IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 19-0447

STATE OF WEST VIRGINIA,

Respondent,

v.

STEVEN TEWALT,

Petitioner.

RESPONSE BRIEF ON BEHALF OF THE STATE OF WEST VIRGINIA

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I. ASSIGNMENTS OF ERROR

Petitioner Steven Tewalt ("Petitioner") argues six assignments of error: insufficiency of the evidence; improper admission of collateral acts evidence under Rule 404(b); the Strangulation statute is unconstitutionally vague; the jury resolved doubt in favor of the State rather than the accused; the court erred in issuing a lifetime no-contact order; and, cumulative error.

II. STATEMENT OF THE CASE

On November 20, 2017, Krystal Tewalt went to the police, then the magistrate, and filled out a Domestic Violence Case Information Statement, asserting that on November 18, 2017, Petitioner Steven Tewalt, her husband, strangled her in a fit of domestic violence. Petitioner had been drinking and got angry with her, telling her she was unfit to take care of their eight children and the home. A.R. Vol. I 47-57. She began to cry and went to her bedroom looking for a first aid kit for one of the children, which angered him and he then put his arms and hands around her neck and squeezed, then threw her against a shelf, hitting her face on the shelf and causing her to fall and hit a table with her legs and body. A.R. Vol. I 57. He then slammed her down again. A.R. Vol. I 57. She notes she had a black eye and bruising on her hip, shoulder, and elbow. A.R. Vol. I 57. She also stated she blacked out and awoke several feet from where she last recalled standing. A.R. Vol. II 146.

Prior to this incident, Krystal Tewalt called the police regarding an event which occurred on September 7, 2017, wherein Petitioner grabbed Krystal and choked her, which she referred to as "choking her out." A.R. Vol. I 12. The investigating officer noted an abrasion on the right side of Krystal's neck and a smaller abrasion on the left side of her neck. A.R. Vol. I 12. Krystal chose not to obtain a Temporary Emergency Protective Order and did not pursue the complaint further. A.R. Vol. I 12.

Petitioner was indicted on March 6, 2018 on one count of Strangulation of Krystal Tewalt. A.R. Vol. I 5. The State issued a notice of intent to present Rule 404(b) evidence on January 3, 2019, in the form of the audio conversation between Petitioner and Krystal Tewalt, noting six separate portions of the recording it intended to introduce to establish motive, opportunity, intent, knowledge, absence of mistake, and lack of accident. A.R. Vol I 9-11. The State also noted that it intended to offer the testimony of Krystal Tewalt regarding a prior incident of strangulation which occurred on September 7, 2017 as well as other prior acts of domestic violence. A.R. Vol. I 11. The State attached the Police Report for the September 7, 2017 incident thereto. A.R. Vol. II 12. Petitioner objected to this evidence, arguing that it was inadmissible based on the spousal communication privilege found in West Virginia Code § 57-3-4. A.R. Vol. I 14-18. Petitioner also argued that the State could not prove the chain of custody of the recording; that the recording had too many inaudible portions to be admissible; that Rule 403 requires the exclusion of any discussion of prior incidents as 404(b) or intrinsic evidence; and, that the State failed to demonstrate a specific purpose under Rule 404(b). A.R. Vol. I 16-18.

A motions hearing was held on January 16, 2019. A.R. Vol. III 2. The hearing concerned recordings made by Krystal Tewalt of a conversation between her and Petitioner, as well as the 404(b) evidence. A.R. Vol. III 4. The court wished to hear the testimony of Krystal Tewalt relating to this, and thus the hearing was rescheduled after arguments by both parties. A.R. Vol. III 7-29.

Petitioner went to trial on February 5, 2019. A.R. Vol. II 1. Prior to the trial commencing, Judge Shaffer heard argument on the admissibility of an audio recording between Petitioner and his wife, as well as the State's argument that it should be able to enter evidence regarding prior acts of domestic violence. A.R. Vol. II 20-35. The audio recording was played for the court, and

the State argued that the recording was not covered by spousal privilege, as several of Petitioner's eight children came into and exited the room during the conversation, and one three-year-old child was present during most of the conversation. A.R. Vol. II 10. Petitioner argued that the three-year-old did not have the capacity to understand and/or repeat the conversation and thus the privilege was not broken. A.R. Vol. II 9.

Regarding the prior acts evidence, the State noted that Petitioner's wife would testify that this was not the first time Petitioner had strangled her, and that evidence of the prior acts would show motive, specific purpose, and lack of accident. A.R. Vol. II 24-25. Petitioner argued that the State never proved any prior cases of domestic violence, and that the evidence is more prejudicial than probative. A.R. Vol. II 26-27. Petitioner's counsel also noted that he did not receive notice ahead of trial of 404(b) evidence showing modus operandi. A.R. Vol. II 34-35. Petitioner further argued that he was not charged with domestic abuse such that proving a pattern of abuse would be relevant. A.R. Vol. II 35. In response, the State argued that the prior acts were not 404(b) evidence but instead represents res gestae evidence. A.R. Vol. II 37.

On February 5, 2019, Judge Shaffer entered an Order excluding the presentation of the audio recording based on spousal privilege, finding that although Krystal Tewalt testified prior to trial that the eight Tewalt children were present in the home during the recording, as well as Petitioner's teen daughter and the daughter's boyfriend, the State did not prove how long any child was present during the conversation, and that the child present during said conversation was three years old and could not comprehend the conversation and relay it to others. A.R. Vol. I 19-21.[1]

[1] The ruling regarding the prior acts of domestic violence does not appear in the appendix record. It is apparent from later trial testimony that the circuit court found the evidence admissible.

