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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 19-0143

STATE OF WEST VIRGINIA,

*Plaintiff below,
Respondent,*

v.

HARRY LEE SMITH, JR.,

*Defendant below,
Petitioner.*



RESPONDENT'S BRIEF

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ASSIGNMENTS OF ERROR

- I. The Trial Court Erred in Denying Appellant's Motion to Dismiss as to the Counts in the Indictment Alleging Kidnapping upon a Defective Indictment.**
- II. The Trial Court Erred in Assigning Mitigation Findings to the Jury.**
- III. The Evidence Does Not Support the Jury's Findings as to Mitigating Factors.**
- IV. The Trial Court Erred in Denying Appellant's Motion in Limine Regarding Evidence of Post Event Impact on Destiny Rose.**
- V. The Trial Court Erred in Failing to Conduct Appropriate Analysis Prior to Admitting Evidence pursuant to Rule 404(b) of the West Virginia Rules of Evidence.**
- VI. The State Improperly Exceeded the Scope of the Trial Court's Ruling as to the Admission of 404(b) Evidence.**
- VII. The Imposition of a Life Sentence Without Mercy Violates Proportionality Provisions in the West Virginia Constitution.**
- VIII. The Trial Court erred in Refusing to Instruct the Jury as to the Offense of Unlawful Restraint as a Lesser Included Offense of Kidnapping.**

STATEMENT OF THE CASE

A. Indictment, Conviction, and Sentencing

Petitioner was indicted for Kidnapping Dustin Rose and Amy Rose, Breaking and Entering the residence of Destiny Rose, Amy Rose, and Dustin Rose, and Wanton Endangerment of Amy, Destiny, and Dustin all occurring on December 4, 2017. A.R. 538-539. A jury convicted Petitioner on all counts. A.R. 512-513; 570-576. The circuit court sentenced Petitioner to 20 to 50 years for kidnapping Dustin, life without mercy for kidnapping Amy, 1 to 10 years for breaking and entering, and 5 years each on the Wanton Endangerment convictions. A.R. 601. The Kidnapping counts were run consecutively with each other, and the Breaking and Entering and Wanton

Endangerment Counts were run concurrently with each other, but consecutively to the Kidnapping convictions. A.R. 601.

B. The Motion to Dismiss Indictment

Petitioner filed a Pretrial Motion and a subsequent amended Motion to Dismiss the Kidnapping Counts. A.R. 550-551. Petitioner contended the Indictment lacked an essential element of the crime, that of transportation. A.R. 550-551. The circuit court denied the Motion to Dismiss finding that transportation was not an essential element of the crime as charged. A.R. 557.

C. The 404(b) evidence

The State filed a Motion to admit 404(b) evidence. A.R. 547. Specifically, the State sought to use the evidence to show intent and to rebut Petitioner's offered defense that his actions were the result of an adverse reaction to medication (Cymbalta and Flexeril) he was taking. A.R. 547. Specifically, the State's Motion sought the following:

Amy Rose had been in an intimate relationship with the defendant. When Defendant became abusive and controlling, Amy attempted to end the relationship and Defendant's abuse heightened. Days before the incidents giving rise to the indictment, the Rose family's property was vandalized repeatedly. Frank Rose and Destiny Rose will testify to Defendant's volatile and violent nature over the course of their relationship with him. Shane Williby and Destiny Rose will testify to Defendant's repeated threats to kill Amy Rose and the Rose family.

A.R. 547. The circuit court ruled the following Rule 404(b) evidence admissible: "any threats or interactions with the named victims are admissible, as well as the phone calls, and the road rage incident." A.R. 565.

D. Motion in Limine

Pre-trial, Petitioner filed a *Motion in Limine Regarding Post-Event Impact*. A.R. 559. Petitioner asserted he anticipated the State would attempt to elicit testimony from Destiny, Dustin, and Frank Rose relating to the impact the December 4, 2017 events had on them in terms of

increased worry and anxiety. A.R. 559. Petitioner asserted such evidence was irrelevant and that its probative value was substantially outweighed by its prejudicial effect. A.R. 559. Prior to trial, the circuit court denied the Motion:

THE COURT: I think – I think it may – I think it may be relevant as to show the intent to terrorize. So, the Court will allow a limited – I don't think we need to dwell a whole lot on it. But, the Court would allow, and perhaps play it by ear, once we get to that testimony. The Court's inclined to allow that for that reason. And, would note the objections and exceptions of the Defendant.

A.R. 162-163.

E. The Trial

On December 4, 2017, Destiny Rose was living in Mercer County with her mother, Amy, and her brother, Dustin. A.R. 202. Destiny was studying for her nursing exams in her bedroom that night when she looked up and saw Petitioner with a gun pointed toward her head. A.R. 202-203. Petitioner had been dating Amy, but Amy had split up with him. A.R. 203. Petitioner ordered Destiny out of her bed and commanded her to collect all the cell phones in the home. A.R. 204. While both Amy and Dustin were asleep, Destiny collected the cell phones and went to the living room where Petitioner dared her to move. A.R. 204. He then went to Amy's room allowing Destiny to run out of the house. A.R. 204. Petitioner followed saying he was going to "f'ing kill" her. A.R. 205. Petitioner gave up his chase and reentered the home. A.R. 205.

Destiny went to her father's house, which was located near Amy, Destiny, and Dustin's trailer. A.R. 206. Her father gave her his cell phone which she used to call 911 while hiding in a closet. A.R. 206. She told 911 that her mother's boyfriend had broken into her house, had held a gun to her head, and that she was not sure if her mother and brother were alive or dead. A.R. 206.

Destiny learned the situation had ended when the 911 operator told her to unlock the backdoor of her father's house. A.R. 208. Destiny was reluctant to unlock the backdoor because

the police had Petitioner there, but not in handcuffs. A.R. 208. The police had agreed to let Petitioner speak with Amy for 30 minutes in order to defuse the situation. A.R. 208.

Destiny testified she could not study again because every time she tried she had flashbacks. A.R. 208.

During Destiny's testimony, the State played the tape of a conversation between Petitioner and Amy that was recorded by Destiny on December 3, 2017. A.R. 208-209. In this conversation, Amy began by asking Petitioner to leave her alone. A.R. 210. After a particularly expletive laden passage, Amy again asked Petitioner to cease contacting her. A.R. 211-212. The following exchange then ensued:

HARRY SMITH JR.: You are my wife. You're tearing my world apart. Without you I could care less if I live or die.

AMY ROSE: Harry, that's – that's your problem. Okay.

HARRY SMITH JR.: It's going –

AMY ROSE: It's not mine.

HARRY SMITH JR.: It's gonna be your problem too. The bloods gonna be on your hands.

AMY ROSE: Do what?

HARRY SMITH JR.: The bloods gonna be on your hands.

AMY ROSE: Blood? What are you talking about Harry?

HARRY SMITH JR.: I told you without you, I don't care if I live or die. I love you Amy. And, I know you all are probably recording this, probably recording it, sitting back a laughing I guess.

A.R. 212.

Destiny also testified to other events, such as when Petitioner and Amy were arguing and Destiny and Amy left the house and got into a car with Destiny's brother and her sister's son and

Petitioner chased them. A.R. 214-215. Destiny testified her family had trouble with slashed tires. A.R. 215-216. She also testified the transmission fluid in her truck was drained out. A.R. 216. When the State asked if the Rose family had any pets poisoned, and she responded, yes that the family had dogs poisoned, Petitioner objected on relevancy grounds. A.R. 216. The circuit court overruled the objection. A.R. 216. Destiny testified the family had two dogs poisoned. A.R. 216. The State then elicited testimony from Destiny that she did not know that Petitioner did that, but that once Petitioner was arrested the incidents of tire slashing and pet poisoning stopped. A.R. 216. During cross-examination, Petitioner's counsel got Destiny to confirm she had no evidence Petitioner was involved with the tire slashing or pet poisoning. A.R. 227.

Dustin testified. A.R. 231. Dustin, who suffered from cerebral palsy, A.R. 247, was living with Amy and Destiny on December 4, 2017. A.R. 231. He testified that although Petitioner and Amy had been dating, they had broken up earlier in the week. A.R. 232. On December 4, Dustin was awoken by his mother who told him to call 911. A.R. 232. Petitioner was outside the house chasing Destiny. A.R. 232. Amy locked the door while Petitioner was outside the house, but Petitioner kicked the door in. A.R. 233. Once he kicked his way back into the house, he told Dustin to get dressed and that they were going to Dustin's father's house. A.R. 234. Petitioner had a gun pointed at Dustin. A.R. 234. Petitioner dragged Amy through the house by her arm and hair. A.R. 235. The trio made it to the porch where Petitioner pointed the gun between Amy and Dustin. A.R. 235. Petitioner threatened to kill Amy and Dustin 30 or 40 times, A.R. 236, telling them they "wasn't gonna survive to see the next day." A.R. 236.

