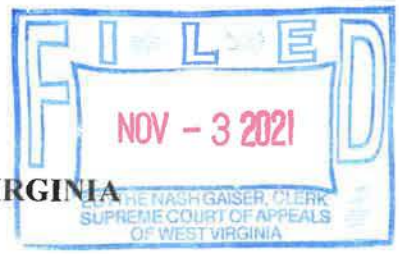

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

REPLY BRIEF OF PETITIONER CARLI RENAE REED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

West Virginia Cases

West Virginia Rules

Cases from Other Jurisdictions

Statutes from Other Jurisdictions

Rules from Other Jurisdictions

Other Authority

Comes now the Petitioner, Carli R. Reed, by and through her counsel, Hunter B. Mullens, C. Brian Matko and Matthew L. Ervin of Mullens & Mullens, PLLC, and, pursuant to Rule 10(g) of the West Virginia Rules of Appellate Procedure, submits the following as the Petitioner's Reply Brief.

STATEMENT CONCERNING ORAL ARGUMENT

The Petitioner reiterates the need for oral argument in this case. This appeal involves an issue of first impression in West Virginia and issues of fundamental public importance. As such, the Petitioner asserts that this appeal is appropriate for a Rule 20 argument.

REPLY ARGUMENT

I. The trial court failed to fully instruct the jury on the defenses asserted by the Petitioner during the trial of this matter.

A. The instruction provided by the trial court regarding the Petitioner's defense of "Battered Women's Syndrome" did not adequately instruct the jury as to the applicable law and misled the jury in the application of the Battered Women's Syndrome

Contrary to the State of West Virginia's statement in the Respondent's Brief, the Petitioner does challenge the correctness and legality of the trial court's instruction. (Resp's Br., pg. 13). As set forth in the Petitioner's brief, the trial court provided the jury with the following instruction regarding Battered Woman's Syndrome:

> [t]he 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.

The instruction given by the trial court only partially provides the law regarding Battered Woman's Syndrome and does not provide the jury with sufficient guidance to apply the Battered Woman's Syndrome defense. The instruction provided by the Petitioner, which 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), fully explained the law with regard to the defense of Battered Women's Syndrome and further instructed the jury on how evidence of Battered Women's Syndrome should be weighed during their deliberations. Further, the instruction given by the trial court was misleading to the jury. *See* App. Vol.1, pg. 118.

1. **A proper jury instruction on Battered Women's Syndrome should make it clear that the jury is to consider the entire history of abuse suffered.**

The West Virginia Supreme Court of Appeals has a long history of recognizing and commenting on the defense of Battered Women's Syndrome, and was one of the first jurisdictions to recognize that the syndrome could aid a jury in understanding a defendant's mental state at the time of an alleged crime. *State v. Stewart*, 228 W. Va. at 415, 719 S.E.2d at 885. It is clear from the cases discussing the defense of Battered Women's Syndrome that a jury should take into consideration the entire history of abuse suffered by the individual raising the defense, not just the events immediately preceding the death of the abuser.

This Court first commented on the Battered Women's Syndrome defense in *State v. Dozier*, 163 W.Va. 192, 255 S.E.2d 552 (1979). In *Dozier*, the Court stated a defendant was 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. Hardin*, 91 W.Va. 149, 112 S.E. 401

(1922); *See generally*, 6 Pepperdine L. Rev. "*The Battered Wife Syndrome: A Potential Defense to a Homicide Charge*" 213-219 (1978).

State v. Dozier, 163 W.Va. 192, 197-198, 255 S.E.2d 552, 555 (1979).

In *State v. Wyatt*, 198 W. Va. 530, 482 S.E.2d 147 (1996), and cited in *Stewart*, this Court recognized battered women's syndrome "as a particularized version of post-traumatic stress disorder, of which, for instance, rape-trauma syndrome is another example." This Court further recognized that a knowledgable expert in the area will assist the trier of fact in determining the issues of criminal intent. *State v. Wyatt,* 198 W. Va. 530, 542, 482 S.E.2d 147, 159 (1996) and *State v. Stewart*, 228 W.Va. at 415, 719 S.E. 2d at 885.