Krystal Tewalt was the first trial witness. A.R. Vol. II 134. She stated that she and her husband got into an argument because he was looking for a first aid kit he could not locate, and because of a problem with his teenage daughter's cell phone. A.R. Vol. II 135. Krystal asked Petitioner if she could go check on a sick goat outside, and he told her to focus on putting away groceries and taking care of the children instead. A.R. Vol. II 137. When he began to get angry over not finding the first aid kit, Krystal said she headed for the back door, "because I knew from previous experiences that he's gotten violent and he's gone for my neck, so I have watched YouTube videos and stuff, so I knew what to do in case he went for my neck again." A.R. Vol. II 139. Petitioner came up behind her, surprising her, and grabbed her neck from behind. A.R. Vol. II 139. She could not get loose, but grabbed at his wrists trying to pull his hands off. A.R. Vol. II 140. While he had his hands on her neck, he was slamming her into the pantry. A.R. Vol. II 140. He kept applying pressure, and while she could yell in the beginning, she eventually blacked out. A.R. Vol. II 140. She eventually came to with him sitting on her, while lying on her back. A.R. Vol. II 142. At that time, Petitioner's teen daughter came into the room so he got off of her and Krystal stood up. A.R. Vol. II 142. Krystal tried to leave the home, but Petitioner told her she could not. A.R. Vol. II 144. She testified that Petitioner was "choking the air out of" her. A.R. Vol. II 145. She woke up six to seven feet away from where she last recalled being while he was choking her. A.R. Vol. II 146. After the incident, her throat hurt, it was hard to swallow, and her voice was hoarse. A.R. Vol. II 146. She also had knots on her head, a blood blister on her eye, and bruises on her hip, both shoulders, the front of her legs, the top of her foot, and her ribs. A.R. Vol. II 147. The State presented a photograph of the side of Krystal's face and the blood bruise in her eye. A.R. Vol. II 148. Other photographs entered into evidence depicted injuries to her neck, foot, and ear. A.R. Vol. II 150-154.

Krystal testified regarding prior incidents, including a September 2017 incident wherein Petitioner choked her from the front, and she filed a police report. A.R. Vol. II 155. She filed a police report but chose not to prosecute. A.R. Vol. II 155-156. Krystal also testified that he had grabbed her by the throat at least one other time, but that time did not apply pressure or choke her. A.R. Vol. II 156.

Krystal admitted that she waited to file a police complaint until the Monday after the incident, while she was at work, for several reasons including that she has eight children with him, and that she still wanted a relationship with Petitioner. A.R. Vol. II 157. She made the report at the police station, wherein the officer took photographs of her injuries. A.R. Vol. II 159. Krystal asked for a restraining order that day, and filed for divorce three months later. A.R. Vol. II 159. Krystal went to the doctor on Friday, as she was unable to fully open her mouth still due to a jaw injury, and had x-rays and an MRI completed. A.R. Vol. II 159.

Krystal stated on cross-examination that she did not draft the original complaint, but only signed her name. A.R. Vol. II 165. Krystal admitted she is unsure as to how she lost consciousness, whether by being choked or due to a head injury. A.R. Vol. II 168. She also admitted she did not mention the strangulation to the doctor, because by that time her neck had healed and she did not think the sore throat needed medical treatment. A.R. Vol. II 169. Krystal made a Facebook post prior to trial noting that should someone testify falsely about the incident they could be charged with a felony, after her stepdaughter was telling others publicly that she was going to testify to her father's innocence. A.R. Vol. II 173-174. Krystal denies making a threat toward her or making a threat toward Petitioner's mother. A.R. Vol. II 174-175.

Krystal admitted that there was no mention of lost consciousness in the initial magistrate court report, but she was not surprised as she felt that the magistrate was having trouble keeping

up with her as she spoke. A.R. Vol. II 178. She is unsure if she told the magistrate that she lost consciousness or not. A.R. Vol. II 178. Following Krystal's testimony, the court gave an instruction that the other acts of Petitioner they heard about were only to be used as evidence of motive, opportunity, intent, absence of mistake and lack of accident, and that it could not be used as evidence that Petitioner committed the crime charged. A.R. Vol. II 182-183. Further, the evidence could not be used as character evidence. A.R. Vol. II 183.

Captain James Root of the Preston County Sheriff's Office, testified next. A.R. Vol. II 183. He took Krystal's complaint, and noted marks on her neck, eye, and shoulder. A.R. Vol. II 184. The photographs he took were published to the jury. A.R. Vol. II 185. Captain Root drafted a criminal complaint, charging Petitioner with Strangulation. A.R. Vol. II 192. When Petitioner was arrested, Captain Root noted an injury on his right arm consistent with someone scratching him. A.R. Volo. II 192. Petitioner denied committing any crime but did not give any further statement. A.R. Vol. II 193. Captain Root took a similar statement from Krystal in September of 2017, wherein he observed abrasions and bruising on each side of her neck, but charges were not filed because she did not wish to cooperate. A.R. Vol. II 193-194. Captain Root recalls bruising on Krystal's neck but does not specifically recall scratches. A.R. Vol. II 203-204.

Following Captain Root's testimony, the State rested and Petitioner moved for judgment of acquittal as there was no adequate showing that Krystal's loss of consciousness was related to the strangulation. A.R. Vol. II 205-206. The motion was denied. A.R. Vol. II 207.

Jordan Barlow was called as a witness by Petitioner, who is the boyfriend of Petitioner's teenage daughter. A.R. Vol. II 209. He stated that he came to the Tewalt home daily after work. A.R. Vol. II 210. He was helping Krystal feed their goat, when he saw Krystal slide a bale of hay off her shoulder and it scratched her neck. A.R. Vol. II 211. This occurred a day or two before

the November 18, 2017 incident. A.R. Vol. II 212. He did not notice bruising in the area. A.R. Vol. II 214. He did not see Krystal after the incident in question occurred. A.R. Vol. II 215. Petitioner also called Jessica McEachern as a witness, who is Petitioner's mother. A.R. Vol. II 217. She was living in Oregon at the time of this incident, but came to West Virginia on December 12, 2017. A.R. Vol. II 217. McEachern testified that Krystal had told Angel, Petitioner's daughter and Krystal's stepdaughter, that she could have Angel arrested for failing to comply with attending school. A.R. Vol. II 219. Krystal never made any threatening statements to McEachern. A.R. Vol. II 218.

