IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff Below;
Respondent herein;

v.

CARLI RENAE REED,

Defendant Below;
Petitioner herein.

Case No. 21-0227
Criminal Action No. 20-F-28 (Barbour County)
The Honorable Shawn D. Nines

BRIEF OF PETITIONER CARLI RENAE REED

Counsel for Petitioner

Hunter B. Mullens, WV Bar No. 7620
C. Brian Matko., WV State Bar No. 7995
Matthew L. Ervin, WV State Bar No. 13197
MULLENS & MULLENS, PLLC
9 North Main Street
PO Box 95
Philippi, WV 26416
Telephone: (304) 457-9000
Facsimile: (304) 457-9002
hmullens@mullensandmullens.com
bmatko@mullensandmullens.com
mervin@mullensandmullens.com

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ASSIGNMENTS OF ERROR

1. The trial court erred in that the jury instruction given to the jury on the Petitioner's defense of battered woman's syndrome was insufficient, failed to adequately inform the jury as to the law regarding the defense of battered woman's syndrome and misled the jury. The trial court further erred by refusing to give a jury instruction on the Petitioner's defense of accident.

2. The trial court erred in finding that the testimony of a previous intimate partner of Mr. Fagons, regarding his abuse of that previous intimate partner, was inadmissible under Rule 404(b) of the West Virginia Rules of Evidence. In the alternative, the West Virginia Supreme Court of Appeals finds that the evidence is inadmissible, an exception should be crafted due to the unique nature of domestic violence and its effect on battered women.

3. The trial court erred in finding that under the doctrine of "curative admissibility," the State of West Virginia did not open the door to allow evidence of Mr. Fagons previous criminal activity, including the domestic violence against former past intimate partners.

4. The trial court erred in finding that the body camera footage was admissible and that it was not gruesome and unduly burdensome.

5. The trial court erred in granting the State of West Virginia's Motion to Bifurcate, or, in the alternative the West Virginia Supreme Court of Appeals should allow a defendant in a criminal prosecution to determine whether bifurcation is appropriate.

6. The State of West Virginia violated the Petitioner's right to due process and right to confront the witnesses against her by failing to provide requested transcripts from previous hearings in a timely manner.

7. The trial court violated the Petitioner's right to due process by entering Orders after the Petitioner had filed her Notice of Appeal and the trial court no longer had jurisdiction.

STATEMENT OF THE CASE

On September 24, 2020, Petitioner, Carli R. Reed, was convicted of second-degree murder for the death of her husband Marcus A. Fagons. At the time of her arrest, Ms. Reed was twenty-three (23) years old, a graduate of West Virginia University and an employee of the Federal Bureau of Investigation. She had been married to Mr. Fagons for approximately three years. During their three-year marriage, Ms. Reed suffered numerous instances of physical, verbal, emotional and

sexual abuse at the hands of Mr. Fagons to such an extent that she exhibited traits and characteristics consistent with battered woman's syndrome.

Statement of Facts

Ms. Reed met Mr. Fagons while they attended Philip Barbour High School in Barbour County, West Virginia. Ms. Reed was sixteen (16) years old and Mr. Fagons was nineteen (19) or twenty (20), and second year senior, at the time they met. App. Vol 5, pg. 1523. Ms. Reed began to tutor Mr. Fagons, and a sexual relationship began shortly thereafter. Ms. Reed and Mr. Fagons relationship lasted a couple of weeks, and was ended by Ms. Reed when she discovered that Mr. Fagons had impregnated another girl, T. C[1]. App. Vol 5, pgs. 1523-1525.

Ms. Reed and Mr. Fagons reconnected in January, 2016, and they began dating in February, 2016. App. Vol 5, pg. 1536. In May, 2016, Ms. Reed told her parents that she was moving out of their house and moving in with Mr. Fagons into an apartment in Philippi. App. Vol 4, pgs. 1413-1414. While reluctantly helping Ms. Reed move into the apartment, Ms. Reed's father got into a verbal altercation with Mr. Fagons, and, in response, Mr. Fagons later posted a threat to Ms. Reed's family on Facebook which stated "[w]e've got enough clips to shoot a fucking movie, watch everything you love burn." App. Vol 4, pgs. 1343 and 1318.

After they had moved in together, Ms. Reed, who had saved a significant amount of money, began to use that money to pay rent, utilities, Mr. Fagons' court fines and Mr. Fagons' outstanding child support. App. Vol 5, pgs. 1540-1541. Ms. Reed quickly ran out of the money she had saved, and could no longer afford to live in the Philippi apartment. As such, they moved into an apartment on a farm owned by Ms. Reed's grandparents. App. Vol 5, pgs. 1542-1543. Prior to moving to

[1] Pursuant to Rule 40(e) of the West Virginia Rules of Appellate Procedure this individual will be identified throughout this brief as T.C.

the farm, in August, 2016, Ms. Reed and Mr. Fagons secretly got married. App. Vol 5, pgs. 1543-1544.

During the course of their marriage, Mr. Fagons' established a routine for abusing Ms. Reed. It would start when he would get mad about something as insignificant as Ms. Reed forgetting to lock a door. Mr. Fagons would physically abuse Ms. Reed and many times would rape her. If Ms. Reed attempted to fight back, Mr. Fagons would call Ms. Reed's mother and tell her that Carli was being crazy again. Ms. Reed began to believe that her mother was on Mr. Fagons' side and that her mother thought she was crazy. Some, but only some, specific examples of the abuse suffered by Ms. Reed include:

1. On another occasion, Mr. Fagons was taking a shower. Mr. Fagons and Ms. Reed were arguing over his infidelity. Mr. Fagons got out of the shower, grabbed Ms. Reed and began to choke her. Mr. Fagons continued to choke her until Ms. Reed was able to grab a frying pan and hit him in the head. App. Vol. 5, pgs. 1549-1551.

2. Once after visiting Mr. Fagons mother's house, Mr. Fagons and Ms. Reed were leaving and Mr. Fagons told Ms. Reed that he was going to drive the car into a tree.[2] Ms. Reed took the keys out of the admission. Mr. Fagons became mad and began to hit Ms. Reed. Ms. Reed attempted to fight back, but Mr. Fagons drug her out of the car by her hair and began to punch her in the face. App. Vol 5, pgs. 1556-1559.

3. During the course of their marriage, Mr. Fagons told Ms. Reed to kill herself on numerous occasions, which sometimes included him handing her a gun and telling her to do it outside so he wouldn't have to clean up. App. Vol. 5, pg. 1569-1570.

4. Also, during the course of the marriage, Mr. Fagons required Ms. Reed to shower with him during which he would frequently rape her. If she attempted to shower by herself, Mr. Fagons would break the door down and rape her, as evidenced by a broken bathroom door. App. Vol 5, pgs. 1533-1534.

5. At one point during the marriage, Ms. Reed became pregnant. Mr. Fagons punched Ms. Reed repeatedly in the stomach and told her that she would be a shitty mother. It was eventually determined that the pregnancy was nonviable, and Ms. Reed underwent a dilation and curettage procedure (hereinafter "D&C"). After the D&C, Mr. Fagons first question to Ms. Reed's doctor was when they could have sex again. The doctor

[2] Mr. Fagons had also expressed suicidal ideations during their marriage. App. Vol 5, pgs. 1557 and 1570.

told him that he would have to wait around a week. Mr. Fagons waited around three days after the appointment and then raped Ms. Reed. Ms. Reed was crying and asking Mr. Fagons to stop, but he refused. After Ms. Reed underwent the D&C procedure, vaginal sex was painful and Ms. Reed would beg Mr. Fagons to stop. Instead of stopping, Mr. Fagons would begin to rape her anally. One anal rape was so violent that Ms. Reed could not use the bathroom for a week to a week and a half. App. Vol 5, pgs. 1535-1536 and 1567-1568.

6. In June, 2019, Ms. Reed attempted to leave Mr. Fagons as a result of Mr. Fagons multiple infidelities. Ms. Reed began to pack her belongings. Mr. Fagons unpacked her belongings and told her that she was not leaving him. Mr. Fagons then relayed a story to Ms. Reed in which his father burned some guy alive in a house and while the house burned, Mr. Fagons' father waited outside with a gun to shoot anyone who was able to make it out of the burning building. Mr. Fagons told her that would happen to her and her family if she left him. App. Vol 5, pgs. 1516-1517.

7. A few days prior to the August 15, 2019 incident, Ms. Reed got off work early and went to the grocery store. On that day, Mr. Fagons had supervised visitation with his daughter. Mr. Fagons called Ms. Reed and asked what they were going to have for dinner. Ms. Reed told Mr. Fagons that she would probably pick up a pizza, but it would take her some time to get home so go ahead and that he should go ahead and feed his daughter. Mr. Fagons began yelling at Ms. Reed when she got home and followed her into the bedroom. Mr. Fagons daughter was present as well as a worker from the West Virginia Department of Health and Human Resources (hereinafter "WVDHHR"). Mr. Fagons followed Ms. Reed into the master bathroom and raised his hands to strike Ms. Reed. By this time, Mr. Fagon's daughter had walked into the bathroom, and Ms. Reed asked him not to hit her in front of his daughter. After the WVDHHR worker and his daughter left, Mr. Fagons beat and raped Ms. Reed. App. Vol 5, pgs. 1573-1574.

On August 15, 2019, after arriving at work at the FBI, Ms. Reed began to receive calls from Mr. Fagons asking her to call his work and tell his supervisors that there was a family emergency and that he needed to come home. Mr. Fagons asked her to make the calls because he was assigned to the "tower," and didn't like working there. Mr. Fagons was also concerned at work because he was the subject of a sexual harassment complaint. Ms. Reed refused Mr. Fagons request to make the call. Mr. Fagons became angry with Ms. Reed and hung up. Ms. Reed and Mr. Fagons continued to text each other throughout the morning and into Ms. Reed's lunch break. Ms. Reed became so upset that she decided to leave work. App. Vol 5, pgs. 1506-1510.

After leaving work, Ms. Reed called Mr. Fagons to tell him that she left work because if she didn't call him, she would suffer consequences. The consequences she would suffer would include a beating and possibly rape. After speaking to Ms. Reed, Mr. Fagons decided to leave work as well. App. Vol 5, pgs. 1511-1512.

When Mr. Fagons got home, Ms. Reed met him at the front door, because Mr. Fagons would become angry if she did not meet him at the front door. App. Vol 5, pg. 1512. Mr. Fagons and Ms. Reed went into the bedroom and they talked about getting a divorce. Mr. Fagons seemed to be in favor of getting a divorce until he learned that Ms. Reed would not continue to pay for a car for him to use, his insurance or any of his other bills. Mr. Fagons became angry, stated that he did not want to talk about the divorce anymore and wanted to take a nap. Mr. Fagons asked Ms. Reed to lay down with him, she refused and went into the living room. App. Vol 5, pgs. 1513-1515.

After a period of time, she returned to the bedroom, and Mr. Fagons stated that he wanted to go forward with the divorce. Ms. Reed, who had previously been treated for suicidal ideations and was having suicidal thoughts on that day, decided to kill herself[3]. Ms. Reed reached over and grabbed Mr. Fagons' gun which he kept on the nightstand. Ms. Reed grabbed the holster of the gun with her left hand and withdrew the gun from the holster with her right hand. As she was pulling the gun out of the holster, Ms. Reed shut her eyes, the gun went off and Mr. Fagons was struck in the head. Ms. Reed was disoriented and confused and walked out of the bedroom. App. Vol 5, pgs. 1515 and 1517-1519.

Ms. Reed returned to the bedroom to check on Mr. Fagons, who was silent. While checking on Mr. Fagons, Ms. Reed saw Mr. Fagons' phone and noticed that he had been texting another

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[3] Ms. Reed had a history of attempting to kill herself. During a previous argument, Mr. Fagons told Ms. Reed to kill herself and locked her outside. Ms. Reed got into her car and drove at a high rate of speed and intentionally crashed her car into a tree. App. Vol. 5, pg. 1552.

girl. Ms. Reed bent down to pick up the phone, shook Mr. Fagons and then saw that blood was coming out of Mr. Fagons ear. Ms. Reed did not know what to do, realized her mom would know what to do, and left to get her mom who lived about five (5) minutes away. App. Vol 5, pgs. 1519-1520.