In *State v. Lambert*, 173 W. Va. 60, 312 S.E.2d 31 (1984) *citing Dozier, supra*, this Court stated that where criminal intent is an element of the offense charged, a defendant is entitled "to elicit testimony about . . . . prior physical beatings . . . . in order that the jury may fully evaluate and consider the defendant's mental state at the time of the commission of the offense." Not only are defendants entitled to present evidence to support such theories as the battered spouse syndrome, which go to negate criminal intent, they are also entitled to receive proper instructions on those theories. In this instance, the trial court did not provide proper instruction on the defense of Battered Woman's Syndrome. *State v. Lambert*, 173 W. Va. 60, 63, 312 S.E.2d 31, 34-35 (1984).

In *Stewart, citing* Syl. Pt 4 of *State v Harden*, 223 W.Va. 796, 679 S.E. 2d 628 (2009) and other cases which involving the defense of Battered Women's Syndrome, this Court stated:

> that evidence of prior abuse is relevant to a defendant's reasoning, beliefs, perceptions, or behavior at the time of the alleged criminal act. *Harden*, and the cases preceding that decision, recognize that the perceptions of a battered and abused person are different from the perceptions of a person who has not lived through an abusive relationship. These cases recognize that an abused person will

> sometimes behave "irrationally" and that a defendant should be permitted to offer an explanation for that behavior. We emphasize "irrationally" because that term is typically measured by, or in comparison to, an "ordinary reasonable person." It is clear, however, that 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.

State v. Stewart, 228 W.Va. at 416, 719 S.E. 2d at 886.

The Court in *Stewart*, further recognized and explained that incidents of physical or mental abuse are not static. The causal effect of the abuse may occur over a period of years. Further, it is impossible to segregate incidents of abuse in a battered woman's life and say that one incident is too remote. All incidents of an abused woman are relevant to her reasoning, beliefs, perceptions and behavior. *See State v. Stewart*, 228 W.Va. at 417, 719 S.E. 2d at 887.

Based upon the foregoing caselaw, it is clear that, in West Virginia, a jury should look at the entire history of the abuse suffered by the woman who is raising a Battered Women's Syndrome defense. The instruction provided by the trial court fails to instruct the jury on this point. The jury instruction submitted by the Petitioner contains language taken directly from the case law relating to the defense of Battered Women's Syndrome. Further, the Petitioner's instruction more fully informs the jury on how repeated abuse can an affect an individual's mind, and how the jury should consider that evidence.

2. **The jury instruction given by the trial court is misleading in that it suggests that the abuse must have occurred immediately prior or close in time to the crime charged.**

In West Virginia, the jury must be clearly and properly advised of the law in order to render a true and lawful verdict. *State v. Romine,* 166 W.Va. 135, 272 S.E.2d 680, 681 (1980). "An instruction misleading because it does not, on its face or in connection with other instructions, fully inform the jury concerning the point which it purports to discuss should not be given." *State* v. *Shamblin*, 105 W. Va. 520, 521 143 S.E. 230, 231 (1928). An instruction may be

misleading and therefore prejudicial though it is correct in its abstract technical phrases. *See* Syl. Pt. 2, *Mercer Funeral Home* v. *Addison Bros.*, 111 W. Va. 616, 163 S.E. 439 (1932). "An instruction which is incomplete and indefinite in its meaning should not be given." Syl. Pt. 5, *Morrison v. Roush*, 110 W. Va. 398, 158 S.E. 514, (1931).

The instruction given by the trial court is misleading and likely created confusion among the jurors. The instruction given by the trial court in this matter suggests that the jury should only consider the Battered Women's Syndrome defense if the abuse occurred immediately prior or close in time. As discussed above, the case law regarding Battered Woman's Syndrome makes it clear that the jury in this matter was to take into consideration all of the abuse suffered by Ms. Reed in their consideration of the Battered Women's Syndrome defense. As set forth in the Petitioner's Brief, 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. Syl. Pt. 4, *Harden, supra.* As such, the jury should have been specifically instructed to look at the entire history of Mr. Fagons abuse of Ms. Reed and the failure to instruct the jury on that point should be sufficient to overturn Ms. Reed's conviction.

B. The Petitioner presented sufficient evidence that the incident for which she was charged was an accident, and, as such, the jury should have been instructed on the defense of accident.

In its reply, the State of West Virginia asserts that the Petitioner did not present any evidence at trial on the defense of accident. (Resp's Br., pg. 13). However, the State of West Virginia is incorrect. The record in this matter demonstrates that not only did the Petitioner present evidence supporting a defense of accident, both the State of West Virginia and counsel for the Petitioner argued in support or in opposition of the accident defense.