Charles Winters was also called by Petitioner, and testified that his father and Petitioner are best friends. A.R. Vol. II 220. Winters would spend the night at the Tewalt home at times, and was at the home the evening of November 18, 2017. A.R. Vol. II 221.Winters observed the couple arguing, and saw Petitioner sit on Krystal's stomach and hold her shoulders down, telling her to be quiet. A.R. Vol. II 221. Winters stated that Krystal began yelling at Petitioner, and Petitioner tried to quiet her because the children were sleeping, then Krystal slid across the dining room table. A.R. Vol. II 223. Winters stated Petitioner never grabbed Krystal by the neck and did not knock her into any furniture. A.R. Vol. II 224.

Krystal Tewalt was recalled, and testified that she generally carries the hay to feed the goats in her hands, not up on her shoulder as Jordan Barlow testified. A.R. Vol. II 229. She stated Barlow never helped her feed the goats. A.R. Vol. II 230. Krystal noted that Winters would not have been able to see what was happening in the kitchen from his place on the couch. A.R. Vol. II 231.

After the jury began to deliberate, they sent the judge a question, asking to see the photographs on the computer, and the judge showed the jury the photographs on the laptop with

no objections. A.R. Vol. II 264-265. A couple of hours later, the jury then asked two questions: "could we consider a charge of battery?" and "please define substantial on page 11 of charge." A.R. Vol. II 266. Judge Shaffer's response to the jury questions was issued at 6:15 pm, and noted:

> (1) No, you may not consider any other criminal charge beyond the criminal charge of "Strangulation" contained in the indictment; and
> (2) To determine what is "substantial" for the element of "bodily injury" in the Strangulation statute, you are to reach conclusions which reason and common sense lead you to draw from the facts established by the evidence in this case.

A.R. Vol. I 22, Vol. II 269-270. Approximately twenty-five minutes later, the jury indicated it was deadlocked. A.R. Vol. II 270. Judge Shaffer then issued an Allen charge with no objection. A.R. Vol. II 271. The jury deliberated another ten minutes and asked to recess for the night, and asked for a laptop to view the photographs in the jury room the next day. A.R. Vol. II 275. There was no objection. A.R. Vol. II 275. The jury returned the next day and deliberated approximately thirty-five minutes and came to a verdict. A.R. Vol. II 281. Petitioner was found guilty of one count of Strangulation. A.R. Vol. II 282. The jury was polled and each juror agreed with the verdict. A.R. Vol. II 284.

Following the verdict, Petitioner moved for judgment of acquittal notwithstanding the verdict, and moved for a new trial and a mistrial. A.R Vol. II 286. Petitioner objected to the collateral acts evidence and sought a mistrial based on that and based on the jury asking for a lesser included charge, arguing that had a lesser included offense been included the jury would have convicted on that, not Strangulation. A.R. Vol. II 286-287. The State indicated its intention to file a recidivist information based on a prior felony conviction. A.R. Vol. II 289. The State opposed the other motions, noting that Petitioner never requested a lesser included offense jury

charge and that the court already heard arguments and ruled on the collateral acts evidence. A.R. Vol. II 290. The oral motions were all denied. A.R. Vol. II 292.

Petitioner filed written post-trial motions on February 19, 2019, moving for a new trial based on the court's admission of 404(b) evidence of prior alleged strangulation; motion for judgment of acquittal based on insufficiency of the evidence; motion in arrest of judgment; and, motion for mistrial based on the jury questions and resolving their doubts in favor of the State rather than Petitioner. A.R. Vol. I 26-30. On March 19, 2019, Judge Shaffer issued an order regarding the post-trial motions, first dismissing the Recidivist Information. A.R. Vol. I 32. Judge Shaffer then denied all other post-trial motions. A.R. Vol. I 32-33.

A post-trial motions hearing was held on March 18, 2019. A.R. Vol. IV 2. Petitioner moved to dismiss the recidivist information based on the State's failure to have him arraigned in the same term of court. A.R. Vol. IV 2. The State agreed and did not oppose the motion, and the recidivist information was dismissed. A.R. Vol. IV 3-4. Petitioner then argued four post-trial motions: a motion for new trial; a motion for judgment of acquittal, a motion in arrest of judgment, and a motion for mistrial. A.R. Vol. IV 5. The motion for new trial was based on the admission of collateral acts evidence, and Petitioner argued that there was insufficient evidence to prove those acts ever took place. A.R. Vol. IV 5-6. Further, Petitioner argues that the jury had to be instructed regarding the specific purpose of the evidence, and not just given the litany of possible uses under 404(b). A.R. Vol. IV 8. He moved for acquittal based on insufficient evidence. A.R. Vol. IV 9. His motion in arrest of judgment had to do with the request for the definition of "substantial" and he argues that no person could know what that means. A.R. Vol. IV 10-11. The motion for mistrial was based on the existence of doubt with the jury that was shown by the request as to if they could find Petitioner guilty of battery. A.R. Vol. IV 11. The

State opposed all motions. A.R. Vol. IV 12-14. The State also noted Krystal Tewalt's request that as part of the sentence she receive a lifetime no contact order. A.R. Vol. IV 19.