Dustin observed his father and observed Petitioner yelling at the father that he was going to kill him. A.R. 237. Petitioner was alternately pointing the gun at Amy and Dustin. A.R. 238. The trio walked to Dustin's father's house. A.R. 238. Dustin talked Petitioner into going around

the father's house where Dustin had a room and where Dustin could gain entry by way of an unlocked window. A.R. 238. In other words, Dustin convinced Harry to let him go so Dustin could gain entry into his father's house and get his father. A.R. 239. The Police arrived minutes later. A.R. 239. When they arrived, Petitioner and Amy were on the back porch with the gun pointed to Amy's head. A.R. 240. Dustin testified Amy was "bruised up" and "had a little bit of hair loss." A.R. 240-241.

The State then called Frank Rose, Amy's estranged husband. A.R. 252. On December 4, 2017, Frank heard beating on his door. A.R. 253. He discovered his daughter Destiny, who told him Petitioner had either killed or was killing Amy and Dustin. A.R. 253. Frank directed Destiny to call 911 and then put on some shoes, grabbed his gun and went out the door. A.R. 253. Frank observed the Petitioner, Amy, and Dustin walking towards Frank's home. A.R. 254. Frank fired a shot into the air to unsuccessfully try to dissuade the trio from approaching. A.R. 254. Petitioner, who had a tight hold on Amy, kept hollering at Frank to come out and that he was going to kill him. A.R. 255. Frank did not attempt to shoot Petitioner because Frank did not have a clear shot. A.R. 256. Petitioner was telling Dustin to slow down or he would shoot him. A.R. 256. Once the police arrived, Frank explained to them what had occurred. A.R. 257.

Lieutenant Gary Woods then testified. A.R. 272. When he arrived on scene, he spoke with Frank Rose, who advised him Petitioner was on a porch. A.R. 273-274. Lieutenant Woods directed Deputies Lester and Farmer to flank around while he made a direct approach. A.R. 274. As Lieutenant Woods approached, he could see Petitioner using Amy as a shield between him and Woods. A.R. 274. Lieutenant Woods identified himself and tried to convince Petitioner to relinquish the firearm and come down and talk to Woods. A.R. 275. As Lieutenant Woods continued to negotiate, he requested further assistance. A.R. 276. Corporal Rose was dispatched.

A.R. 276. Rose also began to negotiate with Petitioner and developed a rapport with the Petitioner.

A.R. 277. Court recessed for the evening.

The next morning, Petitioner expressed further objection to testimony relating to the vandalism. A.R. 309. The circuit court responded:

THE COURT: Well, it seemed to me that once the State got into that, it went on for a while before there was an objection made and that's – to be quite honest, that's why I let them finish that. Because it didn't appear there was an objection made until, like I said, stuff started coming out. I think that it was adequately handled in cross-examination with regards to the fact that there was really no proof of those – of that action. I – to the extent there was any error, I think it was harmless error in light of the other facts and circumstances.

A.R. 309. Petitioner declined the circuit court's offer of a "limine instruction with regard to the 404(b) evidence[.]" A.R. 302.

Sergeant William Rose then took the stand. A.R. 312. Sergeant Rose (who is no relation to Amy, Dustin, or Destiny, A.R. 314), arrived and told Lieutenant Woods he was familiar with the Petitioner. A.R. 315. Sergeant Rose asked Lieutenant Woods if Woods would like Rose to speak to the Petitioner. A.R. 315. Lieutenant Woods agreed. A.R. 315.

Sergeant Rose began to speak to Petitioner A.R. 317. Sergeant Rose was unable to shoot Petitioner because Petitioner was too far away and was holding Amy too closely. A.R. 319. Petitioner finally stated he just wanted to speak to Amy. A.R. 320. Sergeant Rose responded that if Petitioner put his gun down he would give Petitioner 30 minutes to speak to Amy. A.R. 320. Petitioner only then conceded and surrendered his gun to Sergeant Rose. A.R. 320. Sergeant Rose got Destiny to open the door to her father's house and Sergeant Rose, Petitioner and Amy went inside. A.R. 320. Petitioner spoke to Amy a few minutes until he was taken away by the police. A.R. 320. According to Sergeant Rose, Petitioner did not appear to be under the influence or not

in his right mind. A.R. 321. Petitioner “was mad but other than that . . . he seemed fine.” A.R. 321. Sergeant Rose was the State’s last witness.¹

Petitioner sought a motion for judgment of acquittal from the circuit court, A.R. 336, which the circuit court denied. A.R. 336-337.²

Petitioner first called Samantha Nunley, a Nurse Practitioner. A.R. 350-351. She prescribed Petitioner the anti-depression drug Cymbalta. A.R. 355. Ms. Nunley also prescribed Petitioner the drug cyclobenzaprine (also known as Flexeril), a muscle relaxer. A.R. 355. Ms. Nunley testified that side effects of Cymbalta include, *inter alia*, agitation. A.R. 363. She also testified to a potential side effect called serotonin syndrome. A.R. 363. The symptoms of serotonin syndrome include, *inter alia*, agitation and confusion. A.R. 364. Ms. Nunley testified Cymbalta and Flexeril can adversely interact causing, among other things, agitation and irritation. A.R. 365.

Petitioner next called Brian Halsey, who knew Petitioner since the 1980’s. A.R. 367. Around December 4, 2017, Petitioner stopped by Mr. Halsey’s office. A.R. 368. The Petitioner, according to Mr. Halsey, was “confused . . . , out of character, just different.” A.R. 369.

Petitioner called Miranda McPherson. A.R. 372. Ms. McPherson testified she was familiar with the Petitioner. A.R. 73. She testified that when relating to her about the event of chasing the people down the road Petitioner appeared distraught and was crying. A.R. 376. Ms. McPherson had never seen Petitioner cry before. A.R. 376. Petitioner looked different. A.R. 377.

Petitioner also called his mother, Elizabeth Price. A.R. 382. Ms. Price testified that around September, Petitioner started acting weird. A.R. 384. She described him as “very much troubled”

¹The State did not call Amy, who had passed away before trial. A.R. 430-431.

²Petitioner subsequently renewed his motion at the end of all the evidence being admitted, A.R. 426, which was again denied by the circuit court. A.R. 426-427.

in November and very irritable. A.R. 385. Petitioner elicited testimony from Destiny, mostly to rebut the vandalism claims, A.R. 398, and took the stand in his own defense to buttress his drug interaction defense. A.R. 430, 445.

During the jury instruction conference, Petitioner sought an instruction on unlawful restraint as a lesser included offense of kidnapping. A.R. 407. The circuit court denied the requested instruction. A.R. 408-409.

The circuit court also concluded it would instruct the jury on kidnapping giving it a verdict form that allowed the jury to determine the elements under the kidnapping statute:

I'm also gonna instruct the Jury that if they find him guilty of one of the kidnappings, whether or not they also find that each of the victims, that they found him guilty on, was returned unharmed and also physically – without physical injury, and also whether they was returned after concessions were being made or not being made or advantage being made or not being made.

A.R. 409-410. The circuit court explained its rationale:

Just so it's – just so that we – and the reason – even though we have case law from 1994 that says that's a Trial Court determination and not a Jury determination, I think there's been a ton of case law since that on other statutes that basically said these types of questions are questions of fact that the Jury's got to decide. And, specifically with regards to the prior criminal offences on enhanced penalties for such as DUI Third, things of that nature, as well as finding of a firearm and things of that nature. I just think that those are questions of fact that's best left to the trier of fact, which in this case is the jury. I just don't – I just don't feel comfortable – I mean, I personally would feel comfortable making those decisions, but I don't think the Supreme Court's gonna – would feel, at this – in light of the case, the (inaudible) case law with regards to the other matters, would find that it should be an issue that the Jury should decide. So, the Court's also gonna do that. And, like I said, and then we'll figure it out afterwards, depending on what the Jury does. Whether they – whether or not they find him guilty or not guilty of the kidnapping and the – and if they do, then what their additional findings are. Like I said, we'll figure it out afterwards.

A.R. 410-411.

The jury convicted Petitioner on all counts. A.R. 569-576. As part of the verdict forms, the circuit court submitted to the jury interrogatories concerning kidnapping, A.R. 574, 576. The

interrogatories for both kidnapping victims (Amy and Dustin) were identical except for the names. Interrogatory 1 asked the jury, “Does the jury find that [the victim] was returned or allowed to be returned without bodily harm?” Interrogatory 2 asked, “Does the jury find that [the victim] was returned or allowed to be returned without a concession or advantage of any sort having been paid or yielded?” As to Amy, the jury responded no to both interrogatories. A.R. 574. As to Dustin, the jury answered affirmatively to the first interrogatory and negatively to the second. A.R. 577.