As set forth in the Petitioner's Brief, the Petitioner testified at trial that she shot Mr. Fagons by accident. Specifically, the Petitioner testified while standing at the side of the bed, she 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 striking Mr. Fagons. App. Vol 5, pgs. 1515 and 1517-1519.

On cross examination, the following exchange took place:

Mr. Hoxie:	So you weren't -- at that time you didn't have – you weren't overcome by any form of like emotions to kill him right?
A:	No.
Q:	Okay. Do you feel that you were relatively calm when you were doing that?
A:	I was pretty hysterical actually because I was going to kill myself. You know I was crying and I thought, you know, this was it for me.
Q:	So your intent at that point was to commit suicide?
A:	Correct.
Q:	Your specific intent at that time was to kill yourself?
A:	Yes.

App. Vol 5, pgs. 1580-1581.

During closing, and relying upon the testimony of the Petitioner, the Petitioner presented argument that Mr. Fagons death was the result of an accident. In discussing Ms. Reed's testimony, her counsel, stated:

> [a]nd she told you what she believed happened. And she said all along I shot Marcus; never I killed him. In her mind she told you what happened. She went up there, that gun is in a holster, it's laying on that nightstand. The bed is here. As she grabbed that gun, and you saw the passive safety. It's a passive safety. It's on the trigger. If you jerk that in a fit, hysterical woman grabs that to shoot herself and you grab it, as she said, by the trigger, and you pull it out and she shut her eyes, right

there, he's right over here, right here, that makes sense. That makes sense. And that's what Carli believes happened.

App. Vol 5, pgs. 1847-1848.

Counsel for the Petitioner also stated during his closing:

[n]ow you heard about Doctor Fremouw testifying what Carli told him. It was an accident; that's what she told Doctor Fremouw. It was an accident.

App. Vol 5, pg. 1849.

Counsel for the Petitioner further argued that "[y]ou can also find not guilty if you believe it was an accident.

App. Vol 5, pg. 1874.

In his closing, the Prosecutor, Mr. Hoxie argued:

[r]emember, I asked Carli specifically why did you shoot Marcus and she said accident. She didn't say abuse. She didn't say I was trying to escape out of a bad relationship. She didn't say it was because of all of these other reasons. She is basing her case on accident.

App. Vol 5, pgs. 1826-1827.

Mr. Hoxie further argued:

[f]inally she doesn't even rely on that. Remember that. That's so big. She doesn't rely on battered woman syndrome. She relies on it was an accident. So really, this isn't -- it doesn't matter if that wasn't the cause, the reason she is saying I did not shoot him because I was a battered woman then it's irrelevant.

App. Vol 5, pg. 1830.

In West Virginia a defendant 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). The defense of accident is recognized under West Virginia law. *See 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). Further, when a defendant, who raises the defense of accident, presents evidence that establishes such a defense, it is error for the trial court to fail to provide an instruction on the defense of accident. *State v. Evans,* 172 W.Va. at 815, 310 S.E. 2d at 882 *citing* Syl. Pt 10, *State v Legg*, 59 W.Va. 315, 53 S.E. 545 (1906).

As set forth in the Petitioner's Brief (*See* Pet'r Br., pgs., 18-19) and cited above, not only did the Petitioner provide sufficient evidence to establish the defense of accident, both the State of West Virginia and counsel for the Petitioner presented arguments regarding the defense of accident. As such, the State of West Virginia's argument that the Petitioner did not raise the defense of accident during the trial or present any evidence of accident is not supported by the record.

As the Petitioner presented evidence during the trial to support a defense of accident, and the State of West Virginia addressed the defense of accident during its closing, the trial court should have instructed the jury on the defense of accident. As this Court previously ruled in *Evans,* the trial court's failure to provide the Petitioner's requested instruction on the defense of accident is **reversible error.** (Emphasis Added).

II. Evidence of Mr. Fagons' abuse of previous romantic partners was admissible under Rule 404(b) of the West Virginia Rules of Evidence.