Procedural History

On August 15, 2019, the Petitioner, after fully cooperating with the police, was arrested for the murder of Marcus Fagons. Petitioner was subsequently incarcerated in the Central Regional Jail. On May 20, 2020, the trial court held a status hearing in the matter concerning the State's failure to indict the Petitioner. Ms. Reed had been incarcerated since August 15, 2019, had not been yet been indicted, and the second term since the Petitioners arrest was to expire on May 26, 2004. On the day after the second term of court since her incarceration, Petitioner filed a Motion to Dismiss the charges for failure to indict within two (2) terms after her arrest. The Motion to Dismiss was denied (App. Vol 1, pg. 228), and, on June 15, 202, the Petitioner was indicted by the Barbour County Grand Jury on the charge of first-degree murder for the death of Marcus Fagons. App. Vol.1, pg. 1.

On September 10, 2020, the Petitioner filed her proposed jury instructions. App. Vol.1, pgs. 108-142. Included in her proposed jury instructions were instructions of the defense of accident and battered woman's syndrome. On September 22, 2020, after lunch, the trial court provided both the State and the Petitioner with a copy of the trial court's jury instructions. App. Vol.1, pgs. 146-152. During a break in the afternoon, the Petitioner objected to the battered woman's syndrome objection drafted by the trial court and the trial court's failure to include a jury instruction on the defense of accident. The trial court overruled the Petitioner's objections to the jury instruction, noted the Petitioner's objection, and read the charge to the jury later that afternoon.

On August 14, 2020, the Petitioner filed a Notice of Intent to Use and Motion to Admit Rule 404(b) Evidence. App. Vol.1, pg. 42. The Notice advised that, among other evidence, the Petitioner would be seeking to introduce the testimony of T.C. T.C. was a previous romantic partner of Mr. Fagons and the mother of one of his children. T.C. testimony concerned the repeated physical, emotional and sexual abuse she suffered at the hands of Mr. Fagons. Additionally, T.C. testified about a poem she authored and was posted on Facebook in approximately May, 2019, which discussed the abuse she suffered from Mr. Fagons. App. Vol.1, pgs. 187-191. T.C.'s evidence was presented to the trial court on September 1, 2020, and by Order dated September 9, 2020, the trial court found that T.C.'s testimony was inadmissible. However, the trial court did allow a portion of T.C.'s poem to be admitted with no context or testimony from T.C. App. Vol.1, pg. 84.

Petitioner was convicted of second-degree murder by a jury after a seven-day trial which began on September 16, 2020. App. Vol.1, pg. 155. On December 2, 2020, the Petitioner was sentenced to a definite term of forty (40) years in prison. On February 19, 2020, the trial court entered its Sentencing Order sentencing the Petitioner to the above sentence. App. Vol.1, pg. 181. On March 19, 2021, the Petitioner filed her Notice of Appeal from the aforementioned Order. After the filing of the Notice to Appeal, the trial court entered a number of orders on pre-trial issues that were included as Assignments of Error in the Petitioner's Notice of Appeal. App. Vol.1, pgs. 192-234.

SUMMARY OF ARGUMENT

During the course of the prosecution of Ms. Reed, the trial court made numerous and substantial errors that significantly prejudiced Ms. Reed's defense. The errors were significant enough to warrant overturning Ms. Reed's conviction, and ordering a new trial.

The trial court erred in its charge to the jury. The trial court's instruction regarding the Petitioner's battered woman's syndrome defense was insufficient, failed to adequately instruct the jury on the law regarding battered woman's syndrome and was misleading. Further, the trial court failed to instruct the jury on the Petitioner's alternative defense of accident. During trial, the Petitioner provided testimony which supported the defense of accident. However, the trial court refused to give the instruction as, it appears, the trial court was under the mistaken belief that it did not have to instruct the jury on accident. The Petitioner is entitled to have the jury adequately instructed as to all defenses supported by the evidence introduced during trial, and the failure to adequately instruct the jury on battered woman's syndrome and failure to instruct the jury on the defense of accident substantially prejudiced the Petitioner's defense.

The trial court also erred in finding that T.C.'s testimony concerning the abuse she suffered from Mr. Fagons was inadmissible. During the Rule 404(b) hearing, T.C., who was a previous intimate partner of Mr. Fagons and the mother of one of his children, provided testimony of the physical and sexual abuse she suffered at his hands. Mr. Fagons abusive acts toward T.C. are almost a carbon copy of the abuse he perpetrated against Ms. Reed. It is clear that Mr. Fagons had a learned pattern for controlling intimate partners. The history of abuse T.C. suffered was relevant to Ms. Reed's defense, and was admissible under Rule 404(b) of the West Virginia Rules of Evidence as such evidence went to prove Mr. Fagons intent, motivation and pattern of control over Ms. Reed. This evidence is especially relevant as the State used Ms. Reed's initial reluctance to tell anyone of the abuse to argue that Ms. Reed either was fabricating or exaggerating the abuse. In the alternative, if this Court would find that T.C.'s testimony is not admissible under Rule 404(b) of the West Virginia Rules of Evidence, this Court should fashion an exception to allow evidence of domestic abuse of previous intimate partners.

Further, even if T.C.'s testimony was inadmissible under the West Virginia Rules of Evidence, under the doctrine of curative admissibility, the State opened the door for the testimony by making an issue of Mr. Fagons criminal history. By making Mr. Fagons' criminal history an issue, not only did the State "open the door" for T.C. to testify, the State opened the door for other witnesses to describe the domestic abuse they witnessed committed by Mr. Fagons against other young girls.[4]

The trial court further erred by admitting into evidence the body camera footage taken by Sergeant Todd Deffet. The Petitioner objected to the body camera footage on the ground that the footage was gruesome and unduly prejudicial. The body camera footage was not relevant to any fact at issue in the case, and did not go to provide malice and intent. Further the trial court failed to take into consideration the totality of the footage, specifically Mr. Fagons shallow, ragged breathing and Ms. Reed's aunt praying for Mr. Fagons to survive. The body camera footage was used by the State for the sole reason to allow the jury to watch a man dying.

The trial court also erred in granting the State's motion to bifurcate the trial. The State of West Virginia sought to convict Ms. Reed of First-Degree Murder. The State filed a Motion to Bifurcate the guilt and mercy phases of the trial which was granted by the trial court. Ms. Reed opposed the motion arguing that the Defendant in a criminal trial should have the decision of whether the guilt and mercy phases should be bifurcated as the Defendant should be able to make the decision on how to present her defense. Further, the trial court abused its discretion in granting the State's Motion to Bifurcate.

The trial court further violated the Petitioner's right to confront the witnesses against her. In this case, the court reporter was ordered to provide a transcript of the grand jury proceedings to

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[4] Sally Collins, Mr. Fagons' grandmother, and Tracy McCartney, Ms. Fagons' aunt, were prepared to testify that they had witnesses Mr. Fagons abuse girls other than T.C.

the Petitioner ten (10) days prior to the beginning of the trial. The court reporter was further ordered to provide a transcript of the Rule 404(b) hearing testimony to the Petitioner as well. The transcripts were requested so that the Petitioner could effectively cross-examine the State's witnesses. The court reporter failed to timely provided the transcripts and only provided the transcripts the morning before each of the State's witnesses were to testify. As such, counsel for the Petitioner did not have time to adequately prepare for cross-examination.

The trial court also entered certain orders regarding pre-trial matters after the Petitioner had filed her Notice of Appeal. During the course of this case, a number of pre-trial motions were argued before the trial court. The court made oral rulings on those motions, but failed to enter several orders. After the Petitioner filed her Notice of Appeal, the trial court entered several orders that pertained to matters on appeal.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner submits that oral argument is necessary upon this appeal under Rule 20 of the West Virginia Rules of Appellate Procedure. This appeal involves an issue of first impression in West Virginia and issues of fundamental public importance. As such, the Petitioner requests that this appeal be scheduled for a Rule 20 oral argument.

ARGUMENT

I. The trial court erred in that it failed to give an adequate instruction on the defense theory of Battered Woman's Syndrome and it failed to give the jury an instruction of the defense theory of accident.

A. The trial court failed to adequately instruct the jury on the defense of Battered Woman's Syndrome.

In her proposed jury instruction submission, the Petitioner submitted the following proposed instruction on her defense of battered woman syndrome:

> As a general proposition, Battered Woman's Syndrome provides a clinical explanation of the psychological mindset, and behavior, of a woman who has been

> physically or mentally abused over a period of time by a domestic partner. The perceptions of a battered and abused person are different from the perceptions of a person who has not lived through an abusive relationship. An abused person will sometimes behave "irrationally" and that a defendant should be permitted to offer an explanation for that behavior. An "ordinary abused person," particularly a person who has endured abuse to the extent that they exhibit the characteristics of Battered Woman's Syndrome, may reason and react quite differently from someone who has not been abused.
>
> Evidence of Battered Woman's Syndrome is being offered to help explain how domestic abuse may affect a defendant's reasoning, beliefs, perceptions or behaviors. In other words, the evidence is being offered to help explain the Defendant's mental state. Where a Defendant's state of mine (sic) is in issue, the Defendant's history of abuse is a question of fact to be considered by the jury. Evidence that the decedent had abused or threatened the life of the defendant is relevant and may negate or tend to negate a necessary element of the offense charged, such as malice or intent.

App. Vol.1, pg. 118.

In support of the proposed instruction, the Petitioner cited *State v. Dozier*, 163 W.Va. 192, 255 S.E. 2d 552 (1979), *State v. Harden*, 223 W.Va. 796, 679 S.E. 2d 628 (2009) and *State v. Stewart*, 228 W.Va. 406, 719 S.E. 2d 876 (2011).

Over the objection of the Petitioner, the Court refused to provide the Petitioner's proposed jury instruction on Battered Woman's Syndrome, as drafted, and provided the jury with following instruction:

> The Defendant has presented expert testimony regarding Battered Woman's Syndrome. In cases involving Battered Woman's Syndrome, evidence that a victim had abused the defendant may be considered by the jury when determining the factual existence of one or more of the essential elements of the crime charged, such as premeditation, malice or intent. It is generally the function of the jury to weigh the evidence of abuse and to determine whether such evidence is too remote or lacking in credibility to have affected the defendant's reasoning, beliefs, perceptions, or behavior at the time of the alleged offense.

App. Vol.1, pg. 149.

In discussing the standard of review to a challenged jury instruction, this Court has stated:

> [j]ury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. The trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to the [trial] court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion. Syl. pt. 15, *State v. Bradshaw*, 193 W. Va. 519, 457 S.E.2d 456 (1995).

This Court has further stated that the legal propriety or correctness of a jury instruction is a question of law that is reviewed *de novo*. *See State v. Guthrie*, 194 W.Va. at 671, 461 S.E. 2d at 177.

The instructions provided to the jury in this matter failed to adequately instruct the jury on the law of battered woman's syndrome. While the instruction provided to the jury on battered woman's syndrome in this case is a correct statement of the law, the instruction only partially instructed the jury on the law of battered woman's syndrome, and mislead the jury on the applicable law. The trial court failed to fully instruct the jury on how spousal abuse and battered woman's syndrome can affect an individual's mental state, and how such evidence is to be applied when considering the different elements of the crimes for which Petitioner was charged.

A trial judge's instructions to a jury as to the law and how the evidence should be assessed are crucial to a fair trial. Instructions should guide a jury's deliberations and are not mere technicalities in our legal system. Errors in such matters may go to the heart of the question of guilt. *See State v. Miller,* 197 W.Va. 588, 610, 476 S.E. 2d 535, 557 (1996). The purpose of instructing the jury is to focus its attention on the essential issues of the case and inform it of the permissible ways in which these issues may be resolved. If instructions are properly delivered, they succinctly and clearly will inform the jury of the vital role it plays and the decisions it must make. "[W]ithout [adequate] instructions as to the law, the jury becomes mired in a factual morass,

unable to draw the appropriate legal conclusions based on the facts." *State v. Guthrie,* 194 W.Va. 672, 461 S.E. 2d at 178. In general, the question on review of the sufficiency of jury instructions is whether the instructions as a whole were sufficient to inform the jury correctly of the particular law and the theory of defense. We ask whether: (1) the instructions adequately stated the law and provided the jury with an ample understanding of the law, (2) the instructions as a whole fairly and adequately treated the evidentiary issues and defenses raised by the parties, (3) the instructions were a correct statement of the law regarding the elements of the offense, and (4) the instructions meaningfully conveyed to the jury the correct burdens of proof. Thus, a jury instruction is erroneous if it has a reasonable potential to mislead the jury as to the correct legal principle or does not adequately inform the jury on the law. An erroneous instruction requires a new trial unless the error is harmless. *See State v. Miller*, 197 W.Va. at 607, 476 S.E. 2d at 554 *citing State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975).