Petitioner was sentenced as detailed above. Petitioner filed a Motion for a New Trial and Memorandum of Law in support thereof. A.R. 579-599. The circuit court denied the Motion. A.R. 600. This appeal followed.

SUMMARY OF ARGUMENT

The Petitioner contends the Kidnapping counts in the indictment omitted an essential element of the crime, namely that of transportation. Petitioner misreads the Kidnapping statute. Kidnapping with the intent to terrorize does not require transportation as an essential element and, perforce, it did not need to be charged in the indictment.

The State agrees that the submission of interrogatories to the jury was reversible error that violated the decisions of this Court in *State v. Dilliner*, 212 W. Va. 135, 569 S.E.2d 211 (2002), *State v. Farmer*, 193 W. Va. 84, 454 S.E.2d 378 (1994), and *State v. Haught*, 218 W. Va. 462, 624 S.E.2d 899 (2005).

Petitioner also argues he did not inflict bodily harm upon Amy Rose. Petitioner inflicted bodily harm upon Amy Rose when he bruised her and pulled out hair from her head. This meets the common, ordinary, and usual definition of bodily harm. It is also consistent with authority from the United States District Court for the Southern District of West Virginia interpreting West Virginia Code § 61-2-14a.

Petitioner next avers he released Dustin Rose without concession or advantage having been yielded. The Court need not reach this issue as the Petitioner has not supported it with any authority in his brief which is grounds for this Court to simply decline to address the issue. And, in any event, Petitioner's narrow reading of the Kidnapping statute ignores that statute's use of the term "any," as in "any concession or advantage of any sort." Any is an all-inclusive term that would cover Petitioner's release of Dustin only upon Dustin's promise to entice Frank out of his house.

Petitioner also claims that Destiny's testimony as to how Petitioner's conduct on December 4, 2017 affected her post-December 4, 2017 was inadmissible. Because the Petitioner has not cited any authority in his brief to support this argument, it need not be addressed by this Court. In any event, the circuit court did not abuse its discretion in admitting this testimony as Petitioner engaged in the same sorts of behavior toward Destiny as he engaged in toward Amy and Dustin. If Destiny was thus terrorized by Petitioner's conduct, then necessarily the jury could have inferred that so were Amy and Dustin and that such an end was Petitioner's intent.

Petitioner asserts error in the admission of 404(b) testimony. The circuit court has broad discretion in the admission of Rule 404(b) testimony and, as long as the decision is not arbitrary and irrational, it should be affirmed. The decision here was not arbitrary or irrational and, as such, it should be affirmed. Furthermore, any error in the admission of the Rule 404(b) evidence is harmless error at best.

Petitioner further argues the admission of the vandalism evidence (presumably the evidence of the tire slashing and pet poisonings) was error. Petitioner's sole contemporaneous objection at trial was that this evidence was not relevant. Relevance is a low threshold which was met here because the evidence went to demonstrate Petitioner's feelings of animosity to the Rose family.

Petitioner claims his Life Without Mercy Sentence is constitutionally disproportionate. Petitioner specifically contends that such a sentence shocks the conscience. The sentence, when viewed against all of the facts and circumstances of this case, is not constitutionally disproportionate.

Petitioner finally contends he was entitled to an instruction on Unlawful Restraint as a lesser included offense to Kidnapping. Because the facts of the case do not fall within the Unlawful Restraint statute, the circuit court did not abuse its discretion in declining to give the jury Petitioner's requested instruction.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary as the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. This case is suitable for memorandum decision.

ARGUMENT

A. The Circuit Court correctly found the Indictment was not defective.

Petitioner contends the Kidnapping Counts of the Indictment should have been dismissed because they omitted what he contends was an essential element of the crime of kidnapping, transportation. Pet'r Br. at 14. To be sufficient, an indictment must allege all the essential elements of the crime. Syl. Pt. 1, *State ex rel. Combs v. Boles*, 151 W. Va. 194, 151 S.E.2d 115 (1966). *See also State v. Palmer*, 210 W. Va. 372, 377, 557 S.E.2d 779, 784 (2001) ("The failure of an indictment to adequately state the essential elements of a criminal charge is a fundamental defect that may be raised at any time."). "Generally, the sufficiency of an indictment is reviewed de novo." *State v. Miller*, 197 W. Va. 588, 599, 476 S.E.2d 535, 546 (1996). Furthermore, this Assignment of Error requires the Court to engage in statutory interpretation. This also requires a

de novo standard of review for “[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.” Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995). Because the circuit court properly concluded that transportation was not an essential element of the crime of kidnapping as charged, A.R. 557, this Court should affirm the circuit court.

West Virginia Code § 61-2-14a provides, in pertinent part:

(a) Any person who unlawfully takes custody of, conceals, confines or restrains another person against his or her will by means of force, threat of force, duress, fraud, deceit, inveiglement, misrepresentation or enticement with the intent:

(1) To hold another person for ransom, reward or concession;

(2) To transport another person with the intent to inflict bodily injury or to terrorize the victim or another person; or

(3) To use another person as a shield or hostage, is guilty of a felony and, upon conviction, shall be punished by confinement by the Division of Corrections for life, and, notwithstanding the provisions of article twelve, chapter sixty-two of this code, is not eligible for parole.

The indictment in this case provided, in pertinent part:

THE GRAND JURY CHARGES, COUNT 1: that on or about the 4th day of December, 2017, in the County of Mercer, State of West Virginia, **HARRY LEE SMITH, JR.**, committed the offense of “Kidnapping” by unlawfully and feloniously holding Dustin Rose at gun point against her [sic] will, with the intent to terrorize her [sic], against the peace and dignity of the State; and

COUNT 2: the Grand Jury further charges, that on or about the 4th day of December, 2017, in the County of Mercer, State of West Virginia, **HARRY LEE SMITH, JR.**, committed the offense of “Kidnapping” by unlawfully and feloniously holding Amy Rose at gun point against her will, with the intent to terrorize her, against the peace and dignity of the State[.]

A.R. 538.

Petitioner posits the indictment omitted the element of transportation. Pet'r Br. at 14. Because transportation was not an essential element of the crime charged, it was not required to have been included in the indictment.

West Virginia Code § 61-2-14a(a)(2) provides, in pertinent part, “[a]ny person who unlawfully takes custody of, conceals, confines or restrains another person against his or her will by means of force, threat of force, duress, fraud, deceit, inveiglement, misrepresentation or enticement with the intent: . . . To transport another person with the intent to inflict bodily injury or to terrorize the victim or another person” is guilty of kidnapping. Petitioner cites to subsection (a)(2) claiming that the term “To transport” modifies both “with the intent to inflict bodily injury” and “to terrorize the victim or another person.” This is an incorrect reading of the statute.

Had the Legislature intended for Subsection (a)(2) to be read in the manner Petitioner proposes, it would not have made “terrorize” the infinitive verb, “to terrorize.” Instead, the Legislature would have drafted Subsection (a)(2) just as it drafted Subsections (a)(1) and (3)—neither of which include a second infinitive and modifier—making Subsection (a)(2) read: “to transport another person with the intent to inflict bodily injury or [] terrorize the victim or another person.” Such wording would precisely parallel the wording and sentence structure the Legislature chose to use in Subsections (a)(1) and (3). *Cf. Randolph County Bd. of Ed. v. Adams*, 196 W.Va. 9, 16, 467 S.E.2d 150, 157 (1995) (it is a fundamental principle of statutory construction that the meaning of a word cannot be determined in isolation, but it must be drawn from the context in which it is used); *Smith v. United States*, 508 U.S. 223, 229 (1993) (“the meaning of a word that appears ambiguous if viewed in isolation [will] become clear when the word is analyzed in light of the term that surrounds it.”) Thus, the fact the Legislature crafted Subsection (a)(2) differently than Subsections (a)(1) and (a)(3) by including a second infinitive verb and corresponding modifier

signals a significance that cannot be ignored.

Coupling the Legislature's inclusion of the second infinitive with its use of the disjunctive "or" demonstrates a clear legislative decision to establish multiple ways in which the Kidnapping statute can be violated. *See e.g. Carper v. Kanawha Banking & Trust Co.*, 157 W.Va. 477, 517, 207 S.E.2d 897, 921 (1974) ("Recognizing the obvious, the normal use of the disjunctive 'or' in a statute connotes an alternative or option to select."). Thus, Subsection (a)(2) plainly sets forth alternate methods by which Kidnapping may occur: *either* where a person unlawfully restrains another person with the intent to transport that person with the intent to inflict bodily injury *or* where a person unlawfully restrains another person with the intent to terrorize the victim or another person.