Petitioner's sentencing hearing occurred on April 19, 2019. A.R. Vol. V 1. Krystal Tewalt filed a victim impact statement, which was made part of the record. A.R. Vol. V 3. Petitioner requested an alternative sentence, noting he has already served a year and five months of incarceration. A.R. Vol. V 5. Petitioner has several driving violations, including more than one DUI, and a felony from 1995 in Washington. A.R. Vol. V 6-7. The victim impact statement was reviewed by Judge Shaffer, and he noted the breakup of the marriage over this incident, as well as the trauma to Krystal Tewalt and the children. A.R. Vol. V 8-9. In his statement, Petitioner admitted to hitting himself in the face and telling his wife he was going to say she beat him up, but denied strangling her. A.R. Vol. V 10. Judge Shaffer sentenced him to one to five years and granted a lifetime protective order in favor of Krystal Tewalt. A.R. Vol. V 12.

The Sentencing Order in this case was entered on April 26, 2019. A.R. Vol. I 34-35. Judge Shaffer sentenced Petitioner to one to five years of incarceration, a $1,500 fine, and granted a permanent no-contact order regarding Krystal Tewalt. A.R. Vol. I 35.

III. SUMMARY OF ARGUMENT

All of Petitioner's assignments of error are meritless, and the circuit court's rulings should be affirmed. First, the evidence was sufficient to deny the motion for judgment of acquittal, as Krystal Tewalt testified that Petitioner choked her and she lost consciousness. She also testified as to her injuries resulting from the incident.

The circuit court was also correct in denying the motion for a new trial, as the evidence of Petitioner's prior acts of domestic violence were relevant intrinsic evidence, res gestae, and admissible under Rule 404(b). The court properly held a *McGinnis* hearing and admitted the evidence. Next, the circuit court properly denied the motion for arrest of judgment, as the

Strangulation statute is not unconstitutionally vague, since the term "substantial" is a commonly used and understood term, and this Court has historically been reluctant to invalidate statutes as unconstitutional. Likewise, the circuit court did not err in denying the motion for a mistrial, as there is no evidence that the jury somehow disregarding their command to resolve all doubt in favor of the accused.

As to the contention that the provision granting the victim's request for no contact with the Petitioner, this assignment of error is not ripe. This Court's policy is to refuse to address issues that are not ripe. Finally, there is no cumulative error herein, as Petitioner is unable to prove any error by the circuit court. Therefore, all orders of the circuit court should be affirmed.

IV. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to West Virginia Revised Rules of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record. This case is appropriate for resolution by memorandum decision.

V. ARGUMENT

A. Standard of review

Petitioner asserts numerous assignments of error, which have differing standards of review. This Court "review[s] the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard." Syl. Pt. 1, *State v. Blevins*, 231 W.Va. 135, 744 S.E.2d 245 (2013) (quoting Syl. Pt. 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000)). *See also State v. Winebarger*, 217 W. Va. 117, 123, 617 S.E.2d 467, 473 (2005) (rulings on admissibility are "essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse." (citations omitted)).

A trial court's disposition of a motion for judgment of acquittal based on insufficiency of the evidence "is subject . . . to *de novo* review; therefore, this Court, like the trial court, 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." *State v. Souther*, No. 15-1241, 2017 WL 969145, at *2 (W. Va. Mar. 13, 2017) (memorandum decision) (quoting *State v. LaRock*, 196 W.Va. 294, 304, 470 S.E.2d 613, 623 (1996)).

"The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review de novo whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.24." *See State v. Dillon*, 191 W.Va. 648, 661, 447 S.E.2d 583, 596 (1994); *TXO Production Corp. v. Alliance Resources Corp.*, 187 W.Va. 457, 419 S.E.2d 870 (1992), aff'd, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993); *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986); *State v. LaRock*, 196 W. Va. 294, 310–11, 470 S.E.2d 613, 629–30 (1996).

With regard to the denial of a motion for mistrial, this Court has stated that "[t]he decision to grant or deny a motion for mistrial is reviewed under an abuse of discretion standard." *State v. Lowery*, 222 W.Va. 284, 288, 664 S.E.2d 169, 173 (2008).

B. The evidence was sufficient and thus the circuit court did not err in denying the motion for judgment of acquittal.

Petitioner's first assignment of error is that the circuit court erred in denying his motion for judgment of acquittal based on insufficiency of the evidence. Pet'r Br. at 5. Petitioner asserts

that the State failed to prove an essential element of the offense, namely, that there was a restriction of air intake or blood flow, and that the restriction caused a loss of consciousness, substantial physical pain, illness, or impairment of physical condition. Pet'r Br. at 6.

A petitioner who challenges the sufficiency of the evidence underlying their conviction faces a heavy burden. Syl. pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). To prevail, a petitioner must establish that "no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *LaRock*, 196 W. Va. at 303, 470 S.E.2d at 622. While undertaking its review of the record, this Court must "review all the evidence . . . 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." *Guthrie*, 194 W. Va. at 669, 461 S.E.2d at 175. This Court has ruled that it may accept any adequate evidence, including circumstantial evidence, as support for a conviction. *State v. Spinks,* 239 W. Va. 588, 611, 803 S.E.2d 558, 581 (2017) (citing *Guthrie* at 668, 461 S.E.2d at 174). As the Court explained in *Guthrie*, it will not overturn a verdict unless "reasonable minds could not have reached the same conclusion." 194 W. Va. at 669, 461 S.E.2d at 175. Finally, "[t]he evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt." *Id.* Instead, a verdict will be set aside only when "the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *Id.* at 663, 461 S.E.2d. at 169. This Court likewise has stated:

> A convicted defendant who presses a claim of evidentiary insufficiency faces an uphill climb. The defendant fails if the evidence presented, taken in the light most agreeable to the prosecution, is adequate to permit a rational jury to find the essential elements of the offense of conviction beyond a reasonable doubt. Phrased another way, as long as the aggregate evidence justifies a judgment of conviction, other hypotheses more congenial to a finding of innocence need not be ruled out. We reverse only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

State v. LaRock, 196 W.Va. 294, 303, 470 S.E.2d 613, 622 (1996).

