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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 18-0731**

**STATE OF WEST VIRGINIA,**

Respondent,

**On Appeal from the Circuit  
Court of Nicholas County  
(Case No. 17-F-29)**

v.

**JAMIA DAWN COLEMAN,**

Petitioner.

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**RESPONSE BRIEF**

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## ASSIGNMENTS OF ERROR

Jamia Dawn Coleman (“Petitioner”) advances three assignments of error in this appeal. First, she contends that her Fifth and Sixth Amendment right to be present at all critical stages of her trial were violated when the circuit court preliminarily instructed the jury in her absence. Second, she asserts that the circuit court abused its discretion in denying her the right to call witnesses on her own behalf in support of her alibi defense. Finally, she alleges that the circuit court erred in denying her motion for a judgment of acquittal because there was insufficient evidence as to the element of intent to convict her.

## STATEMENT OF THE CASE

### **A. Introduction and Indictment.**

On May 19, 2017, the Grand Jury of Nicholas County, West Virginia, returned Indictment 17-F-29 against Petitioner charging her with the embezzlement of \$6,117.46 from Long Point Grille & Bar (“Long Point”). (App. 6.)

### **B. Relevant pretrial proceedings.**

#### **1. Discovery Requests.**

On May 30, 2017, Petitioner, by counsel, James R. Milam II, served on the State her Omnibus Discovery Motion. (App. 7–17.) The State in turn served its Request for Discovery, specifically requesting “[n]otification, in writing, of the defendant’s intent to offer the defense of alibi at trial of this matter.” (App. 18.) The State also served its initial Answer to Defendant’s Omnibus Discovery Motion on June 12, 2017. (App. 19–24.) On July 13 and 28, 2017, the State served on Petitioner its supplemental discovery consisting of a flash drive containing bookkeeping documents from April 2015 through March 2016, and an October 2015 Excel program reflecting the Lavu System utilized by Long Point. (App. 25–27.)

Having received no response to its discovery requests, on August 8, 2017, the State filed a Motion to Compel Production of Discovery Materials. (SAR 1.)<sup>1</sup>

## **2. Status Hearings.**

Petitioner first advised of an alibi defense on August 9, 2017, during a status hearing. (SAR 15.) Counsel had requested from the State, Petitioner's complete employee file because he had discovered Petitioner was not "even in the state of West Virginia" on 20 or 30 dates on which the alleged acts were to have occurred. (*Id.*) The trial court granted the State's motion to compel and gave Petitioner ten days to comply with the discovery requests. (SAR 2, 22.)

Another status hearing was held on October 2, 2017, at which the State advised the court it had not received any discovery regarding the nature of and witnesses for Petitioner's alibi defense. (SAR 28.) Petitioner's counsel explained he had retained a "ping" expert, Tom Slovenski, who was generating a report based on Petitioner's cellular phone records as to which cellular tower was used on certain dates. (SAR 28–30.) Counsel requested and was granted a 45-day continuance to obtain Mr. Slovenski's report. (SAR 30–34.)

## **3. Notice of Alibi.**

On March 13, 2018, only seven days prior to trial, Petitioner filed her Notice of Alibi Defense and Witness List. (App. 30–31.) In support of her alibi defense, Petitioner proposed to introduce the testimony of her mother-in-law, Ellen Brewster, indicating that Petitioner was in Stuart, Virginia on December 11–13, 2015, and January 29–31, 2016. (App. 30.)

At a hearing on March 16, 2018, the State moved to exclude fact witness testimony as to Petitioner's alibi defense because the notice of the defense was untimely filed. (SAR 44–45.) Petitioner's counsel explained that after analyzing volumes of data provided by the State, he only

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<sup>1</sup> All references to "SAR" are to the Supplemental Appendix Record filed contemporaneously by Motion herewith.

recently discovered that Petitioner could prove an alibi defense in this matter. (SAR 45–46.) Specifically, he discovered the defense on Friday, March 9, 2017. (*Id.*) The courthouse was closed on Monday, March 12, due to weather conditions, and he filed the notice at the earliest time, on Tuesday, March 13. (SAR 46.) Counsel therefore argued that the notice technically was timely under W.Va. R. Crim. P. 12(b). (SAR 46.) The trial court granted the State’s motion to exclude as the defense and witnesses were identified outside the time frame. (*Id.*; App. 34.)

