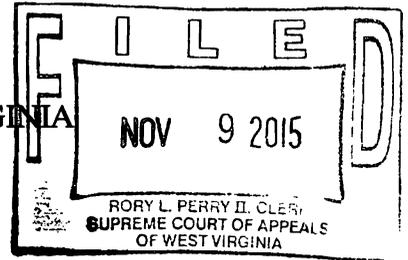


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

JAMES N. MAULDIN,

Defendant Below, Petitioner.

DOCKET NO.: 14-1142
(Berkeley County Case No.: 12-F-135)

RESPONDENT STATE OF WEST VIRGINIA'S BRIEF

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PETITIONER'S ASSIGNMENTS OF ERROR

- I. WHETHER THE CIRCUIT COURT ERRED IN DENYING THE PETITIONER'S MOTIONS FOR JUDGMENT OF ACQUITTAL, OR, CONVERSELY STATED, WHETHER THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT OF THE JURY?**
- II. WHETHER THE CIRCUIT COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR NEW TRIAL BASED UPON THE INTRODUCTION OF TEXT MESSAGES EXCHANGED BETWEEN THE PETITIONER AND HIS CO-DEFENDANT?**
- III. WHETHER THE CIRCUIT COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR NEW TRIAL BASED UPON THE INTRODUCTION OF THE PETITIONER'S FIRST TWO STATEMENTS TO LAW ENFORCEMENT?**
- IV. WHETHER THE PETITIONER'S RIGHT TO COMPULSORY PROCESS WAS VIOLATED?**
- V. WHETHER THE PETITIONER'S SENTENCE WAS CONSTITUTIONALLY DISPROPORTIONATE TO THE CRIMES OF CONVICTION AND/OR TO THE SENTENCE OF HIS CO-DEFENDANT?**

STATEMENT OF THE CASE

On December 31, 2011, an ambulance responded to the residence of the Petitioner where he lived with his girlfriend, Jasmine Dawkins, the Petitioner's 3-year-old son Kaiwon, and the Petitioner's 3-month old son James. Upon arrival, paramedics found 3-year-old Kaiwon wet and cold, bruises on his face and arms, wearing only a pair of shorts, and in full cardiac arrest on the bathroom floor. [Appendix Record, hereinafter referred to as AR, pg. 336-346, 347-355.] Once paramedics saw the condition of the child, they called for law enforcement. [Id.] Kaiwon was rushed to the hospital where his condition was assessed in more detail.

The child had visible bruising and swelling to his face. [AR, 360, 665-672, 707-716.] Again, he was noted to be wet and cold to the touch. [AR, 707-716, *710.] The ER nurse indicated that there were multiple areas on the child's head that felt like a "squishy rotten tomato." [Id.] There was bruising all the way around his wrists as though someone had forcefully held him down. [AR, 665-672, *670, 707-716.] He had a "slap injury" on his thigh

that looked like a hand print. [AR, 707-716, *711.] When medical personnel attempted to remove the child's shorts, they found that it was difficult to do so because his clothing was stuck to him. Upon removing his shorts, they discovered the child had third degree burns across the entirety of his buttocks and on the top of one thigh. [AR, 357-376, *361-362. 665-672, *667, 670, 707-716, *711.] When they removed the stuck-on clothing, they found that the dead, rotting skin on and around the wounds was pulled off with them, causing bleeding of the area and a release of the smell of decaying skin. [665-672, *667, 670, 707-716, *711.] A head CT scan revealed multiple areas of subdural bleeding around the child's brain: on both the left side and the right side, between the upper and lower part of the brain, and also between the left and right hemispheres of the brain. [AR, 383-393, *387.] Local medical personnel arranged for emergency helicopter transport of the child to Children's National Hospital in Washington, D.C. even though they did not expect the child to survive because they wanted to give him his very best chance. [AR 366-367, 368-369, 713-714.] Kaiwon ultimately passed away. The medical examiner determined that the cause of his death was multiple acute and chronic injuries and the manner of death was homicide. [AR, 401-402.] The medical examiner detailed the numerous injuries she had noted to the child. [AR, 394-433.]

Petitioner was indicted jointly with his codefendant Jasmine Dawkins, by a Berkeley County grand jury in May of 2012, on one (1) felony count of Death of a Child by a Parent, Guardian or Custodian by Child Abuse, one (1) felony count of Child Abuse Causing Serious Bodily Injury, one (1) felony count of Malicious Assault, two (2) felony counts of Gross Child Neglect Creating Substantial Risk of Serious Bodily Injury, and one (1) misdemeanor count of Presentation of False Information Regarding a Child's Injuries. [Appendix Record, hereinafter referred to as AR, pg. 9-12.] The circuit court granted a motion to sever the trials of the

Petitioner and Ms. Dawkins. Following a trial by jury on March 25-29, 2014, the Petitioner was found guilty and convicted of each of the above listed indicted charges. [AR, pg. 908-911, 917-918, 927-929.]

