IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0162

STATE OF WEST VIRGINIA,

Respondent,

v.

SHAUN RICHARD DUKE,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the January 28, 2021, Order
Circuit Court of Nicholas County
Case No. 20-F-51

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I. INTRODUCTION

Respondent State of West Virginia, by counsel, Andrea Nease Proper, Assistant Attorney General, responds to Shaun Duke's ("Petitioner") Brief filed in the above-styled appeal. Petitioner has failed to demonstrate the existence of reversible error and, therefore, the circuit court's sentencing order should be affirmed.

II. ASSIGNMENTS OF ERROR

Petitioner raises three assignments of error: whether the testimony of an incarcerated informant, which alleged that Petitioner injected drugs into the victim, is admissible as an "uncharged bad act"; whether Petitioner's convictions and consecutive sentences for "delivery and delivery causing death" violate Double Jeopardy; and, whether the evidence was sufficient to "show an agreement/concerted action." Pet'r Br. 1.

III. STATEMENT OF THE CASE

This case arises from a drug sale that resulted in the death of Teddy Nutter. A.R. 840-44. Petitioner allowed Erica Westfall to use a vehicle in his control in exchange for drugs, and allowed her to use said vehicle to deliver methamphetamine and fentanyl to Ann Russell and Teddy Nutter. A.R. 335-36, 607. Nutter died of a combination of intoxication from methamphetamine and fentanyl. A.R. 37, 290, 403. The forensic pathologist who examined Nutter's body could not say for certain but believed the death occurred from Nutter inhaling the drugs. A.R. 415.

Petitioner was indicted on June 16, 2020, on five counts: (1) delivery of a controlled substance (methamphetamine), in concert with Erica Westfall; (2) delivery of a controlled substance (fentanyl),[1] in concert with Erica Westfall; (3) conspiracy to commit a felony in violation

[1] Westfall and Russell reference heroin repeatedly in their testimony and statements as they believed one of the drugs was heroin and one was methamphetamine. It was later discovered that the drugs obtained by Westfall, sold by Westfall and Petitioner to Russell and Nutter, and used by

of West Virginia Code § 60A-4-401; (4) delivery of a controlled substance resulting in death, in concert with Erica Westfall; and, (5) possession of fentanyl, in concert with Erica Westfall. A.R. 776-77. Petitioner moved to dismiss the indictment on August 17, 2020, arguing that counts 1 and 2 violate constitutional double jeopardy principles by charging a single offense, which was drug delivery, in multiple counts. A.R. 840-44. The motion also argued that count 3 was constitutionally insufficient as it failed to identify the controlled substance that the alleged coconspirators delivered (A.R. 847-48) and that counts 1 and 2 are lesser included offenses of count 4 (A.R. 850-51). Finally, Petitioner argued that count 5 violates constitutional double jeopardy provisions as possession of fentanyl is duplicative of counts one and two. A.R. 852-53.

A motions hearing occurred on August 21, 2020. A.R. 46-83. The evening before the hearing, the State disclosed video of the statement of Corey Smith, who was previously incarcerated with Petitioner. A.R. 49. At the hearing, Petitioner argued that his right to be free from double jeopardy was violated because he was charged with two delivery offenses in the same transaction—one involving cocaine and one involving marijuana. A.R. 53-56. Petitioner also requested a lesser included instruction regarding count 4 which was the drug delivery resulting in death charge. A.R. 68. Petitioner argued that the State was "overreaching" and that delivery resulting in death "simply incorporate[d] Counts One and Two, again, into the causing death [charge]." A.R. 69. Petitioner requested dismissal of the first two counts based on the fact that those two crimes were encompassed in the elements of count 4. A.R. 69-70. In the alternative, Petitioner argued for the inclusion of a lesser-included offense instruction. A.R. 69-70.

Westfall, Russell, Nutter, and Petitioner were actually methamphetamine and fentanyl, not heroin. A.R. 7, 600.

In response, the State argued that the Legislature distinguished the three offenses, and made them separate charges "because we have a humongous opioid and drug infestation in the state." A.R. 70. Further, the State noted that the jury could determine from the evidence that either the methamphetamine or the fentanyl killed the victim. A.R. 70. The circuit court denied Petitioner's motion but noted that it would revisit the motion based on what testimony occurred at trial. A.R. 71.

Petitioner also argued that count 5 violated his constitutional right to be free from double jeopardy, as the words "with intent to deliver" made count 5 duplicative of Counts One and Two, and relied on *Hardesty*[2] for the principle that "you cannot fix something at the end of a case." A.R. 71-72. Petitioner reasoned, "[T]his is just a combination of what amounts to one transaction that has turned into five different counts." A.R. 72. By order dated September 9, 2020, the trial court ruled that the motion to dismiss the indictment was denied but that "after hearing testimony at trial the defense could refile said motion." A.R. 887.

Another pretrial hearing was held on August 24, 2020. A.R. 85-109. Corey Smith's testimony was discussed and Petitioner noted that Smith's statement was that Petitioner had threatened to kill a judge, a prosecutor, and someone involved with taking Petitioner's children, and that Petitioner had doubled back on the date in question and injected Nutter with Fentanyl. A.R. 92-93. Petitioner argued that whether he purposely injected Nutter with Fentanyl would be irrelevant in this matter, as it would represent premeditated murder rather than the charges for which he was indicted, and would serve only to inflame the jury. A.R. 93. Petitioner moved to exclude Smith's testimony because the testimony would be unreliable and motivated by the potential reduction in Smith's sentence. A.R. 93-95. The State countered with the argument that

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[2] *State v. Hardesty*, 194 W.Va. 732, 461 S.E.2d 478 (1995).

the testimony was more credible because Smith had never been to Summersville and did not know any of those involved personally, yet he knew what occurred with respect to the crimes in question, including the names of those involved. A.R. 96. The circuit court found that the statements by Smith "relate[d] directly to the charges contained in the indictment" and were inculpatory. A.R. 99. Any issue regarding credibility was found to be a jury determination. A.R. 99.

