IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0249

STATE OF WEST VIRGINIA,

Respondent,

v.

OSCAR ROSS COMBS, SR.,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the February 24, 2021, Order
Circuit Court of Wyoming County
Case No. 15-F-56

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Rules

Statutes

Other Authorities

I. INTRODUCTION

Respondent, State of West Virginia, by counsel, Lara K. Bissett, Assistant Attorney General, responds to Oscar Combs, Sr.'s ("Petitioner") brief filed in the above-styled appeal. Petitioner has failed to demonstrate the existence of reversible error and, therefore, Petitioner's conviction and sentence should be affirmed.

II. ASSIGNMENTS OF ERROR

Petitioner advances seven assignments of error in his brief: (1) the trial court failed to give a proper limiting instruction as to the permissible uses of evidence admitted pursuant to West Virginia Rule of Evidence 404(b), (2) the trial court erred by admitting evidence of Petitioner's prior murder conviction under Rule 404(b), (3) the trial court erred when it denied Petitioner's motion for a mistrial after a passing reference was made to a polygraph exam, (4) the cumulative effect of errors 1 through 3 rendered the trial unfair to Petitioner, (5) the trial court erred by admitting evidence at trial without establishing the chain of custody,[1] (6) the trial court erred by not granting Petitioner's motion to dismiss based on the speedy trial rule, and (7) Petitioner's conviction was not supported by sufficient evidence. *See* Pet'r Br. 1-4.

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[1] The fifth purported error is not addressed anywhere in the body of the brief. Accordingly, Respondent considers this argument abandoned and will not further address it. *See* W. Va. R. App. P. 10(c)(7) ("The Court may disregard errors that are not adequately supported by specific references to the record on appeal."). Indeed, when Petitioner appealed his conviction in 2018, he presented substantially the same brief to this Court that he presents herein. At that time, this Court noted that "Petitioner includes no argument within his brief to support [his fifth assignment of error]. Accordingly, we deem this argument waived. *See* W. Va. R. App. R. 10(c)(7)." *State v. Combs*, No. 18-0445, 2020 WL 2614649, at *1 n.1 (W. Va. Supreme Court, May 22, 2020) (memorandum decision). This Court should deem the argument waived in the instant matter as well.

III. STATEMENT OF THE CASE

A. The disappearance of Teresa Ford.

Teresa Ford ("Ford") was last seen alive on May 13, 2013. App. 559. On that day, she indicated to William Cottle ("Cottle") that she was meeting Petitioner to sell him her van. App. 553-54. Ford called Cottle that night and stated she was spending the night at Petitioner's home. App. 555. The next day, Petitioner communicated to Cottle that Ford had not spent the night with him but rather "left town" in a "red car," despite having packed no clothing and having left her young son in Cottle's care. App. 555-57. Thereafter, Petitioner was observed driving the van Ford had been planning to sell him, claiming to have purchased it at "460 Auto Sales." App. 989-990. Petitioner later sold the van to Autos For Less. App. 1181.

B. The investigation and trial of Petitioner for the murder of James Butler.

In 2013 Petitioner became a suspect in the robbery-homicide of James Butler ("Butler"). Based on information given to law enforcement by Petitioner's son, Oscar Ross Combs, Jr. ("Junior"), a search warrant was executed on Petitioner's home in November 11, 2013. App. 626-29. In the course of executing the search warrant, law enforcement discovered a large blood stain on Petitioner's mattress that had soaked through the mattress and mattress pad and had transferred to the bed skirt. App. 270-271, 631. Forensic testing determined the blood belonged to Ford. App. 533-534.

Petitioner was interviewed by law enforcement later that day and confessed to participating in the murder of Butler. App. 254-255. At Petitioner's trial, Junior testified that he and Petitioner lured Butler to a secluded area with the promise of selling him some cable clamps. App. 1263-64, 1265-67, 1288. Junior further testified that Petitioner urged him to shoot Butler and help Petitioner steal Butler's money. App. 1263-64, 1265-67, 1288.

On February 4, 2015, Petitioner was convicted of first-degree murder, first-degree robbery, and conspiracy for his role in the Butler killing and sentenced to life without the possibility of mercy, plus 80 years.[2] App. 215-216.

C. The investigation of Petitioner for the murder of Teresa Ford.

Several weeks after Ford disappeared, Petitioner offered to take a polygraph test as part of an investigation by local law enforcement. App. 3350 (at 1:08). After a disagreement with someone at the testing center, though, Petitioner left without starting the test. App. 3350. Petitioner was subsequently interviewed by law enforcement for 90 minutes on November 13, 2013, concerning the disappearance of Ford. App. 3350. In that interview, Petitioner indicated that Ford had spent the night with him before selling him her van and that she left town the next day. App. 3350 (at 1:00). Petitioner also referred to the fact that he had offered to take a polygraph shortly after Ford disappeared. App. 3350 (at 1:08).

Law enforcement obtained a warrant to search Petitioner's home in April of 2014 and conducted a broader search of the surrounding property. App. 692-93. During this search, skeletal human remains were discovered and excavated from the property. App. 695. These remains were later identified as belonging to Ford. App. 701. Petitioner was indicted for the murder of Ford on May 4, 2015. App. 1757.

D. The Ford murder trial.

Prior to the underlying trial in this case, the State sought to introduce evidence of Petitioner's involvement in the Butler robbery-homicide under West Virginia Rule of Evidence 404(b). App. 213. At the hearing on that motion, the State argued that Ford's murder was "done

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[2] Petitioner's conviction was affirmed by this Court on appeal. *State v. Combs*, No. 15-0405, 2016 WL 3304115, at *3 (W. Va. Supreme Court, June 8, 2016) (memorandum decision).

for the purposes of robbery," with "intent here the same as [in the Butler case]," and, thus, the methods and purpose surrounding Petitioner's prior convictions were relevant to questions in the Ford case. App. 290. The State also referred to "the same pattern of *modus operandi*" in the Butler and Ford murders. App. 290. Over Petitioner's objection, the trial court admitted the evidence under Rule 404(b), finding "that the matters relating to the Mercer County event and the Wyoming County event are sufficiently similar in nature" to allow the evidence. App. 295-96.

Petitioner's trial occurred between September 18 and 29, 2017. App. 303. Forty-one witnesses testified on behalf of the State. App. 305-07. Three witnesses testified in whole or in part to the facts of Petitioner's prior conviction. First, the Circuit Clerk for Mercer County testified to authenticate the document certifying Petitioner's conviction. App. 922-931. Second, the law enforcement officer who investigated the Butler murder testified to the general facts of the murder and the investigation thereof. App. 1234-1243. Third, Junior gave a brief overview of his involvement in the Butler murder on direct and redirect examination, as well as in response to Petitioner's counsel on cross examination. App. 1263-64, 1265-67, 1288, 1279-280. Junior's testimony, though, predominantly addressed his knowledge of the Ford murder (App. 1246-1262), including the fact that Petitioner confessed to him that he had killed Ford (App. 1258). Petitioner was convicted of first degree murder on September 29, 2017, and sentenced to life without mercy on April 11, 2018. App. 1601, 1744-45.

E. Appeal and remand.

Petitioner appealed his conviction to this Court, alleging "(1) improper admission of Rule 404(b) evidence; (2) improper instruction to the jury on prior bad acts; (3) improper admission of evidence showing Petitioner refused a polygraph examination; (4) the cumulative effect of errors one through three rendered the trial unfair to Petitioner; (5) the chain of custody was broken, and

any evidence relying upon that chain should have been excluded; (6) Petitioner was not given a speedy trial; and (7) Petitioner's conviction was unsupported by the evidence." *Combs*, 2020 WL 2614649, at *1. At that time, the Court found "that the appendix record is incomplete and does not provide this Court with a meaningful opportunity to review the applicability of the three-term rule. Therefore, this matter is reversed and remanded with directions to conduct an immediate hearing to determine whether the three-term rule bars prosecution of this matter." *Id.*

The circuit court conducted a hearing regarding the three-term rule on December 14, 2020. App. 3351-3364. It entered its order on February 24, 2021, ruling that "[P]etitioner is entitled to no relief pursuant to the three term rule." App. 3365. Petitioner now appeals.

