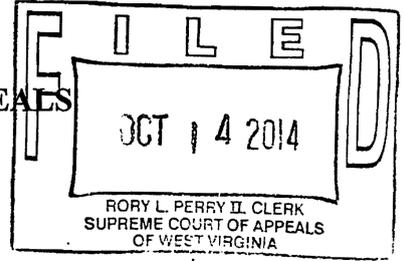


**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA**



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

v.

Supreme Court Docket No.: 14-0400

**CARLETTA ANTOINETTE WATSON, Defendant Below,
Petitioner.**

**FROM THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA**

**STATE OF WEST VIRGINIA'S
RESPONSE TO PETITION FOR APPEAL**

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TABLE OF CONTENTS

Table of Authorities. 3

Alleged Assignments of Error 4

Statement of the Case. 4

Summary of the Argument. 12

Statement Regarding Oral Argument and Decision. 13

Argument 13

Conclusion. 37

Certificate of Service 38

TABLE OF AUTHORITIES

West Virginia Statutes

West Virginia Code § 61-2-1

West Virginia Cases

Schofield v. West Virginia Department of Corrections, 185 W.Va. 199, 406 S.E.2d 425 (1991)

State v. Biehl, 224 W.Va. 584, 687 S.E.2d 367 (2009)

State v. Bradshaw, 193 W.Va. 519, 457 S.E.2d 456 (1995)

State v. Catlett, 207 W.Va. 747, 536 S.E.2d 728 (2000)

State v. Chic-Colbert, 231 W.Va. 749, 749 S.E.2d 642 (2013)

State v. Davis, 232 W.Va. 398, 752 S.E.2d 429 (2013)

State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999)

State v. Finley, 219 W.Va. 747, 639 S.E.2d 839 (2006)

State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995)

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State v. Hose, 187 W.Va. 429, 419 S.E.2d 690 (1992)

State v. Juntilla, 227 W.Va. 492, 711 S.E.2d 562 (2011)

State v. LaRock, 196 W.Va. 294, 460 S.E.2d 613 (1996)

State v. McLaughlin, 226 W. Va. 229, 700 S.E.2d 289 (2010)

State v. Parsons, 214 W.Va. 342, 589 S.E.2d 226 (2003)

State v. Rygh, 206 W.Va. 295, 524 S.E.2d 447 (1999)

State v. Stuart, 192 W.Va. 428, 452 S.E.2d 886 (1994)

State v. Vance, 162 W.Va. 467, 250 S.E.2d 146 (1978)

State v. Wade, 200 W.Va. 637, 490 S.E.2d 724 (1997)

Other Cases

Miranda v. Arizona, 384 U.S. 436 (1966)

West Virginia Rules

West Virginia Rules of Evidence 402, 403, 404, 609

ALLEGED ASSIGNMENTS OF ERROR

- I. The Circuit Court erred when it upheld the jury's verdict of guilt because there was insufficient evidence to support a conviction.
- II. The Circuit Court erred when it admitted the Petitioner's statements.
- III. The Circuit Court erred when it failed to conduct a proper 404(b) hearing.
- IV. The Circuit Court erred when it upheld the jury's recommendation of no mercy, which was contrary to the evidence presented.
- V. The Circuit Court erred when it excluded evidence of the decedent's criminal activities.
- VI. The Circuit Court erred in instructing the jury.

STATEMENT OF THE CASE

On December 5, 2013, at the conclusion of a three-day jury trial, the Petitioner, Carletta Antoinette Watson, was convicted of all five counts of Jefferson County Indictment 13-F-81, which charged murder in the first degree by felony murder, robbery in the first degree, burglary, conspiracy to commit burglary and conspiracy to commit robbery in the first degree. Thereafter, pursuant to her conviction for first degree murder by felony murder, the jury recommended that the Petitioner be granted no mercy, and the Circuit Court sentenced her to the penitentiary for the rest of her natural life without the possibility of parole. Thereafter, on February 24, 2014, the Court sentenced the Petitioner on her other convictions. Upon the argument of counsel, the Court did not sentence the Petitioner for her convictions for robbery in the first degree or burglary. It is from these convictions, and sentences that the Petitioner now appeals.

The evidence at trial was that in April 2012 the Petitioner was from Baltimore, Maryland but was staying in Ranson, West Virginia in the Apple Tree Garden apartment of Rachel Cooke. A.R. 301; 320. Ms. Cooke had known the petitioner for a number of months prior to the

Petitioner moving in with Ms. Cooke in early April, 2012. A.R. 320. At the time that the Petitioner moved in Ms. Cooke lived with her four minor children, ages 1 through 10, and her boyfriend, Dontrell Curry, the decedent. A.R. 301 – 302.

During the few weeks that the Petitioner was staying in Ms. Cooke's apartment Ms. Cooke was granted approximately \$5,800 in back child support¹. A.R. 304 – 305; 322. At the time the back child support was awarded to Ms. Cooke she did not have a bank account. A.R. 305. Instead of opening a bank account she sought the Petitioner's assistance in cashing the check. *Id.* The Petitioner suggested Ms. Cooke use a check-cashing store in Frederick, Maryland called Acer. *Id.* At the Petitioner's suggestion Ms. Cooke decided to go to Acer to cash her child support check, however, because neither Ms. Cooke nor the Petitioner had a car or other transportation, the Petitioner arranged for Ms. Cooke to get a ride to Frederick with a man named Charles Marshall. A.R. 305; 433 – 434.

On April 16, 2012, Mr. Marshall drove the Petitioner, Ms. Cooke and a third woman, Mindy Rankin, to Frederick for Ms. Cooke to cash her check. A.R. 305 – 306; 322 - 323; 434. Ms. Cooke and the Petitioner went into the store together while Mr. Marshall and Ms. Rankin stayed in the car. A.R. 324. Acer did not have sufficient cash to give Ms. Cooke the full amount of her check, so she and the Petitioner discussed with the store other payment options. Ultimately Ms. Cooke received a combination of two pre-paid credit cards of \$1,000 each, three money orders of \$1,000, \$500 and \$300, and the remainder in cash. A.R. 306; 325. Ms. Cooke testified that over the next eight days she spent a good deal of the money she received on rent, clothing, and food. A.R. 326 – 327. Ms. Cooke also testified that she had a substance abuse problem and at one point had even tried to kill herself by overdosing on pills. A.R. 332.

¹ Ms. Cooke was involved in a child support enforcement action that ended when her ex-husband was issued a tax refund which was directly applied to the back child support he owed her. A.R. 304.

On the afternoon of April 24, 2012, Ms. Cooke asked the Petitioner to leave her apartment because there were too many people living there². A.R. 307. Ms. Cooke testified that, “regular school nights, dinner, bed times, with lots of people in the house it is hard to do.” A.R. 334. The Petitioner and her girlfriend had taken over the bedroom where Ms. Cooke’s two older children, A.M.³ and J.M., usually slept. As a result, while the Petitioner stayed with Ms. Cooke, those children, both of whom were less than eleven, were forced to sleep with their mother or on the couch. A.R. 309 – 310. Ms. Cooke testified that, “I didn’t want to be totally mean and kick her to the curb because she was my friend and I didn’t want to be like you can never come back so that is why I offered [to let her stay] weekends.” A.R. 335. Approximately four or five hours after Ms. Cooke asked the Petitioner to leave, Petitioner and her girlfriend left Ms. Cooke’s apartment taking their belongings with them. A.R. 307; 310. When the Petitioner left the apartment she returned the key to Ms. Cooke. A.R. 334. According to the Petitioner’s first statement given to investigating officer W. Henderson of the Ranson Police Department, the Petitioner indicated that her “brother”⁴ who goes by the single letter “J” gave her a ride to Baltimore. A.R. 372.