Based upon the evidence submitted at trial and the testimony given by T.C.[1] during the Rule 404(b) hearing, it is clear that Mr. Fagons was a predator from an early age. T.C.'s testimony, when compared to Ms. Reed's[2], demonstrated that Mr. Fagons had a learned pattern when dealing with romantic partners. Mr. Fagons would target young, insecure girls. He would then isolate them from everyone but their family, and use the girl's and the family's resources to live. After a honeymoon period, Mr. Fagons would begin to physically and sexually assault the girl if she did something he did not like. Mr. Fagons made sure that the physical and sexual assaults either took place behind closed doors or when only his family was present.

The State of West Virginia mischaracterizes the Petitioner's position with regard to the intent behind seeking to introduce evidence of Mr. Fagons abuse of previous domestic partners. In its brief, the State of West Virginia argues that Ms. Reed was unaware of the abuse suffered by T.C. (Resp. Br., pg. 16). This is incorrect, Ms. Reed testified that she was aware of the abuse. 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. After seeing Mr. Fagons' reaction to the poem, Ms. Reed began to believe that Mr. Fagons had abused T.C., and as the allegations of abuse were substantially similar to the abuse she was suffering, the abuse suffered by T.C. was relevant to Ms. Reed's mindset. App. Vol. 5, pg. 1532.

Further, the State of West Virginia argues that the Petitioner sought to introduce the evidence to show that Mr. Fagons was a rapist in general and that Ms. Reed's actions were in self-

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[1] As in the Petitioner's Brief, pursuant to Rule 40(e) of the West Virginia Rules of Appellate Procedure this individual will be identified throughout this brief as T.C.

[2] Additionally, Mr. Fagons' grandmother and aunt were going to testify that he had physically and emotionally abused other girls in their presence.

defense. (Resp. Br., pg. 17). The Petitioner has never put forth this argument. Rule 404(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. Petitioner has always argued that the abuse suffered by T.C. is admissible under Rule 404(b)(2) as the evidence went to show Mr. Fagons' motivations, intent and pattern of control towards Ms. Reed. Mr. Fagons used both physical and sexual abuse to control and dominate his romantic partners. The testimony from Ms. Reed and the proffered testimony from T.C. demonstrated that Mr. Fagons used this control for monetary gain and to have things he would otherwise not have. Ms. Reed even testified that she and Mr. Fagons were discussing divorce until he learned that she would no longer pay for him to have a car. App. Vol 5, pgs. 1514-1515. The evidence regarding Mr. Fagons abuse of T.C. shows his intent and motivations in also abusing Ms. Reed. The abuse was Mr. Fagons way to dominate his romantic partner and live off of them and their family.

Additionally, T.C.'s testimony is the best evidence to rebut the State of West Virginia's argument that Ms. Reed was either not abused or exaggerating the severity of the abuse. Domestic abuse happens in the dark. Like most victims, Ms. Reed did not tell anybody about the abuse she suffered. She took steps to actively hide the abuse from her family. The State of West Virginia took Ms. Reed's failure to tell anybody about the horrific abuse she was suffering to argue that she was either lying about the abuse or exaggerating the abuse. In rebuttal, the State of West Virginia even called a witness to testify that Ms. Reed did not report any abuse when she was first taken to the Central Regional Jail. App. Vol 5, pgs. 1784-1785. T.C.'s testimony would show that Ms. Reed was not fabricating or exaggerating the abuse she was describing and help establish the severity of the abuse caused by Mr. Fagons.

T.C.'s testimony is also more probative of the issues involved than prejudicial. In its response the State of West Virginia makes the conclusory statement that the allegations of abuse by T.C. are voluminous and would likely confuse the jury (Resp. Br., pg. 16). However, the State provides no support for its statement. The allegations of abuse were already in front of the jury as the trial court allowed T.C.'s poem to be introduced into evidence. Allowing T.C. to testify about the abuse would have given the jury the full context of the abuse she suffered. Also, every witness puts their credibility at issue when they testify at trial. It should be the jury who determines credibility, not the trial judge.