Furthermore, the construction of Subsection (a)(2) Petitioner advocates would render statutory language—in this case the word "to"—superfluous, and would thereby violate a "cardinal rule of statutory construction." Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W.Va. 203, 530 S.E.2d 676 (1999) ("A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute."); *See e.g., Commonwealth v. Browner*, 80 F.3d 869, 877 (4th Cir. 1996) ("A court should not—and we will not—construe a statute in a manner that reduces some of its terms to mere surplusage."); This Court has long held that statutes are to be construed so as to give meaning to every word in them. *Keatley v. Mercer Cty. Bd. of Ed.*, 200 W. Va. 487, 493, 490 S.E.2d 306, 312 (1997) (citation omitted); *see Ex Parte Watson*, 82 W.Va. 201, 205, 95 S.E. 648, 649 (1918) (stating that "[a]n interpretation of a statute or clause thereof which gives it no function to perform ... must be rejected as unsound; for it is presumed that the Legislature had a purpose in the use of every word and clause found in a statute, and intended the terms used to be effective"). Petitioner's proposed reading of the statute not only

relegates the word “to” to mere surplusage, it violates the central maxim of statutory construction by reading the “to” in “to terrorize” out of the statute entirely. Because this Court does not “eliminate through judicial interpretation words that were purposely included,” Syl. Pt. 11, in part, *Brooke B. v. Ray*, 230 W.Va. 355, 738 S.E.2d 21 (2013), only one conclusion can be reached: the Legislature plainly intended to craft West Virginia Code §61-2-14a(a) so as to make it a “kidnapping” where a person unlawfully restrains another person with the intent “to transport with the intent to inflict bodily injury” or where a person unlawfully restrains another person with the intent “to terrorize” the victim or another person. And, because legislative intent is plain, “it is the duty of the courts not to construe but to apply the statute.” Syl. pt. 5, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959). Accordingly, this Court should reject Petitioner’s proposed construction of the statute.

B. The State agrees the circuit court erred in submitting interrogatories to the jury.

As part of the verdict forms, the circuit court submitted to the jury interrogatories concerning kidnapping. A.R. 574, 576. The State agrees the circuit court committed reversible error in submitting interrogatories to the jury concerning sentencing for kidnapping.³

“This Court has long since held that special interrogatories should not be submitted to juries in criminal cases.” *State v. Dilliner*, 212 W. Va. 135, 138, 569 S.E.2d 211, 214 (2002). *See, e.g., State v. Bowles*, 109 W. Va. 174, 153 S.E. 308, 308 (1930) (“The practice of submitting

³When representing the State in criminal appeals before this Court, the Attorney General exercises judgment in the role of a party litigant. *Manchin v. Browning*, 170 W. Va. 779, 789, 296 S.E.2d 909, 919 (1982), *overruled on other grounds by State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 231 W. Va. 227, 744 S.E.2d 625 (2013). This entitles the Attorney General to confess reversible error. *Id.*, 296 S.E.2d at 919. While “[t]his Court is not obligated to accept the State’s confession of error in a criminal case [and] . . . will do so when, after a proper analysis, [it] believe[s] error occurred[.]” Syl. Pt. 8, *State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991), such confessions are “entitled to and given great weight[.]” *Sibron v. New York*, 392 U.S. 40, 58 (1968).

interrogatories is not followed in the trial of criminal cases.”). Thus, “[t]he submission of special interrogatories to a jury in a criminal case when not authorized by statute constitutes reversible error.” Syl. Pt. 2, *State v. Dilliner*, 212 W. Va. 135, 569 S.E.2d 211 (2002). While it is within the Legislature’s purview to enact a statute that allows for the submission of interrogatories to a jury for purposes of sentencing, *Dilliner*, 212 W. Va. at 138–39, 569 S.E.2d at 214–15, (footnote omitted) (“the Legislature has provided for the submission of special interrogatories to juries in criminal cases in certain limited circumstances. Primarily, the statutory authorization of special interrogatories in criminal cases is for sentencing purposes. In that context, the reasons for prohibiting the use of special interrogatories do not exist.”), the Legislature has chosen not to do so in West Virginia Code § 61-2-14a.

Furthermore, the West Virginia Supreme Court of Appeals has concluded that the issue of harm and concession are sentencing reducers whose resolution are vested in the trial court and that such a procedure does not violate a defendant’s constitutional rights:

the factual determinations regarding the existence of bodily harm and the payment of ransom, money, or the yielding of any other concession, relate to the punishment rather than to the proof required of the State as to the elements of the crime. Trial judges routinely make factual determinations when determining the sentences defendants should receive. As long as the jury is required to find whether the elements of a crime have been proven, the defendant’s due process rights and right to a trial by jury are not violated by a trial court making factual determinations relating to sentencing.

State v. Farmer, 193 W. Va. 84, 87, 454 S.E.2d 378, 381 (1994). The *Farmer* decision was subsequently reaffirmed and reinforced by *State v. Haught*, 218 W. Va. 462, 624 S.E.2d 899 (2005).

In *Haught*, Haught claimed the Kidnapping statute “improperly permits the circuit court, rather than the jury, to make findings of fact that enhance a defendant’s sentence.” 218 W. Va. at 465, 624 S.E.2d at 902. Haught claimed this procedure violated *Blakely v. Washington*, 542 U.S.

296 (2004). This Court rejected this contention. *Haught*, 218 W. Va. at 467, 624 S.E.2d at 904. As explained by this Court in *Haught*:

In *Blakely*, the Supreme Court applied its previous ruling in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *Apprendi* involved a defendant who was charged under New Jersey law with second-degree possession of a firearm for an unlawful purpose, which carried a prison term of 5 to 10 years. After the defendant pleaded guilty, the prosecutor filed a motion to enhance the sentence pursuant to a separate state hate crime statute. The statute allowed the defendant's sentence to be extended if the court found, by a preponderance of the evidence, that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Apprendi*, 530 U.S. at 468–69, 120 S.Ct. at 2351, quoting N.J. Stat. Ann. § 2C:44–3(e) (West Supp.1999–2000). The trial court found that the shooting was racially motivated and sentenced the defendant to a 12 year term, which was two years more than the maximum sentence provided in the statute under which the defendant was convicted.

218 W. Va. 462 at 465, 624 S.E.2d 899 at 902.

The defendant appealed his conviction arguing that the federal due process clause requires the jury, not the trial judge, to find beyond a reasonable doubt the bias upon which his hate crime sentence was based. A New Jersey appellate court upheld the increased sentence reasoning that the hate crime enhancement was a sentencing factor and not an essential element of the underlying offense. The New Jersey Supreme Court subsequently affirmed the appellate court's decision. The court reasoned that the statute was constitutional because it did not allow "impermissible burden shifting and did not 'create a separate offense calling for a separate penalty.'" *Apprendi*, 530 U.S. at 473, 120 S.Ct. at 2353. The court further explained that the statute was a result of the legislature giving weight to a factor that sentencing courts have used to affect punishment.

Haught, 218 W. Va. at 465, 624 S.E.2d at 902.

The United States Supreme Court reversed the New Jersey Supreme Court's decision. The Supreme Court explained:

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.... [w]e endorse the statement of the rule . . . [that] it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be

established by proof beyond a reasonable doubt.

The New Jersey statutory scheme that *Apprendi* asks us to invalidate allows a jury to convict a defendant of a second-degree offense based on its finding beyond a reasonable doubt that he unlawfully possessed a prohibited weapon; after a subsequent and separate proceeding, it then allows a judge to impose punishment identical to that New Jersey provides for crimes of the first degree. . . based upon the judge's finding, by a preponderance of the evidence, that the defendant's "purpose" for unlawfully possessing the weapon was "to intimidate" his victim on the basis of a particular characteristic the victim possessed. In light of the constitutional rule explained above, and all of the cases supporting it, this practice cannot stand.

Haught, 218 W. Va. at 465, 624 S.E.2d at 902 (quoting *Apprendi*, 530 U.S. at 490–492 (citations and internal quotation marks omitted)).

In *Blakely*, the Court explained further its holding in *Apprendi*. The defendant in *Blakely* pled guilty to second-degree kidnapping. Under Washington's sentencing statute, the facts that Blakely admitted qualified him for a standard sentence of 53 months. However, pursuant to the statute, the trial court could increase the defendant's sentence if it found "substantial and compelling reasons justifying an exceptional sentence." *Blakely*, 542 U.S. at 299, 124 S.Ct. at 2535, 159 L.Ed.2d 403, quoting Wash. Code § 9.94A.120(2). The statute also provided an illustrative list of various aggravating factors for the court to consider when increasing a sentence. Pursuant to the plea agreement, the state recommended a sentence within the standard range of 49–53 months. However, the court increased Blakely's sentence to 90 months after it found facts supporting deliberate cruelty, a statutorily enumerated ground for departure. The defendant appealed arguing that the sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence. The state appellate court affirmed the defendant's sentence based on state precedent. The Washington Supreme Court denied discretionary review of the case.