IV. STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary, and this case is suitable for disposition by memorandum decision because the record is fully developed and the arguments of both parties are adequately presented in the briefs. W. Va. R. App. P. 18(a)(3) and (4).

V. SUMMARY OF THE ARGUMENT

First and foremost, Petitioner's brief and appendix utterly fail to comply with the West Virginia Rules of Appellate Procedure and should be disregarded by this Court. Second, this Court's Scheduling Order of March 31, 2021, recognizes that this is an appeal of the February 24, 2021, order of the Circuit Court of Wyoming County, in which the only issue addressed was the three-term rule. Therefore, the other issues addressed in Petitioner's brief should be disregarded because they are not properly before this Court. Should the Court decide that it will consider the other issues, however, Petitioner's assignments of error do not support reversing the judgment below.

Petitioner's first and second assignments of error misapprehend the permissible uses of evidence under West Virginia Rule of Evidence 404(b) and further ignore the fact that non-specific 404(b) instructions are considered harmless error where a permitted purpose for admitting the evidence is manifestly apparent from the record. Petitioner's second assignment of error also fails to appreciate the permissible uses of evidence admitted under Rule 404(b) and further fails to show any of the evidence introduced in this case was "unduly prejudicial" to Petitioner.

Petitioner's third assignment of error incorrectly assumes that a mistrial must be granted automatically whenever any reference to a polygraph examination is made in a trial. Petitioner's fourth assignment of error fails because "cumulative error" cannot be asserted without first demonstrating multiple errors, which Petitioner has failed to do. Petitioner abandoned his fifth assignment of error and it is, therefore, waived. Petitioner's sixth assignment of error fails because all but one of the continuances granted in his trial were either agreed upon or Petitioner did not object and those terms of court were, therefore, excused under the three-term rule. Moreover, Petitioner's contemporaneous incarceration flowing from his prior convictions meant that any unwarranted delay to the start of the trial in this case did not materially increase the amount of time Petitioner spent in the "pretrial" custody of the State. Finally, Petitioner's seventh assignment of error fails because Petitioner cannot show that "the record contains no evidence" from which the jury could conclude Petitioner premeditated Ford's murder.

VI. ARGUMENT

A. Standard of review.

Regarding Petitioner's first and second arguments,

> [t]he standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the

> evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403. *See State v. Dillon,* 191 W. Va. 648, 661, 447 S.E.2d 583, 596 (1994); *TXO Production Corp. v. Alliance Resources Corp.,* 187 W. Va. 457, 419 S.E.2d 870 (1992), *aff'd,* 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993); *State v. Dolin,* 176 W. Va. 688, 347 S.E.2d 208 (1986).

State v. LaRock, 196 W. Va. 294, 310–11, 470 S.E.2d 613, 629–30 (1996). "'The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.' Syllabus Point 10, *State v. Huffman*, 141 W. Va. 55, 57, 87 S.E.2d 541, 544 (1955), *overruled on other grounds by State ex rel. R.L. v. Bedell*, 192 W .Va. 435, 452 S.E.2d 893 (1994)." Syl. Pt. 2, *State v. Harris*, 230 W. Va. 717, 742 S.E.2d 133 (2013).

With regard to Petitioner's third argument—the denial of his motion for mistrial—this Court has stated that "[t]he decision to grant or deny a motion for mistrial is reviewed under an abuse of discretion standard." *State v. Lowery*, 222 W. Va. 284, 288, 664 S.E.2d 169, 173 (2008).

Regarding Petitioner's allegation of cumulative error in his fourth assignment of error, "[o]n an appeal to this Court the appellant bears the burden of showing that there was error in the proceedings below resulting in the judgment of which he complains, all presumptions being in favor of the correctness of the proceedings and judgment in and of the trial court." Syl. Pt. 2, *Perdue v. Coiner*, 156 W. Va. 467, 194 S.E.2d 657 (1973).

Petitioner's sixth argument, grounded in the three-term rule, is reviewed thus:

> "This Court's standard of review concerning a motion to dismiss an indictment is, generally, *de novo*. However, in addition to the *de novo* standard, where the circuit court conducts an evidentiary hearing upon the motion, this Court's 'clearly erroneous' standard of review is invoked concerning the circuit court's findings of fact." Syl. Pt. 1, *State v. Grimes*, 226 W. Va. 411, 701 S.E.2d 449 (2009).

Syl. Pt. 1, *State v. Holden*, 243 W. Va. 275, 843 S.E.2d 527 (2020).

Finally, as to Petitioner's seventh argument:

> 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. Petitioner's brief fails to comply with the West Virginia Rules of Appellate Procedure; thus, it should be disregarded by this Court.

This Court has made clear on a number of occasions that the West Virginia Rules of Appellate Procedure must be followed. *See, e.g.*, Administrative Order, *Filings that do not comply with the rules of appellate procedure* (Dec. 10, 2012). In fact, the Rules of Appellate Procedure "are not mere procedural niceties; they set forth a structured method to permit litigants and this Court to carefully review each case." *Id.* Neither Petitioner's brief nor his appendix record comply with the Rules of Appellate Procedure. Therefore, his arguments should be wholly disregarded by this Court.

1. The appendix does not comply with Rule 7.

Rule 7(c) of the Rules of Appellate Procedure requires that the appendix accompanying a brief

> must contain the following sections, as described and in the order indicated. (1) The upper portion of the cover page of an appendix must contain the caption of the case, (noting in parentheses the case number of the lower court or agency), and the title and volume number of the appendix, if applicable . . . The lower portion of the cover page must contain the name, address, telephone number, e-mail address, and West Virginia Bar Identification Number of counsel, if the petitioner is represented by counsel. (2) Immediately following the cover page, an appendix must contain a certification page signed by counsel or unrepresented party certifying that: (a) the contents of the appendix are true and accurate copies of items contained in the record of the lower tribunal; and (b) the petitioner has conferred in good faith with all parties to the appeal in order to determine the contents of the appendix. (3) Immediately following the certification page, an appendix must contain a table of

> contents that lists and briefly describes each item included in the appendix by reference to its page number and volume number, if applicable.

Petitioner's appendix does not contain a cover page, a certification page, or a table of contents. Moreover, the 3,384 pages of the appendix are not separated into volumes as required by Rule 7(a) of the Rules of Appellate Procedure. All of these deficiencies make the appendix unnecessarily difficult to navigate. Certainly, "Judges are not like pigs, hunting for truffles buried in briefs." *State v. Gilbert*, No. 20-0174, 2021 WL 653224, at *3 (W. Va. Supreme Court, Feb. 19, 2021) (memorandum decision) (quoting *State, Dep't of Health v. Robert Morris N.*, 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995) (quoting, in turn, *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)).