**C. Trial testimony introduced during the State’s case-in-chief.**

**1. Cpl. Daniel Paul White**

Cpl. White testified he was the certified West Virginia State Trooper who investigated the complaint received from Long Point on February 23, 2016. (SAR 184–85.) As part of his investigation, Cpl. White testified he first interviewed the victim, Ms. Key, the owner of Long Point, and obtained from her a two to three page prepared written statement. (SAR 185.) Ms. Key’s report documented the deletions and discounts by Petitioner as reflected in the point of sale system utilized by Long Point. (SAR 185–86.) He explained that as an employee at Long Point, Petitioner began her shift with a set amount of money from which she reconciled customers’ tabs and then at the end of her shift, the total sales were discussed with Ms. Key and the money for her shift was turned into Long Point. (SAR 186.) Cpl. White testified that, according to Ms. Key’s records, all of the fraudulent transactions were done with cash only. (SAR 187.) Cpl. White explained that the point of sale system, Lavu, showed that customers ordered items, the items were tendered to the customers, and then Petitioner removed certain items from the customers’ bills. (SAR 190.) Cpl. White gave an example of Petitioner’s conduct:

[T]hese tables are set up on the – on the Lavu system; so, if Ms. Coleman comes to your table and there’s four people at that table and, say, all four of your [sic] order a beer to start out your meal, and then you order salads, and then you order your – your main course, and then you also get another beer or you’ll get a third beer, what would happen is, if it was a cash transaction, that the bill would be

totaled up. That receipt would be presented, and then, once that cash money was gave [sic] to Ms. Coleman, she could then re-enter the system, and she would take off, say, those three beers, and that – that is the money that was lost [to Long Point].

(SAR 191–92.)

## 2. Laverne Huffman Key

Ms. Key testified that she is the owner of Long Point, which has been in business at the same location in Summersville, West Virginia for nearly seven years. (SAR 207–08.) Ms. Key acknowledged that Long Point had struggled financially due to massive mine lay-offs and a derecho. (SAR 187.) She testified that Petitioner was employed at Long Point as a server during the period of April 2015 through February 2016. (SAR 207–08.) Ms. Key utilized a point of sale inventory system at Long Point through which all sales were transmitted to the kitchen. (SAR 208.) As a server for Long Point, Petitioner would take a customer's order using the Lavu system installed on an iPad. (SAR 209.) The online system transmits the customer's order to the kitchen and Petitioner delivered the order to the table and presented the customer with a bill, to be paid by cash or credit only. (*Id.*) At the end of Petitioner's shift at Long Point, she would print a server summary and then pay Ms. Key the amount of cash sales minus credit card tips. (*Id.*)

When Ms. Key stumbled across an undated bottle of wine, she began looking into the Lavu system and discovered that none of Petitioner's orders contained drinks. (SAR 210–11.) She went into the back end of the system to examine Petitioner's action log and discovered that her identification number, 23, had removed items from customers' bills after the ticket was printed for the customer, approximately 1,529 times, totaling \$6,117.46. (SAR 211–32, 246.) Ms. Key explained that neither Petitioner, nor any other employee required an access code to increase or decrease items on a ticket. (SAR 232, 240.) The only time a code was needed was when an employee needed to void a complete order. (*Id.*)

On cross-examination, Ms. Key admitted that the Lavu system did not indicate that Petitioner logged in on August 11 and 30, September 11, October 25, or December 13, 2015, despite the system having indicated items were removed from customer tickets by her identification number on these dates. (SAR 276–79.) Ms. Key explained she knew of at least two occasions when Petitioner’s daughter clocked in under Petitioner’s number. (SAR 277.) She stated that she had no specific recollection of Petitioner having stolen any money from her on a specific instance. (SAR 249.) Rather she stated that the system revealed she had removed items approximately 1,529 times. (SAR 249, 271.)

On re-direct examination, Ms. Key testified that she had spoken to several individual customers and verified that they had ordered items from Petitioner that were removed from the system. (SAR 289–93.)

### **3. Stanley Shawn Adkins**

Mr. Adkins, who worked as an accountant for 45 years, testified that he was hired by the State to examine the Lavu records and the system itself from Long Point and determined that Petitioner had taken at least \$5,000.00 from Long Point, more specifically, \$6,117.46 (SAR 298, 303, 320.) He explained that the Lavu system is a point of sale system that is cloud based. (SAR 299–300.) Generally, servers were required to log in by name or number and placed customer orders using an iPad. (*Id.*) The system already had the menu and prices scanned in. (*Id.*) After the order was input by the server, the order was then presented to the kitchen, the meal was served, and the server printed out the ticket and collected the money from the customer. (SAR 304–05.) He explained that it was after the customer had left and the money was in the server’s purse that Petitioner went into the system and changed the quantities of items ordered or deleted an item entirely. (SAR 305.) At the end of the server’s shift, the system totaled what the server was accountable for and paid to Ms. Key that total amount minus tips. (SAR 305–06.) He explained

that the theft of the money occurred when the server had changed the ticket after the customer paid and kept the amount of money for the items removed or deleted. (SAR 306.) The altered ticket was the one turned into Long Point. (*Id.*)

**D. Defense case.**

Petitioner called Brandi Baker, a waitress at Long Point from February through June 2016. (SAR 355.) Ms. Baker testified that she neither worked with, nor knew Petitioner. (SAR 356.) She stated that in order to change a customer's ticket, a code had to be entered by either Ms. Key or a Brian Dorsey. (SAR 356, 358.) Ms. Baker testified that the ticket could not be changed at all without the code. (SAR 358.)