Haught, 218 W. Va. at 465–66, 624 S.E.2d at 902–03.

The United States Supreme Court reversed after finding that the trial court's sentencing of the defendant to more than three years above the 53-month statutory maximum of the standard range for his offense, based on the trial judge's finding that the defendant acted with deliberate cruelty, violated the defendant's Sixth Amendment right to trial by jury. In reaching this decision, the Court reiterated its finding in *Apprendi* that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. The Court then defined the term "statutory maximum" as used in the *Apprendi* case, explaining that

“[o]ur precedents make clear . . . that the ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.” *Blakely*, 542 U.S. at 303, 124 S.Ct. at 2537 (emphasis in the original). The court added “the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” *Blakely*, 542 U.S. at 303–304, 124 S.Ct. 2531.

Haught, 218 W. Va. at 466, 624 S.E.2d at 903 (2005).

This Court in *Haught* found that West Virginia Code § 61-2-14a is not affected by *Blakely* because West Virginia Code § 61-2-14a does not contain sentence enhancers but sentence reducers:

This Court believes that *Blakely* is clearly distinguishable from the instant case. *Blakely* stands for the principle that any fact, other than a prior conviction, that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. In *Blakely*, the facts admitted by Blakely qualified him for a standard sentence of 53 months. This sentence, however, was impermissibly enhanced to 90 months after the trial judge made additional findings of fact. In contrast, the statutory maximum in this case, or, in other words, the maximum sentence that Appellant could receive based on the jury’s findings, was life with mercy which is the sentence Appellant received. Thus, Appellant received no greater sentence than the statutory maximum. In sum, it is clear to this Court that, pursuant to the statute, any additional findings of fact made by the trial judge can only operate under the statute to reduce and not enhance a defendant’s sentence.

Haught, 218 W. Va. at 467, 624 S.E.2d at 904.

Hence, submitting special interrogatories to the jury in the present case violated a line of unbroken West Virginia Supreme Court cases. As such, the State agrees that the decision of the lower court as to the kidnapping convictions should be reversed.

C. Petitioner inflicted bodily harm upon Amy Rose.

The default sentence for kidnapping under West Virginia Code § 61-2-14a is a life without mercy term. *See Shultz v. Terry*, No. 2:18-CV-00899, 2019 WL 1398071, at *2 (S.D. W. Va. Mar. 28, 2019) (“The statute explicitly states that one convicted of kidnapping ‘shall be punished by

confinement . . . for life, and . . . is not eligible for parole[.]” W. Va. Code § 61-2-14a, making life without parole the default mandatory sentence.”). However, the kidnapping statute provides for term of year sentences if certain conditions are met:

(3) In all cases where the person against whom the offense is committed is returned, or is permitted to return, alive, without bodily harm having been inflicted upon him, but after ransom, money or other thing, or any concession or advantage of any sort has been paid or yielded, the punishment shall be confinement by the Division of Corrections for a definite term of years not less than twenty nor more than fifty; or

(4) In all cases where the person against whom the offense is committed is returned, or is permitted to return, alive, without bodily harm having been inflicted upon him or her, but without ransom, money or other thing, or any concession or advantage of any sort having been paid or yielded, the punishment shall be confinement by the Division of Corrections for a definite term of years not less than ten nor more than thirty.

Id. § 61-2-14a(b)(3) & (4). The absence of bodily harm is a prerequisite to a term of years sentence under the kidnapping statute. *State v. King*, 205 W. Va. 422, 426, 518 S.E.2d 663, 667 (1999) (“Initially, we must state that the appellant’s contention that the absence of bodily harm is one of the prerequisites for the imposition of a sentence for a term of years under W. Va. Code § 61-2-14a is correct.”). Whether or not Petitioner inflicted bodily injury upon Amy is either a question of sufficiency of the evidence or statutory interpretation, either of which calls for *de novo* review. *See, e.g., State v. Juntilla*, 227 W.Va. 492, 497, 711 S.E.2d 562, 567 (2011) (“The Court applies a *de novo* standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence.”); *State v. Saunders*, 219 W. Va. 570, 573, 638 S.E.2d 173, 176 (2006) (“Because this case involves an issue of statutory interpretation, our review is *de novo*.”).

Petitioner dragged Amy through the house by her arm and hair. A.R. 235. Consequently, Amy was “bruised up” and “had a little bit of hair loss.” A.R. 240-241. Petitioner contends this does not constitute “bodily harm” under the kidnapping statute. Pet’r Br. at 26. Petitioner is incorrect.

The kidnapping statute does not define “bodily harm.” As such, this Court must give these words their common, ordinary, and accepted meaning for “[u]ndefined words and terms in a legislative enactment will be given their common, ordinary and accepted meaning.” Syl. Pt. 4, *State v. Soustek*, 233 W. Va. 422, 758 S.E.2d 775 (2014) (quoting Syl. Pt. 6, in part, *State ex rel. Cohen v. Manchin*, 175 W.Va. 525, 336 S.E.2d 171 (1984)). The term “bodily harm” has been defined as “[p]hysical pain, illness, or impairment of the body.” *Black’s Law Dictionary* (10th ed. 2014). Bruising and hair loss satisfies this definition as bruising and pulling hair from its follicles is painful. See *Lewis v. State*, No. 07-02-0499-CR, 2003 WL 21688089, at *3 (Tex. App. July 18, 2003) (“Whether pain arises from being pulled by the hair from a truck falls within the realm of a jury’s common intelligence and understanding of pain and its causes.”).

Petitioner, however, seeks support in a pair of California cases, *People v. Jackson*, 282 P.2d 898 (Cal. 1955) and *People v. Schoenfeld*, 168 Cal. Rptr. 762 (Ct. App. 1981). Pet’r Br. at 26-27. However, authority closer to West Virginia exists to address this issue.

In *Martin v. Ballard*, No. CIV.A. 6:07-CV-00014, 2008 WL 803155 (S.D. W. Va. Mar. 20, 2008), the petitioner in that case was convicted of, *inter alia*, kidnapping. *Id.* at *3. The petitioner in *Martin* contended, among other things, that his life sentence for kidnapping was impermissible as he had returned his victim without bodily harm. *Id.* at *39. During the petitioner’s sentencing hearing, the circuit court concluded, “[t]he Court also finds that there was bodily harm done to [victim], that her arm was bruised by the Defendant by holding her so tightly that bruises were inflicted upon her arm.” *Id.* at 42. The petitioner sought federal habeas relief on this claim and was unsuccessful. The United States Magistrate Judge agreed that under the facts that the victim suffered from bodily harm. *Id.* at *43. The Magistrate Judge was subsequently affirmed by

the United States District Judge. *Id.* at *2. Under *Martin*, Petitioner inflicted bodily harm upon Amy under the kidnapping statute.

D. Petitioner did not release Dustin without concession or advantage having been yielded.

Petitioner was sentenced under West Virginia Code § 61-2-14a(b)(3) for kidnapping Dustin. Petitioner claims that he did not fall within the statute as no concession or advantage of any sort had been paid or yielded for Dustin's release. Pet'r Br. at 28, Petitioner is incorrect.

West Virginia Code § 61-2-14a(b)(3) provides:

In all cases where the person against whom the offense is committed is returned, or is permitted to return, alive, without bodily harm having been inflicted upon him, but after ransom, money or other thing, or any concession or advantage of any sort has been paid or yielded, the punishment shall be confinement by the Division of Corrections for a definite term of years not less than twenty nor more than fifty[.]

In the instant case, the State asserted there was a concession or advantage yielded when Dustin was released after telling Petitioner he would go and get Frank. *See, e.g.*, A.R. 339-340; 405-406; 478; 482. Petitioner contends that “[t]his evidence does not support a factual scenario which falls within the parameters contemplated by the statute.” Pet'r Br. at 28. Petitioner argues, with no citation to authority,⁴ “[t]he language of the statute speaking of a ‘concession’ or thing of

⁴Which is, in and of itself, grounds for this Court to summarily reject the claim. West Virginia Rule of Appellate Procedure 10(c)(7) requires “[t]he brief must contain an argument exhibiting clearly the points of fact and law presented, the standard of review applicable, and citing the authorities relied on” “Additionally, in an Administrative Order entered December 10, 2012, Re: Filings That Do Not Comply With the Rules of Appellate Procedure, it provides that ‘[b]riefs that lack citation of authority [or] fail to structure an argument applying applicable law’ are not in compliance with this Court’s rules.” *State v. Sites*, 825 S.E.2d 758, 770 (W. Va. 2019). Thus, where an argument is unsupported by authority, this Court is free to disregard it. *See, e.g., State v. Back*, 241 W. Va. 209, 820 S.E.2d 916, 920 n.4 (2018) (“In his appellate brief, Mr. Back fails to cite to a single authority on this issue. Accordingly, we decline to address this inadequately briefed issue.”); *State v. Shelby S.*, No. 14-0456, 2016 WL 2978567, at *5 (W. Va. May 23, 2016) (Memorandum Decision) (“Here, petitioner’s additional alleged errors are woefully inadequate as he fails to comply with the administrative order and the West Virginia Rules of Appellate Procedure. Thus, we decline to address petitioner’s additional alleged errors[.]”).

value or advantage clearly contemplates a situation where the party making the concession or surrendering value or surrendering an advantage is an individual or entity changing its position or taking an action that it would not otherwise do but for the desire to acquire the release of the kidnapped victim.” Pet’r Br. at 28. Petitioner continues, “[i]n the instant matter, Dustin Rose was released voluntarily by the [Petitioner] with the prospect that he may locate his father and request his return to the location. Dustin Rose accepted no condition, conceded any value or undertook any action that was contrary to his interest or in any mater detrimental to him.” Pet’r Br. at 28. This position is untenable.