While the trial court's instruction is copied verbatim from Syl. pt. 3, *State v. Stewart,* the instruction does not provide the entire law applicable to the defense of battered woman's syndrome. This Court has addressed battered woman's syndrome and claims of abuse on a number of occasions prior to *Stewart*, and has pronounced applicable law with regard to battered woman's syndrome and claims of abuse in addition to Syl. pt. 3 of *State v. Stewart*.

In *State v. Harden*, 223 W.Va. 796, 679 S.E. 2d 628 (2009), the Defendant, Tanya A. Harden, appealed the final order of the Circuit Court of Cabell County sentencing her to life imprisonment with the possibility of parole for the first-degree murder of her husband, Danuel Harden. Ms. Harden defended the charges against her by asserting a claim of self-defense, arguing that the death of Mr. Harden followed a "night of domestic terror" that ended only upon the

shooting of Mr. Harden. In the opinion, this Court noted that the evidence adduced at trial showed that on the night he was killed, Mr. Harden had been drinking heavily and had subjected Ms. Harden to a several hour-long period of physical and emotional violence, including, among other things, beating Ms. Harden with the barrel of a shotgun, beating Ms. Harden with his fists, sexually assaulted Ms. Harden and threatened her life and the life of the children present in the home. After Mr. Harden had possibly either fallen asleep or passed out on the couch, Ms. Harden shot and killed him.

Following testimony, the jury convicted Ms. Harden of first-degree murder and sentenced her to life in prison with the possibility of parole. Ms. Harden appealed her conviction arguing that the State submitted insufficient evidence to prove beyond a reasonable doubt that Ms. Harden's actions were not in self-defense. This Court overturned Ms. Harden's conviction, and in Syl. pt. 4 held:

> [w]here it is determined that the defendant's actions were not reasonably made in self-defense, evidence that the decedent had abused or threatened the life of the defendant is nonetheless relevant and may negate or tend to negate a necessary element of the offense(s) charged, such as malice or intent.

This Court further stated in *Harden*:

> [o]ur precedent since *McMillon* clearly establishes that a defendant, who has been the victim of domestic violence that tragically ends with the defendant's killing the battering spouse, is entitled "to elicit testimony about the prior physical beatings she received in order that the jury may fully evaluate and consider the defendant's mental state at the time of the commission of the offense." *State v. Dozier*, 163 W.Va. 192, 197-198, 255 S.E. 2d 552, 555 (1979), *citing State v. Hardin*, 91 W.Va. 149, 112 S.E. 401 (1922) (defendant entitled to introduce evidence that decedent was a quarrelsome man who had previously attacked defendant and threatened defendant's life).

The Court further stated:

> [w]e have similarly held that evidence of prior threats and violence is relevant to "negate criminal intent." *State v. Lambert*, 173 W.Va. 60, 63-64, 312 S.E. 2d 31, 35 (1984). In *State v. Wyatt*, 198 W.Va. 530, 542, 482 S.E. 2d 147, 159 (1996), we explained that a defendant's domestic abuse was relevant "to establish either the lack of malice, intention or awareness, and thus negate or tend to negate a necessary element of one or the other offenses charged." *State v.Harden*, 223 W.Va. at 803, 679 S.E. 2d at 635.

Based upon the foregoing, in order to adequately instruct the jury on the defense of battered wife syndrome, the jury must be specifically instructed that evidence that the decedent had abused or threatened the life of the defendant is relevant and the evidence may negate or tend to negate a necessary element of the crime charged, such as malice or intent. The jury should have been specifically instructed that their consideration of the evidence should take into account how the decedent's past abusive conduct could have affected Petitioner's thoughts and perceptions and the role that could play in negating elements such as malice and intent. The instruction provided by the trial court in this matter fails to instruct the jury on this important point, and limited the jury in its consideration of the evidence. The instruction given by the trial court would more likely than not confuse a jury on how to properly weight the evidence of abuse. As such, the jury was not adequately instructed on the defense raised by the Petitioner.

Further, the instruction given by the trial court, without additional context, is not clear, is vague and likely to confuse a jury. The jury instruction, as given, suggests that in order for the jury to consider a battered woman syndrome defense, the abuse must have occurred immediately prior or so close in time that the crime for which the abuse spouse is charged must have been in response to a specific act of abuse. As stated above in Syllabus Point 4 of *Harden*, this Court has specifically rejected the requirement that in order for a jury to consider evidence of abuse the actions of the defendant do not have to be in response to a specific act of abuse. Without further

explanation of how to weigh evidence of abuse, a jury would likely be misled by the instruction given by the trial court.

Additionally, the trial court should have at least included the first paragraph of the jury instruction offered by the Petitioner. The language in the paragraph is taken directly from *Stewart*, and explains how an individual, such as Ms. Reed, who suffers repeated abuse may act differently than an individual who has not been abused. This Court has stated jury instructions should adequately state the law and provide the jury with an ample understanding of the issues and the controlling principles of law. *State v. Bradshaw*, 193 W. Va. at 543, 457 S.E.2d at 456 (1995). The first paragraph in the jury instruction submitted by the Petitioner provides to the jury a better understanding of the defense of battered woman's syndrome, and helps to instruct the jury on how the evidence of sustained abuse is to be weighed during the jury's deliberations. Without an explanation of how battered woman's syndrome effects an individual, the jury is not likely to understand how the abuse can affect certain actions of the abused person. As set forth in the Petitioner's proposed instruction, the perceptions of a battered and abused person are different from the perceptions of a person who has not lived through an abusive relationship. A juror who has not gone through an abusive relationship would likely not understand this, and should be so instructed in order to ensure that the evidence of abuse is given the appropriate weight.

The instruction given by the trial court on the Petitioner's defense of battered woman's syndrome failed to adequately instruct the jury on the law regarding the defense and likely led to confusion among the jury on the weight the Petitioner's testimony about abuse should be given. Further, the trial court failed to give an instruction on battered woman's syndrome which provided the jury with a thorough understanding of how a battered woman's syndrome defense should be

weighed by the jury. By failing to properly and thoroughly advise the jury on the defense of battered woman's syndrome, the trial court abused its discretion.

B. The trial court abused its discretion in refusing to provide a jury instruction of the defense of accident.

During her trial, Ms. Reed presented the defense of accident. On September 10, 2020, the Petitioner, pursuant to the trial court's previously entered Order, submitted her proposed jury instructions. Included in the Petitioner's submission was the following jury instruction on the defense of accident:

> [t]he defendant has presented evidence that the death of Marcus Alva Fagons was an accident. While it is never the defendant's burden to prove anything, if you find the defendant's evidence of accident to be credible, then the State must prove beyond a reasonable doubt that the death was not accidental. If the State has not met this burden, then you must find the defendant not guilty of the offense charged.

App. Vol.1, pg. 124. The trial court, however, failed to instruct the jury on Ms. Reed's alternative defense theory.

As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. Syl. pt. 1, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996). "Where there is competent evidence tending to support a pertinent theory in the case, it is the duty of the trial court to give an instruction presenting such theory when requested to do so." Syl. pt. 7, *State v. Alie*, 82 W. Va. 601, 96 S.E. 1011 (1918). *State v. Headley*, 210 W. Va. 524, 529, 558 S.E.2d 324, 329 (2001); Syl. pt. 3, *State v. Foley*, 128 W. Va. 166, 35 S.E.2d 854 (1945). *See also*, Syl. pt. 2, *State v. McCoy*, 219 W. Va. 130, 632 S.E.2d 70 (2006) (stating, in part, that "a criminal defendant is entitled to an instruction on any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his / her favor.").

As a general rule, a criminal defendant is entitled to an instruction on any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his/her favor. Consequently, a criminal defendant may present alternative defenses even when they are inconsistent, and the mere fact that a defense may be inconsistent with an alternate defense does not justify excluding evidence related to either defense. Syl. pt. 2, *State v. McCoy,* 219 W.Va. 130, 632 S.E.2d 70 (2006). This Court also noted in *McCoy* that the:

> "fact that [a] 'recognized defense' may be inconsistent with another defense the defendant is asserting does not justify excluding evidence and failing to give an instruction on the 'recognized defense.'" *Arcoren v. United States*, 929 F.2d 1235, 1245 (8th Cir. 1991). See also *Guillard v. United States*, 596 A.2d 60, 62 (D.C.Cir.1991) ("A defendant's decision ... to establish ... contradictory defenses does not jeopardize the availability of a self-defense jury instruction as long as self-defense is reasonably raised by the evidence."). It has been further noted that "[t]he rule in favor of inconsistent defenses reflects the belief of modern criminal jurisprudence that a criminal defendant should be accorded every reasonable protection in defending himself against governmental prosecution. That established policy bespeaks a healthy regard for circumscribing the Government's opportunities for invoking the criminal sanction." *United States v. Demma*, 523 F.2d 981, 985 (9th Cir.1975). *State v. McCoy,* 219 W.Va. at 134, 632 S.E.2d at 74.

During the trial, Ms. Reed testified that she returned to the bedroom in which Mr. Fagons was sleeping with the intention of committing suicide with Mr. Fagons' handgun. Mr. Fagons had previously placed his handgun on the nightstand beside the bed. While standing at the side of the bed, Ms. Reed grabbed the handgun with her right hand, and while bringing the gun across her body and up to the right side of her head, the gun discharged[5] and the discharged bullet struck Mr. Fagons. Specifically, Ms. Reed, in describing what happened on the day Mr. Fagons died, testified as follows during direct examination:

Q. Okay. Now if we go back to August 15th. So you're back in the room.

A. So I'm back in the room and –

[5] Mr. Fagons gun had a safety on the trigger. By putting pressure on the trigger, the gun would discharge.

Q. And right at that time what happened? Tell the jury what happened.

A. I was already having suicidal thoughts and hearing voices in my head about telling me to hurt myself and to kill myself and to just end it because it would be easier than having to deal with the situation. And Marcus' gun always sat on the nightstand and it didn't have a safety on it.

Q. Was it a loaded gun?

A. It was loaded. He always kept all of his guns loaded.

Q. Okay. And where he was laying was there an AR15 and other guns under the bed loaded?

A. Yes.

Q. All right. Tell the jury what happened.

A. So I walked over to the night stand and the gun is always in a holster. So I put my left hand on the holster and put my right hand on the gun, on the trigger, an I was like, you know, this is it, I'm just going to kill myself. And I pulled the holster away from the gun. As I'm pulling the gun I'm already pulling the trigger and I shut my eyes and the gun goes off. And when the gun goes off it kind of scares me and I kind of like look around and I don't really know what is going on and Marcus is laying there and he seems fine, he's breathing, but his eyes were shut. And I walk into the living room and put on the gun on the loveseat.

Q. Are you in shock at this time?

A. I am. I'm hysterical. I'm crying, you know, I don't know what I was thinking.

Q. And let me back up to the incident. You're saying the night stand, you grab the gun by the gun and by the trigger and you pulled it out to shoot yourself?

A. Yes.

Q. And it went off?

A. Yes.

App. Vol. 5, pgs. 1517-1519.

This Court has previously stated that a trial court's refusal to give a requested instruction is reversible error only if: 1) the instruction is a correct statement of the law; 2) it is not substantially

covered in the charge actually given to the jury; and 3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a defense. Syl. pt. 11, *State v. Derr*, 192 W.Va. 165, 451 S.E. 2d 731 (1994); Syl. pt. 2, *State v. Bell*, 211 W.Va. 308, 565 S.E. 2d 430 (2002). In general, the question on review of the sufficiency of jury instructions is whether the instructions as a whole were sufficient to inform the jury correctly of the particular law and the theory of the defense. *State v. Miller*, 197 W.Va. 588, 607, 476 S.E. 2d 535, 554 (1996).

In this instance, the trial court's failure to provide the requested instruction on accident meets all three criteria necessary to be deemed reversible error. The first criteria requires that the requested jury instruction is a correct statement of law. This Court has previously stated that "[a]ccidental death is a recognized defense to a murder charge in West Virginia. *State v. Evans,* 172 W.Va. 810, 814, 310 S.E. 2d 877, 881 (1983) citing *State v. White,* 171 W. Va. 658, 301 S.E.2d 615 (1983). The Court, in reversing the conviction in *Evans*, cited Syl. pt 10, *State v Legg*, 59 W.Va. 315, 53 S.E. 545 (1906):

> [w]here one, upon an indictment for murder, relies upon accidental killing as a defense, and there is evidence tending in an appreciable degree, to establish such defense, it is error to refuse to instruct the jury that if they believe from the evidence that the killing was the result of an accident, they should find the defendant not guilty.