Petitioner was convicted on one count of Strangulation pursuant to West Virginia Code § 61-2-9d, which states as follows:

> (a) As used in this section:
> (1) "Bodily injury" means substantial physical pain, illness or any impairment of physical condition;
> (2) "Strangle" means knowingly and willfully restricting another person's air intake or blood flow by the application of pressure on the neck or throat;
> (b) Any person who strangles another without that person's consent and thereby causes the other person bodily injury or loss of consciousness is guilty of a felony and, upon conviction thereof, shall be fined not more than $2,500 or imprisoned in a state correctional facility not less than one year or more than five years, or both fined and imprisoned.

Thus, the State had to prove that Petitioner knowingly and willfully restricted Krystal Tewalt's air intake or blood flow by the application of pressure on her neck or throat, without her consent, and caused her bodily injury - substantial physical pain, illness or any impairment of physical condition – or loss of consciousness. Petitioner argues that the State failed to prove that Krystal's blood flow was restricted, and that any restriction of blood flow caused Krystal's unconsciousness, a hoarse voice, or a sore throat. Pet'r Br. at 6-7.

Petitioner's argument basically discounts the evidence in this case. Krystal Tewalt testified that Petitioner grabbed her throat with his hands. A.R. Vol. II 140. She further testified that he kept applying pressure, and while she could yell in the beginning, she eventually blacked out. A.R. Vol. II 140. She testified that eventually she came to with him sitting on her, while lying on her back. A.R. Vol. II 142. She testified that Petitioner was "choking the air out of" her. A.R. Vol. II 145. She testified that she woke up six to seven feet away from where she last recalled being while he was choking her. A.R. Vol. II 146. Krystal testified regarding her injuries, noting that after the incident, her throat hurt, it was hard to swallow, and her voice was

hoarse. A.R. Vol. II 146. Additionally, photographs of her injuries were submitted to the jury. A.R. Vol. II 147, 150-154. The jury clearly found that the requisite elements were met in this case from the relevant testimony. While Petitioner characterizes the evidence as not credible, the jury felt differently. As this Court has noted, "a verdict will be set aside only when "the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *Guthrie*, 194 W. Va. at 669, 461 S.E.2d at 175. The testimonial evidence presented by Krystal Tewalt shows a loss of consciousness relating to the strangulation, and the jury also could have found bodily injury in the form of substantial physical pain or impairment of her physical condition. Since there was sufficient evidence for the jury to find that the State had proven all of the requisite elements of strangulation, the order denying the motion for acquittal should be affirmed.

C. The circuit court properly denied the motion for new trial, as the collateral acts evidence does not represent improper 404(b) evidence.

Petitioner's next assignment of error is that allowing evidence of prior incidents of strangulation by Petitioner against Krystal Tewalt violated West Virginia law and therefore, Petitioner is entitled to a new trial. Petitioner argues that the record was insufficient that the alleged incidents occurred, and that the circuit court was incorrect in finding that the prior acts were relevant to the charge being prosecuted. Further, Petitioner argues that the circuit court erred in finding that the Rule 403 balancing test was satisfied, and that the circuit court failed to comply with Syllabus Point 1 of *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

This Court has provided lower courts with both direction and discretion when determining the admissibility of Rule 404(b) evidence. In Syl. Pt. 2 of *McGinnis*, this Court provided the following instructions for circuit courts when tasked with determining the admissibility of evidence proffered under Rule 404(b):

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

193 W.Va. 147, 455 S.E.2d 516. "In reviewing the admission of Rule 404(b) evidence, we review it in the light most favorable to the party offering the evidence, in this case the prosecution, maximizing its probative value and minimizing its prejudicial effect." *McGinnis*, 193 W. Va. at 159, 455 S.E.2d at 528. Under Rule 404(b), "it is presumed a defendant is protected from undue prejudice if the following requirements are met: (1) the prosecution offered the evidence for a proper purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record Rule 403 determination that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the trial court gave a limiting instruction." Syl. Pt. 3, *State v. LaRock*, 196 W. Va. 294, 311, 470 S.E.2d 613, 630 (1996). Those criteria were satisfied here.

First, the circuit court had a proper *McGinnis* hearing to determine the admissibility of the proffered evidence. A.R. Vol. II 5-37. Petitioner argues that the record was insufficient to

prove that the alleged incidents occurred, but this is simply untrue. Krystal Tewalt and Officer Root both testified regarding the prior acts, and there was a police report to that end. A.R. Vol. II 12.

As to the relevancy of the prior acts, this Court has held several times that prior acts of domestic violence are relevant in a case regarding domestic violence such as this one. *See State v. Dennis*, 216 W. Va. 331, 352, 607 S.E.2d 437, 458 (2004)(Regarding prior acts of domestic violence: "These incidents were used to demonstrate Appellant's pattern of abusive and controlling behavior as a means of defining the turbulent nature of the relationship the victim had with Appellant"); *State v. James B.*, No. 15-0853, 2016 WL 6678987, at *2 (W. Va. Nov. 14, 2016)(memorandum decision)("we find no error in the circuit court's determination that the victim's testimony regarding petitioner's prior acts of violence was intrinsic evidence and that her testimony was also admissible under Rule 404(b)."") Thus, the circuit court did not err in admitting the evidence herein.

