at trial. And second, Dr. Kaplan's testimony was entirely consistent with the opinions rendered in Teresa Rollins's most recent autopsy report, and Rollins was not unfairly surprised at trial.

**A. Standard of Review.**

A claim that the admission of expert opinion evidence constituted unfair surprise is reviewed for an abuse of discretion. Syl. pt. 1, *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995). Furthermore, a party cannot complain of unfair prejudice when it fails "to exercise options available to ameliorate or dilute any unfair surprise resulting from the use of the disputed" evidence, but instead chooses to proceed with the trial. *Id.* at 239, 798. This Court has "explicitly h[e]ld that in order to preserve the claim of unfair surprise for appeal, the aggrieved party must at the very least move for a continuance or recess." *Id.* at 240, 799.

**B. Rollins Was Not Unfairly Surprised by Dr. Kaplan's Opinion Testimony.**

At Rollins's trial, Dr. Kaplan, the State's Chief Medical Examiner, testified that Mrs. Rollins's death was caused by "strangulation while her face was immersed in water." (J.A.-III 147-48.) Rollins contends that this opinion "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." (Pet'r's Br. 58.) The record reflects that this is an overstatement, and that Rollins was not unduly surprised or otherwise unduly prejudiced by Dr. Kaplan's testimony. In fact, Rollins's counsel did not even

object to this opinion evidence when it was introduced. (J.A.-III 148.) Instead, he requested a short recess to use the restroom, and then he began his cross-examination of Dr. Kaplan. (*Id.*)

It was not until after Rollins had been found guilty that Rollins's lawyers objected to Dr. Kaplan's testimony. During the sentencing hearing, Rollins's lawyer complained for the first time that Dr. Kaplan "did inform [defense counsel] that there was a possible strangulation-combination-drowning theory, but not that he would take the stand and testify to a reasonable degree of medical certainty that it was a homicide[.]" (J.A.-VI 427.) The Circuit Court rejected this argument and explained that the testimony was admissible. The court recognized that it was proper for Dr. Kaplan to give his expert testimony, and in any event, Rollins had been afforded the opportunity to point out any conflicting or inaccurate testimony and present that evidence to the jury on cross.

In addition to being untimely and thus waived, this argument lacks merit on its face. From January 19, 2010, onward, Rollins was fully aware that the Medical Examiner believed—or at least suspected—that Teresa Rollins was strangled to death. The January 19 death certificate said her death was caused by "Probable strangulation." (J.A.-VII 197.) And then on July 19, 2010, the Medical Examiner's autopsy report stated that her death occurred "under circumstances suspicious for manual strangulation" and that the autopsy findings "reflect[ed] significant suspicion of homicidal assault." (J.A.-VII 209.) *The belief that Rollins murdered Teresa was the very reason that he was indicted and tried.* It thus borders on the ridiculous for Rollins to now argue that he was unfairly surprised by Dr. Kaplan's testimony because "he did not anticipate Dr. Kaplan to testify that the manner of death was a homicide." (Pet'r's Br. 58.) The opinion that Teresa's Rollins's death was a homicide was not "rendered for the very first time while [Dr. Kaplan] was on the witness stand." (*Id.*) Rather, Dr. Kaplan had provided this

opinion over two years before trial; Rollins was given more than adequate notice that Dr. Kaplan would offer this testimony at trial. Moreover, Rollins failed to “ameliorate or dilute” any purported unfair surprise by asserting a timely objection to the evidence. As such, Rollins’s claim of undue surprise must be rejected.

## **VI. Cumulative Error Does Not Compel the Reversal of Rollins’s Conviction.**

Finally, Rollins’s argument that the cumulative effect of errors in the Circuit Court requires reversal of his conviction must be rejected. By this assignment of error, Rollins maintains that the Prosecuting Attorney’s alleged misconduct and the Circuit Court’s purported errors, viewed in the aggregate, so prejudiced him that he was deprived of a fair trial and that his murder conviction must be reversed.

To prevail on a “cumulative error” claim, Rollins must show that (1) there have been multiple errors that (2) considered together so violated his substantial rights as to warrant reversal of the conviction. *State v. Foster*, 221 W. Va. 629, 645, 656 S.E.2d 74, 90 (2007). As the Fourth Circuit has explained, [t]o satisfy this requirement, such errors must so fatally infect the trial that they violated the trial’s fundamental fairness.” *United States v. Basham*, 561 F.3d 302, 330 (4th Cir. 2009) (King, J.) (internal quotation marks omitted). And this Court has cautioned that the “cumulative error” doctrine “should be used sparingly.” *Tenant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 118, 459 S.E.2d 374, 395 (1995).

The State first maintains that there was no misconduct by the Prosecuting Attorney or error by the Circuit Court, as explained *supra*, and that Rollins cannot show cumulative errors that justify the relief he seeks. *See State v. Carrico*, 189 W. Va. 40, 427 S.E.2d 474 (1993) (recognizing that cumulative error doctrine is inapplicable where no errors are present). But even if the Court finds multiple instances of error below, that error was not so egregious as to violate

Rollins's substantial rights. Given the overwhelming evidence against him—including his own admission of guilt—Rollins's murder conviction must be affirmed.

### CONCLUSION

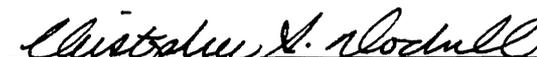
For the reasons identified in this brief and apparent on the face of the record, this Court should affirm the judgment of the Circuit Court of Nicholas County, West Virginia.

Respectfully submitted,

STATE OF WEST VIRGINIA,  
*Respondent,*

By counsel,

PATRICK MORRISEY  
ATTORNEY GENERAL



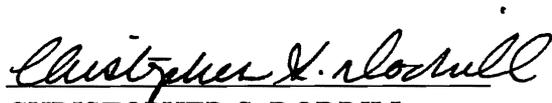
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## CERTIFICATE OF SERVICE

I, Christopher S. Dodrill, Assistant Attorney General and counsel for the State of West Virginia, hereby verify that I have served a true copy of "Respondent's Brief" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 27th day of June, 2013, addressed as follows:

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