Following the preparation of a presentence investigation and a diagnostic evaluation of the Petitioner and upon consideration of the other evidence and argument, the circuit court sentenced the Petitioner to serve a statutory definite term of forty (40) years of incarceration in the penitentiary upon his conviction for Death of a Child by a Parent, Guardian or Custodian by Child Abuse; the statutory term of not less than two (2) nor more than ten (10) years in the penitentiary upon his conviction for Child Abuse Causing Serious Bodily Injury; the statutory term of not less than two (2) nor more than ten (10) years in the penitentiary upon his conviction for Malicious Assault; statutory terms of not less than one (1) nor more than five (5) years in the penitentiary upon each of his two (2) convictions for Gross Child Neglect Creating a Substantial Risk of Serious Bodily Injury; and a statutory definite term of one (1) year in jail upon his conviction of Presentation of False Information Regarding a Child's Injuries. [AR, pg. 938-968, 970-974.] The Petitioner's sentences were ordered to run concurrently with one another. [Id.] The Court also imposed fines and costs. [Id.]

Christopher J. Prezioso, Esq., who was trial counsel, was appointed by the court for purposes of appeal. Mr. Prezioso filed a complete and timely Notice of Intent to Appeal. Before the original deadline for perfection of the appeal, Mr. Prezioso accepted new employment and moved to withdraw from representation of the Petitioner. Thereafter, Matthew T. Yanni, Esq. was appointed for purposes of perfecting the Petitioner's appeal. This Honorable Court has since ordered both Mr. Yanni, as counsel, and Mr. Mauldin, *pro se*, to complete and submit a brief in support of the Petitioner's appeal. The State has reviewed both briefs and files this

consolidated response addressing to the best of its ability the allegations of error contained in both submissions.

SUMMARY OF ARGUMENT

The Petitioner begins his *pro se* brief by alleging ineffective assistance of appellate counsel herein and reiterates said argument under every allegation of error he makes with regard to his grounds for appeal. Because the Court decided to order the preparation of a brief by counsel and a *pro se* brief by the Petitioner considering the nature of appellate counsel's initial filing and because the appeal has not yet been considered or decided by the Court, the State does not feel it timely or appropriate to respond to these allegations concerning appellate counsel's performance in the course of this brief. The Respondent respectfully requests an opportunity to more fully respond to this allegation of error if deemed appropriate to do so by the Court, however.

The Petitioner and his counsel both allege that the Petitioner's motion for judgment of acquittal should have been granted based upon the sufficiency of the evidence. There was more than sufficient evidence upon which, looking at the facts of the case in light most favorable to the State and making all credibility inferences in the State's favor, the jury could have and did find the Petitioner guilty beyond a reasonable doubt.

The Petitioner and his counsel both allege that the circuit court committed error by denying the Petitioner's motion for new trial based upon the introduction of text messages. The circuit court properly allowed the introduction of the text messages in this case, as they fall under Rule 801(d)(2) of the West Virginia Rules of Evidence as a statement of the Petitioner and were properly authenticated based upon the introduction of the phone records and overwhelming circumstantial evidence corroborating the identity of the Petitioner as the author of those

messages. There was no abuse of discretion by the circuit court in admitting this evidence or in denying the Petitioner's motion for a new trial based upon the introduction of this evidence.

The Petitioner and his counsel also both allege that the circuit court committed error by denying the Petitioner's motion for new trial based upon the introduction of his statements to law enforcement. The circuit court properly allowed the introduction of the statements following a full pre-trial evidentiary hearing where it considered testimony and evidence concerning the circumstances surrounding the taking of each of the Petitioner's statements. There was no abuse of discretion by the circuit court in admitting this evidence or in denying the Petitioner's motion for a new trial based upon the introduction of this evidence.

The Petitioner alleges in his *pro se* brief that his right to compulsory process was violated because the Petitioner's codefendant, Jasmine Dawkins, was not forced to take the stand and assert her Fifth Amendment right against self incrimination before the jury. However, neither the State nor the Petitioner called Jasmine Dawkins as a witness at the Petitioner's trial. The Petitioner could have subpoenaed Ms. Dawkins and called her to the stand, but he did not. Since the Petitioner chose not call Ms. Dawkins as a witness, his right to compulsory process was not violated.

Finally, the Petitioner alleges in his *pro se* brief that his sentence was disproportionate to the crimes of conviction and disproportionate to the sentence ultimately received by his co-defendant. However, the Petitioner's sentence is within the statutory terms for the offenses of conviction and is not based upon impermissible factors; therefore, the Petitioner's sentence is not subject to appellate review. Furthermore, under a proportionality analysis, the Petitioner's sentence does not "shock the conscience" given the heinous nature of the crimes committed and is objectively proportional to the offenses of conviction. This is further supported by the fact

that the circuit court showed leniency by granting the Petitioner concurrency. Finally, the Petitioner's co-defendant was found by a jury to be less culpable in the death of the child than the Petitioner, resulting in different convictions and, consequently, a lighter sentence. Under those circumstances, the Petitioner is not entitled to relief based upon any allegation concerning his sentencing.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State avers that the facts and legal arguments are adequately presented in the briefs and record on appeal and that the decisional process would not be significantly aided by oral argument. As such, oral argument would be unnecessary in this matter pursuant to Rule 18. If, however, this Court were to find oral argument necessary, the State believes argument pursuant to Rule 19 would be appropriate.

ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE PRESENTED UPON WHICH THE JURY CONVICTED THE PETITIONER.