That evening Ms. Cooke, Mr. Curry and two of the children ate dinner, and the oldest child, A.M., fell asleep while watching a movie in his mother’s bed. Ms. Cooke and Mr. Curry left A.M. to sleep in the master bedroom around midnight Ms. Cooke and Mr. Curry instead went to sleep in A.M. and J.M.’s bedroom with the baby. A.R. 311 – 312.

² Ms. Cooke also testified that her younger brother and some of his friends would occasionally at her house one or two times per week. A.R. 333.

³ Consistent with Rule of Appellate Procedure 40(e) the identities of the juveniles who resided in the home, one of whom testified at the trial, are restricted and initials are used throughout this brief.

⁴ It was later determined that J was not related to the Petitioner but was simply a man she considered to be her brother. The legal name of J was Paul Newman. A.R. 372.

Ms. Cooke next remembered being awakened “with a gun” pointed toward her head by a masked man who directed her to go to the master bedroom in the back of the apartment. A.R. 312 – 313. When Ms. Cooke exited A.M. and J.M.’s bedroom she looked to her right and saw the Petitioner as she “moved quickly into the kitchen” from the dining room. A.R. 313 – 314. Ms. Cooke testified that the Petitioner had “an unmistakable shape. I know what she looked like. Not very many people, you know, look the same as her. There is a hall light on.” A.R. 340. According to Ms. Cooke, the Petitioner was not wearing a mask and was also recognizable by her hair. A.R. 342. The Petitioner later gave a second statement where she admitted to being in the apartment during the shooting. Supplemental Appendix Record (hereinafter “S.A.R.”) 5:15 – 22.

Ms. Cooke then turned to her left down the hallway toward her own bedroom. When she reached the bedroom she saw Dontrell Curry “kneel[ing] down on the ground facing my dresser.” A.R. 314. A.M. was lying in bed in the room, and “another masked man was standing behind Dontrell with a gun to his head.” A.R. 315. Ms. Cooke did not recognize either of the masked men who then asked for the pre-paid credit cards. *Id.* Consistent with Ms. Cooke’s statement that she did not know either man, the Petitioner in her second statement acknowledged that the men had never before been to West Virginia. S.A.R. 10: 5 – 7. Ms. Cooke got into Dontrell’s drawer where she had hidden the cards and handed her entire wallet to the masked men who then asked her for the Personal Identification Numbers (PINs) for the cards. *Id.* Ms. Cooke testified that:

I was so scared and I couldn’t talk so Dontrell told them what the pin number was. At that time he went to get up and like kind of face towards me, got up on one leg and went to kind of grab at me, and at that time shots were fired.

...

Q: And what was the next thing that happened after that?

A: Dontrell went to get up to shelter me, at that same point in time they shot. I don't know who shot first. Well, obviously Dontrell got shot first because I seen it. And then I went like this, and they shot me, and I fell. I don't remember anything after that. I blacked out.

Q: Prior to that, prior to the shooting, while Dontrell was still alive, did he encourage you to cooperate with the folks that were holding the gun to you?

A: Yes, he said, Rachel, just do what they say.

A.R. 315 – 316. Ms. Cooke testified that when she regained consciousness that she looked at her son, A.M., told him to turn on the lights, and she shook Dontrell, but he didn't move. Ms. Cooke's right arm was not functioning because she had been shot, the bullet traveling completely through her forearm and then into her upper arm, as she held her hand up to protect her face.

A.R. 317 – 318.

The Deputy Chief Medical Examiner, Dr. Jimmy Smith, testified as to the injuries sustained by Dontrell Curry and the cause of his death, describing the two bullets which struck Mr. Curry. One bullet entered the left rear of Mr. Curry's head, went through his skull, through his brain, ruptured his right eye and exited through his face below his right eye. A.R. 438. The second gunshot wound entered the inner part of Mr. Curry's left thigh, and fractured the femur. That bullet was retrieved during the autopsy. *Id.*

Ms. Cooke's oldest son, A.M., also testified. At the time of the shooting A.M. was 10 years old and was in fourth grade. A.R. 351. A.M. testified that he went to sleep in his mother's room on the night before the shooting and that he woke up "and I saw a guy standing in front of my mom and Dontrell and then he put up a gun and shot two—well, three times and then ran."

A.R. 354. A.M. testified about the shooting as follows:

Q: Can you describe that other person?
A: No—well, tall and ski mask on.
.....
Q: Do you remember what color he was wearing?
A: Black and I think his shoes were like black too.
Q: Was anyone speaking when you woke up?
A: My mom said, please don't, my son is right behind me.
Q: What happened next, do you remember?
A: Then they shot.
.....
Q: How could you tell it was the gun going off?
A: I saw like a light and smoke.
.....
Q: Was there any light in the room?
A: There was a light in the hallway.
Q: After the shooter ran out, where was Dontrell?
A: He was on the ground by the bed, my bed.
Q: How close was he to you when this happened?
A: Like two feet away.

A.R. 354 – 355.

Approximately one month after Dontrell Curry was killed the Petitioner was arrested in Baltimore and the investigating officer went there to interview her prior to her extradition. She was properly Mirandized and gave a statement regarding the night of the shooting. A.R. 368 – 370. In this statement the Petitioner advised that she had been selling crack cocaine in the Apple Tree Gardens apartment complex while living with Rachel Cooke and Dontrell Curry, and that the complex was “her biggest moneymaker at the time.” A.R. 373. The Petitioner confirmed that Apple Tree Gardens was her biggest moneymaker during her second statement. S.A.R. 4:24 – 5:3. The Petitioner also admitted that she knew about Ms. Cooke’s child support check. She admitted being asked to leave the apartment and described packing up her belongings and leaving with “J” and her girlfriend and traveling back to Baltimore. She denied returning to Ms. Cooke’s apartment that night and provided the officer with her cell phone number. After

interviewing the Petitioner Officer Henderson obtained a search warrant for the Petitioner's cellular phone records which records were introduced at trial.

The cellular phone records showed two important types of data: telephone calls and texts made and received, and the location of each cellular phone tower which the phone connected to on the day before and the day of the shooting. A.R. 373; 374 – 402. The cellular records demonstrated that between 3:00 and 8:00 p.m. on the day before the shooting the Petitioner's cell phone was in Ranson, West Virginia. A.R. 381 – 382. The cell phone then traveled to Baltimore, back to Ranson, and returned again to Baltimore early in the morning of April 25.