“Interpreting a statute . . . presents a purely legal question subject to de novo review,” Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dep’t*, 195 W.Va. 573, 466 S.E.2d 424 (1995). “Where the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation.” Syl. Pt. 2, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). Petitioner’s efforts to read artificial limitations into West Virginia Code § 61-2-14a(b)(3) should be rejected as such an effort is inconsistent with the broad language of that statute.

West Virginia Code § 61-2-14a(b)(3) (emphasis added) uses the phrase, “after ransom, money or other thing, or *any* concession or advantage of *any* sort has been paid or yielded[.]” The Legislature’s use of the word “any” renders Petitioner’s argument unsupportable.

“‘[A]ny’ is a term of great breadth.” *United States v. Wildes*, 120 F.3d 468, 470 (4th Cir. 1997). “Read naturally, the word ‘any’ has an expansive meaning[.]” *United States v. Gonzales*, 520 U.S. 1, 5 (1997). “The term ‘any,’ when used in a statute is ‘all-inclusive’ and unambiguous.” *State v. Mark Marks, P.A.*, 833 So. 2d 249, 251 (Fla. Dist. Ct. App. 2002). “The term ‘any’ is an inclusive term often used synonymously with the terms ‘every’ and ‘all.’” *Colorado State Bd. of Accountancy v. Raisch*, 931 P.2d 498, 500 (Colo. App. 1996), *aff’d*, 960 P.2d 102 (Colo. 1998).

See also United States v. Angelilli, 660 F.2d 23, 31 (2d Cir. 1981) (“the use of the word ‘any’ indicates an intent to make the list all-inclusive.”). “The word ‘any,’ like other unrestrictive modifiers such as ‘an’ and ‘all,’ is generally considered to apply without limitation.” *Sussex Cmty. Servs. Ass’n v. Virginia Soc. for Mentally Retarded Children, Inc.*, 467 S.E.2d 468, 469 (Va. 1996). *See also Zion v. Kurtz*, 405 N.E.2d 681, 686 (N.Y. 1980) (“[T]he word ‘any’ means ‘all’ or ‘every’ and imports no limitation.”). In short, “[t]he intent to demand ‘any concession or advantage of any sort’ has a broad meaning.” *United States v. D’Arco*, 139 F.3d 894 (4th Cir. 1998) (Table) (Text available at 1998 WL 66592). As this Court has held, “[t]he word ‘any,’ when used in a statute, should be construed to mean any.” Syl. Pt. 2, *Thomas v. Firestone Tire and Rubber Co.*, 164 W. Va. 763, 266 S.E.2d 905 (1980).

Petitioner would not have released Dustin but for Dustin’s promise to Petitioner that he would go and get Frank (apparently so Petitioner could kill Frank). Petitioner released Dustin because of a condition Petitioner imposed on Dustin, a concession he extracted from him. Given the broad and all-inclusive language of West Virginia Code § 61-2-14a(b)(3), such conduct by Petitioner falls well within the parameters of the statute.

E. The Circuit Court did not abuse its discretion in finding testimony concerning the effects of the events of December 4, 2017 upon Destiny Rose to be admissible.

Prior to trial, Petitioner filed a Motion in Limine to preclude the State from introducing evidence relating to the effect that Petitioner’s conduct had on, *inter alia*, Destiny post December 4, 2017. A.R. 559. The circuit court found the evidence admissible concluding:

THE COURT: I think – I think it may – I think it may be relevant as to show the intent to terrorize. So, the Court will allow a limited – I don’t think we need to dwell a whole lot on it. But, the Court would allow, and perhaps play it by ear, once we get to that testimony. The Court’s inclined to allow that for that reason. And, would note the objections and exceptions of the Defendant.

A.R. 162-163. Destiny testified she could not study again because every time she tried she suffered flashbacks. A.R. 208. Petitioner claims the evidence was not relevant and “extraordinarily prejudicial to [him] in the jury’s consideration of the mercy component of the kidnapping charges relating to Amy Rose and Dustin Rose.” Pet’r Br. at 30. Petitioner’s claims should be rejected.

Petitioner’s brief does not contain a single citation to authority in this Assignment of Error. This Court has noted the failure to provide authority to support an argument is a fatal defect in a brief meriting denial of review. *See, e.g., In re D.R.*, No. 18-0496, 2018 WL 6040686, at *5 n.3 (W. Va. Nov. 19, 2018) (memorandum decision) (“petitioner cites to no authority to support his argument and, as such, we decline to address the argument on appeal.”); *Allen v. Terry*, No. 16-1082, 2018 WL 2194014, at *5 (W. Va. May 14, 2018) (“Because petitioner has cited no authority to support this alleged error, we decline to address the same on appeal.”); *State v. Preston*, No. 15-0210, 2015 WL 7628816, at *5 (W. Va. Nov. 23, 2015) (memorandum decision) (“Having cited no authority in support of his claim of error, we also decline to address this issue on appeal.”).

Alternatively, Petitioner’s claim is substantively meritless. Petitioner’s claim deals with the circuit court’s admission of evidence. “We review the trial court’s rulings on the admission of evidence under an abuse of discretion standard.” *State v. Bradshaw*, 193 W. Va. 519, 536, 457 S.E.2d 456, 473 (1995).

Petitioner claims the evidence of how Petitioner’s conduct affected Destiny post December 4, 2017 was not relevant and was “extraordinarily prejudicial to [him].” Pet’r Br. at 30. These claims are incorrect.

West Virginia Rule of Evidence Rule 401 provides, “[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” “Obviously, this is a liberal standard favoring a

broad policy of admissibility.” *McDougal v. McCammon*, 193 W. Va. 229, 236, 455 S.E.2d 788, 795 (1995). *See also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993) (“The Rule’s basic standard of relevance thus is a liberal one.”). Thus, “relevance typically presents a low barrier to admissibility[.]” *United States v. Leftenant*, 341 F.3d 338, 346 (4th Cir. 2003). An appellate court will “rarely reverse relevancy decisions because they ‘are fundamentally a matter of trial management[.]’” *United States v. Zayyad*, 741 F.3d 452, 459 (4th Cir. 2014) (citation omitted).

Rule of Evidence 403 provides, “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice” “Evidence may be excluded under Rule 403 only if the evidence is *unfairly* prejudicial and, even then, only if the unfair prejudice *substantially* outweighs the probative value of the evidence.” *United States v. Siegel*, 536 F.3d 306, 319 (4th Cir. 2008) (emphasis in original). “Rule 403 is a rule of inclusion[.]” *United States v. Udeozor*, 515 F.3d 260, 264 (4th Cir. 2008). “[I]n reviewing a decision under Rule 403, the court must ‘look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect.’” *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1135 (4th Cir. 1988) (quoting *Koloda v. General Motors Parts Division*, 716 F.2d 373, 377 (6th Cir.1983)). Consequently, “Rule 403 exclusion should be invoked rarely,” *United States v. Cooper*, 482 F.3d 658, 663 (4th Cir. 2007), and “sparingly as an ‘extraordinary remedy.’” *United States v. Williams*, 49 F. App’x 420, 426 (4th Cir. 2002). Hence, “[a]s to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court’s discretion will not be overturned absent a showing of clear abuse.” Syl. Pt. 10, in part, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994). There was no abuse of discretion on the circuit court’s part.

Here, the circuit court concluded that how Petitioner's behavior subsequently affected Destiny related to his intent to terrorize Dustin and Amy. A.R. 162-163. Petitioner engaged in holding a gun to Destiny's head, ordering her around, and threatening to kill her. This conduct terrorized Destiny as evidenced by her post-event inability to study due to flashbacks. Perforce, if Destiny was terrorized by Petitioner's conduct, then so would have been Amy and Dustin. And the jury could have drawn the conclusion from Destiny's fear that Petitioner intended to terrorize Amy and Dustin. *See* A.R. 462 ("Intent may be shown from all the facts and circumstances in the case, including the actions of the Defendant and, if from all of this you are satisfied beyond a reasonable doubt that the Defendant intended to do that which he did or that which was the immediate and necessary consequence of his actions, you may find that intent has been shown.").