Petitioner also called Samantha Drennen, a server at Long Point who had worked with Petitioner. (SAR 361.) Ms. Drennen testified that each employee had their own personal code, but only Ms. Key had the access code to alter any ticket after the initial order was input into the system. (SAR 362.) Ms. Drennen stated that she and another server possessed the code to make alterations to tickets for a trial period lasting about one month. (*Id.*) Ms. Key subsequently changed the code. (SAR 363.)

Petitioner neither testified, nor called any other witnesses. The State did not put on a rebuttal.

**E. Verdict and sentence.**

The jury found Petitioner guilty of embezzlement. (SAR 429.) On August 7, 2018, the court sentenced Petitioner to an indeterminate sentence of one to ten years for the felony offense of embezzlement with no credit for time served. (App. 55–56.) Petitioner's penitentiary sentence was stayed for a period of six months with the conditions that she be sentenced to thirty days in jail beginning on September 30, 2018, and upon her release from jail, she was to be placed on home confinement with the Nicholas County Sheriff's Department. (App. 55.) Additionally, she

was ordered to pay restitution in the amount of \$6,117.46 to Long Point immediately upon her release from the Central Regional Jail. (*Id.*) She was further ordered to pay all costs associated with the prosecution of this matter within twenty-four months of her release on parole or probation. (App. 56.)

**F. Motion for judgment of acquittal.**

Following her conviction, Petitioner moved for a judgment of acquittal on the grounds that the State failed to prove beyond a reasonable doubt intent and that Petitioner was the person who committed the alleged acts. (App. 44–48.) She also alleged that the State improperly utilized a bar graph and summary report, misled the jury, and improperly introduced evidence the State should have known was materially false. (*Id.*) The motion was denied. (App. 50–54.) Respecting the allegation the State failed to prove intent, the court found that it could “reasonably be inferred that the reason the Defendant altered the checks was her intention to keep the money for herself.” (App. 52.)

This appeal followed.

**SUMMARY OF ARGUMENT**

Petitioner first contends that the trial court committed reversible error in giving the jury preliminary instructions in her absence during voir dire, in violation of the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment. Petitioner however, was present during the voir dire process, including the questioning of the prospective jurors and the exercise of peremptory strikes by counsel. Assuming that Petitioner’s absence occurred during a critical stage of her criminal proceedings however, any error committed by the trial court in instructing the jury preliminarily in Petitioner absence was harmless.

Petitioner next contends that the trial court abused its discretion in denying her the right to call witnesses in support of her alibi defense. The record demonstrates that Petitioner untimely

disclosed the nature of her alibi defense and the witnesses who would testify in support of her defense. The trial court therefore, pursuant to Rule 12.1(d) of the West Virginia Rules of Criminal Procedure, did not abuse its discretion in denying witness testimony in support of Petitioner's alibi defense. Assuming that Petitioner timely disclosed the nature of and witnesses for her alibi defense, at best, any error by the trial court is harmless as the evidence adduced at trial failed to establish that the monies embezzled on the six dates supporting Petitioner's alibi defense would not result in a finding that she embezzled less than \$1,000.00

Finally, Petitioner contends that the trial court committed reversible error in denying her motion for a judgment of acquittal because the State failed to produce evidence of intent. The evidence adduced at trial established that Petitioner's employee identification number was used approximately, 1,592 times to remove items from customer bills after she collected money from the customer. The monies for these removed items were never received by Long Point. Consequently, it is reasonable for the jury to have concluded that Petitioner's acts in removing the items after having received payment from the customer but not turning the money in to Long Point, was done with the intent to deprive permanently the monies from Long Point. In view of the foregoing reasons, this Court should affirm the Petitioner's conviction.

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

Oral argument is unnecessary and this case is suitable for disposition by memorandum decision because the record is fully developed and the arguments of both parties are adequately presented in the briefs. W.Va. R. App. P. 18(a)(4).

#### **STANDARDS OF REVIEW**

When a defendant is not present at all critical stages in a criminal proceeding, "the State is required to prove beyond a reasonable doubt that what transpired in his absence was

harmless.” Syl. pt. 6, in part, *State v. Boyd*, 160 W.Va. 234, 235, 233 S.E.2d 710, 713 (1977). Interpretations of the State Constitution, statutes, and rules are primarily questions of law, and therefore, are subject to de novo review by this Court. *See Richmond v. Levin*, 219 W.Va. 512, 515, 637 S.E.2d 610, 613 (2006).