2. The brief does not comply with Rule 10.

Rule 10(c)(7) of the Rules of Appellate Procedure requires that

> [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, under headings that correspond with the assignments of error. The argument must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. *The Court may disregard errors that are not adequately supported by specific references to the record on appeal.*

(emphasis added). This Court has held true to that exacting standard, consistently refusing to address inadequately supported claims. *See, e.g., Porter v. Logan Co. Fire Dept.*, 15-0520, 2016 WL 1735243, at *2 n.2 (W. Va. Supreme Court, Apr. 29, 2016) (memorandum decision) (disregarding a portion of the petitioner's argument because he failed to cite to the 1,400-page record); *State v. Trail*, 236 W. Va. 167, 186, 778 S.E.2d 616, 635 (2015) ("This Court previously has found issues asserted on appeal to have been waived as a result of a petitioner's failure to comply with Rule 10(c)(7)."); *State v. Wileman*, 14-0264, 2014 WL 6607732, at *3 (W. Va. Supreme Court, Nov. 21, 2014) (memorandum decision) (finding that the Court was unable to

consider the petitioner's argument because he failed to cite to the record); *Jones ex rel. Estate of Jones v. Underwriters at Lloyd's, London*, No. 12-0293, 2013 WL 3185081, at *2 (W. Va. Supreme Court, June 24, 2013) (memorandum decision) ("[W]e require that arguments before this Court be supported by 'appropriate and specific citations to the record on appeal[.]'" (quoting, in part, W. Va. R. App. P. 10(c)(7))); *see also* W. Va. R. App. P. 10(c)(7), Clerk's Cmt. ("Briefs must carefully cite to the record[.]"). Most recently, this Court flatly "decline[d] to address the merits of [a] petitioner's assignments of error" when he failed to cite to the record in his appeal. *State v. Crawford*, No. 20-0170, 2021 WL 3030695, at *4 (W. Va. Supreme Court, July 19, 2021) (memorandum decision).

Despite these requirements, Petitioner's brief contains only a few random citations—22 citations in 39 pages of argument—to the underlying record, which exceeds 3,300 pages. By and large, though, it is devoid of citations to the record, making wild allegations without directing Respondent or the Court to the relevant passages in transcripts or orders which would support his arguments. Some of the citations to the record Petitioner *does* reference are totally inaccurate. For instance, on page 10 of Petitioner's brief, while discussing an alleged violation of the three-term rule, he refers the reader to "App. Vol. II, at 31-34." First of all, as mentioned previously, the appendix is not broken into volumes. Second of all, pages 31 through 34 of the appendix are wholly unrelated to the point Petitioner is making.

Likewise, while Petitioner periodically cites to passages from various legal authorities, he fails to make any meaningful analysis of how those authorities apply to the facts of his case and support his arguments. Petitioner makes only blanket statements of the law. Furthermore, Petitioner fails to set forth the standards of review applicable to each of his arguments.

Such whole cloth departure from the Rules of Appellate Procedure should not be tolerated by this Court because it violates the basic tenets of appellate practice and runs contrary to the very purpose of appellate review. *See generally State v. Sites*, 241 W. Va. 430, 449, 825 S.E.2d 758, 777 (2019) ("We decline to address this inadequately briefed issue on the merits."), *cert. denied sub nom. Sites v. West Virginia*, No. 19-6068, 2019 WL 6257479 (U.S. Nov. 25, 2019); *State v. Benny W.*, No. 18-0349, 2019 WL 5301942, at *13 n.23 (W. Va. Supreme Court, Oct. 18, 2019) (memorandum decision) (recognizing the same); *State v. Back*, 241 W. Va. 209, 213 n.4, 820 S.E.2d 916, 920 n.4 (2018); *State v. Henry W. J.*, No. 16-0088, 2017 WL 383778, at *5 (W. Va. Supreme Court, Jan. 27, 2017) (memorandum decision) (finding no error in a claim on appeal where the petitioner failed to cite to the appendix record or authority to support his claim); *State v. Larry A.H.*, 230 W. Va. 709, 716, 742 S.E.2d 125, 132 (2013) (stating that a petitioner "must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment."); *LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 ("Although we liberally construe briefs in determining issues presented for review, issues . . . mentioned only in passing but are not supported with pertinent authority, are not considered on appeal.").

This Court has made equally clear that "'[a]n appellant must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment.' Syl. Pt. 5, *Morgan v. Price,* 151 W. Va. 158, 150 S.E.2d 897 (1966)." Syl. Pt. 12, *State v. Hargus*, 232 W. Va. 735, 753 S.E.2d 893 (2013). "Ordinarily, the failure [to produce a record that discloses affirmatively the alleged

reversible errors] requires an affirmance of the judgment of the lower court, since error will not be presumed in the absence of an affirmative showing. *See Ward v. County Court,* 141 W. Va. 730, 93 S.E.2d 44 (1956); *Scott v. Newell,* 69 W. Va. 118, 70 S.E. 1092 (1911); *Dudley v. Barrett,* 58 W. Va. 235, 52 S.E. 100 (1905); *McGraw v. Roller,* 47 W. Va. 650, 35 S.E. 822 (1900); *Zumbro v. Stump,* 38 W. Va. 325, 18 S.E. 443 (1893)." *WV Dep't of Health & Hum. Res. Emps. Fed. Credit Union v. Tennant*, 215 W. Va. 387, 394, 599 S.E.2d 810, 817 (2004).

Accordingly, this Court should disregard Petitioner's arguments for failure to comport with the Rules of Appellate Procedure and for failure to meet his burden of showing error. Should the Court determine that it will address the merits of the appeal, though, they are addressed below.

C. The only issue properly before the Court in this appeal is the issue regarding the alleged violation of the three-term rule. Therefore, the remaining errors assigned by Petitioner should be disregarded by this Court.

Petitioner's Notice of Appeal states that he is appealing the February 24, 2021, order of the Circuit Court of Wyoming County. Notice of Appeal 1-2. Likewise, the Scheduling Order recognizes that this is an appeal of the February 24, 2021, order of the Circuit Court of Wyoming County. Scheduling Order, March 31, 2021. The February 24, 2021, order is entitled "Order per Hearing Requested by the West Virginia Supreme Court of Appeals Pursuant to the Three Term Rule" and addresses the circuit court's findings of fact and conclusions of law following a December 14, 2020, hearing. App. 3365. The circuit court's reference to the "[h]earing [r]equested by the West Virginia Supreme Court" denotes this Court's holding in *State v. Combs*, in which the Court directed, "[W]e reverse and remand for the circuit court to conduct an immediate hearing to determine applicability of the three-term rule and the reasons for the continued delays in commencing trial." 2020 WL 2614649, at *3. The only issue before the circuit court in the December 2020 hearing and addressed in the February 2021 order is the applicability

of the three-term rule to Petitioner's underlying conviction. Accordingly, the only issue properly before the Court in this appeal is whether the circuit court erred in finding that Petitioner was not denied his right to a speedy trial pursuant to the three-term rule. The remaining assignments of error in Petitioner's brief should be disregarded by the Court. Nonetheless, should the Court determine that it will entertain all six assignments of error[3] argued in Petitioner's brief, they are discussed in turn below.

D. The use of Petitioner's prior convictions complied with West Virginia Rule of Evidence 404(b).

Petitioner's first and second assignments of error raise overlapping issues concerning the use of Petitioner's previous murder and robbery convictions. Pet'r Br. 12-25. Petitioner raises four arguments across those assignments of error: (1) evidence of Petitioner's prior convictions was not introduced for a proper purpose (Pet'r Br. 17-20, 24), (2) the evidence of Petitioner's prior convictions was unfairly prejudicial (Pet'r Br. 20-24), (3) the trial court erred in instructing the jury that Petitioner's prior bad acts could be considered proof of "premeditation" (Pet'r Br. 12-13, 25), and (4) the trial court erred in not identifying a sufficiently specific purpose for which Petitioner's prior bad acts could be considered (Pet'r Br. 13-14, 25). Because each of these claims is related to 404(b) evidence, Respondent will address them together herein. As discussed in more detail below, the evidence introduced satisfied the standards articulated by Rule 404 and this Court's associated jurisprudence; thus, Petitioner's arguments are without merit.

