IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0227

STATE OF WEST VIRGINIA,

Respondent,

v.

CARLI RENAE REED,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the February 19, 2021, Order
Circuit Court of Barbour County
Case No. 20-F-28

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I. INTRODUCTION

Respondent State of West Virginia, by counsel, Mary Beth Niday, Assistant Attorney General, responds to Carli Renae Reed's ("Petitioner") Brief filed in the above-styled appeal. Petitioner has failed to demonstrate the existence of error and, therefore, the Barbour County Circuit Court's February 19, 2020, Sentencing Order should be affirmed.

II. ASSIGNMENTS OF ERROR

Petitioner, by counsel, advances seven assignments of error before this Court:

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. Fagon[']s 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.

(Pet'r Br. 1.)

III. STATEMENT OF THE CASE

Petitioner was arrested for the murder of her husband, Marcus A. Fagons ("Marcus"), on August 15, 2019. (App. Vol. 1, 228.) On June 15, 2020, Petitioner was indicted by a Barbour County grand jury of First Degree Murder of Marcus by use of a firearm. (App. Vol. 1, 1.) Trial was scheduled to commence on September 15, 2020. (App. Vol. 1, 2.)

On July 15, 2020, Petitioner filed a Motion in Limine seeking to prohibit the introduction of gruesome or other prejudicial photographs and videos, including body camera video. (App. Vol. 1, 12–15.) Petitioner argued that the crime scene videos and photographs were neither material nor relevant to the prosecution's case-in-chief. (App. Vol. 1, 13.) Rather, the videos and photographs would serve only to inflame the jury. (App. Vol. 1, 13.) Consequently, the prejudicial value far outweighed any probative value and Petitioner requested that the trial court prohibit their introduction at trial. (App. Vol. 1, 13–14.)

In response, the State asserted that it anticipated introducing the bodycam footage of the victim in his house, photographs of the scene after the victim was removed, and autopsy photographs. (App. 19.) The State contended that the bodycam was relevant because it showed the victim's condition when he was found, the layout of the bedroom where the victim was located, and that Marcus was technically alive when law enforcement arrived, refuting Petitioner's defense of accidental shooting. (App. Vol. 1, 20.) The photographs were relevant for the same reasons and to explain the medical examiner's testimony. (App. Vol. 1, 20.) Under Rule 403 of the West Virginia Rules of Evidence, the State argued that any unfair prejudice resulting from the

gruesomeness of the limited number of photographs was outweighed by the relevance of the evidence. (App. Vol. 1, 21.) Following a hearing on August 27, 2020, the trial court found that the body camera footage was "without question relevant to the criminal case," and despite it 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 [Petitioner] left the scene." (App. Vol. 1, 214.) The trial court noted most importantly that the footage was not of a dead victim but of a "still living victim." (App. Vol. 1, 214.) The trial court further found that the footage was not overly gruesome and could be played until the covers and towels were removed from the victim's head. (App. Vol. 1, 214–15.)

On July 17, 2020, State moved to bifurcate the penalty phase from the guilt phase of trial so that additional bad act evidence relevant to the jury's mercy determination could be considered outside of trial. (App. Vol. 1, 16–18.) Petitioner opposed the motion to bifurcate, arguing that the State failed to meet its burden of proving that the First Degree Murder charge should be bifurcated (App. Vol. 1, 143–44.) Following an in camera hearing on the motion on September 16, 2020, the trial court granted the States' Motion, finding that "a limiting instruction regarding evidence presented for the specific purpose of granting mercy or not could be misinterpreted by the jury." (App. Vol. 1, 222.) The trial court further found that both the State and Petitioner "would desire to present evidence at sentencing that is outside the relevancy and prejudicial limits appropriate in a criminal trial wherein mercy is not an issue." (App. Vol. 1, 222.) The trial court therefore concluded that Petitioner failed to offer any compelling reason for a unitary trial, failed to demonstrate that she would be forced to forego introducing relevant evidence for purposes of sentence, and failed to show any prejudice by the bifurcation. (App. Vol. 1, 222.)

Petitioner moved in August 2020 to admit Rule 404(b) evidence in the form of Marcus's prior bad acts, "including acts of physical, verbal, emotional and sexual violence directed against" Petitioner and past partners of Marcus, including Tiffany Carbaugh, which is consistent with the traits and characteristics of Battered Woman's Syndrome. (App. Vol. 1, 42–44.) Petitioner argued that the evidence regarding Ms. Carbaugh went to demonstrating Petitioner's state of mind and refuted the State's contention that Petitioner was not a battered woman, thereby allowing the jury to assess the credibility of the witnesses. (App. Vol. 1, 52–63.)