As argued in the Petitioner's brief (Pet'r. Br., pgs 30-33), other jurisdictions, either by statute, rule or case law, have adopted the position that the domestic abuse of previous romantic partners is relevant to prove domestic abuse against the current romantic partner. *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), *Smith v. State*, 232 Ga. App. 290, 501 S.E. 2d 523 (Ga. Ct. App. 1998), *State v. Fraga* 864 N.W. 2d 615 (Minn. 2015), *State v. Howard*, 106 So. 3d 1038 (La. 2012) and *State v. Yong*, 206 Ore. App. 522, 138 P. 3d. 37 (Ore. 2006). In reviewing the cases that allow testimony of abuse against a former romantic partner, the rationale set forth by the courts acknowledge that domestic abuse occurs often in the privacy of the home, the evidence abuse is consistent between the abuser's different romantic partners, addresses evidentiary difficulties in establishing domestic abuse and aids the finder of fact in determining the credibility of witnesses. The reasons for allowing the testimony set out above are especially present in Ms. Reed's case. Mr. Fagons' abuse towards Ms. Reed was a carbon copy of the abuse suffered by T.C. Mr. Fagons learned a pattern and followed through with the pattern with all of his romantic partners. Allowing

T.C. to testify about the abuse she suffered would aid the trier of fact in determining the full extent of Mr. Fagons' abuse and how he used that abuse to control his romantic partners.

III. The State of West Virginia's opening the door to allow T.C. to testify was not harmless error.

In her brief, the Petitioner argued that the State of West Virginia opened the door to allow T.C. to testify to the abuse she suffered at the hands of Mr. Fagons, that was substantially similar to the abuse suffered by Ms. Reed. During direct examination by counsel for the Petitioner, Stephanie Reed, the mother of Ms. Reed, testified about a poem authored by T.C. which detailed the abuse she suffered from Mr. Fagons. The abuse described in the poem included several instances in which Mr. Fagons raped T.C. On cross examination, the State of West Virginia asked Stephanie Reed whether Mr. Fagons had any criminal record to which Stephanie Reed responded that she did not know if Mr. Fagons had a criminal record. *See* App. Vol. 5, pgs. 1617-1618.

In its response, the State of West Virginia does not provide any argument to support its contention that the line of questioning of Stephanie Reed did not open the door. The State's response simply makes a conclusory statement that the line of questioning did not open the door. Further, the State's Response argues that if the door was opened, the error made by the trial court in not allowing the Petitioner to present evidence of Mr. Fagons' criminal actions was harmless. (Resp. Br., pgs 18-19).

In discussing the doctrine of "opening the door," 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).

State v Baker, 230 W.Va. 407, 413, 738 S.E. 2d 909, 915 (2013) *citing* 1 Cleckley, Palmer, and Davis, *Handbook on Evidence*, § 611.02[3][d][iv]. This Court has also stated with regard to the related doctrine of curative admissibility:

> [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.

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

In determining whether an error made by a trial court is harmless, the review is fact specific. *State v. Guthrie*, 194 W. Va. 657, 677, 461 S.E.2d 163, 183 (1995) citing *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995) . This Court has further explained that:

> when dealing with the wrongful admission of evidence, we have stated that the appropriate test for harmlessness articulated by this Court is whether we can say with fair assurance, after stripping the erroneous evidence from the whole, that the remaining evidence was independently sufficient to support the verdict and the jury was not substantially swayed by the error.

State v. Guthrie, 194 W. Va. at 684, 461 S.E.2d at 190.

In this instance the trial court's failure to allow the Petitioner to introduce evidence of Mr. Fagons's criminal conduct, especially the conduct complained of in T.C.'s poem, was not harmless error. As discussed at length in the Petitioner's brief, the State of West Virginia used Ms. Reed's failure to tell anyone about the abuse she suffered to argue that Ms. Reed was either exaggerating or making up the abuse. Likewise, the State of West Virginia's line of questioning regarding Mr. Fagons not being previously charged with rape was intended to discredit the poem authored by T.C. with the benefit, from the State of West Virginia's point of view, that T.C. could not defend

the allegations in the poem. By allowing the State of West Virginia to discredit the allegations contained in the poem and to present evidence that Mr. Fagons had not been criminally charged with rape made Mr. Fagons' criminal actions an issue in this case. As such, the Petitioner, through the testimony of T.C., Sally Collins, Mr. Fagons' grandmother, and Tracy McCartney, Mr. Fagons' aunt, should have been allowed to present evidence of Mr. Fagons' abuse towards other romantic partners. This is especially true with regard to T.C. as it was her allegations of rape against Mr. Fagons which the State of West Virginia discredited.

IV. The body camera footage was not relevant to any element of the crime charged, and the trial court failed to take into consideration the totality of the body camera footage.