Moreover, the evidence admitted herein is intrinsic as well as res gestae evidence, and was properly deemed admissible. This Court has found that "[e]vents, declarations and circumstances which are near in time, causally connected with, and illustrative of transactions being investigated are generally considered res gestae and admissible at trial." Syl. Pt. 7, *State v. McKinley*, 234 W.Va. 143, 764 S.E.2d 303 (2014). As such, intrinsic evidence which is essential to the "indicted charge is not governed by Rule 404(b)." *State v. Harris*, 230 W.Va. 717, 722, 742 S.E.2d 133, 138 (2013). We have also held that prior act evidence is intrinsic when the evidence of the prior act and the crime charged are "'inextricably intertwined' or ... 'necessary preliminaries' to the crime charged." *State v. LaRock*, 196 W.Va. 294, 312 n. 29, 470 S.E.2d 613, 631 n. 29 (1996). The evidence here is near in time, as it occurred approximately two

months prior to the indicted incident. The incident is causally connected to the indicted incident, as it shows a pattern of domestic violence and a pattern of Petitioner choking Krystal. Likewise, the prior acts are illustrative of the transactions being investigated, as again, they show a pattern of domestic violence, specifically choking.

This case is parallel to this Court's decision in *Dennis* wherein the circuit court allowed evidence of prior domestic violence acts, and found that the acts were necessary to "complete the story of the crime[] on trial" and that the prior acts were intrinsic evidence. *State v. Dennis*, 216 W. Va. 331, 352, 607 S.E.2d 437, 458 (2004). The *Dennis* Court noted that "[t]his is especially true in light of the domestic violence overlay to the pattern of behavior. Even if we were to conclude that the trial court erred in finding the prior act evidence to be res gestae, we believe the evidence would still be admissible under Rule 404(b)." *Id.* In this case, the prior incidents show that Petitioner had previously abused Krystal Tewalt and had a propensity to choke her. Clearly the evidence herein show the domestic violence overlay to the pattern of Petitioner's behavior.

As to the allegation that the circuit court failed to comply with Syllabus Point 1 of *McGinnis,* this, too, is without merit. This Court, post-*McGinnis*, has affirmed a limiting instruction almost exactly like the one given by Judge Shaffer herein:

> Ladies and gentlemen of the jury, in the testimony of this witness, the State has introduced into evidence in this case certain evidence of alleged other wrongs or other acts of the defendant, Frank Williams. Please understand that such evidence was introduced and allowed to be admitted solely and only for the limited purpose of providing proof of motive, intent, plan, knowledge, control and dominion over the substances at issue herein, or absence of accident, and such evidence must be considered by you only for that limited purpose and no other. You are hereby instructed and directed that you must consider such evidence only for that limited purpose and no other.

State v. Williams, 198 W. Va. 274, 278, 480 S.E.2d 162, 166 (1996). Petitioner fails to address the similarities between this case and *Williams*. In *Williams*, this Court allowed testimony regarding prior acts of the Petitioner therein giving someone a tylox tablet, when the issue was possession with intent to deliver a substance containing tylox. The *Williams* Court noted that "[u]nlike the facts in *McGinnis*, however, a "logical nexus" between the testimony of Cathy Jack, that the appellant gave her a tylox tablet in 1993, and the issue at trial concerning possession of tylox, with intent to deliver, is more demonstrable." *Williams*, 198 W. Va. at 280, 480 S.E.2d at 168. The same is true herein. The prior evidence admitted was within the same "logical nexus" in that it was a prior instance of Petitioner grabbing Krystal Tewalt by the throat. Thus, it is apparent that the circuit court properly followed the applicable law regarding the admission of prior acts evidence, and the rulings of the lower court should be affirmed.

D. The circuit court properly denied the motion for arrest of judgment as the Strangulation statute is not unconstitutionally vague.

Next, Petitioner argues that the circuit court erred in denying Petitioner's Motion for Arrest of Judgment, because the Strangulation statute is unconstitutionally vague. Petitioner argues that the term "substantial" in the statute renders it invalid, as the term invites inconsistent results. Further, Petitioner notes that the jury questioned the term at one point in deliberations

"When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment." Syl. Pt. 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967). Furthermore, this Court has stated that "[a] criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." Syl. Pt. 1, *State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538

(1974). "Statutes involving a criminal penalty, which govern potential First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by interpreting their meaning from the face of the statute." Syl. Pt. 2, *Flinn,* 158 W. Va. 111, 208 S.E.2d 538. "Criminal statutes, which do not impinge upon First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by construing the statute in light of the conduct to which it is applied." Syl. Pt.3, *Flinn,* 158 W. Va. 111, 208 S.E.2d 538.

This Court has specifically addressed the doctrine relied upon by Petitioner:

> As we observed in *State ex rel. Appleby v. Recht*, 213 W.Va. 503, 583 S.E.2d 800 (2002), "[t]he void for vagueness doctrine is an aspect of the due process requirement that statutes set forth impermissible conduct with sufficient clarity that a person of ordinary intelligence knows what conduct is prohibited and the penalty if he transgresses these limitations." Id. at 518, 583 S.E.2d at 815.

State v. Yocum, 233 W. Va. 439, 444, 759 S.E.2d 182, 187 (2014). However, this Court has also noted its long held policy of reluctance to overturn statutes properly enacted by the Legislature as a matter of policy:

> "In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt." Syl. Pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965).

Syl. Pt. 1, *Yocum*, 233 W. Va. 439, 759 S.E.2d 182. *See also State v. James*, 227 W.Va. 407, 413, 710 S.E.2d 98, 104 (2011)("our examination of a constitutional challenge to a legislative enactment necessarily involves judicial restraint"); *State v. Legg*, 207 W.Va. 686, 694, 536

S.E.2d 110, 118 (2000) ("Given our clear preference for upholding legislative enactments, this Court 'will interpret legislation in any reasonable way which will sustain its constitutionality.'"); Syl. Pt. 3, *Slack v. Jacob*, 8 W.Va. 612 (1875) ("Wherever an act of the Legislature can be so construed and applied as to avoid a conflict with the Constitution, and give it the force of law, such construction will be adopted by the courts.").