Following this hearing, the circuit court entered an order finding that the statements of Corey Smith were "directly related to this case" and that the statements were inculpatory. A.R. 890. The motion to reconsider the court's prior rulings regarding the motion to dismiss the indictment were denied. A.R. 890-91.

Petitioner's trial commenced on August 25, 2020. A.R. 111. Sgt. Jarred Bennett of the Nicholas County Sheriff's Department testified that the investigation in this case began when a deceased person (who turned out to be Teddy Nutter) was dumped at the Summersville Regional Medical Center emergency department by Ann Russell. A.R. 279. Nutter had already been deceased for "a few hours" when he was dumped at the hospital. A.R. 303. Russell gave a statement indicating that Erica Westfall and Petitioner came to her home to complete a drug transaction, and cell phone texts between Westfall and Russell confirmed this. A.R. 282, 296-97. Westfall told Sgt. Bennett that Westfall, Russell, and Petitioner drove to a gas station in Drennan, West Virginia, which was confirmed by surveillance video. A.R. 284-85.

Both Russell and Westfall stated that Westfall arrived to complete the drug transaction in the vehicle Petitioner was in possession of at the time. A.R. 335-36. Russell indicated that Westfall and Petitioner came to her trailer around 4:00 a.m. and stayed for approximately 40 minutes. A.R. 353. Russell noted that Westfall was alone when she came into the residence and that a "long-

haired guy[3]" was outside asleep in the vehicle. A.R. 354, 357. The "long-haired guy" came into the trailer approximately 25 minutes after Westfall arrived and after Westfall had gone back out to the vehicle to pick up her scales. A.R. 357. The "long-haired guy" came into the house, sat beside Nutter, and began a conversation with him. A.R. 357-58.

Corey Smith testified at trial that he was housed at Central Regional Jail for approximately one year and was cell mates with Petitioner while he awaited federal sentencing based on him bringing approximately 170,000 pounds of methamphetamine into West Virginia. A.R. 368, 378. Smith testified that Petitioner told him he was with Westfall on the night in question, then went to Russell and Nutter's trailer; Petitioner told Smith that Nutter was "supposedly ratting" on someone Petitioner was friends with. A.R. 371-72. Nutter took some drugs and began to "nod out." A.R. 371. Thereafter, Westfall and Russell left to go to a gas station, at which time Petitioner returned to the house to inject fentanyl into Nutter. A.R. 372. Smith testified that he was "promised nothing" for his testimony but believed it was the right thing to do. A.R. 373-74.

Westfall testified[4] that she sold methamphetamine and heroin to support herself for approximately one year, and during that time she was "in the grips of addiction." A.R. 428-29. Westfall had sold drugs to both Nutter and Russell several times. A.R. 437. She met Petitioner four to five months before this incident and sometimes traveled with him in the white Oldsmobile he drove. A.R. 431, 433.

On September 24, 2019, Russell texted Westfall looking for heroin. A.R. 442. Westfall admitted to using some methamphetamine earlier in the evening with her dealer. A.R. 447.

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[3] The "long-haired guy" was later identified by police as Petitioner. A.R. 361.

[4] Westfall testified as part of her plea agreement whereby she pled guilty to drug delivery causing death and drug delivery, receiving a three- to fifteen-year sentence and a one- to fifteen-year sentence, respectively. A.R. 483.

Petitioner showed up at her house sometime just after midnight on September 24, and Westfall informed him she just received a delivery of methamphetamine and heroin. A.R. 449, 452. Westfall never sold drugs to Petitioner, but had given him drugs in exchange for rides several times. A.R. 452, 487, 506-07. Because Westfall and her roommate were fighting at the time, she and Petitioner left the house almost as soon as he arrived, and drove to a remote area of the county to park and get high. A.R. 453. Both she and Petitioner smoked methamphetamine and Petitioner did heroin as well. A.R. 460-61. She estimated they stayed in the area chatting for approximately three hours. A.R. 460-61. During that conversation, Petitioner and Westfall discussed the pending drug deal with Russell. A.R. 484, 491. Petitioner was "in and out" of sleep while they drove from the holler to Russell's house. A.R. 493.

Thereafter, Petitioner and Westfall went to Russell's trailer. A.R. 463. Westfall went to the door and explained that Petitioner was with her in the vehicle and asked if he could come into the home. A.R. 466. She then returned to the vehicle to tell Petitioner he could come in and to get her scales from her purse. A.R. 466-67. Westfall testified that Petitioner knew they were at the trailer to sell drugs and Petitioner was present when she gave Russell and Nutter the drugs and they gave her money. A.R. 467-68. Nutter, Westfall, and Russell then proceeded to get high. A.R. 470.

Westfall testified that she and Petitioner left the home around 5:00 a.m., and then, around 6:30 a.m., Russell texted Westfall that she was "freaking out." A.R. 471-72. After leaving Russell's home, Westfall and Petitioner parked at a vacant house and got high again. A.R. 474. Russell came by Westfall's home around 8:30 or 9:00 a.m. and was fine by that time, asking if Westfall and Petitioner wished to go to the gas station with her. A.R. 472. Sometime after the trio returned from the gas station, Petitioner left in the vehicle he was driving, while Russell stayed another hour or so. A.R. 478.

