IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 18-0445

STATE OF WEST VIRGINIA

Plaintiff below,
Respondent

v.

On Appeal from the Circuit Court of Wyoming County (Case No. 15-F-56)

OSCAR ROSS COMBS, SR.,

Defendant below,
Petitioner.

BRIEF OF RESPONDENT

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ASSIGNMENTS OF ERROR

Petitioner's brief presents six[1] assignments of error.

Petitioner's brief presents six assignments of error:

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 abused its discretion by admitting evidence of Petitioner's previous convictions under Rule 404(b);

3. The trial court abused its discretion 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 court erred by not granting Petitioner's motion for a speedy trial;

6. Petitioner's conviction was not supported by sufficient evidence.

For the reasons set forth below, all six of these assignments are meritless..

STATEMENT OF THE CASE

I. 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 that she was meeting the Petitioner, Oscar Ross Combs, Sr., to sell him her van. App. 553-54. Ford's cell phone records confirm she was making plans to meet Petitioner that day. Ford called Cottle that night and stated she was spending the night at Petitioner's home.

[1] The "Assignment of Error" section of Petitioner's brief initially identifies seven assignments of error. Pet'r Br. 2-4. However, the fifth purported error is not addressed anywhere in the body of the brief. Accordingly, the State considers this argument abandoned. *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."). *See also State, Dep't of Health & Human Res., Child Advocate Office on Behalf of Robert Michael B. v. Robert Morris N.*, 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995) ("Judges are not like pigs, hunting for truffles buried in briefs.") (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991)).

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 obversved 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.

II. 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. ("Petitioner's son"), a search warrant was executed on Petitioner's home in November 11, 2013. App. 626-29. In the course of executing this warrant, law enforcement discovered a large blood stain on Petitioner's mattress. App. 631. Forensic testing determined this blood belonged to Ford. App. 272, 534. Petitioner was interviewed by law enforcement later that day, and confessed to participating in the murder of Butler. App. 255. At trial, Petitioner's son 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. Petitioner's son further testified that Petitioner urged him to shoot Butler and help Petitioner steal Butler's money. *Id.* On February 4th, 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. App 216.

III. 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). However, after a disagreement with someone at the testing center, Petitioner left without starting the test. *Id.* Petitioner was subsequently interviewed by law enforcement for 90 minutes on November 13th, 2013 concerning the disappearance of Teresa Ford. App. 3350. In this 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 again 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 4th, 2015. App. 1757.

IV. 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 this motion, the State argued that Ford's murder was "done 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 oprendi*" in the Butler and Ford murders. *Id.* Over Petitioner's objection, the trial court admitted this evidence under Rule 404(b). App. 295-96.

Petitioner's trial ran from September 18th through 29th, 2017. App. 303. Forty witnesses testified on behalf of the State. App. 305-07. Three witnesses testified in whole or 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. 1234-243. *Third* Petitioner's son 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. Nevertheless, Petitioner's son's testimony 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 29th, 2017, and sentenced to life without mercy on April 11th, 2018. App. 1601, 1744-45.

SUMMARY OF ARGUMENT

Each of Petitioner's assignments of error is flawed and cannot support reversing the judgment below. Petitioner's first and sixth 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 exam 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's fifth assignment of error fails because 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 sixth 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.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument in this matter is unnecessary as the claims presented in this appeal are sufficiently set forth in the record and briefing, and the legal issues involve application of settled law. *See* W. Va. R. App. P. 21(c).

ARGUMENT

I. The Use Of Petitioner's Prior Conviction Complied With West Virginia Rule Of Evidence 404(b)

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 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." *State v. LaRock*, 196 W. Va. 294, 311 n.26, 470 S.E.2d 613, 630 n.26 (1996). 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." Syl. Pt. 3, *LaRock*, 196 W. Va. at 299, 470 S.E.2d at 618 (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.*

Petitioner's first and second assignments of error raise overlapping issues concerning the use of Petitioner's previous murder and robbery convictions during this trial. Petitioner raises four arguments across these assignments of error. *First*, that evidence of Petitioner's prior convictions

was not introduced for a proper purpose. Pet'r Br 17-20, 24. *Second*, that the evidence of Petitioner's prior convictions was unfairly prejudicial. Pet'r Br. 20-24. *Third*, that 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. *Fourth*, that 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 related to 404(b) evidence, they are addressed in unision. As discussed in more detail below, the evidence introduced satisfied the standards articulated by Rule 404 and this Court's associated jurisprudence, and thus Petitioner cannot overcome the presumption that he was shielded from undue prejudice by Rule 404's proper application..