Therefore, the Petitioner's requested jury instruction regarding the defense of accident is a correct statement of law.

With regard to the second criteria set forth by the Court in *Derr,* the trial court did not include any instruction which substantially covered the defense of accident in the charge given to the jury. In response to counsel for the Petitioner's objection to leaving out the requested jury instruction on accident, the trial court stated as follows:

THE COURT: I saw the instruction on accident and I specifically left it out. The Court considered that and deemed that it was not necessary and if they believe it was an accident then there will not be a crime. So accident being something less than involuntary manslaughter they would assume. So a complete accident I don't think there's any real case law on what should happen in an accident except for coming in and saying an accident and seeing how the jury takes that. So I think that's a common usage much more than a legal usage. And I think that accident would necessarily be included in a not guilty.

App. Vol. 5, pg. 1751.

Based upon the foregoing, it is apparent that the trial court did not believe that an instruction regarding the defense of accident was necessary due to the fact that the jury was instructed on involuntary manslaughter. This Court has previously rejected that position in the *Evans* case, finding that a proper involuntary manslaughter instruction does not preclude an instruction on the defense of accident, and the failure to give an instruction on accident is sufficient to constitute reversable error. *See State v. Evans,* 172 W.Va. at 814, 310 S.E. 2d at 881. Further, the trial court was incorrect that there is no case law on instructing a jury on the defense theory of accident.

The third criteria set forth by the Court in *Derr,* requires that the failure to give the requested instruction seriously impairs a defendant's ability to effectively present a defense. This Court has previously held that a defendant in a criminal trial is entitled to a specific instruction on the defendant's theory of defense as long as it is supported by the evidence. *See State v. LaRock,* 196 W. Va. 294, 470 S.E.2d 613, (1996) ([a] failure to instruct a jury upon a legally and factually cognizable defense is not subject to harmless error analysis, but a defendant is entitled to a specific instruction on his theory of defense, not an abstract or general one that is not supported by evidence. *See State v. Smith,* 178 W. Va. 104, 117, 358 S.E.2d 188, 201 (1987); *State v. Bennett,* 157 W. Va. 702, 705-706, 203 S.E.2d 699, 701-702 (1974)(overturned on other grounds).([t]his

rule means that in criminal cases a defendant generally is entitled to a jury charge that reflects any defense theory for which there is a foundation in the evidence. *See State v. Phelps*, 172 W. Va. 797, 801, 310 S.E.2d 863, 867 (1983); *State v. Simmons*, 172 W. Va. 590, 600, 309 S.E.2d 89, 99 (1983)).

The trial court, as set forth in the explanation for the refusal to give the requested instruction of the defense of accident, assumed that the jury knew and understood that an accident is a defense to the charge of murder, and further assumed that the jury would be able to draw an appropriate legal conclusion without the benefit of a legal instruction. Without instructing the jury on the defense of accident, there is no way to determine if the jury drew the appropriate legal conclusions based upon the facts. *See State v. Guthrie*, 194 W.Va. 657, 672, 461 S.E. 2d 163, 178 (1995)([w]ithout [adequate] instructions as to the law, the jury becomes mired in a factual morass, unable to draw the appropriate legal conclusions based on the facts).

Based upon the foregoing, Ms. Reed was entitled to a jury instruction on her defense of accident. Further, by failing to give the requested instruction, it is impossible to determine whether the jury correctly applied the facts presented to the correct standard of law. As demonstrated above, sufficient testimony was provided at trial to support a defense of accident. The trial court's rationale for failing to provide the requested instruction, including the trial court's assumption that the jury would know how to correctly apply the facts to the law, seriously impaired Ms. Reed's defense. Without the instruction, the jury is unaware that accident is a recognized defense, and the trial court's failure to give the instruction minimized the weight of the testimony. It is also clear, based upon the explanation given by the trial court for not providing the requested instruction, that the trial court was mistaken on whether accident was a legal defense to the charge of murder. As

such, Ms. Reed was unable to effectively present all of her defenses. Since all three criteria have been met, the trial court committed reversible error in failing to provide the requested instruction on accident.

II. The trial court erred in not admitting testimony of Mr. Fagons' abuse of previous intimate partners.

In Petitioner's Notice of Intent to Use and Motion to Admit Rule 404(b) Evidence, Ms. Reed sought to introduce evidence of physical, verbal, emotional, and sexual abuse committed by Mr. Fagons against her, her family and Mr. Fagons previous romantic partners, specifically T.C. On September 1, 2020, the trial court held a Rule 404(b) hearing in which T.C. testified about the abuse she suffered at the hands of Mr. Fagons. The testimony provided by T.C. described a relationship that was substantially similar to the relationship between Mr. Fagons and Ms. Reed in which he used violence, both physical and sexual, to control and dominate T.C.

The following are a few examples of the type of abuse described by T.C.:

1. While visiting Mr. Fagons uncle in Weston, Mr. Fagons told T.C. that he cheated on her. T.C. attempted to end the relationship, and, in response, Mr. Fagons grabbed T.C. by the throat, slammed her down on the sidewalk and began to choke her. Mr. Fagons only stopped choking her, when another individual pulled him off of T.C.. Later that same day, after they had returned to T.C.'s house[6], Mr. Fagons raped her for the first time. App. Vol. 3, pgs. 551-554.

2. During the relationship, Mr. Fagons worked to remove every friend from T.C.'s life. T.C. learned that when Mr. Fagons gave her the "look" she was to stop whatever she was doing or he would abuse her once they got home. App. Vol. 3, pg. 557.

3. After T.C. had become pregnant through a rape perpetrated by Mr. Fagons, Mr. Fagons became angry and punched T.C. repeatedly in the stomach. Mr. Fagons then grabbed her by the hair, slammed her down on the bed and raped her. App. Vol. 3, pgs. 566-573.

4. After gaining the courage to leave Mr. Fagons, T.C. was confronted by Mr. Fagons in a wooded area while she was walking to her grandmother's house. Mr. Fagons was hiding in the wooded area, and when T.C. passed, he grabbed her and would not let her

[6] During this time, Mr. Fagons was living with T.C. and her older brother. T.C. did not live with her parents.

go. She was able to escape after a family friend was alerted by her screams. App. Vol. 3, pgs. 575-577.

5. Mr. Fagons showed up at T.C.'s baby shower which was held at a local park. As she was attempting to leave, Mr. Fagons threw her up against a chain link fence, and yelled at her. App. Vol. 3, pgs. 577-578.

T.C. published a poem on Facebook that she had authored detailing abusive relationships she had with two different men. The poem does not name the individuals with whom T.C. had the abusive relationships with, however, she did confirm that the first part of the paragraph was about Mr. Fagons. In the poem, T.C. describes the abuse she suffered at the hands of Mr. Fagons. App. Vol. 3, pgs. 580-587.

In comparing the testimony of T.C. to that of Ms. Reed, it is clear that Mr. Fagons had a clear learned pattern with regard to his abuse of women with whom he was involved in a relationship. That learned pattern was as follows: 1) Mr. Fagons would target quiet girls younger than himself who he could manipulate; 2) Mr. Fagons would isolate the girl from everyone but her family; 3) Mr. Fagons would use his control over the girl to live off of the girl and her family; 4) When the girl would do something that Mr. Fagons did not like, he would wait until they were alone and then physically and sexually abuse the girl; and 5) Mr. Fagons would on numerous occasions rape the girl either vaginally or anally.

After the proffer of the above testimony by T.C., the trial court ruled that T.C.'s testimony was inadmissible. However, the trial court did allow the Petitioner to present that portion of the poem which described T.C.'s relationship with Mr. Fagons. App. Vol.1, pg. 84.

A. The trial court abused its discretion in finding that T.C.'s testimony was not relevant, and that it was more prejudicial than probative.

In reviewing the trial court's rulings it is well established that a trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of

discretion standard. Syl. pt. 4, *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998). Under this rule, evidence having any probative value whatsoever can satisfy the relevancy definition. This is a liberal standard favoring a broad policy of admissibility. *McDougal v. McCammon*, 193 W.Va. 229, 236, 455 S.E. 2d 788, 795 (1995).

In finding that T.C.'s testimony was inadmissible, the trial court found that the instances of abuse suffered by T.C. were not relevant to the mindset of Ms. Reed. The trial court specifically found that there was no evidence that the specific instances of abuse suffered by T.C. had ever been relayed to Ms. Reed, and therefore could not have played a role in Ms. Reed's mindset at the time of the alleged murder. App. Vol.1, pg. 85.

First, the trial court is incorrect in that the battered women's syndrome defense looks only at the mindset of the abused women at the specific time of the alleged murder. In *Stewart*, this Court explained that "[a]s a general proposition, Battered Women's Syndrome provides a clinical explanation of the psychological mindset, and behavior, of a woman who has been physically or mentally abused over a period of time by a domestic partner." *State v. Stewart*, 228 W.Va. at 414, 719 S.E. 2d at 884. This Court further wrote:

> [i]ncidents of physical or mental abuse in a battered woman's life are not static. The casual effect of the abuse may occur over a period of years. Walker, supra[7]. For example, a second incident of abuse in a woman's life may build upon the first incident, just as a third incident. It is not possible to judicially segregate incidents of abuse in a battered woman's life and say that one alleged incident is remote and inadmissible while another is relevant and admissible – all incidents, for the abused woman, may be relevant to her reasoning, beliefs, perceptions and behavior. *State v. Stewart*, 228 W.Va. at 417, 719 S.E. 2d at 887.

[7] Citing to "The Battered Woman" (Harper & Row, 1979); Walker, Lenore, "The Battered Woman Syndrome" (2d ed., 2000); Lenore E. Walker, Psychology and Law Symposium: Women and the Law, 20 Pepp. L. Re. 1170 (1993).

Based upon the foregoing, the entire history of the battered woman's experience is relevant, not just her mindset immediately before the alleged murder takes place. In making a determination of whether evidence of past abusive behavior is admissible, the trial court should not be making a determination of what abusive behavior contributed to an abused wife's actions. It is up to the defendant (and any expert witnesses) to explain how the abuse affected her, and the casual effect of the abuse is a determination to be made by the jury. *See State v. Stewart*, 228 W.Va. at 417, 719 S.E. 2d at 887. Therefore, evidence of Mr. Fagons abusive conduct is relevant.

Further, the trial court was incorrect in stating that Ms. Reed was unaware of the abuse suffered by T.C. Ms. Reed proffered to the Court, and testified to the same at trial, that she had heard that Mr. Fagons had abused T.C. while in high school. App. Vol. 5, pgs. 1525 and 1528. However, at the time she didn't believe it. However, after experiencing Mr. Fagons' reaction to the poem authored by T.C. described above, Ms. Reed began to believe the accusations made by T.C. App. Vol. 5, pg. 1532. Further, the allegations made by T.C. against Mr. Fagons were substantially similar to the abuse suffered by Ms. Reed. Since, Ms. Reed was aware of the allegations of abuse made by T.C. against Mr. Fagons, together with her history of abuse at the hand of Mr. Fagons, T.C.'s testimony is relevant to Ms. Reed's mindset. As such, contrary to the trial court's findings, Ms. Reed was aware of the abuse suffered by T.C., and the jury should have had the opportunity to listen to T.C.'s testimony and determine the effect it had on Ms. Reed.

In order to effectively present a battered woman's syndrome defense, the Petitioner must demonstrate that the alleged victim was a serial abuser. That evidence is especially probative in this case, as the State argued that Ms. Reed was either fabricating or exaggerating the abuse. T.C.'s evidence is relevant to rebut that argument, and to show that Mr. Fagons regularly abused his domestic partners.

B. The testimony of T.C. was admissible under Rule 404(b) of the West Virginia Rules of Evidence, and the trial court abused its discretion in finding that the testimony was inadmissible.

In discussing Rule 404(b), this Court has stated:

> "[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."*State v. Jonathan B.*, 230 W.Va. 229, 236, 737 S.E.2d 257, 264 (2012) (quoting *State v. LaRock*, 196 W.Va. 294, 310-11, 470 S.E.2d 613, 629 30 (1996)).