Ann Russell testified at trial that she met Teddy Nutter while both were in the drug court program and began dating him. A.R. 528. She admitted they both used drugs while living together, including methamphetamine and heroin. A.R. 529-30. On September 23, after she and Nutter took a drug screen they went home and "smoked a little bit of meth" until Westfall and Petitioner arrived. A.R. 536-37. Russell texted Westfall earlier that day seeking drugs. A.R. 537. Westfall arrived at Russell's home and smoked some heroin with Russell and Nutter before going back out to her car to get scales to complete the drug sale. A.R. 537. At that time, Westfall came back in the home with Petitioner, who had been sitting in the vehicle. A.R. 537. After Petitioner and Westfall left Russell's home, Russell testified that Nutter shot heroin intravenously. A.R. 539. After shooting the heroin, Nutter began to "nod out." A.R. 539. Later, Russell left a note for Nutter, who was sleeping on the couch, indicating that she was going to dismantle and pick up a storage building and she then went to Westfall's home. A.R. 550. When Russell arrived at Westfall's home, she, Westfall, and Petitioner went to a local gas station together and then returned to Westfall's home. A.R. 551-52.

When Russell left Westfall's home, she returned to her trailer and did some work outside on her porch while Nutter laid on the couch inside; Russell thought Nutter was sleeping. A.R. 560-61. Russell then took a nap and when she awoke she tried to wake up Nutter, but he was unresponsive. A.R. 561. Russell stated that there was a needle lying near Nutter. A.R. 562. Russell ran to get her neighbor to assist her in taking Nutter to the hospital. A.R. 561. Russell testified that she ran into the hospital and told them Nutter needed Narcan, but the hospital staff informed her Nutter was dead. A.R. 561. When Russell left the hospital she returned home and flushed all of the remaining drugs and drug paraphernalia. A.R. 565.

After the State rested its case, Petitioner moved for judgment of acquittal, arguing that the State did not prove all of the elements of the five counts charged against him. A.R. 605. Petitioner also renewed his pretrial motions. A.R. 606. In response, the State argued that it met its burden and that, using the *Blockburger* test, the charges were proper, because "if you deliver two substances at the same time, it can be two different charges if the elements are different, and we have that here"; the delivery was of a non-narcotic, methamphetamine, and a narcotic, fentanyl. A.R. 606. Further, the State argued that it proved delivery causing death through Westfall's testimony that Petitioner knew what they were doing when they went to see Russell and that Petitioner's vehicle "was the vessel that took the drugs there." A.R. 607. Petitioner had the chance to leave and did not; rather, he allowed Westfall to use his car to deliver the drugs and Nutter died as a result. A.R. 607. Petitioner argued that the drugs were Westfall's drugs—not his; all Petitioner did was "tag along." A.R. 608-09. Petitioner additionally argued that he was in "no condition to even understand what was going on." A.R.609.

The circuit court denied the motion for judgment of acquittal, finding sufficient proof of each element of each crime. A.R. 609. The court also found that "at the time of the transaction, there were different penalties for the crimes, and one is a narcotic, one is a non-narcotic, and, as we learned through the testimony, [there were] two transactions." A.R. 609. The court pointed out that one individual weighed out two different substances and delivered two substances. A.R. 609. Accordingly, the motion to dismiss counts one and two was again denied. A.R. 609.

Petitioner chose not to testify and the defense rested. A.R. 610-11, 616-17. Following closing arguments, the jury began to deliberate. A.R. 684. The jury first requested to see surveillance video again; then, after just over four hours of deliberation, the jury claimed it was deadlocked. A.R. 685-86. Over Petitioner's objection, an *Allen* charge was read to the jury. A.R.

687-89. Just over one hour later, the jury reached a verdict, finding Petitioner guilty on all five counts. A.R. 690-92.

On September 8, 2020, Petitioner moved for a new trial. A.R. 866-76. Petitioner argued several issues, including that he had to "unfairly defend a charge of murder following the testimony of State's witness Corey Smith[,] Jr." A.R. 866. Petitioner also argued that several of his proposed jury instructions were erroneously rejected, and that the evidence was insufficient to sustain Petitioner's convictions. A.R. 870-73. Petitioner additionally filed a motion in arrest of judgment, arguing that the indictment was insufficient. A.R. 877. Similarly, Petitioner filed a motion for post-verdict judgment of acquittal, arguing that the evidence was insufficient to sustain his convictions. A.R. 879-83.

The State responded to the motion for judgment of acquittal, arguing that the evidence submitted supported the verdict. A.R. 900. Similarly, the State responded to the motion in arrest of judgment by arguing that the court held a hearing prior to trial on the same motion, and that this renewed motion should be denied. A.R. 903. In response to the motion for a new trial, the State argued that Smith's testimony was properly noticed and that the testimony of Smith was not offered as evidence of "other crimes"; thus, Rule 404(b) was not implicated. A.R. 906-07. Further, the State noted that Smith's testimony "directly implicated [Petitioner] in the delivery of Fentanyl causing death, as well as the other counts in the Indictment." A.R. 907. The testimony was offered also "specifically as evidence of the defendant's prior statements about the charges he faced." A.R. 907. The State pointed out that Petitioner fully cross-examined Smith regarding his credibility. A.R. 907. The State further argued that the verdict was supported by the evidence and that Petitioner pointed out no errors in his motion which would show that the evidence was insufficient. A.R. 909.

Next, the State argued that its theory was always that Petitioner acted intentionally and in concert with Westfall in each of the five crimes enumerated in the indictment. A.R. 909. The State pointed out that the trial court instructed that "a defendant who is present at the scene of the crime and by acting with another contributes to the criminal act, is criminally liable," and thus informed the jury that "mere presence alone is not enough" and that "the defendant must act with another and contribute to the act." A.R. 909.