Generally speaking, under West Virginia Rule of Evidence 404(b), "[e]vidence 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" but is admissible for other

[3] As discussed in footnote 1 above, Petitioner alleges seven assignments of error but failed to brief the fifth issue. Therefore, it is waived.

purposes, including "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." W. Va. R. Evid. 404(b)(1)-(2). A prior bad act must be "relevant" to one of these issues to be admitted, meaning it must "relate to a matter which is in issue and must deal with conduct substantially similar and reasonably near in time to the offense for which the defendant is being tried." *LaRock*, 196 W. Va. at 311 n.26, 470 S.E.2d at 630 n.26. A trial court that admits evidence of prior bad acts under Rule 404(b) must also conclude that the "probative value of the evidence is not substantially outweighed by its potential for unfair prejudice." *Id.* at Syl. Pt. 3 (citing W. Va. R. Evid. 403). If these safeguards are satisfied, and the trial court instructs the jury that they may only consider evidence of prior bad acts for the limited purposes specified, then "[i]t is presumed a defendant is protected from undue prejudice." *Id.*

1. Petitioner's prior convictions were relevant for demonstrating motive, intent, and premeditation.

Petitioner argues that his prior convictions were not admitted for any proper purpose under Rule 404(b). Pet'r Br. 17-20. His argument centers on his contention that the Butler robbery-homicide did not share an identifying *modus operandi* with the facts presented in the instant case. Pet'r Br. 17-20. Petitioner's argument ignores the other permissible uses of collateral crime evidence, including demonstrating plan, motive, intent, and premeditation. Petitioner's conviction in the Butler murder was relevant to these issues as well. Therefore, the Butler conviction spoke to a permissible use under Rule 404(b).

A "plan" relates to an element at issue for purposes of 404(b) where the plan suggests a motive for the underlying offense. *State v. McFarland*, 228 W. Va. 492, 502–03, 721 S.E.2d 62, 72–73 (2011). A "common scheme or plan" exists where the defendant has an underlying goal that is advanced, but not directly accomplished, by committing the charged offense. *Id.* For example, past convictions for sexual assault do not demonstrate a "plan" to commit sexual assault,

although a distinctive method of committing the offense could be relevant to demonstrating *modus oprendi*. *Id.* However, prior instances of "kidnapping or murder" constitute a common plan if connected by an "underlying motive [ ] to obtain some sexual favor." *Id.* (quoting *Dolin*, 176 W. Va. at 697, 347 S.E.2dat 217).

Here, evidence of Petitioner's conviction for the robbery and murder of Butler was directly relevant to establishing the motive for, intent to commit, and premeditation of, the murder of Ford. As the State noted in the pre-trial *McGinnis* hearing and again at trial, the State's theory of the case was that Ford's murder was "done for the purposes of robbery," with "intent here the same as [in the Butler case]." App. 290. *See also* App. 1220 (arguing both crimes were committed for a "similar motive."). As described in *McFarland*, the Butler case demonstrated that Petitioner has a goal that he advances by committing murder: profit, either by obtaining Ford's van for free or taking Butler's money. App. 1236, 1241. Moreover, both cases present similar, if not distinctive, methodologies. In both cases, Petitioner met an acquaintance in an isolated area under the guise of conducting a secondhand transaction, then proceeded to murder and rob them. App 1221, 1241, 1288. As to similarity in time, Butler was murdered in 2011 and Ford disappeared in 2013. App. 557-58, 1263-64. Indeed, the offenses occurred so close in time that the law enforcement investigations overlapped, such that Ford's blood was discovered in Petitioner's bedroom during the course of the Butler investigation. App. 268-69.

2. Petitioner's prior convictions were probative and not unduly prejudicial.

Petitioner argues that introducing evidence of his conviction for the robbery-homicide of Butler unfairly prejudiced the jury against him. Pet'r Br. 21-24. It is axiomatic that irrelevant evidence is inadmissible at trial. *See* W. Va. R. Evid. 402. Relevant evidence—evidence that "has any tendency to make a fact [of consequence] more or less probable"—is generally admissible at trial subject to the balancing test embedded in West Virginia Rule of Evidence 403. *Compare*

W. Va. R. Evid. 401(a), (b) *with* W. Va. R. Evid. 403. *Cf.* Syl. Pt. 9, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994) (noting that the rules of evidence "strongly encourage the admission of as much evidence as possible," subject to the Rule 403's balancing test). This balancing test compels the admission of relevant evidence so long as its probative value is not substantially outweighed by a danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or [is] cumulative[.]" W. Va. R. Evid. 403. The trial court "enjoys broad discretion" in conducting this balancing test; it is "essentially a matter of trial conduct, and [its] discretion will not be overturned absent a showing of clear abuse." Syl. Pt. 8, *State v. Rollins*, 233 W. Va. 715, 760 S.E.2d 529 (2014) (quoting Syl. Pt. 10, in part, *Derr*, 192 W. Va. 165, 451 S.E.2d 731).

Moreover, "[t]he balancing of probative value against unfair prejudice is weighed in favor of admissibility and rulings thereon are reviewed only for an abuse of discretion." *LaRock*, 196 W. Va. at 312, 470 S.E.2d at 631 (citations omitted). *See also State v. Winebarger*, 217 W. Va. 117, 123, 617 S.E.2d 467, 473 (2005) ("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." (citations omitted)). To that end, this Court has deferred to a trial court's determination where the prior criminal act "involves the same type of conduct and occurred during the same time frame and in the same location and circumstances as the offense charged." *LaRock*, at 312, 470 S.E.2d at 631. The trial court noted such similarity here. App. 295. That determination was not an abuse of discretion and should not be reversed.

3. The trial court did not err in instructing the jury that 404(b) evidence could show premeditation.

Petitioner argues that the court was "clearly wrong" to instruct the jury that prior bad acts can be used to show premeditation. Pet'r Br. 13. "The legal propriety or correctness of a jury

instruction is a question of law that we review de novo." *LaRock*, 196 W. Va. at 308, 470 S.E.2d at 627.

This argument is itself "clearly wrong." The circuit court instructed the jury thus:

> During this case, you have heard evidence that the defendant was convicted of other crimes which were not charged here. You may consider this evidence only for the limited purpose and for its bearing, if any, on the question of the defendant's intent, motive, or plan, and for no other purpose. You may not consider this evidence of his guilt of any crime for which the defendant is now on trial.
>
> You have heard evidence that the defendant was previously convicted of crimes in Mercer County. You may not consider a prior conviction as evidence of guilt of any crime for which the defendant is now on trial.

App. 1527. Rule 404(b) expressly allows the use of prior criminal acts to demonstrate a plan and intent. W. Va. R. Evid. 404(b)(2). *See also* Premeditated, Black's Law Dictionary 1371 (10th ed. 2014) ("Done with willful deliberation and planning."). Similarly, this Court has directly equated proof of "intent" with "premeditation." *LaRock*, 196 W. Va. at 311, 470 S.E.2d at 630 (evidence of a defendant's prior bad acts may "demonstrate the defendant's intent (premeditation) and malice."). Indeed, in *LaRock* the defendant's prior acts of violence towards his children were introduced under Rule 404(b) specifically to satisfy the premeditation element of a first degree murder charge, the same purpose Petitioner claims is forbidden. *Id. See also* Pet'r Br. 12. Thus, Petitioner's argument is flatly contradicted by *LaRock*.

4. The trial court described the permissible uses of 404(b) evidence with sufficient specificity.

Petitioner's final argument regarding Rule 404(b) fails to justify reversal of the judgment below for two reasons: (1) the instructions in this case were sufficiently specific, and (2) even if they were not specific, it is clear from the record for what purpose the convictions were introduced, rendering any flaw in the instructions harmless error.