During the trial, the State introduced, over the objection of the Petitioner, body camera footage, taken by Sergeant R. Todd Deffet of the Barbour County Sheriff's Department, which showed Mr. Fagons laying on a bed, with sporadic, ragged breathing, and another officer tending to him. Additionally, the footage showed Ms. Reed's aunt entering the scene and pleading with Mr. Fagons to survive. The body camera footage showed to the jury lasted for approximately six (6) minutes.[3]

In its response, the State of West Virginia fails to address the issues raised by the Petitioner in her brief regarding the introduction of the body camera footage during the trial of this matter. The State of West Virginia, in its response, essentially argues that since the trial court found that the body camera footage was relevant and not unduly prejudicial, therefore, the body camera footage is relevant and not unduly prejudicial. (Resp. Br., pgs 19 and 20.) In her Brief, the Petitioner makes four (4) arguments in support of her claim that the body camera footage should

[3] The body camera footage shown at the trial was provided on CD and marked in the Appendix at App. Vol. 5, pg. 1963.

not have been introduced. The arguments presented by the Petitioner are as follows: 1) that contrary to the trial court's finding the body camera footage is not relevant; 2) the trial court's purported reasons for finding the body camera footage relevant would be accomplished by the introduction of crime scene photographs or other testimony; 3) allowing the jury to watch approximately six (6) minutes of the body camera footage was improper; and 4) the trial court did not consider the totality of the body camera footage in determining that the footage was not unfairly prejudicial to the Petitioner. The State of West Virginia fails to rebut any of those arguments.

The trial court, in its Order finding that the body camera footage was relevant noted that the body camera footage showed the scene of the alleged crime and how the scene appeared on the day in question. The trial court also noted that the body camera footage showed that Mr. Fagons was still alive at the time the body camera footage was taken. The trial court concluded that the above go to the elements of intent and malice. However, the trial court, in finding that the body camera footage was relevant, gave no explanation and made no findings which supported its conclusion.

The trial court's finding that the body camera footage was relevant because it showed that Mr. Fagons was alive, at the time the officer arrived at the scene, is also incorrect. Throughout the trial, the State of West Virginia argued that the footage supported the charge of first-degree murder against the Petitioner in that it demonstrated Mr. Fagons condition and the scene after he had been shot. However, according to the timeline that was presented by the State of West Virginia, approximately one (1) hour had elapsed between the time when Ms. Reed accidently shot Mr. Fagons and when Sergeant Deffett arrived on the scene. As such, the body camera footage was not representative of the scene when Ms. Reed left the residence to obtain help. The body

camera footage created a false portrait of what occurred at the time Mr. Fagons was shot, and Ms. Reed's reaction to accidently shooting Mr. Fagons.

The location and condition of the scene had no bearing on the State's case, and the State made no argument during the trial that the scene was relevant to the case. Further, to the extent that the scene was relevant, the photographs of the scene taken after Mr. Fagons was removed could have been introduced to show the scene, and the jury would not have been exposed to footage of a dying man, gasping for air an hour after being shot. However, the State of West Virginia elected not to enter these photographs into evidence. As argued in the Petitioner's Brief, based upon the arguments made by the State of West Virginia during its closing, it is clear that the footage was introduced so that the jury could watch a man die.

Even if the body camera footage was relevant for the reasons stated by the trial court, the footage that was shown to the jury was unnecessarily cumulative. The trial court allowed the jury to watch approximately six (6) minutes of the body camera footage. As stated above, the trial court ruled that the body camera footage was relevant as it showed scene of the charged crime and how the scene appeared on the day in question. The trial court also found it important for the jury to see that Mr. Fagons was alive at the time Sergeant Deffet arrived. Notwithstanding the fact that the scene could have been shown to the jury through the crime scene photographs, allowing the jury to watch a man in the process of dying and gasping for air for six minutes was needlessly cumulative to establish the reasons the trial court found the footage relevant. The jury could have been shown far less of the footage to establish the scene and the fact that Mr. Fagons was alive when Sergeant Deffet arrived.

Additionally, even if the body camera footage was relevant and not unnecessarily cumulative, the probative value of the body camera footage is clearly outweighed by its prejudicial value. In finding that the body camera footage was not unduly prejudicial, the trial court failed to take into consideration the totality of the body camera footage. 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).

As mentioned in Petitioner's brief, unlike a photograph, body camera footage records more than just images. The sporadic, ragged breathing of Mr. Fagons shown on the footage and the reaction of the family member who was allowed into the bedroom where Mr. Fagons was lying is what makes the body camera footage unduly prejudicial. The audio of the body camera footage, specifically the Mr. Fagons breathing and Ms. Reed's aunt's pleas for Mr. Fagons to survive, would likely cause a jury to make its decision on emotion.