A hearing was held on the motions on October 6, 2020. A.R. 697-731. Petitioner argued that he had to defend against a "murder charge" and that an instruction stating as much should have been given. A.R. 702-03. Petitioner also argued double jeopardy violations and sufficiency of the evidence. A.R. 708-11. The court questioned counsel regarding how Smith's testimony was impermissible, and Petitioner argued that it was irrelevant and that any probative value was outweighed by prejudice. A.R. 711-12. The State argued in opposition to all motions. A.R. 719-24. The circuit court found that Smith's testimony was related to the facts contained in the indictment, and, to determine whether Petitioner "had to defend a murder charge, for the Court to grant a motion for a new trial based on that allegation[, the court] would be required to get inside the minds of the jurors to see how they interpreted the testimony of Corey Smith." A.R. 729.

The court entered a lengthy order denying the motion for new trial on December 14, 2020. A.R. 918-26. With regard to the testimony of Smith, the court found that it was relevant to the charges even though it was prejudicial, and that the jury determined whether the testimony was credible or not. A.R. 921. The court also found that the evidence was sufficient to sustain the convictions and that judges are not to invade the province of the jury to make factual determinations. A.R. 924. Finally, the court found that there was sufficient evidence for the court to instruct the jury on the concerted action theory. A.R. 925. Likewise, the court denied the motion

for post-verdict judgment of acquittal based on the reasoning set forth in the order denying the motion for a new trial. A.R. 930. The motion in arrest of judgment was denied based on the court's reasoning set forth in the record during the August 24, 2020 hearing. A.R. 934.

Petitioner's sentencing hearing occurred on January 26, 2021. A.R. 740-72. Petitioner argued through counsel that he was remorseful that Nutter died but that his participation in the conspiracy was more minor than that of Westfall and Russell. A.R. 748-55. Further, Petitioner argued that his drug addiction stemmed from injuries due to car crashes. A.R. 752. Petitioner then requested an alternative sentence so that he could obtain drug treatment, or, alternatively, for a three-year sentence with the other sentences to run concurrently. A.R. 756. Petitioner made a statement on his own behalf, first apologizing to the Nutter family and blaming Russell for Nutter's death. A.R. 758-59. The State argued that Petitioner was a part of the conspiracy that led to Nutter's death and the verdict reflected the same. A.R. 759-60. Additionally, the State argued that but for Petitioner providing a vehicle, the drug deal that lead to Nutter's death would not have occurred. A.R. 760-61. The victim's family addressed the court as well. A.R. 762-66.

The court found that the evidence at trial showed Petitioner was "heavily involved in this drug culture" that led to the crimes in this matter. A.R. 767. The court then sentenced Petitioner to one to five years of incarceration on Count 1, delivery of a controlled substance; one to fifteen years of incarceration on Count 2, delivery of a controlled substance; ten years of incarceration on Count 3, conspiracy to commit a felony; fifteen years of incarceration on Count 4, drug delivery resulting in death; and, two to ten years of incarceration on Count 5, possession of fentanyl. A.R. 767-68. All sentences were ordered to run consecutively. A.R. 769.

The sentencing order was entered on January 28, 2021. A.R. 938-41. Petitioner appeals from this order.

IV. SUMMARY OF THE ARGUMENT

Petitioner's claims are all without merit. First, the testimony of Corey Smith does not represent an "uncharged act" but rather is inculpatory and intrinsic evidence. There is no fatal variance in this matter because the evidence presented matched up with the charges in the indictment. Further, Petitioner conflates the reliability of Smith's testimony with its relevance. The court below properly weighed the evidence using the correct legal analysis and, accordingly, the evidence was properly admitted.

Petitioner's claim that his right to be free from double jeopardy was violated is likewise without merit, as the Legislature created a separate and distinct crime in West Virginia Code § 60A-4-416 rather than creating an enhancement to West Virginia Code § 60A-4-401. Additionally, the provisions against double jeopardy were not violated because the evidence in this matter could have easily been interpreted by the jury to prove three separate drug transactions.

Lastly, the evidence was sufficient to convict Petitioner of conspiracy under the concerted action principle. The evidence showed that Petitioner was more than a mere bystander in the drug conspiracy and deliveries that resulted in Nutter's death. The evidence unmistakably proves that Petitioner met the requirements of criminal liability under the concerted action principle by being at the crime scene and contributing to the criminal act by allowing his car to be used as a vehicle to transport drugs for drug deals. Accordingly, Petitioner's sentences should be affirmed.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the West Virginia 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. Accordingly, this case is appropriate for resolution by memorandum decision.

VI. ARGUMENT

A. Standards of review

Petitioner's claims all have differing standards of review. "'"In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review." Syl. Pt. 2, *Walker v. West Virginia Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997).' Syl. Pt. 2, *State v. Hinchman*, 214 W. Va. 624, 591 S.E.2d 182 (2003)." Syl. Pt. 1, *State v. Kennedy*, 243 W. Va. 58, 842 S.E.2d 262 (2020).

"Our review of double jeopardy claims is de novo." *Mirandy v. Smith*, 237 W. Va. 363, 366, 787 S.E.2d 634, 637 (2016).

> The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Syl. Pt. 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

B. The Informant's testimony in this matter does not represent "uncharged acts" and was, therefore, properly admitted at trial.