The evidence was relevant, not unfairly prejudicial, and, hence admissible. Consequently, the circuit court did not abuse its discretion in finding Destiny's testimony admissible. The circuit court should be affirmed.

F. The circuit court did not err in admitting the 404(b) evidence and any error in the process of its admission was harmless.

The State filed a Motion to admit 404(b) evidence. A.R. 547. Specifically, it sought to use the evidence to show intent and to rebut Petitioner's defense that his actions were the result of an adverse reaction to medication he was taking. A.R. 547. Specifically, the State's Motion sought the following:

Amy Rose had been in an intimate relationship with the defendant. When Defendant became abusive and controlling, Amy attempted to end the relationship and Defendant's abuse heightened. Days before the incidents giving rise to the indictment, the Rose family's property was vandalized repeatedly. Frank Rose and Destiny Rose will testify to Defendant's volatile and violent nature over the course of their relationship with him. Shane Williby and Destiny Rose will testify to Defendant's repeated threats to kill Amy Rose and the Rose family.

A.R. 547. At a pretrial hearing on September 10, 2018, the circuit court asked the State to have its witnesses available for another pretrial conference so it could take evidence. A.R. 27. At another pretrial hearing, the circuit court and the parties discussed some evidence, but the circuit court did not take evidence. A.R. 48-50. The circuit court ruled the following was admissible Rule 404(b) evidence: “any threats or interactions with the named victims are admissible, as well as the phone calls, and the road rage incident.” A.R. 565. At trial, Petitioner declined the circuit court’s offer of a “limine instruction with regard to the 404(b) evidence[.]” A.R. 302. As to the failure to take evidence, the circuit court ruled in response to Petitioner’s motion for a new trial that it was harmless because he had heard the testimony at trial and, therefore, would have ruled the evidence admissible had he heard from the witnesses pretrial. A.R. 67-68. Petitioner challenges the circuit court’s rulings on appeal. The circuit court should be affirmed.

West Virginia Rule of Evidence 404(b) provides, in pertinent part:

(1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses*. . . . This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

“This Court reviews a lower court’s determination regarding the introduction of Rule 404(b) other crimes evidence under an abuse of discretion standard.” *State v. Hager*, 204 W. Va. 28, 36, 511 S.E.2d 139, 147 (1998). “We have emphasized that a circuit court abuses its discretion in admitting Rule 404(b) evidence only where the court acts in an ‘arbitrary and irrational’ manner. *Id.*, 511 S.E.2d at 147. “W. Va. R. Evid. 404(b) is an ‘inclusive rule’ in which all relevant evidence involving other crimes or acts is admitted at trial unless the sole purpose for the admission is to

show criminal disposition.” *State v. Edward Charles L.*, 183 W. Va. 641, 647, 398 S.E.2d 123, 129 (1990).

In Syllabus Point 2 of *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994), this Court held:

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.

McGinnis gives Petitioner no solace as it provides no grounds to reverse Petitioner’s convictions.

First, as to the lack of an evidentiary hearing and the Rule 401-403 balancing test, this Court has held that the harmless error doctrine applies to Rule 404(b) violations. *See, e.g., State v. Bowling*, 232 W. Va. 529, 550, 753 S.E.2d 27, 48 (2013) (applying harmless error to Rule 404(b) violations); *State v. Meadows*, No. 14-0952, 2015 WL 6181490, at *3 (W. Va. Oct. 20, 2015) (memorandum decision) (applying harmless error to admission of Rule 404(b) evidence); *State v. Greer*, No. 13-1259, 2014 WL 6607465, at *3 (W. Va. Nov. 21, 2014) (memorandum decision). In the instant case, the circuit court heard the State’s 404(b) witnesses testify at trial and concluded

that, if presented pretrial, it would have found the testimony admissible. In light of this finding, any error in admitting the evidence was harmless.

Second, as to the lack of a limiting instruction, Petitioner's counsel declined such an instruction when asked about it by the circuit court. A.R. 302. *See, e.g., United States v. Tejada*, 974 F.2d 210, 215 (1st Cir. 1992) ("at most the admission of the Fernandez testimony was harmless nonconstitutional error, as Tejada declined a limiting instruction."). *Cf. State v. Ferrell*, 184 W. Va. 123, 131, 399 S.E.2d 834, 842 (1990) ("However, Mr. Ferrell did not request such a limiting instruction, perhaps for reasons of trial tactics and strategy, so there was no error in the court's not giving one."). It does not appear that Petitioner sought such a limiting instruction during the circuit court's charge to the jury.

Finally, the evidence against Petitioner was overwhelming even in the absence of the 404(b) evidence. *State v. White*, No. 14-0918, 2015 WL 7628721, at *5 (W. Va. Nov. 20, 2015) (memorandum decision) ("... even if the circuit court had erred in admitting the Rule 404(b) evidence, the error was harmless given that the State provided the jury with ample and overwhelming evidence of petitioner's guilt beyond [the 404(b) evidence]"). The testimony of Destiny and Dustin, along with that of Frank and Lieutenant Wood and Sergeant Rose amply and fully--indeed, overwhelmingly--supported the case against Petitioner, even without the 404(b) evidence. Any error by the circuit court was at best harmless and Petitioner's convictions should be affirmed.

G. The admission of the vandalism evidence was not error or, at best, constituted harmless error.

At trial, Destiny testified her family had trouble with slashed tires. A.R. 215-216. She also testified the transmission fluid in her truck was drained out. A.R. 216. When the State asked if the Rose family had any pets poisoned, she responded, yes that the family had dogs poisoned, to which

the Petitioner only then objected on relevancy grounds. A.R. 216. The circuit court overruled the objection. A.R. 216. Destiny testified the family had two dogs poisoned. A.R. 216. The State then elicited testimony from Destiny that she did not know that Petitioner did that, but that once Petitioner was arrested the incidents of tire slashing and pet poisoning stopped. A.R. 216.⁵ During cross-examination, Petitioner's counsel got Destiny to confirm that she had no evidence Petitioner was involved with either the tire slashing or pet poisoning. A.R. 227.

The next morning, Petitioner expressed further objection to testimony relating to the vandalism. A.R. 309. The circuit court responded:

THE COURT: Well, it seemed to me that once the State got into that, it went on for a while before there was an objection made and that's – to be quite honest, that's why I let them finish that. Because it didn't appear there was an objection made until, like I said, stuff started coming out. I think that it was adequately handled in cross-examination with regards to the fact that there was really no proof of those – of that action. I – to the extent there was any error, I think it was harmless error in light of the other facts and circumstances.

A.R. 309.

The admission of evidence is reviewed only for abuse of discretion. “With respect to the admission of evidence, this Court has held that “[t]he action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.” Syllabus point 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955), *overruled on other grounds*, *State ex rel. R.L. v. Bedell*, 192 W.Va. 435, 452 S.E.2d 893 (1994).’ Syl. Pt. 1, *State v. Calloway*, 207 W.Va. 43, 528 S.E.2d 490 (1999).” *State v. Lobb*, No. 14-0198, 2015 WL 135036, at *2 (W. Va. Jan. 9, 2015) (memorandum decision). The decision of the circuit court should be affirmed.

⁵Destiny also testified the Rose family had cameras installed temporarily and the Petitioner was aware of them and that after that Petitioner never showed up. A.R. 216.

First, Petitioner's brief contains no citation to authority other than perfunctory citation to Rule 404(b). Pet'r Br. at 33-34. As noted above, this is a sufficient ground for this Court to decline to address this claim at all.

Second, Petitioner in his brief raises Rule 404(b) and prejudice arguments. As neither argument was timely presented at trial, neither are preserved for appellate review. Petitioner's contemporaneous objection at trial was solely on relevancy grounds. A.R. 216 ("MR. BALL: Objection, Your Honor. I don't know what the relevancy is to this.").

It is well established that where the objection to the admission of testimony is based upon some specified ground, the objection is then limited to that precise ground and error cannot be predicated upon the overruling of the objection, and the admission of the testimony on some other ground, since specifying a certain ground of objection is considered a waiver of other grounds not specified.