At 9:07 p.m. on April 24, 2012 the Petitioner's cell phone connected to a cell phone tower located on Keyes Ferry Road in Charles Town, just off Route 340, the four-lane road which leads to Frederick, Maryland. A.R. 383. The phone records then demonstrated that the Petitioner's cell phone travelled to Baltimore, connecting to a cellular phone tower at 1808 North Patterson Park, Baltimore just after midnight on April 25. A.R. 386. A number of phone calls were made with the Petitioner's cell phone in Baltimore between midnight and 2:56 a.m. *Id.* At 3:47 a.m. on April 25, the Petitioner made a cell phone call which connected with the closest cell phone tower located on Frederick County Road, Mt. Airy, Maryland, right off Interstate 70 between Baltimore and Ranson, West Virginia. A.R. 395 – 396. Next the Petitioner made two cell phone calls at 4:34 and 4:35 a.m. on April 25 connecting to the cell phone tower on Keys Ferry Road in Charles Town. A.R. 396 – 397.

No cell tower connections, for either voice calls or texts, were made between 4:35 a.m. and 5:16 a.m. when a three minute call was made and the call connected through two separate towers. The officer testified that the connection to different towers during the call indicated that the person making the call was moving and the phone was connecting to whichever tower was

closer to the phone. A.R. 398 – 399. The call made at 5:16 a.m. connected to the cell phone tower at keep Tryst Road, Knoxville, Maryland, next to Route 340 which leads from Jefferson County to Frederick, Maryland. A.R. 400. Additional calls made between 5:16 and 6:56 a.m. that morning demonstrate that the phone connected to cellular phone towers directly on the route from Jefferson County to downtown Baltimore. A.R. 400 – 402. Several telephone calls made from the Petitioner’s phone during the period from 5:16 a.m. to 6:56 a.m. on April 25 were to a 1-866⁵ number which was the customer service number for the pre-paid credit cards obtained by Rachel Cooke at the check cashing store in Frederick, Maryland. A.R. 399.

The officer testified that by using the cell phone tower location addresses he prepared a map to show where each call connected at each time, and those maps were introduced as evidence to demonstrate that in the less than ten hours before the shootings that around 9 p.m. on April 24 the Petitioner left Ranson and traveled to Baltimore, stayed in Baltimore for several hours before returning to Ranson for approximately 30 to 40 minutes at the exact time of the killing, and once again returned to Baltimore before 7 a.m. on April 25.

These records were in contrast with the Petitioner’s initial statement to police where she denied returning to Ranson on the morning of April 25, and instead claimed that she was at home in Baltimore the night of April 24 to 25, 2012, and that she was awakened by a telephone call from a person in the Apple Tree Gardens apartment complex to alert her to the shooting of Mr. Curry and Ms. Cooke. A.R. 372.

Moreover, in the Petitioner’s second statement to police⁶ she admitted going to Baltimore on the night of April 24, 2012, dropping off her belongings, then returning to West Virginia with

⁵ The number was referred to variously as a 1-800 or 1-866 number during questioning, however, the phone records admitted at trial show the number was in fact a 1-866 number.

⁶ This second statement, the entirety of which is contained in the Supplemental Appendix Record filed with this Response, was given in the presence of the Petitioner’s counsel as part of an agreement for the Petitioner to be

two men who had never been to West Virginia before. A.R. 404; 407. The Petitioner answered “right” when she was asked, “So you came back to Apple Tree, that was your biggest moneymaker, you thought you would come back and get money, correct?” A.R. 405; 420. The Petitioner also admitted that she went into Ms. Cooke’s and Mr. Curry’s apartment the morning of the shooting and that Mr. Curry answered the door and was “being cooperative”. *Id.* The Petitioner admitted she was in the living room area when she heard the gunshots and explained, “what happened was when they got what they were looking for, I just heard gunshots and I ran.” A.R. 405 – 406. Petitioner then admitted that she got back in the car with the two men and returned to Baltimore. She further admitted to calling the 1-866 number to check on the balance of the credit cards.

SUMMARY OF THE ARGUMENT

There was sufficient evidence for a rational jury to have convicted the Petitioner of all five crimes she was found guilty of committing, and the Circuit Court did not err in denying the Petitioner’s motions for judgments of acquittal. The Circuit Court did not abuse its discretion in its evidentiary rulings, including its decision to admit both of the Petitioner’s statements to law enforcement, and to exclude evidence of alleged criminal convictions of the decedent victim. The Circuit Court also did not abuse its discretion in determining that the Petitioner’s admission that she sold drugs, and the State’s introduction of such evidence was inextricably intertwined with the crimes she was convicted of committing herein. The mercy phase of the trial was properly conducted and the jury’s finding of no mercy was proper. The Court properly instructed the jury according to correct statements of law.

released upon bond if she agreed to name the two individuals with whom she traveled to West Virginia. The Circuit Court held that the Petitioner did not uphold her end of that agreement when she gave only the street name of “Midge” for one of the men, and gave no name for the second man, only a vague description of him.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent affirmatively states that oral argument is not necessary unless the Court, in its discretion and pursuant to Rule 19, determines that oral argument is necessary and shall be held.

ARGUMENT

I. The Circuit Court properly denied the Petitioner’s motion for a judgment of acquittal based upon an insufficiency of evidence.

The standard of review for a criminally convicted petitioner seeking relief from this court based upon an insufficiency of evidence was set in *Syllabus Point 3* of State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995):

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent our prior cases are inconsistent, they are expressly overruled.’

“The Court applies a de novo standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence. *State v. LaRock*, 196 W.Va. 294, 304, 470 S.E.2d 613, 623 (1996).” State v. Juntilla, 227 W.Va. 492, 711 S.E.2d 562 (2011).

As this Court explained in *Syllabus Point 1*, of Guthrie, *supra*:

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the

evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

When applying this standard of review to the trial court's denial of the Petitioner's motion for judgment of acquittal at mid-trial and at the close of all evidence, it is clear that there was sufficient evidence for the jury, or any other rational trier of fact, to find the essential elements of the crime were proved beyond a reasonable doubt as to all counts.

Just as the Supreme Court must evaluate the evidence in appellate matters in the light most favorable to the prosecution, a trial court in ruling on a motion for judgment of acquittal must also view the evidence in the light most favorable to the non-moving party, the State. The trial court is held to the same standard for motions for judgment of acquittal at mid-trial and prior to submission of a case to the jury. This court held in *Syllabus Point 1* of State v. Catlett, 207 W.Va. 747, 536 S.E.2d 728 (2000), that:

“Upon motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to the prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.” State v. West, 153 W.Va. 325, [168 S.E.2d 716] (1969).’ *Syllabus Point 1*, State v. Fischer, 158 W.Va. 72, 211 S.E.2d 666 (1974).” *Syllabus Point 3*, State v. Taylor, 200 W.Va. 661, 490 S.E.2d 748 (1997).

The Catlett court further held in *Syllabus Point 2*:

‘The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the

defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.' Syl. Pt. 1, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995)." Syllabus Point 1, State v. Hughes, 197 W.Va. 518, 476 S.E.2d 189 (1996).

Accordingly, it is clear that the function of the trial court is to determine whether there is substantial evidence upon which a jury *might* justifiably find the defendant guilty, not whether the trial court finds the defendant guilty beyond a reasonable doubt. The trial court here did so and properly denied the Petitioner's motions for judgment of acquittal based on insufficiency of the evidence.