The jury should not have been shown the body camera footage during the trial of this case as it does not go to prove any elements of the crime charged. However, to the extent that the body camera footage does have any probative value, the trial court erred in allowing the jury to watch approximately six minutes of footage of a man dying and by allowing the jury to listen to the audio.

V. This Court should re-examine the law with regard to bifurcation, and update the law to allow a Defendant to choose whether or not to bifurcate a trial.

Ms. Reed is not the typical defendant in a criminal case. Other than one parking ticket while a student at West Virginia University, prior to becoming involved with Mr. Fagons, Ms.

Reed had never been in trouble before. She graduated from West Virginia University in less than three (3) years, and was employed by the Federal Bureau of Investigation. She has been continuously imprisoned since August 15, 2019, has been a model prisoner since her incarceration and has recently been hired as a teaching assistant for adult education helping other inmates earn their GED. Witnesses during the trial described Ms. Reed as being a nice person, quiet, always followed the rules and never got into any trouble. *See* generally App. Vol. 5, pgs. 1720-1743. Also, both the defense and prosecution experts, Drs. Clayman and Fremouw, opined that it was very unlikely that Ms. Reed would ever re-offend.[4]

In this case, Ms. Reed determined that bifurcation would not be in her best interests. Ms. Reed believed that, in her case, a unitary trial would allow her to better present her defense, especially since she presented a defense of Battered Women's Syndrome. Ms. Reed objected to the State of West Virginia's Motion to Bifurcate. However, the trial court granted the Motion without taking into consideration Ms. Reed's position. A defendant should have discretion in how they wish to present their defense. Each defendant is different, and each defendant should have the ability to decide how to present their defense. As such, the Petitioner requests that this Court re-examine the current rule regarding bifurcation.

VI. The failure to timely provide transcripts from the Grand Jury proceeding and the Rule 404(b) hearing was "plain error."

In West Virginia in order to satisfy the "plain error" doctrine, this Court must find the following:

> (1) there was error in the trial court's determination; (2) the error was plain or obvious; and (3) the error affected "substantial rights" in that the error was prejudicial and not harmless. 194 W. Va. at 18, 459 S.E.2d at 129, *citing United States v. Olano*, 507 U.S. 725, , 113 S. Ct. 1770, 1776,

[4] Both experts had made these statements in either their report or outside of the trial.

> 123 L. Ed. 2d 508, 518 (1993). If these criteria are met, this Court may, in its discretion, correct the plain error if it "'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Olano*, 507 U.S. at ___, ___, 113 S. Ct. at 1776, 1779, 123 L. Ed. 2d at 518, 521, *quoting United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555, 557 (1936).

State v. LaRock, 196 W. Va. 294, 316-317 470 S.E.2d 613, 635-636 (1996).

In this matter, the Petitioner had previously requested the transcripts of the Grand Jury Proceedings, and the court report was ordered to provide the transcripts prior to trial. The court reporter was also ordered to provide transcripts of the Rule 404(b) hearings prior to the start of trial. App. Vol. 1, pg. 7 and App. Vol. 3, pg. 674. While the State of West Virginia is correct in that the Petitioner did not directly object to the untimely production of the transcripts, the Petitioner was faced with a difficult decision regarding the untimely transcripts. The Petitioner had been waiting for over a year for trial, did not want a mistrial and did not want to wait months for a new trial date.

The failure of the court reporter to timely provided the transcripts seriously affected the integrity, fairness and public reputation of the proceedings. The failure to timely provide the transcripts hampered the ability of counsel for the Petitioner to effectively cross examine certain witnesses. As such, the Petitioner's right to confront the witnesses against her was compromised.

VII. The Petitioner's Right of Due Process was violated by the late entry of orders by the trial court after the trial court no longer had jurisdiction.

The State of West Virginia failed to address the last assignment of error argued in the Petitioner's brief, that the Petitioner's right of due process was violated by the trial court entering orders after Petitioner had filed her Notice of Appeal and the trial court no longer had jurisdiction over the case. The Petitioner stands by the arguments on this issue as set forth in her Brief.

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
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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, ***Reply 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 3rd day of November, 2021:

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