Petitioner argues that Corey Smith's testimony should have been excluded, as it represents uncharged misconduct and constitutes a fatal variance. Pet'r Br. 11. Petitioner further alleges that the trial court "misinterpreted the rules of evidence and applied the wrong conceptual framework for evaluating the evidence's admissibility" by evaluating the testimony under Rules 401 and 403 of the West Virginia Rules of Evidence rather than Rule 404. Pet'r Br. 12. Petitioner's claims are without merit.

1. The testimony of Corey Smith represented inculpatory and intrinsic evidence, not evidence of an "uncharged" act.

The entire premise of Petitioner's argument in his first assignment of error is that Corey Smith's testimony represents an uncharged bad act. Pet'r Br. 11. The court found that the statements by Smith "relate directly to the charges contained in the indictment" and are inculpatory. A.R. 99. Following the trial, the court found that the statements by Smith were relevant to the matters being tried. A.R. 921. The circuit court's rulings should be affirmed.

First, the court determined that the statements were relevant pursuant to Rule 401 of the West Virginia Rules of Evidence. *See* Syl. Pt. 10, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994). "Rule 401 defines relevant evidence in terms of probability. The relevant inquiry is whether a reasonable person, with some experience in the everyday world, would believe that the evidence might be helpful in determining the falsity or truth of any fact of consequence." *Id.* at 178, 451 S.E.2d at 744. "As we have often observed, relevance typically presents a low barrier to admissibility." *United States v. Leftenant*, 341 F.3d 338, 346 (4th Cir. 2003). The evidence contained in Smith's testimony is certainly relevant, as it shows that Petitioner was at the scene of the crime and had a hand in Nutter's death. A.R. 371-72. The evidence also shows elements of the crimes charged, including that Petitioner was with Westfall on the night in question and that he knew drugs were being delivered. *Id.* Hence, the evidence was clearly relevant to the crimes Petitioner was accused of committing.

The next inquiry is whether the Rule 403 balancing test has been met. This Court has stated:

> Although Rules 401 and 402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence.

Syl. Pt. 9, *Derr*, 192 W. Va. 165, 451 S.E.2d 731. "As 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." *Id.* at Syl. Pt. 10. The testimony in this case was not unfairly prejudicial, especially considering Petitioner had the opportunity to cross-examine Smith on the statements made. Further, the probative value of the testimony, testimony that proved elements of the crimes charged, outweighed any prejudice. Rule 403 does not, however, prohibit the introduction of "prejudicial" evidence against a defendant. *See* W. Va. R. Evid. 403; *see also State v. Blevins*, 231 W. Va. 135, 150 n.10, 744 S.E.2d 245, 260 n.10 (2013) ("[I]t is imperative to note that the purpose of Rule 403 is not to exclude all evidence that results in prejudice to a defendant. It is the danger of unfair prejudice to which a reviewing court must be attuned." (emphasis in original)). Indeed, inculpatory evidence introduced against a criminal defendant is, by its nature, prejudicial. Rather, Rule 403 provides that a trial court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice." W. Va. R. Evid. 403 (emphases added); see *State v. LaRock*, 196 W. Va. 294, 312, 470 S.E.2d 613, 631 (1996) ("Unfair prejudice does not mean damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggests decision on an improper basis."). The lower court properly weighed the evidence and deemed it admissible.

Moreover, even if the testimony shows, as Petitioner alleges, "other bad acts," Smith's testimony in this case is intrinsic evidence. Intrinsic evidence is not governed by Rule 404(b). *See State v. McKinley*, 234 W. Va. 143, 155–56, 764 S.E.2d 303, 315–16 (2014); *State v. Harris*, 230 W. Va. 717, 721–23, 742 S.E.2d 133, 137–39 (2013). This Court has noted that "other bad acts evidence is intrinsic when the evidence of the other act and the evidence of the crime charged are

inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged." *McKinley*, 234 W. Va. at 155, 764 S.E.2d at 315 (internal quotation omitted) (quoting *State v. LaRock*, 196 W. Va. 294, 312 n.29, 470 S.E.2d 613, 631 n.29 (1996)). Further, "[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. 3, *State v. Ferguson*, 165 W. Va. 529, 270 S.E.2d 166 (1980), *overruled on other grounds by State v. Kopa*, 173 W. Va. 43, 311 S.E.2d 412 (1983).

The testimony of Smith was necessary, as it represented Petitioner's own statements regarding what occurred that fateful evening. It placed Petitioner inside the home, knowingly participating or at least actively assisting in the drug delivery that caused Nutter's death. Smith's testimony opposed Petitioner's defense that he was merely a passive participant in a drug transaction that caused Teddy Nutter's death.

Petitioner notes that "[b]y calling the evidence intrinsic, the State and court took the position that the jury could convict petitioner of delivery causing death as charged if it believed [Smith's] testimony." Pet'r Br. 14. Petitioner is correct. The evidence was intrinsic, and, as will be discussed further below, the jury could, and did, convict Petitioner based on that evidence.

2. There is no fatal variance in this matter.

Petitioner further argues that the testimony of Corey Smith created a fatal variance, as Smith testified to an "uncharged murder" by Petitioner. Pet'r Br. 14.

> "If an indictment alleges that an offense was done in a particular way, the proof must support such charge or there will be a fatal variance. However, if such averment can be omitted without affecting the charge in the indictment against the accused, such allegation may be considered and rejected as surplusage if not material." Syllabus point 8, *State v. Crowder*, 146 W.Va. 810, 123 S.E.2d 42 (1961).

Syl. Pt. 2, *State v. Scarberry*, 187 W. Va. 251, 418 S.E.2d 361 (1992). Further, "[t]he variance between the indictment and the proof is considered material only where the variance misleads the defendant in making his defense and exposes him to the danger of being put in jeopardy again for the same offense." *Id.* at 255–56, 418 S.E.2d at 365–66 (internal quotation and citation omitted). In this matter, the evidence corresponded directly with the crimes charged. Accordingly, there is no fatal variance.