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

Petitioner argues that his prior conviction was not admitted for any proper purpose under Rule 404(b). Pet'r Br. 17-20. This argument centers on the fact that the murder and robbery Petitioner was convicted of did not share an identifying *modus oprendi* with the facts presented here. *Id.* Petitioner's argument simply ignores the other permissible uses of collateral crime evidence, including demonstrating motive, intent, and premeditation. Petitioner's conviction was relevant to these issues, and thus that conviction spoke to a permissible issue under Rule 404(b). The trial court's identification of relevant permissible purposes is reviewed *de novo*. *State v. LaRock*, 196 W. Va. 294, 310, 470 S.E.2d 613, 629 (1996).

Rule 404(b) expreslly permits the use of prior convictions to show "motive" and "intent". W. Va. R. Evid. 404(b)(2). Further, this Court has treated "premeditation" as a derivative form of "intent." *LaRock* at 311, 470 S.E.2d at 630 ("The prosecutor sought to demonstrate the defendant's intent (premeditation)."). Insofar as Rule 404(b) relates to evidence of a "plan," it would by

definition encompass evidence of premeditation. Premeditated, Black's Law Dictionary 1371 (10th ed. 2014) ("Done with willful deliberation and planning.").

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 *State v. Dolin*, 176 W.Va. 688, 697, 347 S.E.2d 208, 217 (1986)).

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.

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

Petitioner argues that introducing evidence of his conviction for the murder and robbery of Butler unfairly prejudiced the jury against him. Pet'r Br. 20-24. "The 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)). 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. Accordingly, this determination was not an abuse of discretion, and should not be reversed.

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

Petitioner argues first that that the court was "clearly wrong" to instruct the jury that prior bad acts can be used to show premeditation. Pet'r Br. 12. "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." Rule 404(b) expressly allows the use of prior criminal acts to demonstrate a "plan." 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*, 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*.

D. 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 what purpose the convictions were introduced for, 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, *State v. McGinnis*, 193 W. Va. 147, 151, 455 S.E.2d 516, 520 (1994). 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)); *State v. Winebarger*, 217 W. Va. 117, 124, 617 S.E.2d 467, 474 (2005) (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* at. 147, 151, 455 S.E.2d at 520. Of the nine uses expressly set forth in Rule 404(b), the instructions given before jury deliberations began 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. Petitioner challenges the propriety of admitting the 404(b) evidence in question in a separate assignment of error. 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 I.A, *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.

II. The Passing Reference To A Polygraph Examination Did Not Entitle Petitioner To A Mistrial.

Petitioner's third assignment of error argues that a one-sentence statement by Petitioner regarding a polygraph exam, which was in no way referenced by the State in testimony or any statement to the jury, requires a mistrial. Pet'r Br. 25-30. This simplistic approach is out of step with this Court's nuanced analysis of polygraph-related statements. 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." *Harrison v. Ballard*, No. 16-0165, 2017 WL 5514376, at *6 (W. Va. Nov. 17, 2017) (memorandum decision) (quoting Syl. Pt. 5, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995). Accordingly, this assignment of error should be rejected.

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

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.* Moreover, 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.

Here, the 90-minute interview recording played at trial contained Petitioner's statement 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). The State did not allude to this remark in closing, nor did any witness testimony refer to it in any way. This singular statement is just as isolated as the statement in *George J.*, and unquestionably more isolated than the multiple statements in *Harrison*. Moreover, Petitioner's statement indicated willingness to take a polygraph, even though no test was ultimately administered. *Id.* *See also* App. 674-75. This same type of statement was before this Court in *Harrison*, and no prejudice to the defendant was identified in that case. *Harrison*, 2017 WL 5514376, at *6-7. Thus, this Court should reach the same result and affirm the conviction below.