A. When viewed in the light most favorable to the State the Circuit Court properly found that the jury could have found there was sufficient evidence to support a conviction for Felony Murder, First Degree Robbery, Burglary, Conspiracy to Commit Robbery and Conspiracy to Commit Burglary.

When viewing the evidence presented in the light most favorable to the State, a rational trier of fact could have found the State proved the essential elements of each of the offenses. Such circumstantial evidence was sufficient for the jury to find the State proved beyond a reasonable doubt that the Petitioner was guilty on all five counts of the indictment.

1. There was sufficient evidence for a rational trier of fact to have found the essential elements of Felony Murder were proved beyond a reasonable doubt.

The Court instructed the jury that in order to find the Petitioner guilty of felony murder as charged in Count 1 that the State of West Virginia had to prove the elements of the crime by one of two alternative theories, as either incident to the burglary or robbery of Rachel Cooke and Dontrell Curry:

. . . One, the Defendant Carletta Watson; Two, in Jefferson County, West Virginia; Three on or about the 25th day of April of 2012; then as to the burglary theory; Four, did enter without breaking; Five, in the nighttime; Six, the dwelling house or residential structure; Seven, of Rachel Cooke and Dontrell Curry; Eight, with intent to commit a crime therein; Nine, Carletta Watson or a co-conspirator of Carletta Watson; 10, in the commission of that burglary. Now these elements would apply for the robbery theory; Four, in furtherance of robbery; Five, to take from the presence of Dontrell Curry or Rachel Cook; Six, against his or her will; Seven, all or any part or portion of United States currency or pre-paid credit or debit cards of value; Eight, belonging to Rachel Cooke; Nine, by use or presentment of a firearm, to wit, her unnamed co-conspirator did present a firearm and did use the same firearm to shoot both Dontrell Curry and Rachel Cooke; 10, and Carletta Watson or a co-conspirator of Carletta Watson; 11, in the commission of that robbery. Now we go to 12 which is an element of either theory; 12, did in Jefferson County, West Virginia; 13, on or about the 25th day of April of 2012; 14, kill Dontrell Curry.

A.R. 483 – 485.

Viewing the evidence in the light most favorable to the State, it is clear that there was sufficient evidence to support the jury's conviction of the Petitioner for felony murder under either theory of the crime. As to the burglary theory, in her second statement given in the presence of counsel the Petitioner conceded the first seven elements, that she Carletta Watson, in Jefferson County, West Virginia, on or about April 25, 2012, entered without breaking, in the nighttime, the dwelling house or residential structure, of Rachel Cooke and Dontrell Curry. Elements eight, nine, ten, twelve, thirteen and fourteen were contested in regard to the burglary theory.

As to the eighth element, there was sufficient evidence for the jury to have concluded that the Petitioner entered the residence with the intent to commit a crime therein. Rachel Cooke testified that she was awakened inside her apartment by a masked man with a gun and that the Petitioner, despite leaving earlier that day, was also inside the apartment with the masked men.

The Petitioner admitted that she accompanied the two men to the apartment, although those men had never before been to West Virginia, and had no connection to the State. However, these two men seemed to know “what they were looking for” inside Ms. Cooke’s apartment, even though they didn’t know Rachel Cooke or Dontrell Curry and had never before been to West Virginia. A rational trier of fact could have concluded that the armed, masked men traveled to West Virginia with the Petitioner and entered Rachel Cooke’s and Dontrell Curry’s apartment with the express purpose to commit a crime therein.

As to the ninth element, there was sufficient evidence for the jury to have concluded that the Petitioner or a co-conspirator of the petitioner was the individual who discharged the firearm which caused Dontrell Curry’s death. The Petitioner’s own statement was that while she was inside Rachel Cooke’s apartment she heard the gunshots in the bedroom where her two male companions were with Rachel and Dontrell. Rachel Cooke and A.M. testified they saw of the masked men fire the gun inside the bedroom. A rational trier of fact of fact could have concluded that one of the Petitioner’s co-conspirators discharged the firearm which killed Dontrell Curry.

As to the tenth element, there was sufficient evidence for the jury to have concluded that the shots were fired in the commission of the burglary. The two men were armed when they entered the apartment to get “what they were looking for” according to the Petitioner. Rachel Cooke testified that when she awoke one of the men was already holding a gun pointed toward her head. Ms. Cooke testified that the men knew that she had pre-paid credit cards in her apartment and demanded the cards and the PINs for each card. With such evidence it was reasonable for the jury to have concluded that the men were armed with firearms to perpetrate the burglary, and to encourage Ms. Cooke and Mr. Curry to cooperate without incident. Ms.

Cooke testified that Mr. Curry told her to “just do what they say”, and the Petitioner confirmed in her statement that Mr. Curry was “being cooperative.” S.A.R. 5:13 – 15. A rational trier of fact could have concluded that the gun was discharged inside the apartment in the furtherance of the burglary of that apartment.

As to the twelfth⁷ element, there was sufficient evidence for the jury to conclude that the killing of Dontrell Curry occurred in Jefferson County. It was uncontested that the apartment where Mr. Curry was shot was located in Ranson, Jefferson County.

As to the thirteenth element, there was sufficient evidence for the jury to conclude that the shooting of Dontrell Curry occurred on or about April 25, 2012. Officer Henderson testified that he responded to Rachel Cooke’s apartment for reported shots fired on April 25, 2012.

As to the fourteenth element, there was sufficient evidence for the jury to conclude that Dontrell Curry was killed as a result of the gunshots. Rachel Cooke and Officer Henderson testified that Mr. Curry was either without any movement, response or breathing on the morning of the shooting. Medical Examiner Dr. Jimmy Smith testified that the cause of Mr. Curry’s death was a gunshot wound to the head and thigh.

2. There was sufficient evidence for a rational trier of fact to have found the essential elements of Robbery in the First Degree were proved beyond a reasonable doubt.

The Court instructed the jury that in order to find the Petitioner guilty of Robbery in the First Degree as charged in Count 2 that the State of West Virginia had to prove the elements of the crime as follows:

⁷ The court’s instructions included elements 1 through 10 followed by elements 12 through 14 for the burglary theory of felony murder, and elements 1 through 11 followed by the same elements 12 through 14 for the robbery theory of felony murder, thus there was no “element eleven” for the jury to consider under the theory of felony murder by burglary.

One, the Defendant, Carletta Waston; Two, in Jefferson County, West Virginia; Three, on or about the 25th day of April, 2012; Four, did take from the presence of Rachel Cooke and/or Dontrell Curry; Five, against the will of Rachel Cooke and/or Dontrell Curry; Six, United States currency and prepaid credit or debit cards; Seven, belonging to Rachel Cooke; Eight, by the threat of deadly force by presentment of a firearm, to wit, at least one co-conspirator of Carletta Antoinette Watson did present a firearm; Nine, and at least one co-conspirator of Carletta Antoinette Watson did shoot and kill Dontrell Curry and did shoot and wound Rachel Cooke putting Rachel Cooke in fear of her death; 10, with intent to permanently deprive Rachel Cooke of the said United States currency and prepaid credit and/or debit cards.

A.R. 487 – 488.