In response, the State argued that the evidence should be excluded because first, Petitioner made the specific argument that because Marcus was an abuser in the past, he is more likely to be one now. (App. Vol. 1, 72.) Second, Ms. Carbaugh's testimony was not relevant to Petitioner's personal Battered Woman Syndrome defense and should not be admitted. (App. Vol. 1, 72–73.) Third, the evidence was relevant only if Petitioner was acting in self-defense and reasonably relied upon the knowledge of Ms. Carbaugh's relationship with Marcus as a reason why she resorted to self-defense. (App. Vol. 1, 73.) Fourth, Petitioner failed to state how Ms. Carbaugh's evidence affected Petitioner, if at all, and how that affect was applicable to the batter woman syndrome defense. (App. Vol. 1, 73.) Fifth, the evidence was highly prejudicial and substantially outweighed any relevancy. (App. Vol. 1, 74.) Finally, the State did not intend to raise Ms. Carbaugh's credibility to the jury, because such testimony would complicate the trial and steer the jury away from Petitioner's actions. (App. Vol. 1, 74.) Petitioner countered the State's contentions in her Reply. (App. Vol. 1, 77–82.) Following the September 1, 2020, hearing, the trial court found that Petitioner's proffered testimony from Ms. Carbaugh was neither relevant nor more probative than prejudicial and excluded the specific acts of domestic violence against Ms. Carbaugh. (App. Vol. 1, 84–86.)

Prior to trial, Petitioner also moved for an expedited hearing transcript of the August 27, 2020, motions and suppression hearing no later than September 10, 2020. (App. Vol. 1, 49–50.) Petitioner asserted that the transcript of the hearing was needed to prepare for trial and assist in the filing of other pretrial motions. (App. Vol. 1, 49.)

Trial commenced on September 15, 2020. (App. Vol. 1, 155.) At the conclusion of the State's case-in-chief, Petitioner moved for judgment of acquittal or in the alternative, for dismissal of the first degree murder because the State failed to prove premeditation. (App. Vol. 4B, 1296–98.) After hearing arguments from Petitioner and the State, the trial court, noting that the charge against Petitioner "is simply murder, and that would include first degree murder, second degree murder, and at the request of the defense all of the manslaughters that go along with that," found that the State presented evidence sufficient to support a jury verdict for any one of those charges. (App. Vol. 4B, 1300–02.) Petitioner again moved for judgment of acquittal at the conclusion of its presentation of evidence, which was denied by the trial court for the same reasons. (App. Vol. 5B, 1788–89.) On September 24, 2020, the jury found Petitioner guilty of Second Degree Murder. (App. Vo. 1, 153.) By Order entered February 19, 2021, the trial court sentenced Petitioner to a definite term of imprisonment of forty years. (App. Vol. 1, 184.) It is from this Order that Petitioner appeals.

Dr. Piotr Kubiczek, West Virginia Deputy Chief Medical Examiner conducted the autopsy on Marcus's body on August 16, 2019. (App. 749.) It was Dr. Kubiczek's opinion that Marcus Marcus's cause of death was homicide by a "perforating gunshot wound of the head." (App. 761.) He explained that the gunshot entered Marcus's head through the right middle ear and exited above the left ear at the left parietal clip. (App. 753.) It was an intermediate gunshot wound because gunshot stippling was observed on the skin surface near the entrance wound, meaning that the gun

barrel was positioned anywhere from one centimeter to two or three feet from the skin's surface. (App. 753–54.) Petitioner used a Glock 9 semi-automatic firearm to kill Fagons and the firearm was loaded with 14 cartridges in the magazine and one in the chamber. (App. 907–08.) No gunshot residue ("GSR") was found on Petitioner's hands or face. (App. 930–31.)

Marcus's sister, Selena Fagons, described her brother's and Petitioner's relationship as toxic because they were always fighting, unhealthy as they fought over "the dumbest stuff putting their hands on each other," and controlling in that Petitioner controlled the money. (App. 1015–16.) Selena described an incident in 2018 when Petitioner told Marcus if he cheated on her she would tie up him and the girl with whom he cheated, "do sexual things to her in front of [Marcus] and then kill you both." (App. 1018.) Selena further related two times in 2018 and 2019 when she, Marcus, and Petitioner were fishing at a pond and then later sitting on their couch at home, Marcus teasingly asked Petitioner if he could "have a girl over" to which Petitioner responded "only if you want me to kill you." (App. 1019, 1021, 1038.)