A. Standard of Review

“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 weighted, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.’ Syllabus Point 3, State v. Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995).”

Syl. Pt. 1, State v. Miller, 204 W. Va. 374, 513 S.E.2d 147 (1998); Syl. Pt. 3, State v. Williams,

198 W. Va. 274, 480 S.E.2d 162 (1996); Syl. Pt. 2, State v. Hughes, 197 W. Va. 518, 476 S.E.2d 189 (1996).

B. Discussion

The State presented sufficient evidence for each crime charged upon which the jury based its findings of guilt beyond a reasonable doubt. The Petitioner was convicted of (1) felony count of Death of a Child by a Parent, Guardian or Custodian by Child Abuse, pursuant to **W.Va. Code §61-8D-2a(a)**;¹ one (1) felony count of Child Abuse Causing Serious Bodily Injury, pursuant to **W.Va. Code §61-8D-3(b)**;² one (1) felony count of Malicious Assault, pursuant to **W.Va. Code §61-2-9(a)**;³ two (2) felony counts of Gross Child Neglect Creating Substantial Risk of Serious Bodily Injury, pursuant to **W.Va. Code §61-8D-4(c)**;⁴ and one (1) misdemeanor count of Presentation of False Information Regarding a Child's Injuries, pursuant to **W.Va. Code §61-8D-7**.⁵ [AR, 908-911, 917-918, 927-929.]

The child's biological mother and members of her immediate family testified concerning the demeanor and health of the child prior to spending a large part of the month of November with the Petitioner and his co-defendant. [AR, 490-498, 498-515, 515-556.] They also testified

¹ **W.Va. Code §61-8D-2a(a)** makes it a felony offense "if any parent, guardian or custodian shall maliciously and intentionally inflict upon a child under his or her care, custody or control substantial physical pain, illness or any impairment of physical condition by other than accidental means, thereby causing the death of such child."

² **W.Va. Code §61-8D-3(b)** makes it a felony offense "if any parent, guardian or custodian shall abuse a child and by such abuse cause said child serious bodily injury as such term is defined in section one, article eight-b of this chapter." **W.Va. Code §61-8B-1** defines serious bodily injury as "bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ."

³ **W.Va. Code §61-2-9(a)** makes it a felony offense "If any person maliciously shoot, stab, cut or wound any person, or by any means cause him or her bodily injury with intent to maim, disfigure, disable or kill."

⁴ **W.Va. Code §61-8D-4(c)** makes it a felony offense "if a parent, guardian or custodian grossly neglects a child and by that gross neglect creates a substantial risk of death or serious bodily injury."

⁵ **W.Va. Code §61-8D-7** provides that "any person who presents false information concerning acts or conduct which would constitute an offense under the provisions of this article to attending medical personnel shall be guilty of a misdemeanor."

that they believed Kaiwon looked thin when they saw him on Thanksgiving and that he complained of having a tummy ache at that time, although no one reported seeing visible injuries on the child. [Id.] The mother further testified that Kaiwon was only supposed to be with his father for a brief period of time following Thanksgiving and that she was supposed to get him back well before Christmas, but the Petitioner did not return the child. [515-556.] She indicated that the Petitioner gave her the runaround, avoided answering most of her calls and texts, and gave her vague and/or inconsistent information on when he was going to return the child to her custody. [Id.] She stated she was able to talk to Kaiwon on the phone, but he sounded “weak and tired” like he was “sad.” [AR, 515-556, *539.] She did not see Kaiwon again until he had passed away, and she went to Children’s National Hospital to identify his body. [AR, 515-556, *544-546.]

Evidence showed that the only people living in the household with Kaiwon during the month of December were the Petitioner, his co-defendant, and a 3-month old infant. [AR, 569.] The majority of the injuries to the child as described by both the medical personnel at Berkeley Medical Center as well as the medical examiner were classified as being “acute” and estimated to have occurred within the hours, days, and- at most- weeks before his death. [AR, 357-376, 383-393, 394-433, 665-672, 707-716.]

The child had visible bruising and swelling to his face. [AR, 360, 665-672, 707-716.] He was noted to be wet and cold to the touch. [AR, 707-716, *710.] The ER nurse indicated that there were multiple areas on the child’s head that felt like a “squishy rotten tomato.” [Id.] He had a “slap injury” on his thigh that looked like a hand print. [AR, 707-716, *711.]

Kaiwon had bruising all the way around his wrists as though someone had forcefully held him down. [AR, 665-672, *670, 707-716.] When medical personnel attempted to remove the

child's shorts, they found that it was difficult to do so because his clothing was stuck to him. Upon removing his shorts, they discovered the child had third degree burns across the entirety of his buttocks and on the top of one thigh. [AR, 357-376, *361-362, 665-672, *667, 670, 707-716, *711.] When they removed the stuck-on clothing, they found that the dead, rotting skin on and around the wounds was pulled off with them, causing bleeding of the area and a release of the smell of decaying skin. [AR, 665-672, *667, 670, 707-716, *711.] It was opined by the medical experts that the child could have been held down by his wrists and forcibly sat on a very hot, flat surface or, alternatively, may have been forcibly held in some scalding hot water. [AR, 360-363, 416-418, 670.] While the area smelled of rotten flesh, some of the burns appeared to be in some stage of healing. [AR, 360-363, 405, 416-418] It was further opined that such an injury would have been painful [AR, 363] and was not accidental. [AR, 418.]