Petitioner was charged with delivery of a controlled substance causing death pursuant to West Virginia Code § 60A-4-416, and the indictment specified that Petitioner committed the offense by "unlawfully, intentionally, knowingly, willfully, and feloniously delivering unto Teddy J. Nutter controlled substances which was the proximate cause of his death." A.R. 777. Petitioner reads this provision somehow as an unintentional act, ignoring the very language of the indictment stating that the act was intentional. Petitioner misconstrues the entirety of the relevant statute, making repeated claims that Nutter's death had to be unintentional. *See* Pet'r Br. 11, 13, 14. The statute reads as follows:

> Any person who knowingly and willfully delivers a controlled substance or counterfeit controlled substance in violation of the provisions of section four hundred one, article four of this chapter for an illicit purpose and the use, ingestion or consumption of the controlled substance or counterfeit controlled substance alone or in combination with one or more other controlled substances, proximately causes the death of a person using, ingesting or consuming the controlled substance, is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility for a determinate sentence of not less than three nor more than fifteen years.

W. Va. Code § 60A-4-416. Nothing in this statute requires that the delivery or death be unintentional, or even that the consumption of the controlled substance be voluntary. "Delivery" is defined as "the actual, constructive or attempted transfer from one person to another" of a controlled substance. W. Va. Code § 60A-1-101(h). The testimony of Smith is that the drug was

transferred from Petitioner to Nutter through a syringe. A.R. 371-72. The testimony of Westfall and Russell showed a separate, voluntary exchange of drugs, still within the statutory construct and still meeting all the requirements for conviction. A.R. 357-58, 466-67, 537.

Petitioner asserts, without support, that delivery causing death is a property transaction. *See* Pet'r Br. 14-15. As noted in the definition of delivery above, nothing contemplates that it is only a property transaction. Petitioner states that an individual cannot be said to be using, ingesting, or consuming a drug administered without consent, but again, does not support his statement with the statutory language. *See* Pet'r Br. 15. Nothing in the statute states that the ingestion or consumption must be performed voluntarily by the victim.

Petitioner further argues that the evidence showed homicide rather than drug delivery resulting in death. Pet'r Br. 11. This assertion ignores the fact that the prosecuting attorney enjoys discretion in what charges are brought against a particular defendant. Indeed, this Court has advised that "a prosecuting attorney's 'discretion extends to the determination of what type of indictment will be sought in a particular case.'" *State ex rel. Chadwell v. Duncil*, 196 W. Va. 643, 648, 474 S.E.2d 573, 578 (1996) (citations omitted). Further, "the prosecutor in his discretion may decide which of several possible charges he will bring against an accused." *State ex rel. Skinner v. Dostert*, 166 W. Va. 743, 752, 278 S.E.2d 624, 631 (1981) (citations omitted). In this case, the State chose to indict Petitioner on drug delivery resulting in death, even if the facts may have supported a different charge. Selecting a lesser charge than murder does not create a fatal variance.

3. The credibility of Corey Smith's testimony was a jury determination, and the reliability of the testimony was properly determined by the court below.

Petitioner further argues that the court below erred in finding Smith's "incredible" testimony sufficiently reliable to submit the same to the jury. Pet'r Br. 15. Unfortunately, Petitioner

conflates the reliability of the testimony with Smith's credibility, and, thus, this argument must fail. Petitioner rehashes his unsuccessful 404(b) argument, stating that the circuit court had to find that Petitioner in fact committed the "bad act" in order to present it as evidence (Pet'r Br. 16). As noted above, this argument fails because Smith's testimony was not 404(b) evidence.

As for the reliability of the testimony, the lower court properly examined Smith's statements and found them to be credible. A.R.99, 890. Significantly, the State pointed out that Smith's testimony regarding the actors in this case and the area in which the crime occurred was very detailed, and would only be known to Smith if Petitioner had relayed the information to him. A.R. 96.

The remainder of Petitioner's argument on this issue goes not to the reliability of the testimony, but instead to its credibility. It is axiomatic that "[c]redibility determinations are for a jury and not an appellate court." Syl. Pt. 3, in part, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163. Further, this Court has specifically stated that

> [a]n appellate court may not decide the credibility of witnesses or weigh evidence as that is the exclusive function and task of the trier of fact. *State v. Bailey, supra.* It is for the jury to decide which witnesses to believe or disbelieve. Once the jury has spoken, this Court may not review the credibility of the witnesses.

Id. at 670 n.9, 461 S.E.2d at 176 n.9. Indeed, the lower court noted that any issue regarding Smith's credibility was for the jury to determine. A.R. 99. Any issue regarding conflicting testimony was also for the jury to determine and should not be disturbed on appeal. Petitioner notes that the medical examiner found that Nutter smoked the drugs (Pet'r Br. 16), but the medical examiner stated himself he could not conclusively determine how the drugs were ingested (A.R. 415).

Petitioner's attempts to malign the federal court's decision on how to charge and sentence Petitioner are but a red herring and should be ignored by this Court. *See* Pet'r Br. 17. The State has no control over what federal charges are pursued or what federal sentences are given and any

implication that the State or lower court exhibited any kind of control over what the federal government chose to do with Smith's pending charges, or that it suborned perjury in this matter and, in turn, rewarded Smith, is not only erroneous but also repugnant. The State has no idea what basis the federal government used to reduce Smith's charges, and neither does Petitioner. As Smith's testimony in this matter represented intrinsic, inculpatory evidence, the court below did not err in admitting the same and this assignment of error is without merit.