Viewing the evidence in the light most favorable to the State, it is clear that there was sufficient evidence to support the jury’s conviction of the Petitioner for first degree robbery. The Petitioner conceded in her second statement elements One, Two, Three, Four, Six, Seven, and Eight, that she Carletta Watson, in Jefferson County, West Virginia, on or about April 25, 2012, took⁸ from the presence of Rachel Cooke or Dontrell Curry, prepaid credit or debit cards, belonging to Rachel Cooke, by threat of deadly force by presentment of a firearm.

As to the fourth element, in her statement Petitioner did not admit that she personally took the prepaid credit cards but did concede that she returned to West Virginia with the two men who had never before been to West Virginia, that they all entered the apartment and that the two men “got what they were looking for”. A rational trier of fact could have determined that the men could not have been looking for anything without the knowledge provided by and complicity of the Petitioner who told them about the prepaid credit cards, led them to the residence, and got them inside. Thus, a reasonable jury could have determined that the Petitioner

⁸ The Court also instructed the jury that, “A person who is actually or constructively present at the scene of a crime at the same time as the criminal act of the absolute perpetrator, who acts with shared criminal intent contributing to the criminal act of the absolute perpetrator, is an aider and abettor, and a principal in the second degree, and as such may be criminally liable for the criminal act as if she were the absolute perpetrator of the crime.” A.R. 485 – 486.

was an aider and abettor of the principals in the first degree and thus was criminally responsible for taking the prepaid credit cards from Ms. Cooke, just as if she were the principal in the first degree when one of two men took the prepaid cards.

As to the fifth element, there was sufficient evidence for a rational jury to conclude that the prepaid credit cards were taken against the will of Rachel Cooke and Dontrell Curry. The testimony that the men were armed with guns and wore masks could reasonably have been the basis for the jury's conclusion with regard to the fifth element, that the men as principals in the first degree and the Petitioner as a principal in the second degree, intended to take the prepaid cards against the will of Rachel Cooke and Dontrell Curry.

As to the ninth element, the Petitioner admitted in her statement that she heard the gunshots in the bedroom while she was in the living room. Rachel Cooke and A.M. testified that the men with firearms shot Dontrell Curry and Rachel Cooke at point blank range. Dr. Smith testified that one of the two bullet which killed Mr. Curry went through his skull from back to front, exiting through his face. A rational trier of fact could have found that this "execution-style" killing of Mr. Curry, combined with the bullet wound suffered by Ms. Cooke reasonably put Ms. Cooke in fear of her death.

As to the tenth element, it was clear from the Petitioner's own statement that the perpetrators intended to permanently deprive Ms. Cooke of her prepaid credit cards. The Petitioner admitted that the men gave her the prepaid credit cards to check the balance on those cards. Officer Henderson also testified that the Petitioner's cell phone records demonstrated that she repeatedly called the 1-866 service number for those prepaid credit cards in the hour immediately after the shooting. A rational trier of fact could have reasonably concluded that the

Petitioner intended to permanently deprive Ms. Cooke of her prepaid credit cards based on the fact that she checked the available balance of those cards.

3. There was sufficient evidence for a rational trier of fact to have found the essential elements of Burglary were proved beyond a reasonable doubt.

The Court instructed the jury that in order to find the Petitioner guilty of Burglary as charged in Count 3 that the State of West Virginia had to prove the elements of the crime as follows:

One, the Defendant, Carletta Antoinette Waston; Two, in Jefferson County, West Virginia; Three, on or about the 25th day of April, 2012; Four, did enter without breaking and in the nighttime; Five, a dwelling house; Six, belonging to Rachel Cooke and Dontrell Curry; Seven, with the intent to commit of robbery in the first degree therein.

Viewing the evidence in the light most favorable to the State, it is clear that there was sufficient evidence to support the jury's conviction of the Petitioner for burglary. In her second statement the Petitioner conceded elements One through Six, that she Carletta Watson, in Jefferson County, West Virginia, on or about April 25, 2012, entered without breaking in the nighttime, a dwelling house, belonging to Rachel Cooke and Dontrell Curry. The only element of burglary that remained in contest was whether the Petitioner entered the dwelling with the intent to commit robbery. However, based upon the testimony of Ms. Cooke and A.M. that the men entered the apartment were masked and had firearms with them, combined with the admission by the Petitioner that the men had no connection to the State of West Virginia, other than the Petitioner herself, but nonetheless made a three hour round trip journey to West Virginia in the middle of the night, a reasonable jury could have concluded that the Petitioner and the men came to Jefferson County with the express purpose of committing the crime of robbery to obtain

the prepaid credit cards which the Petitioner was fully aware of. The Petitioner and her co-conspirators came to the apartment between 4:30 and 5:00 a.m. when the likelihood of being seen and the possibility of resistance were both lowest. Upon fleeing the apartment the group traveled directly back to Baltimore, during which trip the Petitioner by her own admission made several calls to verify the balance remaining on each card. A rational trier of fact could have reasonably determined that the Petitioner and her co-conspirators entered the apartment with the intent to commit the robbery which they subsequently committed.

4. There was sufficient evidence for a rational trier of fact to have found the essential elements of Conspiracy were proved beyond a reasonable doubt.

The Court instructed the jury that in order to find the Petitioner guilty of Conspiracy as charged in Counts 4 and 5 that the State of West Virginia had to prove the elements of the crime as follows:

One, the Defendant, Carletta Waston; Two, in Jefferson County, West Virginia; Three, on or about the 25th day of April, 2012; Four, intentionally entered an agreement and conspired with two other unknown persons; Five, for the purpose of burglarizing the home of Rachel Cooke and Dontrell Curry; Six, and that the Defendant Carletta Antoinette Watson; Seven, subsequent to the agreement; Eight committed an overt act in furtherance of the conspiracy which conspiracy had not terminated.

In her second statement the Petitioner conceded the first three elements. A reasonable trier of fact could also have determined that there was sufficient evidence of the other elements.

As to the fourth element, in her second statement the Petitioner conceded that the men had no prior connection to the State of West Virginia, but that they drove her back to Jefferson County, and accompanied her into Ms. Cooke's and Mr. Curry's apartment. A reasonable jury could have concluded from the testimony of Ms. Cooke and A.M. that the men intended to

burglarize the apartment. Further, the jury could have concluded that the Petitioner intended to assist in the burglary based upon the Petitioner's attempt to hide in the kitchen after Rachel came out of an unexpected bedroom and saw the Petitioner in the apartment.

As to the fifth element, the jury could have found there was sufficient evidence to support a conviction based upon the phone records which demonstrated that the Petitioner went to Baltimore in the evening of April 24, and returned to Jefferson County by 4:30 a.m. on April 25, departing Baltimore around 3:00 a.m.

As to the sixth element, the jury could have found there was sufficient evidence that the Petitioner entered a conspiracy with the men based upon the Petitioner's second statement that the men "got what they were looking for", as well Ms. Cooke's testimony that the Petitioner was physically present when she was issued the prepaid cards, and that the men specifically requested her prepaid cards and PIN numbers on the morning of April 25, approximately twelve hours after the Petitioner was asked to leave Ms. Cooke's apartment.

As to the seventh and eighth elements, the jury reasonably could have found that subsequent to the agreement being reached that the Petitioner committed an overt act in furtherance of the conspiracy by telling the men about the existence of the prepaid cards, the need to obtain the PINs for the cards, leading them to Jefferson County to Rachel Cooke's and Dontrell Curry's apartment, and then determining the available balance on each card.