A head CT scan revealed multiple areas of subdural bleeding around the child's brain: on both the left side and the right side, between the upper and lower part of the brain, and also between the left and right hemispheres of the brain. [AR, 383-393, *387.] Local medical personnel arranged to emergency helicopter transport of the child to Children's National Hospital in Washington, D.C. even though they did not expect the child to survive because they wanted to give him his very best chance. [AR 366-367, 368-369, 713-714.] Kaiwon ultimately passed away. The medical examiner determined that the cause of his death was multiple acute and chronic injuries and the manner of death was homicide and detailed the numerous injuries she had noted to the child. [AR, 394-433, *401-402.] All medical experts agreed that the Petitioner's explanations of what occurred were inconsistent with the child's injuries and that those injuries were not due to accidental trauma. [AR, 357-376, 394-433, 665-672, 707-716.]

Furthermore, the Petitioner did admit in his Mirandized statement to law enforcement at

the police station that he would hit Kaiwon in the head sometimes as part of his punishment. Additionally, the State recovered text messages exchanged between the Petitioner and his codefendant discussing beating Kaiwon for talking back and having peeing his pants. [AR, 470-490, 672-706, 752-762, *479-483, 485-486.] The Petitioner also complains about the child's mother calling him constantly and indicates to his codefendant that they have to wait until the child heals before he can take him back to his mother. [AR, 485-486.]

The above evidence, taken in light most favorable to the State and crediting all inferences and credibility assessments in favor of the State, is wholly sufficient for the jury to have found the Petitioner guilty beyond a reasonable doubt of each of the crimes charged. State v. Guthrie, *supra*; State v. Miller, *supra*.

II. THE CIRCUIT COURT PROPERLY ALLOWED THE INTRODUCTION OF THE TEXT MESSAGES OF THE PETITIONER.

A. Standard of Review

“The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice.” **W.Va.R.Crim.P. 33.**

“The question of whether a new trial should be granted depends on the circumstances of the case and is a matter largely in the discretion of the trial court. State v. Nicholson, 170 W.Va. 701, 296 S.E.2d 342, 344 (1982).”

State v. King, 173 W. Va. 164, 165, 313 S.E.2d 440, 442 (1984). “The question of whether a new trial should be granted is within the discretion of the trial court and is reviewable only in the case of abuse.” State v. Crouch, 191 W. Va. 272, 275, 445 S.E.2d 213, 216 (1994).

Furthermore,

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.

Syl. Pt. 1, State v. Harris, 216 W.Va. 237, 605 S.E.2d 809 (2004)(per curiam); Syl. Pt. 1, State v. Calloway, 207 W.Va. 43, 528 S.E.2d 490 (1999).

B. Discussion

The circuit court properly allowed the introduction of the Petitioner's text messages in this case. The Petitioner filed an objection and motion in limine with regard to the anticipated introduction of the Petitioner's text messages in this case. [AR, 87-92.] The Petitioner further supplemented that filing with additional case law and analysis. [AR, 93-95.] The State filed a written response to the Petitioner's motion. [AR, 104-107.] The circuit court then conducted a hearing on the motion before ultimately entering an order allowing the admission of the text messages based upon the ability of the State to corroborate the identity of the sender as the Petitioner through the use of circumstantial evidence. [AR, 110-132, 134-135.]

The State was able to establish the Petitioner as the author/sender of the text messages based upon the introduction of the stipulation regarding the parties' phone numbers, the introduction of phone records, and the introduction of circumstantial evidence presented in the context of the communication, which left no doubt as to the identity of the Petitioner as the author. The Petitioner stipulated to the authenticity of the electronic records and the telephone numbers to which they are attached without the necessity of testimony from a records custodian from the communications company. [AR, 469.] Therefore, the Petitioner's sole objection is to the authenticity of the authorship of the text messages.

The primary case discussed by the parties in the proceedings below was Commonwealth v. Koch, 39 A.3d 996 (Pa. Super., 2011), which indicates that "authentication of electronic communications, like documents, requires more than mere confirmation that the number or address belonged to a particular person. Circumstantial evidence, which tends to corroborate the identity of the sender, is required." Com. v. Koch, 39 A.3d 996, 1005 (Pa.Super., 2011).

Recently, this Honorable Court heard a case dealing with the authenticity of the authorship of text messages. This Court assessed authenticity under the following guidelines:

Preliminary questions of authentication and identification pursuant to **W.Va. R. Evid. 901** are treated as matters of conditional relevance, and, thus, are governed by the procedure set forth in **W.Va. R. Evid. 104(b)**. In an analysis under **W.Va. R. Evid. 901** a trial judge must find that the party offering the evidence has made a *prima facie* showing that there is sufficient evidence ‘to support a finding that the matter in question is what its proponent claims.’ In other words, the trial judge is required only to find that a reasonable juror could find in favor of authenticity or identification before the evidence is admitted. The trier of fact determines whether the evidence is credible. Furthermore, a trial judge's ruling on authenticity will not be disturbed on appeal unless there has been an abuse of discretion. Syl. Pt. 1, in part, State v. Jenkins, 195 W.Va. 620, 621, 466 S.E.2d 471, 472 (1995).