This court reviews a trial court’s exclusion of alibi witnesses under an abuse of discretion standard. *See State v. Schlatman*, 233 W.Va. 84, 89, 755 S.E.2d 1, 6 (2014). “An appellate court is obligated to see that the guarantee of a fair trial under Section 10 of Article III of the West Virginia Constitution is honored. Thus, only where there is a high probability that an error of due process proportion did not contribute to the criminal conviction will an appellate court affirm. High probability requires that an appellate court possess a sure conviction that the error did not prejudice the defendant.” Syl. pt. 11, *State v. Guthrie*, 194 W.Va. 657, 665, 461 S.E.2d 163, 170 (1995).

A trial court’s disposition of a motion for judgment of acquittal based upon the sufficiency of the evidence is subject to de novo review. *State v. LaRock*, 196 W.Va. 294, 304, 470 S.E.2d 613, 623 (1996). This Court therefore, “must scrutinize the evidence in the light most compatible with the verdict, resolve all credibility disputes in the verdict’s favor, and then reach a judgment about whether a rational jury could find guilt beyond a reasonable doubt.” *Id.* When reviewing the legal sufficiency of the evidence underlying a conviction, this 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.” Syl. pt. 3, in part, *Guthrie*, 194 W.Va. at 169, 461 S.E.2d at 663. “[A] jury verdict should be set aside [due to insufficiency of the evidence] only when the record contains

no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.” *Id.*

## ARGUMENT

**I. Any error the circuit court may have committed in giving the jury preliminary instructions in Petitioner’s absence was at most harmless error beyond a reasonable doubt.**

The Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment of the United States Constitution, together with Article III, Sections 10 and 14 of the West Virginia Constitution, guarantee a criminal defendant charged with a felony the right to be present “at all critical stages in the criminal proceeding.”<sup>2</sup> Syl. pt. 6, in part, *Boyd*, 160 W.Va. at 235, 233 S.E.2d at 713 (1977); *see also Faretta v. California*, 422 U.S. 806, 819 n.15 (1975). A critical stage of a criminal proceeding “is where the defendant’s right to a fair trial will be affected.” Syl. pt. 2, *State v. Tiller*, 168 W.Va. 522, 285 S.E.2d 371 (1981). This right however, is not without limitation. Although “a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure[,]” his presence is not guaranteed when it “would be useless, or the benefit but a shadow.” *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987).

This Court has specifically found that a defendant’s presence is deemed critical at pretrial hearings involving substantial issues and witness testimony, and at matters concerning speedy trial issues. *Boyd*, 160 W.Va. at 246, 233 S.E.2d at 718–19. Jury instructions and verdict renditions also are critical stages. *State v. D.M.M.*, 169 W.Va. 276, 279, 286 S.E.2d 909, 910 (1982) (citing *Schwab v. Berggren*, 143 U.S. 442 (1982)). Conversely, discussions among

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<sup>2</sup> The statutory basis for a defendant’s right to be present is found at W.Va. Code § 62-3-2, which provides that “[a] person indicted for felony shall be personally present during the trial therefor.” W.Va. Code § 62-3-2; *see also* Syl. pt. 3, *State v. Blair*, 158 W.Va. 647, 647–48, 214 S.E.2d 330, 331 (1975) (“if anything is done at trial in the accused’s absence which may have affected him by possibly prejudicing him, reversible error occurs.”).

counsel and the court prior to trial do not require a defendant's presence. *D.M.M.*, 169 W.Va. at 279, 286 S.E.2d at 910. "Generally, all matters starting with the commencement of the actual trial require the presence of the accused through final judgment." *Boyd*, 160 W.Va. at 246-47, 233 S.E.2d at 719. Voir dire represents a critical stage of a criminal trial because it is the "primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice[.]" *State v. Miller*, 197 W.Va. 588, 601, 476 S.E.2d 535, 548 (1996) (quoting *Gomez v. United States*, 490 U.S. 858, 873 (1989)) *see also State v. Hamilton*, 184 W.Va. 722, 726, 403 S.E.2d 739, 743 (1991) (finding that the right to be present for jury selection "is constitutional in nature and fundamental to the defendant's right to a fair trial. It cannot be waived by someone other than the defendant[.]"). A defendant's absence during the impaneling of the jury "certainly frustrates the fairness of the trial." *United States v. Camacho*, 955 F.2d 950, 953 (4th Cir. 1992).