When an offer of Rule 404(b) evidence is made, the trial court must hold an *in camera* hearing to evaluate that evidence. *See* Syl. pt. 2, *State v. McGinnis,* 193 W.Va. 147, 455 S.E. 2d 516 (1994). Rule 404(b) is an "inclusive rule" in which all relevant evidence involving other crimes or acts is admitted at trial unless the sole purpose for the admission is to show criminal disposition. *State v. Nelson*, 189 W. Va. 778, 784, 434 S.E.2d 697, 703 (1993) *citing State v. Edward Charles L.,* 183 W.Va. 641, 647, 398 S.E. 2d 123, 129 (1990). The proponent of W. Va. R. Evid. 404(b) evidence must show that such evidence will help to prove a fact that a defendant has placed, or conceivably will place, at issue or a fact that the statutory elements obligate the Government to prove. Where evidence is offered under Rule 404(b), the proponent bears the burden of showing how the proffered evidence is relevant to one or more issues in the case and must articulate precisely the evidentiary hypothesis by which a fact of consequence may be inferred from the evidence of other acts. *State ex rel. Caton v. Sanders*, 215 W. Va. 755, 761, 601 S.E.2d 75, 81 (2004).

As set forth above, in making a determination of the admissibility of evidence offered under Rule 404(b) of the West Virginia Rules of Evidence, a trial court must first make a determination, by a preponderance of the evidence, as to whether the actions or conduct offered occurred. In this case, the trial court failed to make that determination. During the *McGinnis* hearing, T.C. described a number of instances of horrific abuse she suffered at the hands of Mr. Fagons. T.C.'s testimony was backed up by the poem she authored years prior to Mr. Fagons death in which she described the physical and sexual abuse she suffered. The State, in response to the testimony, provided no evidence that such acts did not occur, other than alluding to issues with T.C.'s credibility. However, the trial court determined that it was not going to let the evidence in, and did not make a determination as to whether the actions or conduct occurred.

Rule 402(b)(2) of the West Virginia Rules of Evidence provides that evidence of a crime, wrong or other act may be admissible if it meets certain exceptions. The Rule provides a list of exceptions that would make such evidence admissible, which includes: such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. This Court has also held that the list of "other purposes" for which evidence of other crimes or uncharged misconduct is admissible under subdivision (b) is illustrative only, and the exceptions to the admission of collateral crimes listed in the rule are not meant to be exhaustive. *State v. Hanna*, 180 W.Va. 598, 607, 378 S.E. 2d 640, 649 (1989).

The Petitioner contends that T.C.'s testimony is admissible under Rule 404(b)(2) as the evidence went to show Mr. Fagons motivations, intent and pattern of control towards Ms. Reed. In order to effectively establish a battered woman's syndrome defense, a defendant must show that she was the subject of repeated abuse and how that abuse affected the defendant's reasoning,

beliefs, perceptions and behaviors. Part of proving how the repeated abuse affected a defendant's mindset is showing how the abuser was able to control the defendant through the abuse.

Based upon the testimony of Ms. Reed and the proffered testimony of T.C. demonstrate that their experiences with Mr. Fagons are substantially similar. Their testimony established that Mr. Fagons had the same pattern of control with his intimate partners. That patterns was as follows: 1) Mr. Fagons would target younger, vulnerable girls; 2) Mr. Fagons would begin to live off of the girls and their families; 3) Mr. Fagons would isolate the girl from everyone but their family[8]; 4) Mr. Fagons began by verbally abusing the girl; 5) Mr. Fagons' abuse eventually escalated to the point where Mr. Fagons would begin to physically and sexually abuse the girl; 6) Mr. Fagons made sure that the physical and sexual abuse would always be behind closed doors; and 7) both girls learned that when Mr. Fagons would give them the "look" they would be subject to both physical and sexual abuse when they returned home.

As this Court recognized in both *Harden* and *Stewart* an abused person will sometimes act irrationally and that a person who has the characteristics of battered woman's syndrome will reason and react quite differently from someone who has not been abused. T.C.'s testimony demonstrates how Mr. Fagons used physical and sexual abuse to control his intimate partners. This evidence demonstrates the intent and motivation of Mr. Fagons in abusing Ms. Reed, and how he used physical and sexual abuse to control Ms. Reed. Without understanding the intent and motivations of Mr. Fagons, a jury could not put into context the behavior of Ms. Reed. Additionally, this evidence is necessary to rebut the State's argument that Ms. Reed was not a battered woman. The

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[8] Mr. Fagons' pattern of abuse appears to be somewhat unique in that he did not cut off contact with the girls' families. However, based upon the testimony introduced at trial, Mr. Fagons intended to live off of the families, but was able to assert control to such an extent that the girls would not reveal the abuse to their families.

proffered testimony of T.C. directly rebutted the State's arguments, and conclusively demonstrated that Mr. Fagons acted in an aggressive manner in his romantic relationships.

C. If this Court determines that T.C.'s testimony is not admissible under Rule 404(b), the Court should fashion an exception which recognizes the evidentiary issues present in cases of domestic violence and battered women.

Domestic abuse has become almost an epidemic in the United States. According to the most recent statistics gathered by the National Coalition Against Domestic Violence 39.4% of West Virginia women will experience intimate partner physical violence, intimate partner sexual violence or intimate partner stalking in their lifetime.[9] As such, even if this Court determines that T.C.'s testimony is not admissible under a traditional Rule 404(b) analysis, this Court should recognize that domestic abuse presents a unique issue with regard to evidentiary rules and craft an exception for cases in which domestic abuse is an issue.

The traditional rules of evidence prohibit the admission of a defendant's prior bad acts to suggest to the jury that the defendant's propensity or character is to engage in the charged conduct. However, the unique nature of domestic abuse supports the admissibility of such evidence. Evidence of prior domestic abuse against the same victim and previous partners provides context to the jury to understand the abuser's motivations and intent. Domestic abuse is not an isolated act, it is a pattern of conduct that demonstrates how the abuser controls and dominates his or her romantic partners.

As this Court has previously recognized:

> [m]en who abuse their wives classically follow [a] pattern and the family follows this pattern. A man beats his wife, makes promises and they kiss and make up, and there is a period psychologists call "the honeymoon." At some point following the honeymoon there is a cycle of abuse and the cycle starts all over again. *In the Interest of Betty J.W.*, 179 W.Va. 605, 611, 371 S.E. 2d 326, 332 (1988).

[9] National Center for Injury Prevention and Control of the Centers for Disease Control and Prevention (2019). The National Intimate Partner and Sexual Violence Survey (NISVS): 2010-2012 State Report Retrieved from http://cdc.gov/violenceprevention /pdf/NISVS-StateReportBook.pdf.

Other jurisdictions have recognized the unique characteristics of domestic abuse, which make proving such abuse difficult. In *People v. Jennings*, 81 Cal. App. 4th 1301, 97 Cal. Rptr. 2d 727 (2000), the California Court of Appeals wrote:

> [d]omestic violence is quintessentially a secretive offense, shrouded in private shame, embarrassment, and ambivalence on the part of the victim, as well as intimacy with and intimidation by the perpetrator. The special relationship between victim and perpetrator in both domestic violence and sexual abuse cases, with their unusual private and intimate context, easily distinguishes these offenses from the broad variety of criminal conduct in general.

The jurisdictions which have recognized this issue, and have either through statute, rule or case law allowed evidence to be admitted of instances of domestic abuse against former intimate partners. The states of California, Alaska, Colorado and Michigan have adopted statutes which specifically permit the introduction of evidence of past domestic abuse against previous romantic partners. *See Cal. Evid. Code § 109, Alaska Rules of Evidence Rule 404(b)(4);* C.R.S. 18-6-801.5 (Colorado); *MCLS §* 768.27(b) (Michigan).

Cases which hold that evidence of domestic abuse against past intimate partners include: *Smith v. State*, 232 Ga. App. 290, 501 S.E. 2d 523 (Ga. Ct. App. 1998)(concluding that admission of prior bad act against a separate victim was proper since previous act, attacking a previous intimate partner with a machete, was sufficiently similar to the current charge of attacking the current intimate partner by dousing her with lighter fluid, in that defendant is motivated to attack his intimate partners with weapons); *State v. Fraga* 864 N.W. 2d 615 (Minn. 2015)(Such conduct (i.e. intimate partner violence) involves family dynamics otherwise masked by the privacy of home, addresses the difficulties in prosecuting domestic abuse offenses, and provides a more complete context to aid the finder of fact in determining the credibility of witnesses); *State v. Howard*, 106 So. 3d 1038 (La. 2012)(holding the trial court's admission of past acts of domestic

violence against a previous girlfriend as tending to prove motive or pattern of domestic violence); *State v. Yong*, 206 Ore. App. 522, 138 P. 3d. 37 (Ore. 2006)(holding that the proffered evidence (e.g. assault against previous wife) tended to prove that when similarly agitated in a domestic setting, defendant will act violently and intentionally.)

West Virginia has already recognized a propensity exception with regard to cases involving child molestation. This Court held, in Syl. pt. 2 of *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990) that "[c]ollateral acts or crimes may be introduced in cases involving child sexual assault or sexual abuse victims to show the perpetrator had a lustful disposition towards the victim, a lustful disposition towards children generally, or a lustful disposition to specific other children provided such evidence relates to incidents reasonably close in time to the incident(s) giving rise to the indictment. . ."

The facts of this case demonstrate the need to carve out an exception with regard to domestic abuse similar to the exception carved out for cases involving child molestation. The evidence proffered by T.C. and as testified to by Ms. Reed demonstrates that Mr. Fagons had a pattern with regard to his intimate partners. He would target insecure, younger girls, and would isolate them from their friends. After a period of time, Mr. Fagons would become aggressive and begin to physically, verbally and sexually abuse these girls. Mr. Fagons made sure that the abuse happened behind closed doors, and that, other than his family, nobody ever witnessed the abuse. His abuse would follow a pattern in which if he became angry, he would wait until he and the girl were home, and then he would usually physically abuse the girl and then rape her.

The evidence regarding Mr. Fagons' abuse of T.C. is especially probative in this case. As with many other abused women, Ms. Reed never told anyone about the abuse she suffered at the hands of Mr. Fagons. Ms. Reed would make excuses for Mr. Fagons behavior and took steps to

actively hide the results of his abuse. As such, at trial, the State argued Ms. Reed was making up aspects of the abuse, that Ms. Reed was not credible and was fabricating tales of her abuse during her defense. As shown above, T.C. and Ms. Reed's experiences with Mr. Fagons was remarkably similar. Allowing T.C. to testify would have allowed the Petitioner to rebut the State's argument, buttress Ms. Reed's credibility and give the jury a better understanding of Mr. Fagons abusive behavior and how it affected Ms. Reed.

Allowing evidence of domestic abuse of previous romantic partners would help solve the problem of the perceived lack of credibility of abused women. Like Ms. Reed, many abused women are abused in private and do not report the abuse they suffer. These women usually have no one that can corroborate their stories of abuse. By allowing evidence of abuse of previous romantic partners, a jury would be able to understand the full, relevant history of abuse and the abuser's pattern of control over his romantic partners, and it would help the jury understand and help determine the role that such abuse played in woman's life.

III. The trial court abused its discretion in finding that the State did not "open the door" to allow the testimony of T.C.

During direct examination, Stephanie Reed, Ms. Reed's mother, testified about Mr. Fagons' reaction to the poem by T.C. in which she revealed that Mr. Fagons had repeatedly raped her. App. Vol. 5, pgs. 1616-1617. On cross examination, in an effort to discredit T.C.'s poem, the following exchange took place:

Mr. Hoxie: And you know Marcus has no criminal record in regards to anything, in regard to – actually I think he has only traffic tickets. Do you know that?

A: No.

Q: So he has no criminal record whatsoever in regards to any of this?

A: I couldn't answer that, sir.

App. Vol. 5, pgs. 1617-1618.

This line of questioning on cross examination opened the door to allow T.C. to testify about the abuse she suffered at the hands of Mr. Fagons, and for others to testify to abuse of other intimate partners of Mr. Fagons that they witnessed. Sally Collins, Mr. Fagons grandmother, who testified on behalf of Ms. Reed was prepared to testify that Mr. Fagons had physically assaulted another previous girlfriend, and Tracy McCartney, Mr. Fagons aunt who also testified on behalf of Ms. Reed, would testify that she saw Mr. Fagons pick up and shake the mother of one of his children.