At trial, the evidence demonstrated that on August 15, 2019, Petitioner murdered her husband Marcus. In late July 2019 Marcus began having an affair with Lydia Hill, primarily meeting on their days off from work, who worked at the Tygart Valley Regional Jail with Marcus, Selena, and Aaron. (App. Vol. 4A, 1112–13, 1115, 1022–23, 1056–57.) Aaron testified that Marcus really liked Ms. Hill and was very fond of her (App. Vol. 4A, 1056), so much that Marcus told Aaron he wanted a divorce from Petitioner because he was unhappy. (App. Vol. 4A, 1057.) Marcus frequently took Ms. Hill to his mother's house where Aaron and sometimes Selena would be. (App. Vol. 4A, 1079.) Their affair lasted less than a month prior to Marcus's murder. (App. Vol. 4A, 1077.) Besides Ms. Hill, Marcus took three other women to his mother's house during the summer of 2019, including a girl named Alaya. (App. Vol. 4A, 1079–80.)

Ms. Hill testified she had sexual relations with Marcus on two occasions and because Marcus never told her nor wore a wedding ring, Ms. Hill was unaware he was married until a couple weeks into their relationship. (App. Vol. 4A, 1114.) Ms. Hill was uneasy about Marcus being married. (App. Vol. 4A, 1114.) She saw herself only dating Marcus but believed he eventually would have divorced Petitioner. (App. Vol. 4A, 1115.) Nevertheless, Marcus had mentioned to Ms. Hill the possibility of moving in together. (App. Vol. 4A, 1118.) She described Marcus as loving and caring and that they had a lot of fun together. (App. Vol. 4A, 1118.) Marcus created a Snap Chat account a day or two before he was murdered. (App. Vol. 4A, 1119.) Ms. Hill last saw Petitioner on a personal level on August 14, 2019, the day before his murder, when they went to Arden River. (App. Vol. 4A, 1118.) But she saw him the morning of August 15 at work (App. Vol. 4A, 1120) and later when he went up into the tower to answer a telephone call from Petitioner. (App. Vol. 4A, 1121.) When he came down from the tower Marcus was visibly upset, refused to speak to Ms. Hill, and eventually left the jail. (App. Vol. 4A, 1121.) Selena acknowledged Marcus was cheating on Petitioner with Ms. Hill at the end of their marriage and with another woman at the beginning of the marriage. (App. Vol. 4A, 1030.) She observed Petitioner and Marcus push each other over car keys because Petitioner had said she was going to hurt herself and Marcus did not want her doing it in her car. (App. Vol. 4A, 1033, 1035.) Selena believed Petitioner said that not with the intent to harm herself but because her feelings had been hurt. (App. Vol. 4A, 1037.)

Marcus's younger brother, Aaron Fagons, observed Petitioner controlling Marcus through his expenditures, when she called and cursed him for spending money (App. Vol. 4A, 1050), and through limiting his time around his own family. (App. Vol. 4A, 1051.) At times, Aaron believed that Petitioner and Marcus were "[m]ost definitely" a "good couple." (App. Vol. 4A, 1053.) He

also observed, however, many verbal arguments between Petitioner and Marcus, including when Petitioner told Marcus he would be nothing without her. (App. Vol. 4A, 1051–52.) Similarly, Aaron observed some physical altercations, including Memorial Day weekend of 2018 when Petitioner did not want Marcus going away for the weekend with his family. (App. Vol. 4A, 1058–60.) After arguing about Marcus leaving, Petitioner slammed Marcus's fingers in the doorway. (App. Vol. 4A, 1060.) In response, Marcus kicked in the door and cursed Petitioner, who screamed "to the top of her lungs . . . [that] she would f-ing kill him." (App. Vol. 4A, 1060, 1075–76, 1088.) Another incident occurred Christmas of 2018 when Petitioner and Marcus were arguing in their vehicle, which ended with Marcus pulling her out of the vehicle, Petitioner shouting she would kill him, and Petitioner getting back in the vehicle, locking Marcus out. (App. Vol. 4A, 1062–64, 1071–72, 1089.) Finally, in July 2019 Aaron observed Petitioner hit Marcus three times in his right ear after she became upset for him creating his own Snapchat account. (App. Vol. 4A, 1065–66, 1084.) In response, Marcus smacked Petitioner with open hand three times on the right side of her face. (App. Vol. 4A, 1066, 1074, 1084.) Petitioner then retrieved a .22 rifle Marcus had hidden under the couch and told Marcus she was going to kill him. (App. Vol. 4A, 1066.)