Undoubtedly the jury selection process is a critical stage of a criminal trial and Petitioner had a right to be present. Meaningful and effective voir dire is necessary to effectuate the fundamental right to a trial by an impartial jury. Syl. pt. 4, *State v. Peacher*, 167 W.Va. 540, 280 S.E.2d 559, 563 (1981). Rule 43 of the W.Va. R. Crim. P. specifically states that a defendant "shall be present at . . . every critical stage of the trial including the impaneling of the jury[.]" W.Va. R. Crim. P. 43(a) (emphasis added); *see also State v. Barker*, 176 W.Va. 553, 556, 346 S.E.2d 344, 347 (1986) ("The right of an accused to be present at every stage of a criminal trial is also protected by W.Va. Crim. P. 43."). Voir dire serves as the primary means by which a trial court may "assure that the defendant's right to a jury free of interest, bias or prejudice is protected and effectuated." *Peacher*, 167 W.Va. at 553, 280 S.E.2d at 569; *see also Miller*, 197 W.Va. at 601, 476 S.E.2d at 548 (finding voir dire is the "primary means by which a court may

enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice[.]"). To ensure this right, the voir dire process provides "a basis for challenges for cause and to acquire information that will afford the parties an intelligent exercise of peremptory challenges." Syl. Pt. 2, *Michael v. Sabado*, 192 W.Va. 585, 589, 453 S.E.2d 419, 423 (1994). It is reversible error when a trial court limits "the questioning of potential jurors as to infringe upon a litigant's ability to determine whether the jurors are free from interest, bias or prejudice, or to effectively hinder the exercise of peremptory challenges." *Peacher*, 167 W.Va. at 554, 280 S.E.2d at 570.

The United States Supreme Court has observed that "the exclusion of a defendant from a trial proceeding should be considered in light of the whole record." *United States v. Gagnon*, 470 U.S. 522, 525–26 (1985) (citing *Snyder v. Massachusetts*, 291 U.S. 97 (1934) *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964)). In reviewing the entire underlying record in the instant case it is evident that Petitioner's brief absence from the courtroom during the circuit court's preliminary instructions to the jury was harmless beyond a reasonable doubt.

The record demonstrates that Petitioner was absent from the courtroom for a short period of time during the circuit court's preliminary instruction phase to the jury, which typically occurs after the voir dire process has concluded. (SAR 132–36.) Prior to Petitioner's departure from the courtroom, all counsel indicated a need to step out of the courtroom to consider their respective juror strikes. (SAR 132–33. Without any objection from Petitioner or her attorney,<sup>3</sup> the trial court advised counsel and Petitioner that he would proceed with the pre-trial instructions in their

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<sup>3</sup> Respondent does not suggest Petitioner waived her right to be present but rather notes an objection was not preserved in the record below regarding her absence. "The constitutional right to be present at jury selection is a right which belongs exclusively to a defendant. It does not belong to counsel for a defendant and cannot be waived by counsel. Likewise, actions by counsel cannot obliterate a defendant's constitutional right to be present and cannot render harmless the error of proceeding in the defendant's absence." *State v. Hamilton*, 184 W.Va. 722, 743, 403 S.E.2d 739, 726 (1991).

absence. (SAR 133.) Neither Petitioner nor her attorney expressly agreed to the court's proposed course of action however, neither objected to it. (*Id.*) During Petitioner's absence, the trial judge advised the prospective jurors of the six stages of every jury trial, advised the jury they were the sole judge on determining the credibility of the witnesses and the weight of the evidence, defined the term credibility, and advised the prospective jurors of the criteria they could consider in making a credibility determination. (SAR 133–36.) It was during the discussion on the credibility criteria when Petitioner and his attorney entered the courtroom. (SAR 136.)

Assuming Petitioner's absence occurred during a critical stage of her criminal proceedings, the Respondent asserts that any error the circuit court committed by proceeding with preliminary jury instructions was harmless. There is no evidence that she was prejudiced by not being present. The facts of the case demonstrate that Petitioner was not absent from voir dire. Rather, she was absent for a very narrow window of time during the circuit court's preliminary instructions to the jury. The trial transcript reflects that Petitioner was present in person for the questioning of the prospective jurors, as well as during the exercise of peremptory strikes. (SAR 39–133, 136–53.) Petitioner asserts however, that her absence denied her the essential opportunity “to gauge the jury's reactions or mannerisms concerning their understanding of the way the witnesses were to be viewed by the jurors.” (Pet'r Br. at 7.) She further asserts conversely that her absence restricted the jury's ability to evaluate her “during this time to determine if her reactions and mannerisms may aid them in their decision-making process.” (*Id.*)

There is nothing in the record to suggest that any of the jurors were biased against Petitioner or had any issue with the concept of gauging the credibility of witness testimony or other evidence before them. The record clearly demonstrates what transpired in Petitioner's absence. In *Boyd*, this Court found the lack of a record of what transpired in the defendant's

absence prevented the state from establishing beyond a reasonable doubt that the defendant's absence was harmless. *Boyd*, 160 W.Va. at 247, 233 S.E.2d at 719. Here, the trial transcript clearly reflects the circuit court's instructions to the jury. Petitioner has not alleged any error as to the substance of the circuit court's instructions to the jury.