The Court instructed the jury that in order to find the Petitioner guilty of Conspiracy as charged in Count 5 that the State of West Virginia had to prove the same elements as in Count 4, with one change, the fifth element which required the State to prove that "for the purpose of robbing Rachel Cooke and Dontrell Curry". Again, a reasonable jury could have concluded that the Petitioner and her co-conspirators entered their agreement for the purpose of robbing Ms.

Cooke and Mr. Curry. The three hour drive from Baltimore in the middle of the night to go to Ms. Cooke and Mr. Curry's apartment was premised on the idea that there would be some benefit to the Petitioner and her co-conspirators, and that benefit was the acquisition of thousands of dollars in either cash or prepaid credit cards. The perpetrators specifically requested the prepaid cards, they did not search the apartment for other valuables. The specific demand for the prepaid cards demonstrated the agreement was for that specific purpose: to rob Ms. Cooke and Mr. Curry of the cards.

In a criminal case, a verdict of guilty will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilty on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done. Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).” *Syllabus Point 1, State v. Hose*, 187 W.Va. 429, 419 S.E.2d 690 (1992). The evidence was not manifestly inadequate. Although circumstantial, the evidence was cumulative and overwhelming that the Petitioner initiated these crimes and provided all the necessary information for the principals in the first degree to break and enter into Ms. Cooke's and Mr. Curry's apartment, to demand the money and prepaid cards at gunpoint, and later to shoot both Mr. Curry and Ms. Cooke, causing the death of Mr. Curry during the commission of two enumerated felonies, robbery and burglary.

The jury properly found this evidence to be persuasive beyond a reasonable doubt, and that jury verdict should not be set aside because there was sufficient evidence from which the

jury could find guilt beyond a reasonable doubt. In *Syllabus Point 3, State v. Chic-Colbert*, 231 W.Va. 749, 749 S.E.2d 642 (2013), this Court held:

“The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Accordingly, because when viewing the evidence in the light most favorable to the non-moving party, the State, there appears to be sufficient evidence to support the jury’s finding that the State proved all the elements of Felony Murder, Robbery in the First Degree, Burglary, Conspiracy to Commit Burglary and Conspiracy to Commit Robbery beyond a reasonable doubt, the Circuit Court’s determination should be affirmed.

II. The Circuit Court did not abuse its discretion in determining the admissibility of evidence.

In Syllabus Point 5 of *State v. Davis*, 232 W.Va. 398, 752 S.E.2d 429 (2013), this Court reiterated its prior holding regarding a trial court’s discretion to admit evidence:

“ ‘ ‘ ‘Rulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.’ *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596 (1983).” Syl. Pt. 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983)’ Syl. Pt. 1, *State v. Shrewsbury*, 213 W.Va. 327, 582 S.E.2d 774 (2003).” Syl. Pt. 1 *State v. Kaufman*, 227 W.Va. 537, 711 S.E.2d 607 (2011).

In Syllabus Point 1 of *State v. Parsons*, 214 W.Va. 342, 589 S.E.2d 226 (2003) this Court held that:

‘The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.’ Syllabus point 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955), *overruled on other grounds*, *State ex rel. R.L. v. Bedell*, 192 W.Va. 435, 452 S.E.2d 893 (1994).” Syl. pt. 1, *State v. Calloway*, 207 W.Va. 43, 528 S.E.2d 490 (1999).

“On appeal, legal conclusions made with regard to suppression determinations are reviewed de novo. Factual determination upon which these legal conclusions are based are reviewed under the clearly erroneous standard.” *Syllabus Point 3, State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994).

“ ‘A trial court’s decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.’ ” *Syllabus Point 6, State v. Hardaway*, 182 W.Va. 1, 385 S.E.2d 62, 67 (1989), quoting *Syllabus Point 3, State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978). “When evaluating the voluntariness of a confession, a determination must be made as to whether the defendant knowingly and intelligently waived his constitutional rights and whether the confession was the product of an essentially free and unconstrained choice by its maker.” *Syllabus Point 7, State v. Bradshaw*, 193 W.Va. 519, 457 S.E.2d 456 (1995), *cert. denied*, 516 U.S. 872, 116 S.Ct. 196, 133 L.Ed.2d 131 (1995).

A. The Petitioner’s first statement was properly admitted by the Circuit Court.

The Petitioner’s first statement, taken by West Virginia officers on May 24, 2012 while the Petitioner was in the custody of United States Marshals in Baltimore, was made after the Petitioner was Mirandized, acknowledged her rights individually on a *Miranda* rights waiver form, and signed that *Miranda* rights waiver form. A.R. 367 – 370. The Petitioner does not

dispute that she was properly Mirandized and waived her Constitutional rights prior to giving her first statement. Further, the Petitioner does not assert, nor is there any evidence to support, any coercion, duress, inducement or other improper police tactic used by police in exchange for the Petitioner's statement. Under these circumstances the trial court properly concluded, consistent with the requirement of *Syllabus Point 7* of State v. Bradshaw, *supra*, that the first statement was made voluntarily after the Petitioner made a knowing and intelligent waiver of rights, which was evidenced by her execution of a signed *Miranda* rights form. The trial court's decision regarding the voluntariness of the Petitioner's first statement was not plainly wrong or clearly against the weight of the evidence. Accordingly, pursuant to *Syllabus Point 3* of State v. Vance, *supra*, this court should not disturb the Circuit Court's ruling that the Petitioner's first statement was given voluntarily because that determination is not plainly wrong, or clearly against the weight of the evidence.

B. The Petitioner's second statement was properly admitted by the Circuit Court.

The Petitioner's second statement was taken by Officer Henderson on June 9, 2012 while the petitioner was incarcerated in the Eastern Regional Jail and was accompanied⁹ by her counsel. The second statement was given as part of an agreement between the State and the Petitioner; the Petitioner agreed to provide "complete information about the incident, including the names of the unknown males present in the home at the time of the incident, as well as the name of the actual shooter" on April 25, 2012, and the State agreed to reduce the Petitioner's bond from cash only to surety with other terms and conditions. The agreement was reduced to writing and entered as an order by the Circuit Court.

⁹ Petitioner's counsel confirmed his presence at both the beginning and end of the June 9, 2012 interview. S.A.R. 3:8 - 10; S.A.R. 19:6 - 7.

However, the entirety of the information the Petitioner provided regarding the two men was that the shooter's nickname was "Midge", that he was American, lived in Baltimore, was about 5 feet 4 four inches tall, the same height as the Petitioner, had dark skin and was about 150 pounds, had short hair and bad teeth. S.A.R. 4 – 8. The Petitioner described the second man as brown-skinned, about 5 feet 7 inches tall, kind of stocky with a beard and weighing about 195 to 200 pounds. S.A.R. 15; 17. The Petitioner was either unable or unwilling to provide any information that might lead to the actual identity or names of those two individuals. However, regardless of her ability or willingness to provide such information, the Petitioner made the decision to speak with law enforcement with the advice of counsel and, further, was represented by that counsel during the interview. Accordingly, pursuant to *Syllabus Point 3* of State v. Vance, *supra*, this court should not disturb the Circuit Court's ruling that the Petitioner's second statement was given voluntarily because that determination is not plainly wrong, or clearly against the weight of the evidence.