State v. Spaulding, No. 14-0718 (W.Va. Supreme Court, June 22, 2015)(memorandum decision), 2015 WL 3875802, at *5.^{6 7}

In its response to the Petitioner’s motion in limine, the State set forth the anticipated evidence it would present regarding the Petitioner’s authorship of those text messages. [AR, 104-107.] The State indeed produced this evidence at trial.

The text messages introduced were sent from the phone and phone number registered to the Petitioner to the phone and phone number registered to the codefendant.⁸ The Petitioner’s father and exgirlfriend (the mother of the deceased infant) testified regarding the home life and

⁶ **W.Va.R.Evid. 901** provides that “to satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”

⁷ **W.Va.R.Evid. 104(b)** provides that “when the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.”

⁸ The State also sought to introduce the reciprocal text messages from the codefendant, Ms. Dawkins, not for the truth of the matter asserted, but to establish the context for both the statements made by the Petitioner as well as the authentication of the messages as being written by the Petitioner. [AR 129, 131.] The Petitioner does not raise any objection regarding the reciprocal texts in his appeal. In fact, the Petitioner frequently quotes the text messages of his codefendant in his *pro se* brief as being helpful to his theory of the case.

living arrangement between the Petitioner, the codefendant (Ms. Dawkins) and Kaiwon. The Petitioner and Ms. Dawkins were the only adults living in the residence with Kaiwon and the baby. When the Petitioner would work, Ms. Dawkins would be left at home with the children. The text messages contain discussions about the Petitioner and Ms. Dawkins' home life, including behavior problems and disciplinary measures regarding Kaiwon. The messages also reference Kaiwon's mother calling and texting regarding Kaiwon. She testified that she called and text messaged the Petitioner regarding Kaiwon.

Given the context of the living arrangement of the Petitioner, there is no reasonable consideration to be had that these text messages could have been authored by anyone other than the Petitioner and Ms. Dawkins. This is precisely the type of evidence sufficient to support a finding that a reasonable juror could find in favor of authenticity or identification. State v. Jenkins, supra., State v. Spaulding, supra.

Furthermore, since the evidence was sufficient to prove authorship of the text messages, then the text messages were properly admissible under **W.Va.R.Evid.** 801(d)(2) as admissions by a party-opponent and are not hearsay.⁹

Based upon the above, the circuit court did not abuse its discretion in denying the Petitioner's motion for new trial based upon the introduction of the Petitioner's text messages. State v. King, supra., State v. Crouch, supra., State v. Harris, supra.

III. THE CIRCUIT COURT PROPERLY ALLOWED THE INTRODUCTION OF THE PETITIONER'S STATEMENTS.

A. Standard of Review

"The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice." **W.Va.R.Crim.P.** 33.

⁹ **W.Va.R.Evid.** 801(d)(2) states in relevant part as follows: "a statement that meets the following conditions is not hearsay...the statement was offered against an opposing party and...was made by the party in an individual or representative capacity."

“The question of whether a new trial should be granted depends on the circumstances of the case and is a matter largely in the discretion of the trial court. State v. Nicholson, 170 W.Va. 701, 296 S.E.2d 342, 344 (1982).”

State v. King, 173 W. Va. 164, 165, 313 S.E.2d 440, 442 (1984). “The question of whether a new trial should be granted is within the discretion of the trial court and is reviewable only in the case of abuse.” State v. Crouch, 191 W. Va. 272, 275, 445 S.E.2d 213, 216 (1994).

Furthermore,

1. “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.” Syl. Pt. 3, State v. Vance, 162 W.Va. 467, 250 S.E.2d 146 (1978).

2. “This Court is constitutionally obligated to give plenary, independent, and *de novo* review to the ultimate question of whether a particular confession is voluntary and whether the lower court applied the correct legal standard in making its determination. The holdings of prior West Virginia cases suggesting deference in this area continue, but that deference is limited to factual findings as opposed to legal conclusions.” Syl. Pt. 2, State v. Farley, 192 W.Va. 247, 452 S.E.2d 50 (1994).

3. “When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.” Syl. Pt. 1, State v. Lacy, 196 W.Va. 104, 468 S.E.2d 719 (1996).

Syl. Pts. 1-3, State v. Jones, 220 W. Va. 214, 640 S.E.2d 564 (2006).

B. Discussion

The circuit court did not err in allowing the introduction of the Petitioner's statements to Trooper Conner. The Petitioner filed a written motion to suppress his statements. [AR, 62-79.]

The circuit court conducted an evidentiary hearing concerning the Petitioner's motion where it

considered testimony and evidence concerning the surrounding circumstances of each of the Petitioner's statements. [AR, 83-84.] Upon hearing the evidence and argument, the court denied the Petitioner's motion to suppress. [Id.]