In view of the foregoing, Respondent contends that the circuit court's act of preliminarily instructing the jury in Petitioner's absence, at most, amounted to harmless error beyond a reasonable doubt. The Petitioner's conviction therefore, should be affirmed by this Court.

**II. The circuit court did not abuse its discretion in excluding Petitioner's alibi witness and any error resulting therefrom is at most harmless.**

The Sixth Amendment to the United States Constitution and Article III, Section 14 of the West Virginia Constitution, also guarantee an accused in criminal proceedings the fundamental "right to . . . have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI; *see also Taylor v. Illinois*, 484 U.S. 400, 409 (1988) (recognizing an accused's right to offer witness testimony as a fundamental element of due process of law); Syl. pt. 3, *State v. Harman*, 165 W.Va. 494, 270 S.E.2d 146, 148 (1980).

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

*Washington v. Texas*, 388 U.S. 14, 19 (1967).

This fundamental right, however, is not unlimited and the accused must comply with the same rules of procedure and evidence as does the state. *See Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). "The 'State's interest in protecting itself against an eleventh-hour defense,' is

merely one component of the broader public interest in a full and truthful disclosure of critical facts.” *Taylor*, 484 U.S. at 412 (quoting *Williams v. Florida*, 399 U.S. 78, 81–82 (1970)).

In her second assignment of error, Petitioner argues that the trial court committed reversible error when it abused its discretion in denying her the right to call witnesses on her own behalf in support of her alibi defense. (Pet’r Br. 8–11.) Rule 12.1 of the West Virginia Rules of Criminal Procedure requires a defendant to provide the State with a written notice of an alibi defense within ten days of demand, or “at such different time as the court may direct.” W.Va. R. Crim. P. 12.1(a). A defendant’s alibi witnesses shall be disclosed to the state no later than ten days before trial unless the court otherwise directs. *Id.* at 12.1(b). Failure to comply with the requirements of Rule 12.1 may result in the exclusion of an alibi witness. *Id.* at 12.1(d); *see also State v. Fields*, 225 W.Va. 753, 759–60, 696 S.E.2d 269, 275–76 (2010) (recognizing a trial court’s authority under Rule 12.1(d) to impose the sanction of excluding an alibi witness).

“To safeguard the integrity of its proceedings and to insure the proper administration of justice, a circuit court has inherent authority to conduct and control matters before it in a fair and orderly fashion.” *Fields*, 225 W.Va. at 760, 696 S.E.2d at 276. When a circuit court is presented with an untimely disclosure of witnesses pursuant to W.Va. R. Crim. P. 16,

the trial court must inquire into the reasons for the defendant’s failure to comply with the discovery request. If the explanation offered indicates that the omission of the witness’ identity was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it is consistent with the purposes of the compulsory process clause of the sixth amendment to the United States Constitution and article III, § 14 of the West Virginia Constitution to preclude the witness from testifying.

*State v. Ward*, 188 W.Va. 380, 387, 424 S.E.2d 725, 732 (1991).

The record below demonstrates that the State initially submitted to Petitioner its Request for Discovery on June 8, 2017. (App. 18.) This request specifically requested “[n]otification, in

writing, of the defendant's intent to offer the defense of alibi at trial." (*Id.*) Having received no response from Petitioner, the State moved to compel the production of the requested discovery materials. (SAR 1.) In the absence of any objection by Petitioner, the circuit court granted the State's motion at a status hearing on August 9, 2017, and gave Petitioner ten days to produce the requested discovery. (SAR 2, 21–22.) Petitioner's counsel initially asserted an alibi defense at this hearing based upon Petitioner's absence from the state of West Virginia on at least 20 to 30 dates on which the alleged acts of embezzlement were to have occurred. (SAR 15.)

At a status hearing on October 2, 2017, Petitioner still had not produced any discovery regarding her alibi defense. (SAR 28.) Counsel notified the State he had located a "ping" expert to show that based on her cell phone records, Petitioner was not in the state of West Virginia on certain dates she allegedly embezzled monies from Long Point. (SAR 29.) The court gave Petitioner 45 days to provide the State with the expert report and the "ping" reports. (SAR 30–34.) The record neither indicates that any such evidence was ever provided to the State, nor that any further mention of an alibi defense was made until March 13, 2018. On March 13, Petitioner filed her Notice of Alibi Defense indicating that she would introduce the testimony of her mother-in-law, Ellen Brewster, to demonstrate that she was in Stuart, Virginia on December 11–13, 2015, and January 29–31, 2016. (App. 30.) In view of Petitioner's untimely disclosure of an alibi defense, the State sought to exclude Ms. Brewster as an alibi witness. (SAR 44–45.) At a pretrial hearing on March 16, 2018, Petitioner's counsel explained that "we just recently found that we can prove an alibi defense in this case. . . and we found 2 weekends that we can show that the defendant wasn't working[.]" (SAR 45.) He further explained that he only discovered the defense on Friday, March 9, 2018, and given the court closure on Monday, March 12, the earliest

he could file the Notice was Tuesday, March 13, 2018. (SAR 46.) The circuit court granted the State's motion to exclude because "it's outside the time frame" (*Id.*)