As discussed above, this Court, in commenting on the standard of review for a trial court's evidentiary rulings, has stated: [a] trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard." Syl. pt. 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E. 2d 469(1998). In *State v. Baker*, with regard to the "opening the door" doctrine, this Court stated:

> [t]he opening the door doctrine is essentially a rule of expanded relevance and authorizes admitting evidence which otherwise would have been irrelevant or inadmissible in order to respond (1) admissible evidence that generates an issue, or (2) inadmissible evidence admitted by the court over objection. *State v. Baker,* 230 W.Va. 407, 412, 738 S. E. 2d 909, 914 (2013) *citing State v James*, 144 N.J. 538, 677 A. 2d 734 (1996).

This Court further stated:

> [n]ormally the scope of cross examination is limited to the subject matter, or issues, or events to which the witness testified on direct examination . . . [This] means the subject opened up, such as: (1) the period of time; (2) the relationship between the two parties; or (3) an element of the offense . . . It is always permissible to inquire into the details of the events testified to on direct. Statements relate to the direct testimony of a witness when they relate generally to the events and activities [to which the witness] testified.

State v Baker, 230 W.Va. at 413, 738 S.E. 2d at 915 *citing* 1 Cleckley, Palmer, and Davis, *Handbook on Evidence*, § 611.02[3][d][iv].

As has been discussed extensively in this appeal, the State used Ms. Reed's failure to tell anybody about the abuse she suffered to argue that she was either fabricating or exaggerating the abuse. The State also presented evidence that Ms. Reed was the aggressor in the relationship. The State, through this line of questioning of Stephanie Reed, was seeking to establish that since Mr. Fagons had not been charged with the rape of T.C., then the allegations contained in the poem could not be true. By questioning whether the allegations contained in the poem were true, T.C. should have been allowed to tell the jury that the allegations in the poem were true, and that Mr. Fagons had raped her. The jury could then judge the credibility of the accusations made against Mr. Fagons by T.C.

The questioning about Mr. Fagons criminal history and the fact that he was never charged with the rape of T.C. was outside the scope of direct examination, and made Mr. Fagons' criminal history an issue. By putting into issue Mr. Fagons criminal history, Mrs. Collins and Mrs. McCartney should have been permitted to testify that they witnessed Mr. Fagons committing criminal actions. The jury should have heard testimony so that they could judge the credibility of the accusations made against Mr. Fagons. The State was able to put into evidence that Mr. Fagons had never been charged with a crime, but Ms. Reed was precluded from introducing evidence that Mr. Fagons had committed a number of criminal acts.

In Syl. pt 8, *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303 (2014), this Court held:

> [t]he curative admissibility rule allows a party to present otherwise inadmissible evidence on an evidentiary point where an opponent has 'opened the door' by introducing similarly inadmissible evidence on the same point. Under this rule, in

> order to be entitled as a matter of right to present rebutting evidence on an evidentiary fact: (a) The original evidence must be inadmissible and prejudicial, (b) the rebuttal evidence must be similarly inadmissible, and (c) the rebuttal evidence must be limited to the same evidentiary fact as the original inadmissible evidence.

Under the West Virginia Rules of Evidence, evidence of Mr. Fagons lack of criminal history is not admissible to prove that Mr. Fagons had not committed a specific criminal act. Since that evidence is inadmissible, under the "curative admissibility rule," Ms. Reed is allowed to introduce similarly inadmissible[10] evidence on the same point. Since the State introduced evidence that Mr. Fagons had not previously been charged with any crime, and by implication did not abuse T.C. or any other domestic partners, under the "curative admissibility rule", the Petitioner could introduce evidence that Mr. Fagons had previously committed such abusive and criminal acts.

IV. The trial court erred in finding that the body camera footage was admissible and that it was not gruesome and unduly prejudicial.

During the underlying trial, and over the objection of the Petitioner, the State of West Virginia entered into evidence approximately six (6) minutes of body camera footage taken by Sergeant R. Todd Deffet of the Barbour County Sheriff's Office[11]. Sergeant Deffet was the second officer on the scene, and assisted with the initial care of Mr. Fagons. The portion of the body camera footage admitted by the trial court begins with Sergeant Deffet inside of the residence and ends after Mr. Fagons had been removed from the residence. Generally, the body camera footage shows Mr. Fagons lying on a bed with the officers tending to him. The body camera footage also records Mr. Fagons sporadic, ragged breathing, and the Petitioner's aunt, who was admitted to the scene, pleading with Mr. Fagons to survive.

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[10] The Petitioner maintains that the evidence concerning Mr. Fagons abuse of T.C. is admissible under the applicable West Virginia Rules of Evidence.

[11] The entire body camera footage from Sergeant Deffet is approximately twenty-two (22) minutes long. However, the trial court found that the body camera footage was overly long, and limited the body camera footage to be introduced at trial to the first six (6) minutes of footage. A CD containing the footage was provided and is referred to in the Appendix at App. Vol. 5, pg. 1963.

The Petitioner objected to the introduction of the body camera footage on the grounds that the footage is gruesome or otherwise unfairly prejudicial, and the prejudicial nature of which far outweighs the probative value of the footage. App. Vol. 1, pg. 12. The trial court denied the Petitioner's Motion, finding as follows:

> a. The body scene footage is without question relevant to the criminal case; likewise, there is no question that the body camera footage is prejudicial. Despite being prejudicial, the footage is highly probative; it not only shows the scene of the charged crime and how the scene appeared on the day in question, it also demonstrates the condition of the alleged victim after Defendant left the scene. It is important to consider that the video is not of a dead victim, but rather a still living victim. The body camera footage goes directly to the elements of crime such as intent and malice. The footage is essential information and necessary for the jury to have a full understanding of the circumstances of the case.

App. Vol. 1, pg. 214.

This Court has held that in determining the admissibility of photographs over a gruesome objection must be determined on a case-by-case basis pursuant to Rules 401 through 403 of the West Virginia Rules of Evidence. *See State v. Derr,* 192 W.Va. at 178, 451 S.E. 2d at 744. In establishing the test to determine whether a photograph is gruesome, the Court, has stated:

> [r]ule 401 defines relevant evidence in terms of probability. The relevant inquiry is whether a reasonable person, with some experience in the everyday world, would believe that the evidence might be helpful in determining the falsity or truth of any fact of consequence. *See generally Young v. Saldanha*, 189 W. Va. 330, 336, 431 S.E.2d 669, 675 (1993). Rule 402 provides that all relevant evidence is admissible limited only to certain specified exceptions not pertinent here. *See also Roberts v. Stevens Clinic Hospital, Inc.*, 176 W. Va. 492, 497, 345 S.E.2d 791, 796 (1986) ("the general rule is that pictures or photographs that are relevant to any issue in a case are admissible"). It can be said that although Rules 401 and 402 strongly encourage the admission of as much evidence as possible, Rule 403 restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence. *See State v. Dillion,* W. Va. , 447 S.E.2d 583, 596 (1994).

> Applying these rules to a "gruesome" photograph objection, Rule 401 requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse. *State v. Derr,* 192 W.Va. at 178, 451 S.E. 2d at 744.

In conducting the balancing test under Rule 403 of the West Virginia Rules of Evidence, the necessary balancing must appear on the record. *State v. McGinnis*, 193 W. Va. at 156, 455 S.E.2d at 525, (1994) *citing Arnoldt v. Ashland Oil, Inc.*, 186 W. Va. 395, 412 S.E.2d 795 (1991). A trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to a review under an abuse of discretion standard. Syl pt. *4, State v. Rodoussakis*, 204 W.Va. 58, 511 S.E. 2d 469 (1998).

A. The body camera footage is not relevant to any fact at issue in this matter.

In this instance, the trial court abused its discretion in finding that the body camera footage was relevant and also that the body camera footage was highly probative in that it showed the scene of the charged crime and how the scene appeared on the day in question and it also demonstrated the condition of Mr. Fagons after Ms. Reed left to get help. The trial court further abused its discretion by finding that the footage went directly to prove the elements of the crime such as intent and malice. After reviewing the footage, it is clear that the body camera footage had scant probative value, is unnecessarily cumulative of other evidence that could have been introduced, and any probative value could have been established through crime scene photographs instead of the body camera footage. Further, the camera footage does not demonstrate that any elements of the crime charged are more likely than not.

With regard to the trial court's finding that the body camera footage was highly probative in that it showed the scene of the crime and how the scene appeared on the day, those specific reasons have no relevance to this case. As set forth above, in determining whether an item of evidence is relevant, the inquiry is whether a reasonable person, with some experience in the everyday world, would believe that the evidence might be helpful in determining the falsity or truth of any fact of consequence. *See State v. Derr,* 192 W.Va. at 178, 451 S.E. 2d at 744. The location and condition of the scene had no bearing on the State's theory of the case, and the State made no argument or really any reference to the scene in any way that went to prove an element of the crime charged or any fact of consequence. Further, the trial court provided no rationale to support its finding that the scene and condition of the scene were relevant to this case

To the extent that the listed reasons for the admitting the body camera footage were relevant, the scene and the condition of the scene on the day could have achieved through the introduction of the crime scene photographs. During the investigation, after Mr. Fagons had been removed from the bedroom, the investigating officer took a number of still photographs of the crime scene. The still photographs documented the room where the incident took place, and the condition of the room soon after Mr. Fagons had been removed. App. Vol.1, pgs. 35-36. These photographs were not offered as evidence by the State of West Virginia during the trial of the case[12]. If the scene was in fact important to the State's case and necessary to establish some element of the crime, those photographs could have been introduced instead of the body camera footage. The reason the still photographs were not used by the State is that the scene was not important to the State's case, but the body camera footage allowed the State to show the jury footage of a dying man, gasping for air. The State's actual rationale for using the body camera

[12] The photographs were not offered into evidence, but attached to the State's Response to Petitioner's Motion *in Limine* regarding the body camera footage.

footage can be found in the State's closing argument: During closing argument, the prosecutor made the following statement:

> Mr. Hoxie: She also says that Marcus made no sounds. You heard it in the bodycam. You know what sounds he was making. That was the sounds of a dying man as he was slowly dying. She heard him.

App. Vol. 5, pg. 1816.

In its ruling, the trial court further found that the body camera footage was relevant because it shows the condition of Mr. Fagons after Ms. Reed left the scene. App. Vol.1, pg. 214. The trial court is simply incorrect in its determination. There was no evidence presented to the trial court to support this finding. The implication the State attempted to create was that Mr. Fagons was in the same condition as shown on the body camera footage as when Ms. Reed left to get help. As the State admitted in its closing, the body footage is very difficult to watch. The footage showed Mr. Fagons barely breathing and when he did breathe, his breathing was ragged, sporadic and rattling. The State argued that this somehow demonstrated that Ms. Reed could not have accidently shot Mr. Fagons. However, the State offered no evidence to support that Mr. Fagons was breathing like this at the time Ms. Reed left to get help.

According to the State's theory of the case, the body camera footage was taken approximately one hour after Mr. Fagons was shot, and the State provided no evidence that even suggested that Mr. Fagons was in the same condition shown on the body camera footage as when Ms. Reed left. The body camera footage created an impermissible implication that should not have been shown to the jury. Further, Mr. Fagons would be in the same condition depicted on the body camera footage whether Ms. Reed shot him intentionally or accidently. As such, Mr. Fagons condition during the body camera footage does not make any fact at issue in the case more likely than not.

The trial court also found that the body camera footage went directly to prove the evidence of malice and intent. App. Vol.1, pg. 214. However, again the trial court finding is a generalized statement for which the trial court provides no rationale to support. Contrary to the trial court's ruling, the body camera footage does not demonstrate either malice or intent. Malice and intent are elements of a crime which go to why the crime was committed. Body camera footage of a man dying has no bearing on proving malice and intent. The body camera footage would have shown the same images and recorded the same sound whether Mr. Fagons was shot intentionally, accidently or even if he had shot himself.

The trial court's finding that the footage was admissible because it showed a dying man is also improper. At the hearing on Defendant's Motion *in Limine* regarding the admissibility of the body camera footage, the trial court stated:

> [a]nd further, the victim is not dead. It is not a video of a dead man. They can still look at a man. That too makes it highly probative for the jury to look at.

App. Vol 3, pg. 654.

Also, in the written Order regarding the admissibility of the body camera footage, the trial court, in its determination that the body camera footage is relevant, stated "[i]t is important to consider that the video is not of a dead victim, but rather a still living victim." App. Vol 1, 214. Further in the Sentencing Order, the trial court made the following finding:

> 3. The officer's bodycam footage that was introduced into evidence shows that the victim did not die peacefully and quickly, but that he suffered and died slowly and mostly alone.

App. Vol 1, pg. 183.