In criminal trials, "[i]t is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b)," as "[t]he specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction." Syl. Pt. 1, *McGinnis*, 193 W. Va. 147, 455 S.E.2d 516. However, evidence of prior bad acts may be introduced under Rule 404(b) for more than one permitted use. *See, e.g., State v. McIntosh*, 207 W. Va. 561, 574, 534 S.E.2d 757, 770 (2000) (affirming use of 404(b) evidence to show "intent, motive, malice, common scheme, plan, *and* the absence of accident." (emphasis added)). *See also State v. Spinks*, 239 W. Va. 588, 608, 803 S.E.2d 558, 578 (2017) (affirming use of 404(b) evidence to show "motive *and* intent" (emphasis added)); *Winebarger*, 217 W. Va. at 124, 617 S.E.2d at 474 (affirming use of 404(b) evidence "for the purpose of showing absence of mistake or accident *and, also*, to show intent." (emphasis added)); *State v. Edward Charles L.*, 183 W. Va. 641, 649, 398 S.E.2d 123, 131 (1990) (affirming use of 404(b) evidence that "*not only* showed lascivious intent . . . to commit the crimes charged, *but also* that the acts did not occur accidentally." (emphasis added)).

Here, the trial court's instructions did not merely regurgitate "the litany of possible uses listed in Rule 404(b)." Syl. Pt. 1, *McGinnis* 193 W. Va. at 147, 455 S.E.2d 516. Of the nine uses expressly set forth in Rule 404(b), the instructions given to the jury referred to only three: intent, motive, and plan. App. 1527. The instruction given before a witness testified pursuant to Rule 404(b) was similarly limited, but included a reference to "malice and premeditation." App. 1224. However, as noted in *LaRock*, "premeditation" is included within the concept of "intent," making the addition of "premeditation" merely repetitive rather than suggestive of an irrelevant use. *LaRock*, 196 W. Va. at 311, 470 S.E.2d at 630. Thus the jury was presented with four potential uses of 404(b) evidence, and this Court's jurisprudence demonstrates that no error has occurred

when the State identifies that number of purposes. *See McIntosh*, 207 W. Va. at 574, 534 S.E.2d at 770 (affirming use of 404(b) evidence for five distinct purposes).

Moreover, even where a trial court "fails to articulate precisely" the purpose for admitting 404(b) evidence, such failure is "harmless error" where "the purpose for admitting the evidence is apparent from the record and its admission is proper." *LaRock*, 196 W. Va. at 312, 470 S.E.2d at 631. This argument fails, as the prior criminal act addressed in Petitioner's trial presented another example of the same intent, motive, and plan as was at issue in this case: Petitioner would set up a meeting with an acquaintance, purportedly to conduct a secondhand sales transaction, then murder said acquaintance in order to take the benefit of the bargain for himself. *See* Section C. 1., *supra*. The testimony of Trooper Reed conveys the mechanics of this plan in what amounts to only nine pages of trial testimony. App. 1234-243. Thus, it is apparent from the record that Petitioner had a common scheme or plan that was demonstrated through the facts underlying his prior convictions.

E. The circuit court did not abuse its discretion in declining to declare a mistrial when Petitioner's recorded statement to police yielded a passing reference to him walking out on a polygraph examination.

Petitioner's third assignment of error argues that a single sentence regarding a polygraph exam in a 90-minute recorded statement by Petitioner—which sentence was not further referenced by the State in testimony or any statement to the jury—required a mistrial. Pet'r Br. 25-30. "This Court has indicated that a grant of a mistrial is within the sound discretion of the trial judge, and that a mistrial should be granted only where there is a manifest necessity for discharging the jury prior to the time it has rendered its verdict." *State v. Lewis*, 207 W. Va. 544, 548, 534 S.E.2d 740, 744 (2000) (citing *State v. Williams,* 172 W. Va. 295, 305 S.E.2d 251 (1983)); *see also Harrison v. Ballard*, No. 16-0165, 2017 WL 5514376, at *6 (W. Va. Supreme Court, Nov. 17, 2017)

(memorandum decision) (finding that motions for mistrial are within the discretion of the trial court, and reversal is warranted only where such statements "clearly prejudice the accused or result in manifest injustice." (quoting Syl. Pt. 5, *State v. Sugg*, 193 W. Va. 388, 456 S.E.2d 469 (1995))). Petitioner has failed to demonstrate any such manifest necessity here; so, his argument is without merit.

"Reference to an offer or refusal by a defendant to take a polygraph test is inadmissible in criminal trials to the same extent that polygraph results are inadmissible." Syl. Pt. 2, *State v. Chambers*, 194 W. Va. 1, 459 S.E.2d 112 (1995). Nonetheless,

> a mistrial should not be automatically granted in any case where mention of a polygraph test is made. *State v. Porter,* 182 W. Va. 776, 392 S.E.2d 216 (1990) and *State v. Acord,* 175 W. Va. 611, 336 S.E.2d 741 (1985). Specifically, in note 4 of *State v. Acord, id.,* we stated: "[O]ur analysis of whether the mention of a polygraph test is grounds for a mistrial is the same as the analysis for any other error."

State v. Lewis, 207 W. Va. 544, 548, 534 S.E.2d 740, 744 (2000); *see also State v. George J.*, No. 13-0132, 2013 WL 5967012, at *3 (W. Va. Supreme Court, Nov. 8, 2013) (memorandum decision) ("[A] mistrial should not be automatically granted when mention of a polygraph is made." (citing *State v. Lewis*, 207 W. Va. 544, 548, 534 S.E.2d 740, 744 (2000))).

Additionally, this Court has held that, "[a]lthough polygraph-related evidence has been deemed inadmissible in this State, the improper admission of such evidence does not automatically warrant a new trial. Rather, improperly admitted evidence involving a polygraph examination is subject to a harmless error analysis." Syl. Pt. 6, *State v. Tyler G.*, 236 W. Va. 152, 778 S.E.2d 601 (2015). This Court has explained that an error is deemed harmless when it is highly likely that the error did not impact the outcome of the proceeding. *See Guthrie*, 194 W. Va. 657, 684, 461 S.E.2d 163, 190 ("[N]onconstitutional error is harmless when it is highly probable the error did not contribute to the judgment."); Syl. Pt. 13, in part, *State v. Bradshaw*, 193 W. Va. 519, 457 S.E.2d

456 (1995) ("The harmless error inquiry involves an assessment of the likelihood that the error affected the outcome of the trial."); *State v. Blake*, 197 W. Va. 700, 705, 478 S.E.2d 550, 555 (1996) (it is only "[w]hen the harmlessness of the error is in grave doubt, [that] relief must be granted.").

Here, the 90-minute interview recording played at trial contained an exceedingly brief statement by Petitioner that he "went . . . to do a polygraph test, and that guy down there got hateful with me and I walked out the door." Pet'r Br. 27. *See also* App. 3350 (at 1:08). This singular statement, made in passing in Petitioner's statement to police—which was played in the midst of a nine-day trial—almost certainly had no impact on the jury's verdict. As the trial court pointed out, "all it says is that he was willing to take it without fear apparently and somebody caused him not to." App. 674. The court went on to remark that the statement "could be construed in his favor," noting that "[t]he refusal to take a polygraph is one thing. In agreeing to take it but not taking it, because of some difficulty with the examiner, is an entirely different situation . . . ." App. 675.

To the extent Petitioner's argument implicates prosecutorial misconduct, this Court has held that where remarks by the State draw attention to a defendant's refusal to take a polygraph, a "judgment of conviction will not be set aside" unless "the remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Harrison*, 2017 WL 5514376, at *6 (quoting *Sugg* at Syl. Pt. 5; *id.* at 405, 456 S.E.2d. at 486). This Court considers four factors when considering the impact of such statements:

> (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Id. at *7 (quotations omitted). Here, the prosecutor did not remark on the polygraph at all. Rather, he inadvertently played an unredacted recording of Petitioner's statement which contained Petitioner's own remark that he walked out on his polygraph because he took umbrage to the examiner. Therefore, the prosecutor did not mislead the jury at all, let alone prejudice Petitioner by doing so.