It is true that in both *Harrison* and *George J.*, curative instructions were given to the jury regarding the inadmissibility of polygraph evidence. *Harrison*, 2017 WL 5514376, at *7; *George J.*, 2013 WL 5967012, at *5. Here, however, defense counsel did not "object[] and ask[] for a curative," but simply "ask[ed] for a mistrial." App. 675. *See also* App. 672 (defense counsel insisting that "we have to miss try [sic] this case."). In light of the isolated and non-prejudicial nature of Petitioner's single comment, coupled with defense counsel's decision to immediately move for a mistrial rather than explore a curative instruction, the trial court was well within its discretion to deny the motion. Accordingly, its decision should not be reversed, and this assignment of error should be rejected.

III. Petitioner Has Not Demonstrated Any Error On Assignments Of Error 1-3, And Thus Cannot Make A Claim Of Cumulative Error.

Petitioner's fourth assignment of error is an invocation of the doctrine of "cumulative error" first endorsed by this court in *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972). Petitioner raises this claim only with respect to assignments of error one, two, and three—those relating to Rule 404(b) and polygraph evidence. Pet'r Br. 33-35. As discussed above, these assignments of error are all without merit. At most, the trial court's directions to the jury amount to a single harmless error, and there can be no cumulative error without multiple 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 errors, Petitioner's claim of cumulative error must fail.

IV. Petitioner's Right To A Speedy Trial Was Not Violated Because No Continuance Granted In This Case Affected The Length Of Time Petitioner Was Detained Prior To Trial.

Petitioner's fifth assignment of error relates to "speedy trial rights," "within the meaning of the United States [Constitution] and West Virginia [Constitution], [] protected by West Virginia Code § 62-3-21." Pet'r Br. 30-33 (citing *State ex rel. Shorter v. Hey*, 170 W. Va. 249, 294 S.E.2d 51 (1981)). This Court has rejected such claims 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. June 24, 2013) (memorandum decision). In *Glaspell*, "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. Such a decision represents this Court's recognition of the obvious purpose of the Speedy Trial right—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—and further represents its understanding that these concerns are considerably lessened when a Petitioner is already incarcerated and will remain so for an extended period of time.

Similar to the defendant in *Glaspell*, here Petitioner had already been sentenced to a term of life without mercy plus 80 years in the Southern Regional Jail on February 4th, 2015, three months before any indictment was issued in this case. 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. Petitioner's fourth assignment of error should therefore be denied.

V. There Was Sufficient Evidence For The Jury To Conclude The Murder Of Teresa Ford Was Premeditated.

Petitioner's final assignment of error claims that the trial court should have dismissed this case due to "insufficiency of the evidence to support the *mens rea* element of first degree murder."[2] Pet'r Br. 35. A petitioner who challenges the sufficiency of the evidence underlying their conviction faces a heavy burden. Syl. pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995); see also *id.* at 173, 461 S.E.2d at 667 (describing the standard to be applied as "strict" and "highly deferential"). 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. *Spinks* at 611, 803 S.E.2d at 581 (citing *Guthrie* at 668, 461 S.E.2d at 174). As the Court explained in *Guthrie*, it will not overturn a verdict unless "reasonable minds could not have reached the same conclusion." *Id.* 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.

Petitioner acknowledges that the jury likely relied on the collateral crime evidence introduced under Rule 404(b) in making its *mens rea* finding. Pet'r Br. 36. As set forth with respect to Petitioner's first and second assignments of error, this use of Petitioner's prior conviction

[2] This assignment of error also reasserts Petitioner's mistaken assignment of error with respect to jury instructions.

was proper. *See* Argument I.A, *infra*. Thus, Petitioner is incorrect to suggest that "the record contains no evidence" from which the jury could conclude that Petitioner premeditated Ford's murder. *Guthrie*, 149 W. Va. at 663, 461 S.E.2d. at 169.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the circuit court.

STATE OF WEST VIRGINIA,
Respondent

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