The fact that Mr. Fagons was still alive at the time of the body camera footage was taken is not relevant to the crimes charged, and the trial court does not provide any rationale as to why this fact is relevant. As stated above, the body camera footage is essentially a video of a man

dying. Based upon the above statements and rulings of the trial court, it appears that the trial court believed that the jury should take into consideration how Mr. Fagons died in deciding the Petitioner's guilt. However, how Mr. Fagons died does not make any fact in issue, with regard to Ms. Reed's guilt, more likely than not. The fact that Mr. Fagons is alive at the time does not demonstrate either intent or malice, and allowing the jury to watch Mr. Fagons dying is improper and an abuse of discretion.

Additionally, showing six (6) minutes of body camera footage is unnecessarily cumulative. Any relevant information that would be necessary for the State to make its case could be gleaned from the body camera footage could have been established by either still shots or by playing much less of the body camera footage without sound. Neither the State nor the trial court provide any rationale of why playing six (6) minutes of body camera footage is necessary to establish any element of the crime charged. There was no legitimate reason to show six (6) minutes of footage, it simply allowed the jury to watch a dying man.

B. Even if this Court finds that the body camera footage is relevant, its probative value is outweighed by unfair prejudice to the Petitioner.

Even if this Court finds that the body camera footage is relevant to some aspect of the State's case, the body camera footage's probative value is outweighed by unfair prejudice to the Petitioner. Rule 403 of the West Virginia Rules of Evidence states:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rules 401 through 403 direct the trial judge to admit relevant evidence, but exclude evidence whose probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *Collins v. Bennett,* 199 W. Va. 624, 629, 486 S.E.2d 793, 797 (1997) *citing* Syl. pt. 4, *Gable v. Kroger Company*, 186 W.Va. 62, 410 S.E. 2d 701 (1991). Although Rules 401 and

402 of the West Virginia Rules of Evidence strongly encourage the admission of as much evidence as possible, Rule 403 of the West Virginia Rules of Evidence restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence. *State v. Derr*, 192 W. Va. at 178, 451 S.E.2d at 741. The balancing necessary under this rule must affirmatively appear on the record. *State v. McGinnis*, 193 W. Va. at 156, 455 S.E.2d at 525.

In discussing what constitutes unfair prejudice, this Court has stated:

> It has been recognized that under Rule 403 "a court has discretion to exclude evidence if its probative value is substantially outweighed by a danger of unfair prejudice." 1 Palmer, et al., *Handbook on Evidence*, § 403.05[2], at 295. It has been said that unfair prejudice is evidence that has "an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one." *Old Chief v. United States*, 117 S. Ct. 644, 519 U.S. 172, 136 L. Ed. 2d 574 (1997). (internal quotation marks and citation omitted). *State v. Sites*, 241 W. Va. 430, 441, 825 S.E.2d 758, 770 (2019).

In its Order, the trial court stated the following:

> b. The body camera footage is not overly gruesome. The Court notes that in the video, one can see **some blood on the bedding where the alleged victim is located, but that is all.** (Emphasis Added).

App. Vol.1, pg. 214. Contrary to the trial court's ruling, both the State, in its closing argument, and Sergeant Deffet, during his testimony, agreed that the body camera footage was difficult to watch. *See* App. Vol. 5, pg. 1824-1825 and App. Vol. 3, pg. 964.

The West Virginia Supreme Court of Appeals has previously not had the opportunity to discuss objections to body camera footage on the grounds that the footage is both gruesome and unduly prejudicial. However, the State of Georgia recently decided a case in which one of the

issues concerned an objection over body camera footage on the ground that such footage was gruesome and unduly prejudicial.

In *Morgan v. State*, 307 Ga. 889, 838 S.E. 2d 878 (2020), the Defendant, Jokeera Morgan (hereinafter "Morgan") was found guilty but mentally ill of murdering her two daughters by drowning. On appeal, among other things, Morgan argued that the trial court erred by admitting the policy body camera footage of her children's bodies[13]. Morgan argued that the prejudicial impact of the body camera footage substantially outweighed the probative value of such footage. In response, the State of Georgia argued that it had no crime scene photographs and the footage as the only evidence of how the children had died. Further, the body camera footage captured Morgan's statements, her demeanor and the dirty and disordered state of the home.

The evidence at trial showed that after drowning her children, Morgan called 911 to report what she had done. The responding officers found the children's bodies inside the house. The body camera footage of the responding officers showed the discovery of the bodies and attempts to resuscitate the children.

In Georgia, OCGA §§ 24-4-401 through 24-4-403, are substantially similar to Rules 401 through 403 of the West Virginia Rules of Evidence. The Georgia Supreme Court analyzed the body camera footage pursuant to OCGA §§ 24-4-401 through 24-4-403 and found that the footage which depicted a dead baby, sprawled on the floor with water and foam oozing from her nose as an officer attempted to resuscitate her was unfairly prejudicial. The Georgia Supreme Court found that such image was likely to incite feelings of revulsion, disbelief, shock, sadness and anger. Further, the Georgia Supreme Court concluded that this portion of the video had an undue tendency to suggest for the jury to render an opinion on an improper basis. Based upon the foregoing, the

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[13] The trial court admitted the body camera footage, but ordered the State to mute the recordings. *See Morgan v. State*, 307 Ga. At 894, 838 S.E. 2d at 883.

Georgia Supreme Court found that the scant probative value of that portion of the body camera footage was outweighed by the undue prejudicial impact.[14]

In *Morgan,* the Georgia Supreme Court took the opportunity to discuss its concern about the use of body camera footage during a criminal trial. The Court recognized that the use of body camera footage may pose significant risks to the defendant's right of a fair trial. The Court also recognized the fact that a body camera records everything within its range, including some evidence which is irrelevant. Further, video and audio of an event is often much more emotionally powerful than testimony or still photographs, so the prejudicial impact of relevant body camera evidence may substantially outweigh its probative value, particularly in cases involving violent crimes. Finally, the Court recognized that a video recording is the equivalent of a series of still images, so the playing of a length of body-camera video may be needlessly cumulative. *See Morgan v. State*, 307 Ga. At 886, 838 S.E. 2d at 896.

Based upon the trial court's ruling, it is clear the court did not consider the totality of what the body camera footage provided. As discussed by the Georgia Supreme Court, unlike a photograph, body camera footage is not static. In addition to pictures, body cameras also record the sounds and emotions which are occurring at the time. In this case, while the body camera footage does not show a close up of Mr. Fagons head wound, the body camera footage does record Mr. Fagons sporadic, shallow, ragged breathing and the Petitioner's aunt, in extreme distress, begging Mr. Fagons not to die.

In determining whether body camera footage should be precluded due to its gruesome nature, the trial court should take into consideration the totality of the footage, not just whether the

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[14] The Georgia Court while finding that the body camera footage was admitted in error found that its introduction during the trial constituted harmless error as the footage played a minor role in the both the State's case and the theory of defense.

wound is shown or the amount of blood depicted. In this case, the State made the body camera footage a significant factor in its prosecution of Ms. Reed. It is highly unlikely that any member of the jury has previously watched or listened to a person die from a gunshot wound to the head. It is the sporadic, ragged, shallow breathing of Mr. Fagons and the reaction of the family member which makes the body camera footage unduly prejudicial, as it makes it more likely than not that the jury would make its decision on the basis of emotion and/or revulsion of the scene. By failing to take into the totality of the body camera footage, the trial court abused its discretion. This is what makes the footage unduly prejudicial.

V. The trial court erred when granting the State's motion to bifurcate, and based on this error, the Petitioner asks for an update to the current law to provide defendants with primary discretion when bifurcating a trial.

The trial court erred when granting the State's motion to bifurcate because under West Virginia Code § 62-3-15, and rulings by this Court, Ms. Reed was not provided an adequate opportunity to present evidence pertinent to her character. West Virginia Code allows for both unitary and bifurcated trials. *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996). Further, a party may present much broader evidence during a mercy phase of a trial. *State v. McLaughlin*, 226 W.Va. 229, 700 S.E.2d 289 (2010). The trial court erred when it prevented Ms. Reed from presenting relevant character evidence, including her not being at risk to reoffend. Ms. Reed now requests an update to the current bifurcation law.

A. The trial court erred when granting the State of West Virginia's motion to bifurcate, because the Petitioner was unable to present relevant character evidence.

The trial court erred when granting the State's motion to bifurcate because Ms. Reed was not given the opportunity to present specific evidence relevant to a jury finding of mercy. This Court stated "[w]hen a motion to bifurcate is made both sides must have an equal opportunity to

present relevant evidence." *State v. LaRock*, 196 W.Va. at 315, 470 at 634. In *McLaughlin,* a trial court certified the following question to this Court, "is the prosecution limited in the mercy state of a bifurcated trial to the presentation of evidence introduced in the guilt state of trial and rebuttal of evidence presented by the defendant?" *State v. McLaughlin*, 226 W.Va. at 232, 700 S.E. 2d 292. This Court held "the type of evidence that is admissible in the mercy phase of a bifurcated first-degree murder proceeding is much broader than the evidence admissible for purposes of determining a defendant's guilt or innocence." This Court further stated, "[a]dmissible evidence necessarily encompasses evidence of the defendant's character, including evidence concerning the defendant's past, present, and *future*..." *State v. McLaughlin*, 226 W.Va. at 240, 700 S.E. 2d 300. (emphasis added).

Here, Ms. Reed opposed the State's motion to bifurcate. During the trial, the State introduced video evidence arguing it displayed Ms. Reed's malice and intent. The footage was prejudicial because it contained a gruesome video of the wounded victim. However, Ms. Reed was unable to present evidence pertaining to her past, present, or future character. Specifically, evidence from her trial expert, psychologist, Dr. David A. Clayman, concerning her very low probability of reoffending.

Therefore, the trial court erred when granting the State's motion to bifurcate, because Ms. Reed was not awarded the opportunity to present evidence of her past, present, or future character, while the State of West Virginia was allowed to present similar evidence against Ms. Reed.

B. Because West Virginia law does not provide defendants sole discretion to determine to bifurcate their own trials, the Petitioner asks that this law be updated.

Defendants should have the ability to make strategic decisions on how to best present defenses. Currently, West Virginia does not provide discretion to defendants concerning this issue.

Therefore, Ms. Reed asks that the law be updated to provide defendants sole discretion to bifurcate their own trials.

In his *McLaughlin* dissent, Justice Ketchum outlined why discretionary bifurcation creates "...a procedural nightmare that allows the State to introduce egregious formerly inadmissible, 'bad character' evidence at the penalty phase of the trial." He analogized bifurcation to a defendant's option to present evidence of good character in a unitary trial. While bifurcation was meant to initially aid defendants in introducing good character evidence, what happens in reality is "...prosecutors encourage and seek bifurcation, and then use that bifurcated system to *initiate* the introduction of character evidence – before the defendant ever opens the door by introducing any character evidence." *State v. McLaughlin*, 226 W.Va. at 241, 700 S.E. 2d 301.

Here, Ms. Reed determined bifurcation would not be in her best interest. Nevertheless, the State's motion was granted. Much like Justice Ketchum's dissent, Ms. Reed argued a defendant should have the ability to choose when to bifurcate a trial, because such a determination is like a defendant choosing to introduce character evidence. However, exactly as Justice Ketchum described, the State was allowed to introduce disparaging character evidence, prior to Ms. Reed producing her own pertinent past, present, or future character evidence. Such a change would continue to foster the defendant's ability to make strategic decisions on how to present his or her defense and ensure a constitutionally fair trial.

VI. The State violated the Petitioner's right to due process and her right to confront the witnesses against her by failing to timely provide transcripts from the Grand Jury proceedings and the Rule 404(b) hearing as ordered by the trial court.

Throughout the pendency of this case, the Petitioner's defense has been hampered by the court reporter's failure to provide timely and accurate transcripts. The court reporter was ordered to provide the transcripts of the grand jury proceedings to counsel for the Petitioner at least ten

(10) days prior to the start of the trial[15]. Further, the court reporter was ordered to provide transcripts of the proffered testimony from the 404(b) hearings to counsel for the Petitioner prior to the start of trial. App. Vol. 3, pg. 674. However, the court reporter failed to provide those transcripts as ordered[16]. As a result, the first day of trial was ended early, and a replacement court reporter was used for the second day of trial in order for the original court reporter to have time to prepare the transcripts.