Moreover, this Court has focused on the second factor and affirmed the denial of mistrials where the remarks in question are particularly isolated. For example, in *Harrison* the State introduced a recording of the petitioner agreeing to participate in a polygraph exam which he "never ultimately participated in." *Id.* at *6. The State also made a reference to polygraphs in a "few improper statements" during closing statements. *Id.* This Court compared the small number of remarks against the volume of the 58-page closing statement and held the remarks were "unquestionably isolated," which "this Court usually deems . . . to be harmless." *Id.* This Court rejected a similar challenge where a recording played at trial contained only "a vague offer to take [a polygraph] made by petitioner." *George J.*, 2013 WL 5967012, at *3. In light of the isolated and non-prejudicial nature of Petitioner's single comment, the trial court was well within its discretion to deny the motion.

Certainly, even without the remark about the polygraph, the evidence presented at trial was more than enough to establish Petitioner's guilt. Indeed, it was overwhelming, including testimony that Petitioner confessed the murder to his son (App. 1258), Ford's skeletal remains were found on the edge of Petitioner's property (App. 695), and her blood was found soaked through a mattress in his home (App. 270-271, 631). Finally, Petitioner does not even allege that the prosecutor deliberately left that clip in the recording to divert the jury's attention to extraneous matters. In fact, Petitioner's brief makes clear that it was inadvertent. *See* Pet'r Br. 26-31. It was a careless

mistake at worst, but one that Petitioner himself contributed to when he did not insist when given the opportunity by the trial court that the parties and the court review the supposedly-redacted recording prior to playing it for the jury. App. 667-678.

Accordingly, the circuit court did not abuse its discretion in denying Petitioner's motion for a mistrial, and this assignment of error should be rejected.

F. Petitioner has not demonstrated any error on assignments of error 1 through 3, and, thus, cannot demonstrate cumulative error.[4]

Petitioner argues that the errors alleged in his first three arguments resulted in an unfair trial. Pet'r Br. 35-37. He points to *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972) to argue the cumulative effect of those errors so prejudiced his defense that his conviction should be set aside. Pet'r Br. 36. As discussed above, though, those assignments of error are all without merit. There can be no cumulative error where there are no distinct errors. *State v. Knuckles*, 196 W. Va. 416, 425, 473 S.E.2d 131, 140 (1996). ("Cumulative error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Accordingly, in the absence of any demonstrable error in assignments of error 1 through 3, Petitioner's claim of cumulative error must fail.

G. Petitioner was convicted within three terms of court and, therefore, received the speedy trial guaranteed by W. Va. Code § 62-3-21.

Petitioner argues that at least three terms of court passed in which his trial was continued without any order from the circuit court charging one party or the other with responsibility for the

[4] Petitioner briefed this issue as his fifth argument; however, Respondent has undertaken this argument out of order for the ease of reading.

continuance.[5] Pet'r Br. 31. He points to *State v. Underwood*, 130 W. Va. 166, 43 S.E.2d 61 (1947) to argue that he is entitled to dismissal of his indictment. Pet'r Br. 35. His argument fails.

West Virginia Code § 62-3-21 provides that a criminal defendant indicted on a felony offense shall be tried within three terms of court unless:

> the failure to try him was caused by his insanity; or by the witnesses for the State being enticed or kept away, or prevented from attending by sickness or inevitable accident; or by a continuance granted on the motion of the accused; or by reason of his escaping from jail, or failing to appear according to his recognizance, or of the inability of the jury to agree in their verdict . . . .

Id. The purpose of this statute is to ensure that the State diligently pursues its case against a defendant. *See Good v. Handlan*, 176 W. Va. 145, 149, 342 S.E.2d 111, 115 (1986) (gathering authorities and noting that "[u]nder the three-term rule, we have held that it is the duty of the State to provide a trial without unreasonable delay and an accused is not required to demand a prompt trial as a prerequisite to invoking the benefit of this rule."); *State ex rel. Waldron v. Stephens*, 193 W. Va. 440, 442, 457 S.E.2d 117, 119 (1995) (noting that "[i]n syllabus point 2 of *State v. Carrico*, 189 W. Va. 40, 427 S.E.2d 474 (1993), we held that '[i]t is the three-term rule, W. Va. Code § 62-3-21 [1959], which constitutes the legislative pronouncement of our speedy trial standard under Article III, Section 14 of the West Virginia Constitution.'"); *Town of Star City v. Trovato*, 155 W. Va. 253, 257, 183 S.E.2d 560, 562 (1971) (noting that the purpose of § 62-3-21 "is to assure the defendant a speedy trial").

As this Court has recognized on a number of occasions, "[t]he three-term rule provides that a post-indictment delay cannot be much longer than a year without an act on the defendant's part to extend the term between indictment and trial[.]" *State ex rel. Murray v. Sanders*, 208 W. Va. 258, 262, 539 S.E.2d 765, 769 (2000); *see also* Syl. Pt. 1, *State v. Damron*, 213 W. Va. 8, 10, 576

[5] Petitioner filed a *pro se* "Motion for a Prompt and Speedy Trial" on September 1, 2016. App. 3358, 3382.

S.E.2d 253, 255 (2002) ("[W]hen an accused is charged with a felony or misdemeanor and arraigned in a court of competent jurisdiction, if three regular terms of court pass without trial after the presentment or indictment, the accused shall be forever discharged from prosecution for the felony or misdemeanor charged unless the failure to try the accused is caused by one of the exceptions enumerated in the statute.") (quoting Syllabus, *State v. Carter*, 204 W. Va. 491, 513 S.E.2d 718 (1998)). This rule—the product of a statutory command—while intertwined with a criminal defendant's constitutional right to a speedy trial, is generally considered to provide a greater level of protection than the text of the constitution itself. *See Lewis v. Henry*, 184 W. Va. 323, 326, 400 S.E.2d 567, 570 (1990) (referring to W. Va. Code § 62–3–21 as the "statutory method of guaranteeing the constitutional right to a speedy trial"). Thus, if a defendant is not tried timely, the remedy under W. Va. Code § 62-3-21 is a dismissal of the indictment with prejudice.

With this context in mind, there are four exceptions to the three term rule which apply to the matter at hand. First, the term in which the indictment is returned does not count. *State v. Fender*, 165 W. Va. 440, 446, 268 S.E.2d 120, 124 (1980) (citing *State ex rel. Smith v. DeBerry*, 146 W. Va. 534, 120 S.E.2d 504 (1961) ("In computing the three-term rule we do not count the term at which the indictment is returned.")); *see also Raleigh v. Coiner*, 302 F. Supp. 1151, 1154 (N.D. W. Va. 1969) (noting the same); *Handlan*, 176 W. Va. at 152, 342 S.E.2d at 118 ("[A]s we have earlier noted, the term at which the indictment is returned is not counted under the three-term statute, W. Va. Code, 62-3-21, according to our cases."); *State v. Adkins*, 182 W. Va. 443, 445 n.4, 388 S.E.2d 316, 319 (1989) (noting that "the statute provides that the term in which the indictment is brought is not counted in the three term calculation.").

Second, agreed continuances do not count toward the three-term limit. *Handlan*, 176 W. Va. at 153, 342 S.E.2d at 118 ("Since the May 1985 term was continued by agreement of the

parties, it cannot be counted and, consequently, the relator has failed to show three terms excluding the term of the indictment that are countable under W. Va. Code, 62-3-21."); *State v. Jordan*, No. 13-0616, 2014 WL 1672951, at *2 (W. Va. Supreme Court, Apr. 25, 2014) (memorandum decision).