C. The Petitioner's admission that she sold drugs was properly admitted by the Circuit Court.

The State introduced evidence of the Petitioner's livelihood as a drug dealer which it argued was "inextricably intertwined with the crime itself." A.R. 45. Such inextricably intertwined evidence was admissible and not precluded by West Virginia Rule of Evidence 404(b), as recently recognized in State v. Harris, 230 W.Va. 717, 742 S.E.2d 133 (2013). The Court there wrote that, "before determining that Rule 404(b) applies [] we must first determine if the 'other bad acts' were intrinsic or extrinsic evidence." 230 W.Va. at 721. The Court looked to a number of decisions of United States Circuit Courts of Appeal in its analysis, and quoted its earlier decision in State v. LaRock, 196 W.Va. 294, 312, 470 S.E.2d 613, 631 (1996):

‘Other act’ evidence is ‘intrinsic’ when the evidence of the other act and the evidence of the crime charged are ‘inextricably intertwined’ or both acts are part of a ‘single criminal episode’ or the other acts were ‘necessary preliminaries’ to the crime charged.

The State explained during the September 12, 2012 pre-trial hearing that the “motive for the Defendant to do the robbery in the case, which is part of the felony murder, is that she lost money as a result of being kicked out of that house and returned to get money to recoup the money she had lost.” *Id.* The investigating officer testified under direct examination:

Q: Did you also talk to Ms. Watson about why she was in Apple Tree, what she was doing there, what her business was there?

A: Yes, I did.

Q: Did she admit to you that she had been selling crack cocaine at Apple Tree?

A: Yes, she did.

Q: Did she make any other—did she indicate to you if that was a profitable business or not, did she make reference to that?

A: Yes, she expressed that Apple Tree was definitely her biggest moneymaker at that time.

A.R. 373. The ‘other acts’ of the Petitioner’s drug dealing and Ms. Cooke’s request that the Petitioner leave the apartment complex where she made her money as a drug dealer were necessary preliminaries to the single criminal episode committed by the Petitioner. The Petitioner’s eviction from Ms. Cooke’s apartment and departure from Jefferson County occurred in the late afternoon and evening of April 24, 2012. Over a period from 9 p.m. on April 24, the Petitioner left Jefferson County, went to Baltimore, then returned to Jefferson County in the early morning hours of April 25, 2012 with two men, with whom she entered Ms. Cooke’s and Mr. Curry’s apartment to obtain the money and prepaid credit cards inside the apartment. The Petitioner’s need to obtain money, either by the sale of drugs, or through the perpetration of other felonies led her to this immediate conduct. The Harris court quoted at length from a Fourth Circuit case which explained the difference between such intrinsic and extrinsic evidence:

One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence “furnishes part of the context of the crime” or is necessary to a “full presentation” of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its “environment” that its proof is appropriate in order “to complete the story of the crime on trial by proving its immediate context or the ‘res gestae’ ” or the “uncharged offense is ‘so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...’ (and is thus) part of the res gestae of the crime charged.” And where evidence is admissible to provide this “full presentation” of the offense, “(t)here is no reason to fragmentize the event under inquiry” by suppressing parts of the “res gestae.” As the Court said in *United States v. Roberts*, 548 F.2d 665, 667 (6th Cir.1977), ... “(t)he jury is entitled to know the ‘setting’ of a case. It cannot be expected to make its decision in a void without knowledge of the time, place and circumstances of the acts which form the basis of the charge.”

230 W.Va. at 721 -2, 742 S.E.2d at 137 – 8. *Quoting United States v. Masters*, 622 F.2d 83, 86 (4th Cir.1980). *Harris* concludes its analysis by stating that, “[t]his Court has consistently held that evidence which is ‘intrinsic’ to the indicted charge is not governed by Rule 404(b),” and citing to five¹⁰ separate West Virginia cases to that effect. One of those cases, *State v. Biehl*, 224 W.Va. 584, 687 S.E.2d 367, 372 (2009) stated, “Under our jurisprudence, there is a clear distinction between evidence offered as res [g]estae of the offense charged and Rule 404(b) evidence.” *Biehl*, *quoting Syllabus Point 3, 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, 311 S.E.2d 412 (1983), held that “[e]vents, declarations and circumstances which are near in time, causally connected with, and illustrative of transactions being investigated are generally considered *res gestae* and admissible at trial.”

¹⁰ *State ex rel. Kitchen v. Painter*, 226 W.Va. 278, 700 S.E.2d 489 (2010) ; *State v. Biehl*, 224 W.Va. 584, 687 S.E.2d 367 (2009); *State v. Cyrus*, 222 W.Va. 214, 664 S.E.2d 99 (2008); *State v. Woodson*, 222 W.Va. 607, 671 S.E.2d 438 (2008); *State v. Slaton*, 212 W.Va. 113, 569 S.E.2d 189 (2002).

The evidence of other acts admitted by the Circuit Court—that the Petitioner was selling drugs in the Apple Tree Gardens apartment complex where Rachel Cooke and Dontrell Curry lived, and admitted returning to her “biggest moneymaker”, Apple Tree Gardens, in her statement to police—were events, declarations and circumstances which are near in time and causally connected to the burglary, robbery, conspiracies and felony murder of Mr. Curry. The Circuit Court properly permitted the State to explain the res gestae of the crimes, which occurred less than twelve hours after Ms. Cooke evicted the Petitioner from her apartment, and place of business. That information was intrinsic to the commission of the crimes.

The Circuit Court did not abuse its discretion in making the determination to admit such intrinsic, inextricably intertwined evidence. Accordingly, the trial court’s sound discretion should not be disturbed.

D. The Circuit Court properly excluded evidence regarding whether victim Dontrell Curry had a criminal record.

Petitioner argues that the decedent Dontrell Curry was a drug dealer and that she should have been permitted to introduce evidence of that conduct. However, the Petitioner had no evidence to demonstrate that to be the case, as Mr. Curry had never been convicted of any felony drug charge. The Petitioner claimed that based upon a number of drug charges which were pending against Mr. Curry at the time of his death that she should have been permitted to raise this issue.

West Virginia Rule of Evidence 404(a)(2) permits, “Evidence of a pertinent trait of character of the victim of the crime . . . offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.” Self-defense is not an

available defense to a charge of felony murder, thus the Petitioner was without an opportunity to avail herself of offering any trait of character of the victim pursuant to Rule 404(a)(2). State v. Wade, 200 W.Va. 637, 490 S.E.2d 724 (1997).

Further, West Virginia Rule of Evidence 609 governs the use of criminal convictions of witnesses for impeachment purposes, if the crime was punishable by death or imprisonment in excess of one year. Pursuant to Rule 609 the Petitioner might have used evidence of a conviction of a crime to impeach Mr. Curry had he been a witness. As a decedent as the result of a felony murder, neither did this rule of evidence permit the Petitioner to introduce such evidence. Moreover, such a criminal conviction did not exist.

Petitioner cites to no authority to suggest that such evidence was permissible in the trial. The existence of criminal charges pending against Mr. Curry at the time of his death was not relevant pursuant to Rule of Evidence 402 and pursuant to Rule of Evidence 403, even if the evidence was found to have been relevant, it was still more prejudicial than probative.