State v. DeGraw, 196 W.Va. 261, 272, 470 S.E.2d 215, 226 (1996):

Petitioner's attempt on appeal to argue Rule 404(b) and prejudice, Pet'r Br. at 33-34, is not permissible as the relevance objection raised at trial constituted a waiver of all grounds not otherwise raised—including Rule 404(b) and prejudice. *See, e.g., United States v. Mejia*, 909 F.2d 242, 246 (7th Cir. 1990) ("A general objection to 'relevance,' the objection Mejia made at trial, is not sufficient to preserve an objection under Rules 404(b) or 403."); *United States v. Sandini*, 803 F.2d 123, 126–127 (3d Cir.1986) (determining that timely relevance objection failed to preserve appellate review of untimely objections under Rules 403 and 404(b)); *State v. Price*, No. 1 CA-CR 06-0650, 2008 WL 3855852, at *2 (Ariz. Ct. App. Mar. 18, 2008) (finding a "relevance objection did not preserve any other objection, such as improper character or propensity evidence under Rules 404(a)(1) or 404(b), and/or it was unduly prejudicial under Rule 403.").

Finally, Petitioner contends in his brief that, “[t]he evidence was clearly of limited value probative value [sic] as it was absolutely speculative hat [sic] appellant committed these acts.” Pet’r Br. at 34. This is incorrect. The evidence was relevant and, hence, admissible.

As noted above, the relevancy standard under Rule 401 sets a low threshold for admissibility. “Under Rule 401, evidence having any probative value whatsoever can satisfy the relevancy definition. Obviously, this is a liberal standard favoring a broad policy of admissibility. For example, the offered evidence does not have to make the existence of a fact to be proved more probable than not or provide a sufficient basis for sending the issue to the jury.” *McDougal v. McCammon*, 193 W. Va. 229, 236, 455 S.E.2d 788, 795 (1995) (emphasis deleted). In the instant case, the State established the vehicle vandalisms and the pet poisonings ended when Petitioner was arrested, or with the installation of cameras which dissuaded Petitioner from returning to the Rose home. A.R. 216. The State, therefore, established a basis for the jury to conclude Petitioner was the culprit. And the evidence was relevant to demonstrate Petitioner’s animosity toward the Rose family given his history of his rocky relationship with Amy. The circuit court should be affirmed.

H. Imposing a Life Without Mercy Sentence on Petitioner for Kidnapping Amy Rose was not Constitutionally disproportionate.

Petitioner contends his Life Without Mercy Sentence is constitutionally disproportionate. Pet’r Br. at 34-35. Because Petitioner’s Life Without Mercy sentence is constitutionally proportionate, the judgment of the circuit court should be affirmed.

“Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: ‘Penalties shall be proportioned to the character and degree of the offence.’” Syl. Pt. 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980). “[W]e

employ two tests in determining whether a sentence is constitutionally disproportionate to the crime: one is subjective and the other objective.” *State v. Gibbs*, 238 W. Va. 646, 659, 797 S.E.2d 623, 636 (2017). The subjective test is contained in Syllabus Point 5 of *State v. Cooper*, 172 W. Va. 266, 304 S.E.2d 851 (1983):

Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.

The objective test is contained in Syllabus Point 5 of *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981):

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

Petitioner does not invoke the objective test; rather, he contends only the subjective test is violated. Pet’r Br. at 35. Petitioner argues, *ipse dixit*, “[i]n the instant matter given the jury’s pronouncements the conduct separating a sentence of life without mercy and sentence of 30-50 years is as little as pulled hair and a bruise. That facts lacking significant severity can have such a significant impact on appellant’s sentence clearly challenges constitutional ideals as to proportionality of sentences.” Pet’r Br. at 35. Petitioner takes too narrow a view of the subjective proportionality test. “In making the determination of whether a sentence shocks the conscience, we consider *all* of the circumstances surrounding the offense.” *State v. Adams*, 211 W.Va. 231, 233, 565 S.E.2d 353, 355 (2002) (citations omitted) (emphasis added). Petitioner’s conduct justifies a Life Without Mercy sentence.

This Court has recognized kidnapping is a violent offense carrying with it the great risk of injury to the victim. *State v. King*, 205 W. Va. 422, 428, 518 S.E.2d 663, 669 (1999); *Pendleton v. Ballard*, No. 12-0653, 2013 WL 2477245, at *16 (W. Va. May 24, 2013) (memorandum decision). In the present case, Petitioner not only inflicted bodily harm upon Amy by bruising her and pulling her hair out, A.R. 235, 240-241, but he broke into her house and repeatedly held a gun to her head and to Dustin's head, repeatedly threatening to kill them both. A.R. 235. Petitioner also used Amy as a human shield to protect himself from the police. A.R. 274. Petitioner additionally threatened to kill Frank, A.R. 237, and Destiny. A.R. 205. Petitioner's violent behavior toward Amy, coupled with his other heinous conduct in the case, justifies a Life Without Mercy sentence. Petitioner's Life Without Mercy sentence does not shock the conscience.⁶

I. Petitioner was not entitled to a jury instruction on Unlawful Restraint.

During the jury instruction conference, Petitioner sought an instruction on unlawful restraint as a lesser included offense of kidnapping. A.R. 407. The circuit court denied the requested instruction in the following exchange:

THE COURT: First of all, with regards to – other than kidnapping—with regards to kidnapping, does either side wish any lesser includes [sic] of kidnapping?

MR. LEFLER: Yes, sir, Your Honor. I – there is an unlawful restraint statute that at one time was, I think, the mirror image of the kidnapping statute if it's not morphed, I think, along with the kidnapping statute but would request an instruction on that offense as a lesser included.

THE COURT: What says the State?

MS. WILLIAMSON: It says without the intent to obtain any other concession or advantage and –

⁶Petitioner also contends in a single sentence in his brief, “these circumstances would also run afoul of the provisions of the Eighth Amendment to the United States Constitution.” Pet'r Br. at 36. This single sentence is insufficient to present an Eighth Amendment claim for appellate review. See, e.g., *Christopher J. v. Ames*, ___ W. Va. ___, ___, n.19, 828 S.E.2d 884, 896 n.19 (2019).

MR. LEFLER: That is the intent at the time of the offense, Your Honor.

THE COURT: I was gonna ask you all that. The State has not alleged that the kidnapping was done with the intent to gain any vantage [sic] or concession. Correct?

MS. WILLIAMSON: It was done with the intent to kill everyone but Amy.

THE COURT: What did you allege in the indictment?

MS. WILLIAMSON: Concession with the intent to terrorize.

THE COURT: Alright. Does concessions even matter if it's the intent to terrorize—whether or not concessions were made or not made?

You see, I, you know, I think there's separate way this – I mean, like I said, this is about the worst written statute that I have ever seen in my life. And, it is because, it was like Mr. Lefler said a while ago, part of the reason is because every time the legislature gets there hands in it – which is like every other session – they just muck it up worse than what it was previously. You know, I think there's – I think there's an argument to be made that if it's done – if the Jury finds it is done with the intent to terrorize that's it. That's the only thing they have to find after that. And, it's guilty or not guilty on the intent to terrorize and whether or not there was concessions made or whether or not there was return is immaterial. And, if that's the case, then I think the abduction [sic] statute does not apply at all[.]”

A.R. 407-408.

“As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion.” Syl. Pt. 1, in part, *State v. Hinkle*, 200 W. Va. 280, 281, 489 S.E.2d 257, 258 (1996).

There was not abuse of discretion in this case.

Pursuant to Syllabus Point one of *State v. Jones*, 174 W.Va. 700, 329 S.E.2d 65 (1985):

The question of whether a defendant is entitled to an instruction on a lesser included offense involves a two-part inquiry. The first inquiry is a legal one having to do with whether the lesser offense is by virtue of its legal elements or definition included in the greater offense. The second inquiry is a factual one which involves a determination by the trial court of whether there is evidence which would tend to prove such lesser included offense. *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

As Petitioner does not satisfy the second part of the *Jones* test, the circuit court did not err in refusing an unlawful restraint instruction.

The Unlawful Restraint Statute, W. Va. Code § 61-2-14g(a), provides, in pertinent part:

Any person who, without legal authority intentionally restrains another with the intent that the other person not be allowed to leave the place of restraint and who does so by physical force or by overt or implied threat of violence or by actual physical restraint but without the intent to obtain any other concession or advantage as those terms are used in section fourteen-a of this article is guilty of a misdemeanor[.]

Here, Petitioner did not release either Amy or Dustin without concession. Amy was not released until Petitioner extracted a promise from the police that he could speak to her. *State v. Hanna*, 180 W. Va. 598, 606, 378 S.E.2d 640, 648 (1989) (“forcible reconciliation efforts [are] sufficient to sustain a kidnapping conviction.”). Dustin was not released until he promised to go into Frank’s house and entice Frank out (presumably so Petitioner could shoot Frank). As such, West Virginia Code § 61-2-14g(a) is not implicated and the circuit court did not err in refusing to instruct the jury on unlawful restraint. The circuit court should be affirmed.

CONCLUSION

The judgment of the Circuit Court of Mercer County should be affirmed.

Respectfully submitted,

State of West Virginia,

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