Third, when a criminal defendant delays trial, the term does not count. "Any term at which a defendant procures a continuance of a trial on his own motion after an indictment is returned, or otherwise prevents a trial from being held, is not counted as one of the three terms in favor of discharge from prosecution under the provisions of Code, 62-3-21, as amended." Syl. Pt. 3, *Fender*, 165 W. Va. at 441, 268 S.E.2d at 121 (quoting Syl. pt. 2, *State ex rel. Spadafore v. Fox*, 155 W. Va. 674, 186 S.E.2d 833 (1972)). Citing *Fender*, this Court reiterated in *State v. Elswick*, 225 W. Va. 285, 295 n.7, 693 S.E.2d 38, 48 (2010), "that a defendant cannot prevent trial from being held and then insist on that term counting toward the three term limit." Similarly, in *Adkins*, 182 W. Va. at 445 n.4, 388 S.E.2d at 319, this Court reiterated that "where the defendant 'instigates a proceeding which forces a continuance of the case at a particular term of court, he will not be permitted to take advantage of the delay thus occasioned." (quoting *Spadafore*, 155 W. Va. at 674 186 S.E.2d at 836.) Again quoting *Spadafore*, the *Adkins* Court stated "it has generally been held that the phrase 'on the motion of the accused' does not require a formal motion to be made by the defendant." *Adkins*, 182 W. Va. at 445 n.4, 388 S.E.2d at 319. More recently, in *Jordan*, this Court expressed that the term in which a circuit court addressed a petitioner's motion to dismiss did not count towards the limit. *Jordan*, 2014 WL 1672951 at *2.

Fourth, "[w]here a court does not have time for the disposition of motions or pleas filed by the accused and a term passes as a result thereafter, such term cannot be counted as one of the three terms under the provisions of Code, 62-3-21, as amended." *State v. Bias*, 177 W. Va. 302, 316,

352 S.E.2d 52, 66 (1986) (citations omitted); *see also Adkins*, 182 W. Va. at 445 n.4, 388 S.E.2d at 319 ("[F]inally, in *Spadafore,* this Court reiterated that 'where a court does not have time for the disposition of motions or pleas filed by the accused and a term passes as a result thereafter, such term cannot be counted as one of the three terms under the provisions of Code, 62-3-21, as amended.'") (internal citations omitted).

When a trial is not held on the charges against the accused during a certain term of court due to no fault on the part of the accused, and where no exception set forth above or in West Virginia Code § 62-3-21 exists, such term is an "unexcused term" chargeable to the State under West Virginia Code § 62-3-21. *See State ex rel. Stines v. Locke*, 159 W. Va. 292, 220 S.E.2d 443 (1975).

Here, the terms of court of the Circuit Court of Wyoming County begin on the first Monday of February, May, and October each year. W. Va. T.C.R. 2.27. Petitioner was indicted on May 4, 2015, during the *May 2015 term* of court. App. 19-20. It is well-established that the term during which a defendant is indicted does not count towards the three-term rule, *e.g.*, *Handlan*, 176 W. Va. at 152, 342 S.E.2d at 118; *State v. Ballenger*, No. 16-0986, 2017 WL 5632824, at *3 (W. Va. Supreme Court, Nov. 22, 2017) (memorandum decision). Therefore, it is undisputed that this term of court is excused and does not count toward the three-term rule. *See* Pet'r Br. 32, App. 3358.

In the *October 2015 term* of court, trial was set for January 25, 2016, but was continued on the joint motion of both parties. App. 3356, 3367. Petitioner does not assert or otherwise offer any evidence that he objected to that continuance. *See* Pet'r Br. 31-35, App. 3357-3362. Thus, the October 2015 term of court is excused and does not count toward the three-term rule because

it was an agreed continuance. *Handlan*, 176 W. Va. at 153, 342 S.E.2d at 118; *Jordan*, 2014 WL 1672951, at *2.

Trial was reset to April 1, 2016, which fell in the *February 2016 term* of court. App. 3356, 3367. While the State asserted below that trial was continued on the joint motion of both parties (App. 3356, 3367), Petitioner acknowledges in his appeal brief that that trial was continued on the motion of the defense (Pet'r Br. 33). He acknowledges that the February 2016 term is excused and does not count toward the three-term rule.[6] Pet'r Br. 33.

In the *May 2016 term* of court, trial was set for July 26, 2016. App. 3356, 3367. The State filed a motion to continue trial.[7] App. 3356, 3367. Petitioner objected to the continuance, but the circuit court granted the motion nonetheless. App. 211. Accordingly, the May 2016 term is unexcused and would count toward the three-term rule. *SER Murray*, 208 W. Va. 258, 262, 539 S.E.2d 765, 769.

Trial was next set for November 14, 2016, during the *October 2016 term* of court. App. 3356, 3367. Again, trial was continued by joint motion (App. 3356, 3367) and, thus, is excused and does not count toward the three-term rule. *Handlan*, 176 W. Va. at 153, 342 S.E.2d at 118; *Jordan*, 2014 WL 1672951, at *2. Petitioner does not assert or otherwise offer any evidence that he objected to that continuance. *See* Pet'r Br. 31-35, App. 3357-3362.

The next term of court occurred in *February 2017*, with trial set for April 3, 2017. App. 3356, 3368. That trial was continued by agreement, however, because "the State's motion

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[6] The circuit court noted in its February 24, 2021, order that a "[a] written order was generated continuing the matter." App. 3367. Petitioner does not dispute that in his brief. Pet'r Br. 33.

[7] The record contains a "Motion to Continue," but, in fact, the "Motion" actually contains the circuit court's ruling. App. 211. Accordingly, there is an order reflecting the disposition of the continuance, and it was entered in the same term of court as the motion.

concerning 404[(b)] evidence had major implications for both the defense and the State." App. 3356-3357. Petitioner does not dispute that the continuance was agreed, but, rather, expressed at the December 2020 hearing that he did not believe he should be faulted for the continuance simply because the 404(b) hearing could not be completed in time.[8] App. 3358. That argument affords him no solace, though, because trials that are continued from one term of court to the next on the State's motion and without objection by the defendant do not count toward the three-term rule. *See, e.g., State v. VanHoose*, 227 W. Va. 37, 49, 705 S.E.2d 544, 556 (2010). Moreover, the court's congested docket prevented the hearing from being completed in the February 2017 term. App. 3375. Therefore, the term is excused and does not count toward the three-term rule. *Bias*, 177 W. Va. 302, 316, 352 S.E.2d 52, 66.

Trial was reset for and began on September 18, 2017, which was during the *May 2017 term*. App. 3357, 3368.

The record makes clear that only one term of court passed without excuse and, so, Petitioner's argument that he was not afforded a speedy trial pursuant to the three-term rule is meritless. Regardless of whether orders were timely entered to mark each of those continuances, Petitioner's failure to contest the court's findings that he either agreed to or failed to object to all but one of those continuances is fatal to his claim. Again, the purpose of the three-term rule is to ensure that the State diligently pursues its case against a defendant. *See Handlan*, 176 W. Va. 145,

[8] At the July 17, 2017, rescheduled hearing on that motion, defense counsel stated, "[T]here is just not any written notice [of the rescheduled hearing], and Mr. Combs doesn't want to proceed without proper notice in this case." App. 224. Petitioner went on "to ask, Your Honor, to reschedule this hearing once more." App. 224 (emphasis added); *see also* App. 225 ("[W]e make this motion to continue the matter."). The State objected to a further continuance of the hearing (App. 225), but the circuit court continued the hearing again (App. 236).

149, 342 S.E.2d 111, 115. A lack of diligence in trying an accused cannot fairly be placed at the feet of the State, though, when the accused himself agrees to the delays.

Moreover, this Court has rejected claims invoking the speedy trial rule where continuances of trial "had no impact on the length of time petitioner was detained in jail prior to trial." *State v. Glaspell*, No. 12-0685, 2013 WL 3184918, at *5 (W. Va. Supreme Court, June 24, 2013) (memorandum decision). In *Glaspell*, the petitioner was contemporaneously under the jurisdiction of the state and federal courts and "while petitioner was in state custody, if the state case had been dismissed . . . petitioner would have been returned to federal custody." *Id.* at *5 n. 1. Clearly, this Court recognized the obvious purpose of the speedy trial rule: precluding an unnecessarily lengthy period of pretrial incarceration and a reduction of the other various harms that accrue when an individual with the presumption of innocence is facing legal jeopardy.