Even though the court reporter was given additional time to provide the required transcripts, the transcripts were provided piece meal, usually the morning when the witness, whose previous testimony was included in the transcript, would testify, and only a few hours, and sometimes only several minutes, before the witness would testify. Counsel for the Petitioner was entitled to these transcripts in order to prepare effective cross examination of the State's witnesses. The failure to provide timely and accurate transcripts violated the Petitioner's right to properly confront the witnesses against her.

In discussing the duties owed by a court reporter, this Court has stated:

> [t]he law requires diligence on the part of both judges and attorneys. The law similarly requires diligence on the part of court reporters. Court reporters cannot be permitted, after the judge and the lawyers have diligently performed their duties, to constipate the process by neglecting their duties. *Mayle v. Ferguson*, 174 W.Va. 430, 433, 327 S.E. 2d 409, 413 (1985).

This Court also stated that "[d]ilatory court reporters present a serious threat to the administration of the criminal justice system. *Mayle v. Ferguson*, 174 W.Va. at 432, 327 S.E. 2d at 412.

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[15] On June 26, 2020, the Petitioner filed a motion requesting a copy of the grand jury proceeding transcript. The Court denied the Petitioner's request, but ordered that the Petitioner would receive a copy of the transcripts ten (10) days before the start of the trial. App. Vol.1, pg. 7.

[16] The Petitioner has still not received a complete copy of the grand jury proceedings.

Under the Sixth Amendment to the United States Constitution and § 14 of Article III of the West Virginia Constitution, an accused is guaranteed the right to confront and cross-examine the witnesses against him. As this Court held in Syl. pt. 1 of *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990), *overruled on other grounds by, State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006).

> [t]he Confrontation Clause contained in the Sixth Amendment to the United States Constitution provides: 'In all criminal prosecutions, the accused shall ... be confronted with the witnesses against him.' This clause was made applicable to the states through the Fourteenth Amendment to the United States Constitution.

"'An essential purpose of the Confrontation Clause is to ensure an opportunity for cross-examination. In exercising this right, an accused may cross-examine a witness to reveal possible biases, prejudices or motives.'" Syl. pt. 2, in part, *State v. Phillips*, 194 W.Va. 569, 461 S.E.2d 75, (1995) (*quoting* Syl. pt. 1, in part, *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995), *overruled on other grounds by, State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006).).

A defendant on trial has the right to be accorded a full and fair opportunity to fully examine and cross-examine the witnesses. Syl. pt. 1, *State v. Crockett,* 164 W.Va. 435, 265 S.E. 2d 268 (1979). This right is not unbridled and is subject to general rules, as this Court has previously defined as follows:

> Several basic rules exist as to cross-examination of a witness. The first is that the scope of cross-examination is co-extensive with, and limited by, the material evidence given on direct examination. **The second is that a witness may also be cross-examined about matters affecting his credibility. The term "credibility" includes the interest and bias of the witness, inconsistent statements made by the witness and to a certain extent the witness' character.** The third rule is that the trial judge has discretion as to the extent of cross-examination. Syl. pt. 4, *State v. Richey*, 171 W. Va. 342, 298 S.E.2d 879 (1982). (Emphasis Added).

One of the most common cross-examination techniques used is to confront a witness with a prior inconsistent statement. During the Rule 404(b) hearing, the State called Mr. Fagons siblings, Aaron and Selena Fagons, and his aunt, Misty Collings, to testify concerning alleged prior bad acts of Ms. Reed. Even though their testimony lacked credibility, the trial court allowed each to testify. For example, Misty Collins and Aaron Fagons testified about the same alleged incident involving an argument over a Snapchat account. Their testimony was so inconsistent that they were barely describing the same incident. Further, Selena Fagons provided testimony at the Rule 404(b) hearing which was substantially different from statements she had previously made to the investigating officer.

Additionally, Trooper Austin Clark of the West Virginia State Police testified at the grand jury proceedings. Trooper Clark testified about the initial call, his interview with Ms. Reed and other aspects of his investigation in this matter. During the trial, Ms. Reed's statement during the initial interview, and the interpretation of that interview, became an important issue during the trial. As such, Trooper Clark's testimony during the grand jury proceeding was necessary to adequately perform a cross-examination. Also, the extent of Trooper Clark's investigation became an issue during the trial.

Counsel for the Petitioner only received the transcripts for the Rule 404(b) hearings and the grand jury proceedings the morning before the above-mentioned witnesses testified, usually within hours or even minutes of the cross examination. As such, counsel for the Petitioner did not have sufficient time to adequately prepare to cross examine these witnesses. The court reporter's failure to provide the transcripts in a timely fashion resulted in the Petitioner being unable to fully and fairly cross-examine the State's witnesses. Further, there were twenty (20) inaudibles in the

transcript which further hampered cross-examination. As such, the State violated the Petitioner's right to confront the witnesses against her.

This Court has observed on numerous occasions that "'failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.' Syl. pt. 5, *State ex rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975), *State v. Salmons*, 203 W. Va. 561, 582, 509 S.E.2d 842, 863 (1998). In a criminal case, the burden is upon the beneficiary of a constitutional error to provide beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Syl. pt. 3, *State v. Frazier,* 229 W.Va. 724, 735 S.E. 2d 727 (2012). Errors involving the deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction. Syl. pt. 20, *State v. Thomas,* 157 W.Va. 640, 203 S.E. 2d 445 (1974). In this case, the State cannot demonstrate that there is no reasonable possibility that the State's violation of the Confrontation Clause did not contribute to Ms. Reed's conviction. As described above, the failure to provide timely transcripts of the Rule 404(b) hearings and the grand jury proceedings severely hampered counsel for the Petitioner's ability to adequately cross examine witnesses that were crucial to the State's case against Ms. Reed. Since there was a clear violation of Ms. Reed's constitutional rights, her conviction must be overturned.

Further, the court reporter has failed to provide timely transcripts in order for the Petitioner to appeal her sentence. After accepting the appeal, this Court entered an order requiring that the court reporter provide the transcripts requested in the Notice of Appeal by May 14, 2021[17]. The

[17] Due to the complicated issues present in this appeal, the Petitioner first requested the transcripts in early November, 2020. In December, 2020, the Petitioner tendered initial payment to the court reporter for the transcripts and were advised they would be ready in two (2) weeks. In early January, 2021, the court reporter advised that the transcripts would be ready by the end of January. Counsel for the Petitioner did not receive all requested transcripts until July 27, 2021.

court reporter failed to comply with this deadline. Due to the court reporter's failure to provide the requested transcripts, this Court entered an Amended Scheduling Order extending the deadline to perfect the appeal to August 20, 2021. The court reporter did not deliver the last requested transcript until July 27, 2021, less than a month before the Petitioner's brief is due. The court reporter's failure to timely provide the requested transcripts has affected the amount of time the Petitioner has had to review the transcripts and has interfered with the Petitioner's ability to prepare her appeal.[18]

VII. The Petitioner right of due process was violated by the trial court entering orders after the Petitioner had filed her Notice of Appeal and the trial court no longer had jurisdiction over the case.

In this matter, the trial court entered Orders on a number of pre-trial issues, including issues on appeal, after the Notice of Appeal had been filed by the Petitioner. However, the trial court was without jurisdiction to enter those Orders. On December 2, 2020, the Petitioner was sentenced to definite term of forty (40) years on her second-degree murder conviction. On February 19, 2021, the trial court entered its Sentencing Order. Pursuant to Rule 5 of the West Virginia Rules of Appellate Procedure, the Petitioner filed her Notice of Appeal on March 19, 2021. On March 31, 2021, the West Virginia Supreme Court of Appeals entered an Order placing this matter on the court's docket. Subsequently, the trial court entered a number of Orders that addressed pre-trial issues that are part of this appeal. App. Vol. 1, pgs. 192-234.

Pursuant to Article VIII § 3 of the West Virginia Constitution and W.Va. Code § 51-1-3, the West Virginia Supreme Court has appellate jurisdiction over all appeals of criminal matters in which there has been a conviction. In discussing the jurisdiction between this Court and circuit courts, this Court has stated that once this Court takes jurisdiction of a matter pending before a

[18] The transcripts provided also contained a number of errors, including having the incorrect dates for hearings and listing another case style on the certification for three (3) hearings.

circuit court, the circuit court is without jurisdiction to enter further orders in the matter except for specific leave of this court. *See* Syl. pt. 3, *Fenton v. Miller,* 182 W.Va. 731, 391 S.E. 2d 744 (1990). This Court has also stated that a trial court is deprived of jurisdiction only when it has entered a "final" order within the contemplation of W.Va. Code § 58-5-1, and the final order has been appealed properly to this Court. *See Bartles v. Hinkle,* 196 W.Va. 381, 388, 472 S.E. 2d 827, 834 (1996).

Additionally, W.Va. Code § 62-7-2, provides:

> A writ of error, awarded under the provisions of article five [§§ 58-5-1 et seq.], chapter fifty-eight of this code to any judgment of a circuit court referred to in the preceding section [§ 62-7-1], shall operate as a stay of proceedings in the case until the decision of the Supreme Court of Appeals therein. A writ of error awarded under the provisions of article four [§§ 58-4-1 et seq.], chapter fifty-eight of this code, to any judgment of a court of record of limited jurisdiction, by a circuit court or the judge thereof, shall operate as a stay of proceedings in the case until the decision of the circuit court therein.

In *State ex rel. Dye v. Bordenkircher*, 168 W.Va. 374, 284 S.E. 2d 863 (1981), this Court had the opportunity to discuss the application of W. Va. Code § 62-7-2. This Court stated:

> [a]postponement of the execution of the sentence in a criminal case under *W. Va. Code*, 62-7-1 [1931], delays that one specific event in the case. A stay of proceedings under *W. Va. Code*, 62-7-2 [1931], however, stops all action in the circuit court which otherwise might occur in a case after the stay takes effect. When this Court grants a petition for appeal all proceedings in the circuit court relating to the case in which the petition for appeal has been granted are stayed pending this Court's decision in the case. Such stay of proceedings is mandatory under *W. Va. Code*, 62-7-2 [1931]. *State ex rel. Dye v. Bordenkircher*, 168 W.Va. at 378, 284 S.E. 2d at 866.

Based upon the foregoing, once the Petitioner filed her Notice of Appeal. The trial court no longer had jurisdiction over the matter. As such, the trial court lacked jurisdiction to enter Orders after the Notice of Appeal was filed. Further, the Petitioner did not have the benefit of the Orders on the trial court's pre-trial rulings during trial.

CONCLUSION

WHEREFORE, the Petitioner, Carli R. Reed, by and through her counsel, Hunter B. Mullens, C. Brian Matko, and Matthew L. Ervin of Mullens & Mullens, PLLC, respectfully pray that the Supreme Court of Appeals of West Virginia find that the Circuit Court of Barbour County, West Virginia committed error during the underlying trial in this matter, reverse the verdict entered against the Petitioner, remand the case for a new trial, release the Petitioner from incarceration and any such further relief as justice requires.

CARLI RENAE REED
Petitioner, By Counsel

Hunter B. Mullens, WV Bar No. 7620
C. Brian Matko, WV Bar No. 7995
Matthew L. Ervin, WV Bar No. 13197
MULLENS & MULLENS, PLLC
PO Box 95, Philippi, WV 26416
Telephone: (304) 457-9000
Facsimile: (304) 457-9002
hmullens@mullensandmullens.com
bmatko@mullensandmullens.com
mervin@mullensandmullens.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff Below;
Respondent herein;

v.

Case No. 21-0227
Circuit Court Case No. 20-F-28
(Barbour County)

CARLI RENAE REED,

Defendant Below;
Petitioner herein.

CERTIFICATE OF SERVICE

I, Hunter B. Mullens, certify that the foregoing, ***Brief of Petitioner Carli Renae Reed*** and ***Appendix***, was served on the following counsel of record by electronic message and by U.S. Mail on the 20th day of August, 2021:

Patrick Morrisey, Esq.
Mary Beth Niday, Esq.
OFFICE OF THE WEST VIRGINIA ATTORNEY GENERAL
Appellate Division
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Mary.B.Niday@wvago.gov

Hunter B. Mullens, WV Bar No. 7620
C. Brian Matko., WV State Bar No. 7995
Matthew L. Ervin, WV State Bar # 13197
MULLENS & MULLENS, PLLC
9 North Main Street
PO Box 95
Philippi, WV 26416
Telephone: (304) 457-9000
Facsimile: (304) 457-9002
hmullens@mullensandmullens.com
bmatko@mullensandmullens.com
mervin@mullensandmullens.com