The Petitioner states that the circuit court should have suppressed the Petitioner's first statement pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). The Petitioner's initial statement was taken by Trooper Conner at the scene. [AR 83-84, 719-721, 734.] After paramedics arrived on scene and saw the injuries to the child, they radioed dispatch for law enforcement to respond. Trooper Conner arrived on scene and after speaking to the paramedics, attempted to ask both the Petitioner and his codefendant, who were the only two adults in the residence, what had occurred. Trooper Conner recorded his contact with the Petitioner and Ms. Dawkins at the scene. The Petitioner was not in custody at the time and only gave a brief statement that the child had suffered a fall. [Id.] After speaking with Trooper Conner at the scene, the Petitioner left his residence and was driven by his father to the hospital while officers stayed behind. [Id.] Based thereon, the circuit court then concluded that the Petitioner was not in custody and the officer was not required to Mirandize the Petitioner at that time; therefore, there were no grounds to suppress based upon Miranda. [AR 83-84.] Based upon the record, construing all facts in the light most favorable to the State, the circuit court did not abuse its discretion in reaching that determination. State v. Lacy, *supra.*, State v. Jones, *supra.*

The Petitioner next states that the circuit court should have suppressed the Petitioner's written statement because it was not freely or voluntarily made pursuant to State v. Williams, 190 W.Va. 538, 438 S.E.2d 881 (1983). The Petitioner's written statement was taken in the waiting room at the hospital. [AR, 83-84, 731, 735-739, 744-747.] Trooper Conner had left the scene and reported to the emergency room to check on the condition of the child. Upon his

arrival, medical personnel informed Trooper Conner about the child's extensive injuries, including the severe burns to the child's buttocks. [Id.] Trooper Conner found the Petitioner in the waiting room outside of the emergency room and read the Petitioner the Miranda warnings. After receiving some basic information, Trooper Conner specifically asked the Petitioner about the burns. [Id.] The Petitioner gave a brief written statement implicating the child's biological mother. [Id.] While Trooper Conner wrote the statement, he did so word for word, just as the Petitioner had told him. [Id.] The Petitioner then had an opportunity to review the written statement, and the Petitioner signed the written statement as true and accurate. [Id.] As stated in Williams,

“A confession or statement made by a suspect is admissible if it is freely and voluntarily made despite the fact that it is written by an arresting officer if the confession or statement is read, translated (if necessary), signed by the accused and admitted by him to be correct.” Syl. pt. 2, State v. Nicholson, 174 W.Va. 573, 328 S.E.2d 180 (1985).

Syl. Pt. 6, State v. Williams, 190 W. Va. 538, 438 S.E.2d 881 (1993). The written statement of the Petitioner, written by Trooper Conner at the hospital, was shown to the Petitioner who read the same and signed it as correct. Therefore, this statement did not offend the principles of Williams and the court did not abuse its discretion in so finding. State v. Vance, *supra.*, State v. Jones, *supra.*¹⁰

Based upon the above, the circuit court did not abuse its discretion in denying the Petitioner's motion for new trial based upon the introduction of the Petitioner's statements. State v. King, *supra.*, State v. Crouch, *supra.*

¹⁰ The Petitioner also gave a statement at the police station later the same evening. The Petitioner alleges no error with regard to that statement in his appeal.

IV. THE PETITIONER DID NOT TO CALL HIS CO-DEFENDANT AS A WITNESS; THEREFORE, HIS RIGHT TO COMPULSORY PROCESS WAS NOT VIOLATED.

A. Standard of Review

This Court accords substantial deference to rulings and factual determinations of a trial court regarding the qualifications, competency, and extent of a witness's testimony. McDougal v. McCammon, 193 W.Va. 229, 235, 455 S.E.2d 788, 794 (1995); Michael v. Sabado, 192 W.Va. 585, 595, 453 S.E.2d 419, 429 (1994). We review these determinations either under a clearly erroneous or an abuse of discretion standard. Grillis v. Monongahela Power Co., 176 W.Va. 662, 666-67, 346 S.E.2d 812, 817 (1986). On the other hand, where a trial court's determination involves a construction of the West Virginia Rules of Evidence and rulings of law, our review is plenary. See Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (No. 22845 12/8/95).

State v. Omechinski, 196 W. Va. 41, 44, 468 S.E.2d 173, 176 (1996).

B. Discussion

This Court holds that “in a criminal trial, when a non-party witness intends to invoke the constitutional privilege against self-incrimination, the trial court shall require the witness to invoke the privilege in the presence of the jury...” Syl. Pt. 2, State v. Herbert, 234 W. Va. 576, 767 S.E.2d 471, 474 (2014). The Court made this finding with the knowledge and rationale that “the Sixth Amendment right to compulsory process for obtaining witnesses in his/her favor is a fundamental right, and excluding a defense witness from the jury's presence would impinge on this fundamental right for reasons outside the defendant's control.” Id., 234 W. Va. at 585-86, 767 S.E.2d at 480-81.