Obviously, these concerns are considerably lessened when a petitioner is already incarcerated and will remain so for an extended period of time, as in this case, where Petitioner had already been sentenced to a term of life without mercy plus 80 years for the robbery-homicide of Butler. App. 215, 1757. Thus, the Wyoming County trial schedule "had no impact on the length of time petitioner was detained in jail." *Glaspell*, 2013 WL 3184918 at *5.

For all of these reasons, this Court should affirm the lower court's ruling.

H. The evidence adduced at trial was more than sufficient to support a first degree murder instruction.

Petitioner's final argument is that "[t]here was no direct evidence as to even what happened to bring about Teresa Ford's death," let alone proof that Petitioner formed the *mens rea* to commit first degree murder. Pet'r Br. 37-38. In making his argument—which is less than a page long—Petitioner cites no legal authority to demonstrate that the nine days of evidence presented at trial was not sufficient to meet the State's burden of proof. To the extent that he challenges jury

instructions, he fails to cite to the record as to what instructions were erroneous and whether he objected to them. For these reasons alone, his argument fails.

It is a "juridical rule that the judgment of the trial court is presumed to be correct." *M. W. Kellogg Co. v. Concrete Accessories Corp.*, 157 W. Va. 763, 768, 204 S.E.2d 61, 64 (1974). This Court has long, repeatedly, and firmly held that "[a]n Appellate Court will not reverse the judgment of an inferior court unless error affirmatively appear upon the face of the record, and such error will not be presumed, all the presumptions being in favor of the correctness of the judgment." Syl. Pt. 2, *Shrewsbury v. Miller*, 10 W. Va. 115 (1877). *See also* Syl. Pt. 3, *Griffith v. Corrothers*, 42 W. Va. 59, 24 S.E. 569 (1896) ("An appellate court will not reverse the judgment of an inferior court unless error affirmatively appears upon the face of the record; and such error will not be presumed, all the presumptions being in favor of the correctness of the judgment."); *Darnell v. Flynn*, 69 W. Va. 146, 71 S.E. 16, 18–19 (1911) ("every presumption exists in favor of judgments of courts of general jurisdiction, and that they are presumed to be correct, and such presumption prevails, unless want of authority appears on the face of the record, and the burden of showing want of service of the process rests upon the party who asserts."); *Baltimore & O. R. Co. v. Bitner*, 15 W. Va. 455, 458 (1879) ("The judgment of a court of competent jurisdiction is presumed to be correct, and will not be reversed by an Appellate Court, unless it affirmatively appears from the record to be erroneous.").

The burden of showing error in the lower court rests upon the Petitioner. "A [petitioner] assumes upon himself the burden of showing error in the judgment complained of." Syl. Pt. 2, *Griffith v. Corrothers*, 42 W. Va. 59, 24 S.E. 569 (1896). *See also Pozzie v. Prather*, 151 W. Va. 880, 886, 157 S.E.2d 625, 629 (1967) ("The burden is on the appellant or plaintiff in error to produce before the appellate court a record sufficient affirmatively to disclose error committed to

his prejudice in the trial court."). In short, "[a]n appellant must carry the burden of showing error in the judgment of which he complains. This Court will not reverse the judgment of a trial court unless error affirmatively appears from the record. Error will not be presumed, all presumptions being in favor of the correctness of the judgment." Syl. Pt. 5, *Morgan v. Price*, 151 W. Va. 158, 150 S.E.2d 897 (1966).

Petitioner's argument also fails on the merits. This Court has held:

> A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Syl. Pt. 3, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (emphasis added). Any adequate evidence, including circumstantial evidence, will be accepted as support for a conviction. *Spinks*, 239 W. Va. 588, 611, 803 S.E.2d 558, 581 (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. The *Guthrie* Court continued, "[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.* Rather, a verdict will be set aside only when "the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *Id.* at 663, 461 S.E.2d. at 169.

This Court reiterated this standard just one year later when it 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. 294, 303, 470 S.E.2d 613, 622 (1996). "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." *State v. Etchell*, 147 W. Va. 338, 349, 127 S.E.2d 609, 615 (1962) (citing Syl. Pt. 1, *State v. Bowles*, 117 W. Va. 217, 185 S.E. 205 (1936)) (additional citations omitted).

Here, Petitioner specifically takes issue with the lack of evidence to establish either a cause of death or the requisite mental state. Pet'r Br. 37-38. This Court has held that

> "[u]nder our decisions, the corpus delicti consists in cases of felonious homicide, of two fundamental facts: (1) the death; and (2) the existence of criminal agency as a cause thereof. The former must be proved either by direct testimony or by presumptive evidence of the strongest kind, *but the latter may be established by circumstantial evidence or by presumptive reasoning upon the facts and circumstances of the case*." Syllabus Point 6, *State v. Beale,* 104 W. Va. 617, 141 S.E. 7, 141 S.E. 401 (1927).

Syl. Pt. 7, *State v. Jenkins*, 229 W. Va. 415, 729 S.E.2d 250 (2012) (emphasis added). The evidence adduced at trial made clear that Teresa Ford is dead—her skeletal remains were discovered in a shallow grave on a piece of property adjacent to Petitioner's property in 2014. App. 693-698, 701. "To hold, however, that the defendant in this case was responsible, we must find that the corpus delicti was established by direct evidence *or by cogent and irresistible grounds of presumption and that such death was not due to natural or other causes in which the accused did not participate*. *State v. Roush*, 95 W. Va. 132, 120 S.E. 304; *State v. Merrill*, 72 W. Va. 500, 78 S.E. 699." *State v. Durham*, 156 W. Va. 509, 519, 195 S.E.2d 144, 150 (1973) (emphasis added). While the State in this case was not able to establish precisely how Ford died or place the

murder weapon in Petitioner's hand, it defies logic to assume that Ford died a natural death which somehow culminated with her burial in a shallow grave. It can be presumed, then, that her death resulted from a criminal act.

As to Petitioner's agency in her death, the evidence presented at trial (cell phone records, Petitioner's possession of Ford's vehicle with no proof of sale, that her last known whereabouts were with Petitioner, that her blood was found to be soaked through a mattress in Petitioner's home, that her skeletal remains were found near Petitioner's home, that Petitioner told his son that he killed Ford, etc.) may well be circumstantial, but it is enough to meet the State's burden. Likewise, intent need not be proven by direct evidence. "'Intent is the purpose formed in a person's mind which may, and often must, be inferred from the facts and circumstances in a particular case. The state of mind of an alleged offender may be shown by his acts and conduct.' *Ridley v. Commonwealth*, 219 Va. 834, 252 S.E.2d 313 (1979)." *State v. Ocheltree*, 170 W. Va. 68, 72, 289 S.E.2d 742, 746 (1982). Again, the credibility of the evidence is a question for the jury and not for appellate courts. Syl. Pt. 3, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163.

To the extent that Petitioner argues that his criminal history—particularly, the Butler robbery-homicide—is not sufficient to prove intent, as explained more fully above, he is flatly wrong. Rule 404(b)(2) of the West Virginia Rules of Evidence permits the introduction of such evidence for the purpose of "proving motive, opportunity, *intent*, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." W. Va. R. Evid. 404(b)(2).

The State presented 41 witnesses and 136 exhibits over the course of nine days. Taken in the light most favorable to the State, the evidence adduced at trial was more than sufficient to support the jury's verdict. Accordingly, this Court should affirm Petitioner's conviction.

VII. CONCLUSION

For the foregoing reasons, this Court should affirm the February 24, 2021, Order of the Circuit Court of Wyoming County denying Petitioner's petition for writ of habeas corpus.

Respectfully submitted,

STATE OF WEST VIRGINIA,
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0249

STATE OF WEST VIRGINIA,

Respondent,

v.

OSCAR ROSS COMBS, SR.,

Petitioner.

CERTIFICATE OF SERVICE

I, Lara K. Bissett, 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, August 9, 2021, and addressed as follows:

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