First, Petitioner admits he did not object to the circuit court's response to the question regarding the term "substantial." Pet'r Br. at 11. Thus, the Court should not entertain this assignment of error: "[o]ur jurisprudence clearly establishes the doctrine that preserving error is the responsibility of the parties." *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 114, 459 S.E.2d 374, 391 (1995). However, Petitioner also cannot succeed on the merits of this argument under this Court's edict that every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality.

"Under our law, '[a] term which is widely used and which is readily comprehensible to the average person without further definition or refinement need not have a defining instruction.' Syllabus Point 2, *State v. Bartlett*, 177 W.Va. 663, 355 S.E.2d 913 (1987)." *State v. Jett*, 220 W. Va. 289, 293, 647 S.E.2d 725, 729 (2007). *See also, Ballard v. Thomas*, 233 W.Va. 488, 759 S.E.2d 231 (2014) (noting the terms "care, custody and control," "reckless disregard," and "cause" were self-explanatory and readily understood, and need not be specifically defined). Further, "[w]e have never held that every term in a jury instruction must be defined, nor does the petitioner direct us to any authority requiring that the term in question be defined." *State v. Bartlett*, 177 W. Va. 663, 667, 355 S.E.2d 913, 917 (1987). Finally, this Court has noted that a word is not vague if it is "not so arcane a term that the lack of a definitional instruction left the

jury entirely without guidance." *State v. Bartlett*, 177 W. Va. 663, 667, 355 S.E.2d 913, 917 (1987).

Petitioner stresses that the jury in this action asked for a definition of substantial, showing that it is not a common term. However, the term was never defined by the circuit court, and yet the jury, relying on their own understanding of a commonly used word, was able to make a determination in this case, as evidenced by their unanimous verdict. Furthermore, the term "substantial" appears in many statutes in the West Virginia Code and has not been found to be vague relating to any of those provisions. The Legislature did define other terms in the statute, which implies that it felt the term substantial should be read with the common man's understanding of the word, and not any specific legal definition. Upon examination of this code provision, it is likely that the jury, in an abundance of caution, and because other terms were defined in the jury instructions, questioned whether a legal definition was necessary. This does not render the statute void for vagueness, and Petitioner has failed to meet the heavy burden necessary to support his contention.

E. The circuit court did not err in denying the motion for mistrial.

Petitioner argues that because the jury did not resolve the conflict of guilt versus innocence in favor of Petitioner, he should have been granted a mistrial. Specifically, Petitioner argues that based upon the jury's inquiry concerning the word "substantial" it is clear that a conflict existed regarding Petitioner's guilt, and because he was found guilty, it is clear that the jury resolved the conflict in the State's favor instead.

Regarding mistrials, this Court has explained that:

> The decision to declare a mistrial, discharge the jury and order a new trial in a criminal case is a matter within the sound discretion of the trial court. A trial court is empowered to exercise this discretion only when there is a 'manifest necessity' for discharging the jury before it has rendered its verdict. This power of the trial court must be exercised wisely; absent the existence of manifest

> necessity, a trial court's discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy.

State v. Williams, 172 W.Va. 295, 304, 305 S.E.2d 251, 260 (1983); *State v. Smith*, 225 W. Va. 706, 709, 696 S.E.2d 8, 11 (2010). Petitioner's contentions herein do not support a mistrial, and the circuit court did not err in failing to grant the requested mistrial. Petitioner's contention that the jury failed to follow instruction is mere speculation. Uncertainty for a moment over a word in the jury instruction does not support a mistrial in this matter. The jury was polled and the verdict was unanimous. Petitioner has presented no evidence of any juror misconduct or any other evidence to support his contention that the jury somehow was forced into a guilty verdict, rather than a not guilty verdict or a hung jury. The jury deliberated for a period of time after the court indicated that it had to define the word substantial according to their own experience; Petitioner has no reason to believe that the jury, which was particularly rigorous in its examination of the jury instructions, suddenly disregarded said instructions. Likewise, the fact that the jury asked if Petitioner could be found guilty of battery early on in its deliberations does not show that the jury somehow disregarded the law; rather, this shows that the jury was thorough and exacting in its verdict and carefully considered all options.

This Court has repeatedly stated that "[a] skeletal 'argument,' really nothing more than an assertion, does not preserve a claim.... Judges are not like pigs, hunting for truffles buried in briefs." *State v. Day*, 225 W.Va. 794, 806 n. 21, 696 S.E.2d 310, 322 n. 21 (2010) (internal quotations and citations omitted). "Although we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal." *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996). *See also State v. Lilly*, 194 W.Va. 595, 605 n. 16, 461

S.E.2d 101, 111 n. 16 (1995) ("casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal"). As this assignment of error is meritless and without any legal or factual support, the circuit court's order should be affirmed.

F. The circuit court's ruling concerning the no-contact order is not ripe for appeal at this time.

Petitioner next asserts that the circuit court erred in granting Krystal Tewalt a lifetime no contact order. Petitioner argues that this portion of the sentence is without statutory authority. However, this issue is not ripe for this Court to decide, as the provision has not yet been enforced, and thus this Court should decline to address this assignment of error.

This Court has repeatedly declined to address issues which are not ripe for policy reasons:

> we have traditionally held that "courts will not . . . adjudicate rights which are merely contingent or dependent upon contingent events, as distinguished from actual controversies." Likewise, "courts [will not] resolve mere academic disputes or moot questions or render mere advisory opinions which are unrelated to actual controversies."
>
> Indeed, a matter must be ripe for consideration before the court may review it. Courts must be cautious not to issue advisory opinions.