However, in this matter there was nothing for the circuit court to require because neither the State nor the Petitioner chose to call the Petitioner's co-defendant, Jasmine Dawkins, as a witness at the Petitioner's trial. While it was mentioned by the parties at pre-trial hearings that it was anticipated that *if* Ms. Dawkins *would* be called to testify, she would likely invoke her Fifth

Amendment privilege, neither the State nor the Petitioner chose to call her to the stand in the course of the Petitioner's trial.¹¹ Since neither the State nor the Petitioner subpoenaed Ms. Dawkins or called her as a witness, there was no requirement that the circuit court have her take the stand to invoke her Fifth Amendment right against self-incrimination. Because the Petitioner had the ability to subpoena Jasmine Dawkins and call her to the stand but chose not to do so, there was no violation of the Petitioner's compulsory process rights. State v. Omechinski, *supra*.¹²

V. THE PETITIONER WAS PROPERLY SENTENCED BY THE CIRCUIT COURT.

A. Standard of Review

"The Supreme Court of Appeals reviews sentencing orders...under an abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, State v. Lucas, 201 W.Va. 271, 496 S.E.2d 221 (1997). "Sentences imposed by the trial court, if within statutory limits and if not based on some impermissible factor, are not subject to appellate review." Syl. Pt. 7, State v. Layton, 189 W.Va. 470, S.E.2d 740 (1993); Syl. Pt. 4, State v. Goodnight, 169 W.Va. 366, 287 S.E.2d 504 (1982).

In State v. Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983), this Court stated in

Syllabus Point 5:

"Punishment may be constitutionally impermissible, although not cruel and unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and

¹¹ While Ms. Dawkins chose to testify during the course of her criminal trial, which was held in advance of the Petitioner's criminal trial, Ms. Dawkins' had filed an appeal of that case that was then pending. The parties agreed that case law indicated that Ms. Dawkins' ability to exercise her Fifth Amendment rights continued.

¹² While the Petitioner advances that Ms. Dawkins' testimony would have been helpful to him in his case, Ms. Dawkins testified substantively at her trial that it was the Petitioner who abused the child and that she was so frightened of the Petitioner that she admittedly did not seek help for the child when she probably should have. It was no wonder that the Petitioner did not seek to call her in the course of his trial for fear that she would choose not to exercise her Fifth Amendment rights and would choose to testify as she had testified in her own trial.

offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.”

Furthermore, this Court sets forth in State v. Glover, 177 W.Va. 650, 658, 355 S.E.2d 631, 639 (1987) the applicable tests for disproportionate sentence consideration:

“In State v. Cooper, 172 W.Va. 266, 304 S.E.2d 851 (1983), we set forth two tests to determine whether a sentence is disproportionate to the crime that it violates W.Va. Const. art. III §5. The first test ‘is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further.’ 172 W.Va. at 272, 304 S.E.2d at 857. Cooper then states the second test: If it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by the objective test spelled out in syllabus point 5 of Wanstreet v. Bordenkicher, 166 W.Va. 523, 276 S.E.2d 205 (1981):

‘In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.’”

The Court noted its reluctance to apply the proportionality principle inherent in the cruel and unusual punishment clause as an expression of due respect for and in substantial deference to legislative authority in determining the types and limits of punishments for crimes. State v. James, 227 W.Va. 407, 710 S.E.2d 98, 106 (2011).

Lastly, this Honorable Court finds as follows:

“Disparate sentences between codefendants are not per se unconstitutional. Courts consider many factors such as each codefendant’s respective involvement in the criminal transaction (including who was the prime mover), prior records, rehabilitative potential (including post-arrest conduct, age, and maturity), and

lack of remorse. If codefendants are similarly situated, some courts will reverse on disparity of sentence alone.”

Syl. Pt. 2, State v. Buck, 173 W.Va. 243, 314 S.E.2d 406 (1984).

B. Discussion

The Petitioner was sentenced to a definite term of forty (40) years of incarceration in the penitentiary upon his conviction for the felony offense of Death of a Child by a Parent, Guardian or Custodian by Child Abuse, pursuant to **W.Va. Code §61-8D-2a(c)**¹³; the statutory term of not less than (2) nor more than ten (10) years in the penitentiary upon his conviction for Child Abuse Causing Serious Bodily Injury, pursuant to **W.Va. Code §61-8D-3(b)**; the statutory term of not less than two (2) nor more than ten (10) years in the penitentiary upon his conviction for Malicious Assault, pursuant to **W.Va. Code §61-2-9(a)**; statutory terms of not less than one (1) nor more than five (5) years in the penitentiary upon each of his two (2) convictions for Gross Child Neglect Creating a Substantial Risk of Serious Bodily Injury, pursuant to **W.Va. Code §61-8D-4(c)**; and a definite term of one (1) year in jail upon his conviction of Presentation of False Information Regarding a Child’s Injuries, pursuant to **W.Va. Code §61-8D-7**¹⁴. [AR, 938-968, 970-974.] All of these sentences are within the statutorily prescribed guidelines.

Furthermore, the Petitioner does not allege that they are based upon impermissible factors. As such, these sentences should not be subjected to appellate review. State v. Layton, *supra.*, State v. Goodnight, *supra.*

Should the court nevertheless consider the proportionality of the Petitioner’s sentence, the Petitioner’s sentence does not “shock the conscience.” The circuit court ordered the above

¹³ **W.Va Code §61-8D-2a(c)** provides that any person convicted of a felony under **W.Va. Code §61-8D-2a(a)** shall be punished by a definite term of imprisonment in the penitentiary which is not less than ten (10) nor more than forty (40) years.