C. The prohibition against double jeopardy was not violated in this case.

Petitioner next argues that the circuit court erred in permitting the jury to convict him of both delivery of a controlled substance and delivery causing death. Pet'r Br. 17. The Double Jeopardy Clause in the Fifth Amendment to the United States Constitution "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution provides these same protections. *State v. Gill*, 187 W. Va. 136, 141, 416 S.E.2d 253, 258 (1992). Petitioner's challenge involves the last of these three protections. *See* Pet'r Br. at 40-42.

Notwithstanding the general rule that an individual may not be punished twice for a single offense, *see, e.g., Ex parte Lange*, 85 U.S. 163, 168 (1873) ("If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence."), double jeopardy does not preclude the imposition of multiple punishments for multiple crimes that arise during a single factual occurrence. "The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the Legislature has

acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial." *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *see also Ohio v. Johnson*, 467 U.S. 493, 499 (1984) ("Because the substantive power to prescribe crimes and determine punishments is vested with the legislature, the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent." (internal citations omitted)). Thus, where multiple sentences are imposed after a singular criminal transaction, "the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." *Brown*, 432 U.S. at 165.

Consistent with the Legislature's power to prescribe penalties for any particular crime, double jeopardy is not offended by the existence of multiple offenses that are specifically intended to criminalize—and thus amplify the punishment for—a specific factual occurrence. *See Garrett v. United States*, 471 U.S. 773, 778 (1985) ("Where the same conduct violates two statutory provisions, the first step in the double jeopardy analysis is to determine whether the Legislature—in this case Congress—intended that each violation be a separate offense."); *Missouri v. Hunter*, 459 U.S. 359, 368–69 (1983) ("Where . . . a legislature specifically authorizes cumulative punishments under two statutes, regardless of whether those two statutes proscribe the 'same' conduct . . . a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment."). Put another way, the *Blockburger*[5]

[5] The test in *Blockburger v. United States*, which this Court adopted in Syl. Pt. 8, *State v. Zaccagnini*, 172 W. Va. 491, 308 S.E.2d 131 (1983), states that "[w]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." 284 U.S. 299, 304 (1932). The *Blockburger* test "applies to determinations of whether [a legislature] intended the same conduct to be punishable under two criminal provisions." *State v. McGilton*, 229 W. Va. 554, 563, 729 S.E.2d 876, 885

test is not controlling where there is a clear indication of legislative intent. Syl. Pt. 5, *Gill*, 187 W. Va. 136, 416 S.E.2d 253.

This Court has correspondingly held that "[a] claim that double jeopardy has been violated based on multiple punishments imposed after a single trial is resolved by determining the legislative intent as to punishment." *Id.* at Syl. Pt. 7. "In ascertaining legislative intent, a court should look initially at the language of the involved statutes and, if necessary, the legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes." *See id.* at Syl. Pt. 8. "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).

The legislature could not have made its intent any clearer: "drug delivery resulting in death" is a separate, distinct felony subject to separate punishment. See W.Va. Code §S 60A-4-401, 416. The legislature plainly intended the crime of "drug delivery resulting in death" to be an additional crime exclusive of a simple drug delivery charge. Double jeopardy is not violated in the instant case.

Importantly,

> [T]he Supreme Court has expressly recognized that where the legislature intended to make the same conduct the subject of two criminal acts and, therefore, separately punishable, this could be done even though under the *Blockburger* test, the crimes would constitute the same offense:
>
> > Where the same conduct violates two statutory provisions, the first step in the double jeopardy analysis is to determine whether the legislature-

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(2012) (alteration in *McGilton*) (internal quotation and citation omitted). "Under *Blockburger* . . . , if two statutes contain identical elements of proof, the presumption is that double jeopardy principles have been violated *unless there is a clear and definite statement of intent by the Legislature that cumulative punishment is permissible*." Syl. Pt. 5, *State v. Sears*, 196 W. Va. 71, 468 S.E.2d 324 (1996) (emphasis added).

> in this case Congress-intended that each violation be a separate offense . . . .
>
> * * * * * *
>
> . . . We have recently indicated that the *Blockburger* rule is not controlling when the legislative intent is clear from the face of the statute or the legislative history.

State v. Rummer, 189 W. Va. 369, 374–75, 432 S.E.2d 39, 44–45 (1993) (internal quotations and citations omitted). In other words, "simply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes." *Gill*, 187 W. Va. at 142, 416 S.E.2d at 259 (internal quotation and citation omitted). Consequently, because the legislative intent to punish drug-related conduct under multiple statutes is abundantly clear from the face of the statute, West Virginia Code § 60A-4-416, punishing Petitioner for violating West Virginia Code § 60A-4-401, as well as causing death while violating that provision, does not violate Double Jeopardy. As Petitioner notes, the Legislature referenced West Virginia Code § 60A-4-401 inside the text of West Virginia Code § 60A-4-416. This clearly shows that had the Legislature wished to combine the two into one statute it was quite aware that it was creating a wholly separate statute, not simply an enhancement of West Virginia Code § 60A-4-401. Further, West Virginia Code § 60A-4-401 was just amended in 2020, lending further credence to the fact that the Legislature never intended to combine simple delivery and delivery causing death, and always intended the two to be separate crimes.

Additionally, in the present case, the State presented evidence of multiple drug deliveries. Testimony showed that Petitioner and Westfall drove to Russell's home and delivered both methamphetamine and fentanyl to Russell and Nutter. A.R. 335-36, 463-67, 537. Further, Corey Smith testified that Petitioner returned to the home and delivered fentanyl intravenously to Nutter.