In view of the foregoing, the record clearly establishes that although Petitioner may have timely disclosed her alibi witness, Ms. Brewster, pursuant to W.Va. R. Crim. P. 12.1(b), the actual notice of her defense indicating its nature, was untimely under W.Va. R. Crim. P. 12.1(a). Despite counsel having stated he only learned of the alibi defense on March 9, 2018, the transcript of the August 9, 2017, status hearing demonstrates counsel was aware then of at least 20 to 30 instances when Petitioner was out of state. (SAR 15–16.) The circuit court therefore, did not abuse its discretion in excluding witness testimony supporting Petitioner's alibi defense.

Assuming for the sake of argument the trial court committed error in denying Petitioner's alibi witness as untimely, at best, such error is harmless.<sup>4</sup> There was sufficient testimony from the victim in this case that Petitioner was not "clocked in" to work on five specific dates even though she allegedly embezzled monies from Ms. Key and Long Point on those dates: August 11 and 30, September 11, October 25, and December 13, 2015. (SAR 276–79.) The amount of monies embezzled on these five days was less than one hundred dollars per day. (*Id.*) The Indictment charged her with embezzling \$6,117.46 (App. 6.), and the trial court instructed the jury in order to find Petitioner guilty of embezzlement they had to find she embezzled money of the value of \$1,000.00 or more. (SAR 386.) In order for Ms. Brewster's testimony to have had any value, the jury would had to have found that the value of money embezzled on those six dates in December 2015 and January 2016, together with the four additional dates testified to by

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<sup>4</sup> This Court has held that "nonconstitutional errors are harmless unless the reviewing court has grave doubt as to whether the [error] substantially swayed the verdict." *State v. Potter*, 197 W.Va. 734, 748, 478 S.E.2d 742, 756 (1996). In the instant case, the issue of the trial court's exclusion of alibi witnesses may be disposed of on non-constitutional grounds under Rule 12.1. *See* Syl. pt. 5, *In re Tax Assessments Against Pocahontas Land Corp.*, 158 W.Va. 229, 230, 210 S.E.2d 641, 643 (1974) ("When it is not necessary in the decision of a case to determine a constitutional question, this Court will not consider or determine such question.").

the victim, exceeded \$5,117.46, such that these ten instances of the approximate 1,529 instances of embezzlement, did not exceed \$1,000.00. Given the victim's testimony that Long Point suffered financial difficulties, it is unreasonable to believe the jury would have found as such. Ms. Brewster's testimonial value would have been minimal, at best, and therefore, any error resulting from the trial court's exclusion of Petitioner's alibi witness was harmless. The Petitioner's conviction therefore, should be affirmed by this Court.

**III. Petitioner's contention that there was insufficient evidence as to the element of intent for a rational jury to convict her of embezzlement in the amount of \$1,000.00 or more, is without merit.**

A petitioner who challenges the sufficiency of the evidence underlying her conviction faces a heavy burden. Syl. pt. 3, *Guthrie*, 194 W.Va. at 667–68, 461 S.E.2d at 173–74 (describing the standard as “strict” and “highly deferential.”). To succeed, the petitioner must demonstrate that the record “contains no evidence . . . from which the jury could find guilty beyond a reasonable doubt.” *Id.*, 194 W.Va. at 669–70, 461 S.E.2d at 175–76. This 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.” *Id.*, 194 W.Va. at 669, 461 S.E.2d at 175. A verdict will not be disturbed unless this Court finds “that reasonable minds could not have reached the same conclusion.” *Id.*

When the State rested its case-in-chief, Petitioner's counsel unsuccessfully moved for a judgment of acquittal pursuant to W.Va. Crim. P. Rule 29, arguing that the State failed to identify Petitioner as the person who altered the Long Point records. (SAR 348–50.) Subsequent to the jury verdict, counsel again renewed his motion for a judgment of acquittal and argued alternatively, *inter alia*, that the State failed to produce any evidence of the intent element

because no witness identified any specific instance when the removal of items from a client's bill was improper or unauthorized. (App. 44–49.)