Accordingly, the Circuit Court's decision to exclude such evidence was not an abuse of discretion and should not be disturbed on appeal.

III. The jury's finding of no mercy for the Petitioner was proper.

Syllabus Point 8 of State v. McLaughlin, 226 W.Va. 229, 700 S.E.2d 289 (2010), holds that while, "in the mercy phase of a bifurcated first degree murder proceeding, the defendant will ordinarily proceed first; however, the trial court retains the inherent authority to conduct and control the bifurcated mercy proceeding in a fair and orderly manner."

Additionally, *Syllabus Point 7* of McLaughlin provides that:

The type of evidence that is admissible in the mercy phase of a bifurcated first degree murder proceeding is much broader than the

evidence admissible for purposes of determining a defendant's guilt or innocence. Admissible evidence necessarily encompasses evidence of the defendant's character, including evidence concerning the defendant's past, present and future, as well as evidence surrounding the nature of the crime committed by the defendant that warranted a jury finding the defendant guilty of first degree murder, so long as that evidence is found by the trial court to be relevant under Rule 401 of the West Virginia Rules of Evidence and not unduly prejudicial pursuant to Rule 403 of the West Virginia Rules of Evidence.

In McLaughlin this court also wrote that "there is no 'burden of proof' relative to the mercy recommendation" (226 W.Va. at 234), and cited footnote one of State v. Rygh, 206 W.Va. 295, 524 S.E.2d 447 (1999) which stated:

We do not believe that conceptually there is any separate or distinctive "burden of proof" or "burden of production" associated with the jury's mercy/no-mercy determination in a bifurcated mercy phase of a murder trial, if the court in its discretion decides to bifurcate the proceeding. In making its overall verdict, in a unitary trial or a bifurcated trial, the jury looks at all of the evidence that the defendant and the prosecution have put on—and if the jury concludes that an offense punishable by life imprisonment was committed, then the jury determines the mercy/no-mercy portion of its verdict, again based on all of the evidence presented to them at the time of their determination. We would anticipate that a defendant would ordinarily proceed first in any bifurcated mercy phase. We emphasize that the possibility of bifurcation of a mercy phase is not an open door to the expansion of the ambit of evidence that the prosecution may put on against a defendant, in the absence of the defendant opening that door to permit narrowly focused impeachment or rebuttal evidence from the prosecution.

Accordingly it is clear from the holdings and dicta of McLaughlin, LaRock and Rygh that the trial court possessed the inherent authority to conduct and control the bifurcated mercy proceeding in a fair and orderly manner, and that neither party had a burden of proof in that stage of the proceedings.

Moreover, during the mercy phase of the trial the Petitioner, through counsel, advised the Court that she did not wish to testify or present any witnesses.

I know for the record obviously, of course, my client has the right to speak during this stage and testify on her own behalf. Her mother is present here in the courtroom. We have discussed the matter with her as well. I encouraged them both to testify. They wish to at this stage my understanding is that neither at this point will provide any additional testimony or evidence before the court.

A.R. 551.

The opinion issued in State v. LaRock, 196 W.Va.294, 470 S.E.2d 613 (1996) quotes Justice Workman's dissent in Schofield v. West Virginia Department of Corrections, 185 W.Va. 199, 406 S.E.2d 425 (1991), where she wrote, "The determination of whether a defendant should receive mercy is so crucially important that justice for both the state and defendant would be best served by a full presentation of all relevant circumstances without regard to strategy during trial on the merits." Nonetheless, the defendant for strategic or personal reasons chose not to proceed during the mercy phase other than through argument of counsel.

Defendant also argues that the admission of a prior convictions for forgery and counterfeiting which were non-violent was improper. However, McLaughlin is again instructive. The decision quotes a prior decision of this court in State v. Finley, 219 W.Va. 747, 639 S.E.2d 839 (2006), which stated:

at the penalty phase, the jury is no longer looking narrowly at the circumstances surrounding the charged offense. In order to make a recommendation regarding mercy, the jury is bound to look at the broader picture of the defendant's character—examining the defendant's past, present and future according to the evidence before it—in order to reach its decision regarding whether the defendant is a person who is worthy of the chance to regain freedom. *See Zant v. Stephens*, 462 U.S. 862, 900, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (Rehnquist, J., concurring in judgment) (at the penalty stage a jury considers the character and propensities of

a defendant in order to make a “unique, individualized judgment regarding the punishment that a particular person deserves.”).

The McLaughlin court recognized that evidence of a defendant’s character and past conduct was critical evidence for a jury prior to making a recommendation of mercy. Accordingly, the admission of evidence of the defendant’s prior convictions for forgery and counterfeiting was appropriate evidence for the jury to hear in the penalty phase. The proceedings conducted by the Circuit Court were fair and orderly and those proceedings should not be disturbed by this court.

IV. The Circuit Court properly instructed the jury.

This Court has previously held that whether a jury was properly instructed is a question of law to be reviewed *de novo*.

As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*.

Syllabus Point 1, State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996). This Court has also held if a trial court’s instructions to the jury are a correct statement of law, then deference shall be given to the trial court whose ruling shall be disturbed only for an abuse of discretion.

A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

Syllabus Point 4, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Petitioner argues that the jury was improperly instructed because the two men with whom she entered Ms. Cooke's and Mr. Curry's apartment on the morning of April 25, 2012 were described as "co-conspirators". The Petitioner instead requested that the men be described in the instructions as "accomplices". At trial counsel for the State argued against that language:

I don't think we have a co-defendant, we have a co-conspirator. I think that the instructions indicate that she conspired with unknown individuals. I don't know how, if we look at Page 10 of the elements of conspiracy to commit the offense of burglary, she intentionally entered into an agreement, conspired with two other unknown persons, we have the street name for one individual and we have no name for the other. Accomplices, Mr. Rasheed suggests, would be the only other word. But I don't think that is prejudicial in light of the fact she is being charged with conspiracy. To conspire you have to have a co-conspirator. From that viewpoint, I think using the word co-conspirator is not prejudicial.

A.R. 473 – 474.

The instructions given by the Circuit Court when looked at as a whole, A.R. 478 – 497, contain a correct statement of law, as required by *Guthrie*. Moreover, the Circuit Court did not abuse its discretion in formulating those jury instructions, and the instructions should not be dissected here on appeal down to the use of the single term "co-conspirator". Because there was no abuse of discretion by the court in formulating the wording of the instructions, and because the instructions are a correct statement of law, they should not serve as the basis to disturb the Circuit Court's determination.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Respondent requests that this Court deny the Petition for Appeal.

Respectfully submitted,
STATE OF WEST VIRGINIA

By counsel:



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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA, Plaintiff Below,
Respondent,

v.

Supreme Court Docket No.: 14-0400

CARLETTA ANTOINETTE WATSON, Defendant Below,
Petitioner.

CERTIFICATE OF SERVICE

I, Brandon C. H. Sims, Assistant Prosecuting Attorney for Jefferson County, West Virginia and counsel for the Respondent do hereby certify that on this 10th day of October, 2014, I have served a true copy of the foregoing, "State of West Virginia's Response to Petition for Appeal" by electronic mail and first class United States mail upon:

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