A.R. 372. The jury could have easily determined that there were three separate delivery crimes in this matter: two deliveries of fentanyl and one delivery of methamphetamine. Accordingly, double jeopardy principles are not implicated as there was evidence of three separate deliveries in this matter, all involving Petitioner and the decedent.

As this Court found in *State v. McGilton*, with regard to malicious assault, a defendant may be charged with multiple counts of malicious assault against the same victim, even if the assaults resulted from the same course of conduct. *See* 229 W. Va. at 560–61, 729 S.E.2d at 882–83. As this Court stated, "[s]uch convictions do not violate the double jeopardy provisions contained in either the United States Constitution or the West Virginia Constitution as long as the facts demonstrate separate and distinct violations of the statute." *Id.* at Syl. Pt. 9.

D. The evidence in this matter was sufficient to sustain a conspiracy charge under the concerted action principle.

Finally, Petitioner argues that there was insufficient evidence to sustain the conspiracy conviction. Pet'r Br. 19. A petitioner who challenges the sufficiency of the evidence underlying his or her conviction faces a heavy burden. Syl. Pt. 3, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163. 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*, 194 W. Va. 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 standard is a strict one; a defendant must meet a heavy burden to gain reversal because a jury verdict will not be overturned lightly." *Id.* at 667–68, 461 S.E.2d at 173–74. 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.

LaRock, 196 W. Va. at 303, 470 S.E.2d at 622. "To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. Pt. 4, *State v. Etchell*, 147 W. Va. 338, 127 S.E.2d 609 (1962) (internal quotation omitted) (quoting Syl. Pt. 1, *State v. Bowles*, 117 W. Va. 217, 185 S.E. 205 (1936)). Petitioner cannot sustain his heavy burden on this assignment of error.

Petitioner correctly notes that "[t]o show a conspiracy, the State must show an agreement—at least tacitly—between Petitioner and the dealer" and that "to show concerted action it must show that Petitioner knowingly and intentionally contributed to the criminal act regardless of a prior agreement." Pet'r Br. 20. Petitioner, however, ignores the testimony showing that he was a knowing participant in the drug exchange that killed Teddy Nutter. The evidence at trial showed

that Petitioner knew Westfall was a drug dealer, as she had given him drugs more than once in exchange for him allowing her to use his vehicle. A.R. 452, 487, 506-07. . Further, Westfall specifically testified that she discussed the pending drug exchange with Petitioner while both got high in Petitioner's car for approximately three hours. A.R. 452, 487, 506-07. Petitioner takes issue with Westfall's statement in this regard, issuing a thinly veiled allegation of perjury (*see* Pet'r Br. 21); nonetheless, Petitioner presents no evidence that Westfall was lying nor does he present contrary evidence that he did not know about the pending drug deal.

Further, Petitioner also glosses over the fact that the State clearly proceeded under the concerted action principle. This Court has stated that "'[u]nder the concerted action principle, a defendant who is present at the scene of a crime and, by acting with another, contributes to the criminal act, is criminally liable for such offense as if he were the sole perpetrator.' Syllabus Point 11, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989)." Syl. Pt. 7, *State v. Foster*, 221 W. Va. 629, 656 S.E.2d 74 (2007). There is no question in this case that Petitioner is guilty under the concerted action principle. The testimony of both Westfall and Russell establish that Petitioner was present at the scene of the crime; in fact, Petitioner voluntarily exited the vehicle into Russell's home even after unquestionably knowing that a drug deal was about to occur. *See* A.R 467-68. Petitioner had every opportunity to leave the scene, as he and Westfall traveled to Russell's home in the car Petitioner possessed, yet he chose not to leave and, instead, went inside the home with Westfall after she returned to the vehicle to get her scales to weigh out the drugs. *Id.* Further, once inside the home, Petitioner's current position of feigning ignorance regarding the entirety of the drug exchange falls apart. Both Russell and Westfall testified that Petitioner was present inside the home while Westfall weighed out the drugs and gave them to Russell and Nutter. A.R. 466-68,

537. Considering this testimony, Petitioner's unsubstantiated statements that he was somehow unaware of any crime occurring are clearly disingenuous.

Petitioner also intimates that he was unconscious throughout the criminal transactions in this case; in spite of these repeated statements in his brief, Petitioner presented no evidence of his continued unconsciousness, and thus inability to participate in the crimes, at trial. Clearly, Petitioner was conscious when he drove to Westfall's home, and clearly he was conscious when he chose to give Westfall permission to drive his vehicle. Westfall testified that she told Petitioner of her intentions to sell drugs that night; it is nonsensical to believe that she made this statement to an unconscious man. *See* A.R. 466. The evidence also shows that Petitioner was conscious when the drug transaction actually took place; both Westfall and Russell testified as much. *See* A.R. 466-68, 537. No evidence was presented at trial to support Petitioner's contentions before this Court that he was incapable of conspiring with Westfall at any point during this criminal enterprise.

Finally, Petitioner aided and abetted in this crime by allowing a known drug dealer to use his car to further a criminal enterprise. But for Petitioner's aid, there is no evidence that this transaction would have occurred because Westfall did not have possession of a vehicle. *See* A.R. 433. For all of these reasons, the evidence was sufficient to support the jury's verdict in this matter, and the sentencing order should be affirmed.

VII. CONCLUSION

For the foregoing reasons, the Respondent respectfully asks this Court to affirm the circuit court's sentencing order.

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0162

STATE OF WEST VIRGINIA,

Respondent,

v.

SHAUN RICHARD DUKE,

Petitioner.

CERTIFICATE OF SERVICE

I, Andrea Nease Proper, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, July 26, 2021, and addressed as follows:

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