Regarding this last assignment of error, Petitioner argues that no rational jury could conclude beyond a reasonable doubt that she intended to deprive permanently the victim and Long Point of their money. (Pet'r Br. 12–13.) Petitioner reasons that the victim was unable to identify any specific instance wherein Petitioner's conduct was improper. (*Id.* at 12.) The other two State's witnesses, the investigating officer and the accountant, both testified they did not have any independent knowledge of the alleged acts. (*Id.*) Because the victim was unable to identify any specific improper act, the State therefore, was unable to prove the element of intent. (*Id.*)

“The essential elements of embezzlement are a trust relationship to the property or money involved, belonging to someone else and in the possession of the defendant by virtue of his office and converted to his own use with intent to defraud.” Syl. pt. 19, *State v. Riley*, 151 W.Va. 364, 151 S.E.2d 308 (1966), *overruled on other grounds by Proudfoot v. Dan's Marine Serv., Inc.*, 210 W.Va. 498, 558 S.E.2d 298 (2001). Long ago, this Court identified the elements of embezzlement more distinctly:

[I]n order to constitute the crime of embezzlement, it is necessary to show (1) the trust relation to the person charged, and that he falls within that class of persons named; (2) that the property or thing claimed to have been embezzled or converted is such property as is embraced in the statute; (3) that it is the property of another person; (4) that it came into the possession or was placed in the care of the accused under and by virtue of his office, place, or employment; (5) that his manner of dealing with or disposing of the property constituted a fraudulent conversion and an appropriation of the same to his own use; and (6) that the conversion of the property to his own use was with the intent to deprive the owner thereof.

Syl. pt. 2, in part, *State v. Moyer*, 58 W.Va. 146, 52 S.E. 30 (1905); *accord* Syl. pt. 1, *State v. Frasher*, 164 W.Va. 572, 265 S.E.2d 43, 44 (1980) *overruled on other grounds by State v.*,

*Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995); *see also State v. Berry*, 239 W.Va. 226, 234, 800 S.E.2d 264, 272 (2017). Petitioner contends that the State’s evidence was insufficient with respect to the sixth element, that of intent. Specifically, Petitioner asserts that the trial court erred in finding that the State needed only to introduce an inference of intent. (Pet’r Br. 12.)

This Court has found that “garden variety embezzlement” as opposed to embezzlement by a public official, is a specific intent offense and requires as an element of proof that “the defendant intended to permanently deprive an owner of the use of his property.” *State v. Brown*, 188 W.Va. 12, 16 n.4, 422 S.E.2d 489, 493 n.4 (1992). The intent element may be proven by circumstantial evidence. *See Berry*, 239 W.Va. at 235–36, 800 S.E.2d at 273–74. Other courts have found that proof of intent “must often be proved by circumstantial evidence. *Dove v. Commonwealth*, 41 Va.App. 571, 578, 586 S.E.2d 890, 894 (2003) (citing *Wilson v. Commonwealth*, 249 Va. 95, 101, 452 S.E.2d 669, 673–74 (1995) (“Intent is a state of mind that may be proved by an accused’s acts or by his statements and that may be shown by circumstantial evidence.”)). In *Wilson*, the court found that the specific intent to commit rape “may be inferred from the conduct of the accused if such intent flows naturally from the conduct proven.” *Wilson*, 249 Va. at 101, 452 S.E.2d at 674.

Respondent contends that in viewing the evidence in the light most favorable to the prosecution, as required by *Guthrie*, it is evident that a rational jury could have concluded Petitioner’s actions showed a willful intent to deprive permanently Ms. Key and Long Point of money in excess of \$1,000.00. The trial court instructed the jury that they were permitted to “infer that a person intends to do that which he or she does, or which is the natural and necessary consequences of his or her own act.” (SAR 387.) The court further instructed that intent could be “found by inferences from all the facts and circumstances in the case provided [the jury is]

convinced from all such facts and circumstances, beyond a reasonable doubt, that the defendant had the required intent.” (*Id.*)

Petitioner’s contention that there was insufficient evidence for a rational jury to convict her of the intent element necessary for the offense of embezzlement is without merit. The testimony adduced at trial, viewed in the light most favorable to the State on appeal, established that Petitioner worked at Long Point from April 2015, through February 2016, and was assigned identification number 23. During this time, Petitioner’s identification number was used to remove certain items from customer bills within the system after the customer had paid and these items were removed approximately 1,529 times. It was reasonable for the jury to have concluded that because Petitioner removed items from customer bills after they paid and Long Point did not receive the money for the items removed, that it naturally flowed from her actions that Petitioner intended to keep permanently the money from Long Point.

The trial court properly concluded it was reasonable for the jury to infer from Petitioner’s actions in removing items from customers’ bills that she intended to keep the money which did not belong to her and deprive permanently the money from Ms. Key and Long Point. The Petitioner’s conviction therefore, should be affirmed by this Court.

### **CONCLUSION**

For the foregoing reasons, the judgment of the Circuit Court of Nicholas County, West Virginia, should be affirmed.

Respectfully Submitted,

STATE OF WEST VIRGINIA,  
*Respondent,*

By Counsel,

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