Zaleski v. West Virginia Mut. Ins. Co., 224 W.Va. 544, 552, 687 S.E.2d 123, 131 (2009) (citations omitted). Further, without a ripe claim, the Court does not have subject matter jurisdiction:

> We hereby hold that subject matter jurisdiction does not exist over claims that are not ripe for adjudication. See *Dakota, Minn. & E. R.R. Corp. v. South Dakota*, 362 F.3d 512, 520 (8th Cir. 2004) ("The issue of ripeness ... is one of subject matter jurisdiction."); *City of Chico*, 880 F.2d at 201 ("Whether a claim is ripe for adjudication goes to a court's subject matter jurisdiction[.]").

State ex rel. Universal Underwriters Ins. Co. v. Wilson, 239 W. Va. 338, 346, 801 S.E.2d 216, 224 (2017).

"The test for ripeness has been explained as follows: "Determining whether ... [an] action is ripe for judicial review requires us to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." [*National Park Hospitality Ass'n v. Department of Interior,* 538 U.S. 803], 808 [2003] . . .(citation omitted)." *State ex rel. Healthport Techs., LLC v. Stucky,* 239 W. Va. 239, 244–45, 800 S.E.2d 506, 511–12 (2017)(Justices Davis and Workman, dissenting). In the present case, Petitioner has not been punished in any manner for violating the no contact provision; thus, the provision is not ripe for this Court to examine as there is no justiciable controversy. As to the second point, there is no hardship to the parties in withholding court consideration. Petitioner was convicted of strangulation against his now ex-wife, and there was testimony and evidence of prior domestic violence in the relationship. Domestic violence is such a serious problem in this state that the Court has created an entire set of rules to govern domestic violence proceedings, and the Legislature has noted as follows:

> (1)Every person has a right to be safe and secure in his or her home and family and to be free from domestic violence.
>
> (2) Children are often physically assaulted or witness violence against one of their parents or other family or household members, violence which too often ultimately results in death. These children may suffer deep and lasting emotional harm from victimization and from exposure to domestic violence;
>
> (3) Domestic violence is a major health and law-enforcement problem in this state with enormous costs to the state in both dollars and human lives. It affects people of all racial and ethnic backgrounds and all socioeconomic classes; and
>
> (4) Domestic violence can be deterred, prevented or reduced by legal intervention that treats this problem with the seriousness that it deserves.

W.Va. Code § 48-27-101(a). Further, the provisions governing domestic violence should be liberally construed. W.Va. Code § 48-27-101(b). In the present case, Petitioner does not meet the

test for ripeness, and he has no reason to even have the provision removed from the sentencing order unless he intends to violate it by contacting the victim of his crime. Since this claim is not ripe, this Court should not entertain it and should find no merit in Petitioner's assignment of error.

G. The circuit court did not commit cumulative error.

Petitioner's final argument is that he has set forth multiple assignments of error, and if there is "harmless error" in two or more issues, then this Court should find that the errors accrued and prejudiced him, creating cumulative error. Pet'r Br. at 16. Petitioner argues for a new trial as a result of these alleged errors.

Under the cumulative error doctrine:

> Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.

Syl. Pt. 5, *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972). "Under the decision in *Smith*, the cumulative error doctrine is applicable only when 'numerous' errors have been found." *State v. Tyler G.*, 236 W. Va. 152, 165, 778 S.E.2d 601, 614 (2015). "[T]his Court has recognized that the cumulative error doctrine 'should be used sparingly' and only where the errors are apparent from the record." *State v. Peterson*, 239 W. Va. 21, 35, 799 S.E.2d 98, 112 (2017) (quoting *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 118, 459 S.E.2d 374, 395 (1995)). It has been "emphasized that the cumulative error doctrine necessitates reversal only in rare instances and . . . 'the possibility of cumulative error is often acknowledged but practically never found persuasive.'" *United States v. Delgado*, 672 F.3d 320, 344 (5th Cir.2012) (en banc) (quoting *Derden v. McNeel,* 978 F.2d 1453, 1456 (5th Cir.1992) (en banc)). "Cumulative error analysis should evaluate only the effect of matters determined to be error, not the cumulative

effect of non-errors." *State v. Knuckles*, 196 W. Va. 416, 426, 473 S.E.2d 131, 141 (1996). In other words, where there is no error at all, the cumulative error doctrine lacks vitality and cannot afford a petitioner a basis for relief. *State v. Bailey*, No. 16-0740, 2018 WL 300588, at *5 (W. Va. Jan. 5, 2018) (memorandum decision) ("Because we have found no error, the cumulative error doctrine does not apply. Thus, we reject this assignment of error."); *State v. Wilfred H.*, No. 17-0170, 2018 WL 3005947, at *9 (W. Va. June 15, 2018) (memorandum decision) ("Here, as we find no error, we find no merit in petitioner's argument for the application of the cumulative error doctrine.").

Petitioner misstates the law, noting that two or more errors would be sufficient, but the relevant law states that "numerous" errors are required. Petitioner, however, has pointed to no errors sufficient to grant him a new trial, let alone numerous errors equating to harmless error. Thus, the circuit court's sentencing order should be affirmed.

VI. CONCLUSION

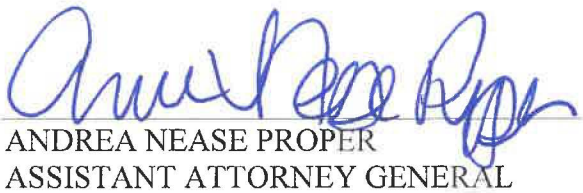
For the foregoing reasons, Respondent respectfully asks this Court to deny Petitioner's appeal and affirm Petitioner's sentence.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Respondent,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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