¹⁴ **W.Va. Code §61-8D-7** provides that anyone convicted pursuant to that statute shall be confined in the county jail not more than one (1) year.

sentences of the Petitioner to run concurrently, for an aggregate sentence of only forty (40) years.¹⁵ As discussed above with regard to the sufficiency of the evidence, the Petitioner abused, tortured, and ultimately caused the death of his 3-year-old son. He burned his buttocks, causing third degree burns to his tiny body. He beat Kaiwon to the point where he had multiple sources of bleeding in his brain, which caused him to go into cardiac arrest and die. Considering the atrocities committed by the Petitioner against his own child, this sentence certainly does not “shock the conscience” under the subjective test of Cooper, *supra*.

Furthermore, the Petitioner’s sentence is not disproportionate according to the objective test under Glover, *supra*. The offenses herein are all serious and violent felony offenses involving the abuse, neglect, and death of the Petitioner’s own child who, at the age of only three (3) years was completely dependent upon the Petitioner for care. The West Virginia Code is replete with references to and examples of the significant societal and public policy interests inherent in the prevention and punishment of child abuse and neglect. *See W.Va. Code §§15-11-1, et seq.; W.Va. Code §§15-13-1, et seq.; W.Va. Code §§61-8D-1, et seq.; and Chapter 49 of*

¹⁵ **W.Va. Code §61-11-21** provides that

“when any person is convicted of two or more offenses, before the sentence is pronounced for either, the confinement to which he may be sentenced upon the second or any subsequent conviction, shall commence at the termination of the previous term or terms of confinement, unless, in the discretion of the trial court, the second or subsequent conviction is ordered by the court to run concurrently with the first term of imprisonment.”

This statute provides by default that sentences for separate crimes run consecutively unless the trial court chooses in its discretion to mandate otherwise, such that where an order makes no provision that two sentences shall run concurrently, under the provisions of **W.Va. Code §61-11-21**, they must run consecutively. *See State ex rel. Cobbs v. Boles*, 149 W.Va. 365, 368, 141 S.E.2d 59, 61 (1965). Based upon this statute, this Court holds that “where a defendant has been convicted of two separate crimes, and the legislature has authorized a distinct punishment for each, the defendant has no constitutional right to serve less than the cumulative total.” *Miller v. Luff*, 175 W.Va. 150, 153, 332 S.E.2d 111, 114 (1985). The circuit court granted the Petitioner leniency in sentencing by ordering specifically that he serve the above enumerated sentences concurrently. The State objected to concurrent sentencing in this case.

the **West Virginia Code**. The State has a vested interest in resolving the particularly egregious acts of the victimization of children, especially those of such tender years and especially when those acts are committed by the child's parent who is charged with maintaining the child's care and safety and who should already have those concerns at heart. Although jurisdictions vary in their classification of and punishment for various levels of child abuse and neglect, they uniformly find a significant governmental interest in preventing and penalizing abusers. The Petitioner does not argue that these interests do not exist nor does he argue that these interests do not or should not apply to his case. Furthermore, not only was the Petitioner convicted of the neglect of his child, but also the abuse of his child and said abuse actually caused the death of his child. Some jurisdictions classify deaths resulting from child abuse as murder. Based upon these considerations, the Petitioner's sentence of forty (40) years is objectively reasonable considering the heinous nature of his crimes. State v. Glover, supra.

The Petitioner's final argument with regard to his sentence is that his codefendant, Jasmine Dawkins, who was tried separately from the Petitioner, received a much lesser sentence. This is because, however, the juries determined by virtue of their respective verdicts that the Petitioner and his codefendant were not similarly situated with regard to their involvement in these crimes.

While the Petitioner and his codefendant were jointly indicted, the court entered an order severing their cases for purposes of trial. The codefendant was tried in November of 2013, and a jury returned verdicts of guilty on only two (2) felony counts of Gross Child Neglect Creating a Substantial Risk of Serious Bodily Injury, pursuant to **W.Va. Code §61-8D-4(c)**; and one (1) misdemeanor count of Presentation of False Information Regarding a Child's Injuries, pursuant to **W.Va. Code §61-8D-7**. Like the Petitioner, she was sentenced to statutory terms of not less

than one (1) nor more than five (5) years in the penitentiary upon each of her two (2) convictions for Gross Child Neglect Creating a Substantial Risk of Serious Bodily Injury, pursuant to **W.Va. Code §61-8D-4(c)**; and a definite term of one (1) year in jail upon her conviction of Presentation of False Information Regarding a Child's Injuries, pursuant to **W.Va. Code §61-8D-7**.

During her trial, the codefendant argued that the Petitioner caused the injuries to the child, and she was too afraid of him to seek help for the child or tell the truth about what happened when the child died. By virtue of the verdict in her case, the jury believed her. The Petitioner argued in his trial that the codefendant caused the injuries to the child unbeknownst to him. By virtue of the verdict in his case, the jury did not believe him. Because the Petitioner and his codefendant were not similarly situated with regard to their involvement in the crimes, the Petitioner is not entitled to relief based upon disparate sentencing. State v. Buck, *supra*.

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to affirm the conviction and sentence of the Petitioner and deny the Petition for Appeal.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Cheryl K. Saville, Assistant Prosecuting Attorney, hereby certify that I have served a true and accurate copy of the foregoing Respondent State of West Virginia's Brief by mailing of the same, United States Mail, postage paid to the following on this 6th day of November, 2015:

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