Marcus always carried a loaded Glock on his hip. (App. Vol. 4A,1086; Vol. 4B, 1385.)

Misty Dawn Collins, whose parents raised Marcus, texted with Marcus four or five times a day in 2019 and saw him frequently. (App. Vol. 4A, 1091–92.) Misty described Marcus and Petitioner's relationship as good and she generally never observed them arguing or fighting. (App. Vol. 4A, 1092.) In July 2019, however, Misty observed Petitioner argue with Marcus over him having created a Snapchat account while she was at work. (App. Vol. 4A, 1093.) While in the kitchen, Misty heard Aaron yell Petitioner was going for the gun. (App. Vol. 4A, 1095–96.) Misty communicated with Marcus on the day of his death via Facebook Messenger, but later that day it

seemed that his account was deleted. (App. Vol. 4A, 1100.) Misty had communicated with Marcus through Messenger for ten years or longer. (App. Vol. 4A, 1101.)

A few months after Petitioner and Marcus began dating in 2016, Sarah accompanied them to the movies and while driving to the theater, Marcus told Sarah that she would not recognize her sister "once he was done with her." (App. Vol. 4B, 1311.) On May 15, 2016, Petitioner, against her family's wishes, moved out of her parents' house into an apartment with Marcus. (App. Vol. 4B, 1313–15.) Petitioner's father, Anthony Reed, dropped her off at the apartment, and ended up in a verbal altercation with Marcus, yelling at him that he was going to ruin his daughter's life. (App. Vol. 4B, 1344.) Later that evening when Petitioner was with Marcus at the apartment, Marcus posted on Facebook "we've got enough clips to shoot a fucking movie, watch everything you love burn." (App. Vol. 4B, 1315, 1318.) Sarah and her family took this post as a threat and it made them angry. (App. Vol. 4B, 1318, 1345.) Sarah observed Petitioner with a black eye following an automobile accident, which Petitioner alleged resulted from the deployed airbag. (App. Vol. 4B, 1323.) Sarah found it unusual she received only one black eye. (App. Vol. 4B, 1323.) Another time Sarah observed bruising on Petitioner's left arm which she claimed first were from roughhousing with Marcus and then said she bruised easily. (App. Vol. 4B, 1324.) Sarah also observed at another time a bruise on Petitioner's leg. (App. Vol. 4B, 1324.) Petitioner's dad never saw her and Marcus fighting and she never told him she was being abused by Marcus. (App. Vol. 4B, 1348–49.) Marcus did not work steadily and had many jobs within a two-year period. (App. Vol. 4B, 1356.)

When Petitioner stayed in her grandmother's and step-grandfather's barn apartment, they observed handprint bruising on Petitioner's arm and bruising on her leg. (App. Vol. 4B, 1379–80, 1388.)

IV. SUMMARY OF THE ARGUMENT

Petitioner first assigns as error the trial court's failure to give the jury her proposed jury instruction regarding Battered Woman's Syndrome. Petitioner concedes that the instruction given by the trial court was an accurate statement of law and, therefore, there was no error by the trial court. Petitioner also asserts that the trial court erred in failing to give an instruction on accident. Such a defense, however, was neither advocated by Petitioner nor supported by the record and, therefore, the instruction was properly not given to the jury.

Petitioner's next three arguments challenge evidentiary rulings by the trial court in the exclusion of testimony from Ms. Carbaugh regarding prior abuse to her by Marcus, the State questioning Stephanie Reed regarding whether the statements by Ms. Carbaugh in her poem published on Facebook were accurate in that Marcus had never been charged criminally, and finding admissible the body camera footage of the second arriving officer on the scene. The trial court conducted the appropriate evidentiary analysis and did not abuse its discretion regarding the admissibility and inadmissibility of such evidence.

Next, Petitioner challenges the trial court's granting of the State's bifurcation motion because she was unable to present character evidence. The record, however, demonstrates that Petitioner presented multiple witnesses in her own defense speaking to her credibility.

Finally, Petitioner argued that her rights to due process and confrontation were abridged when the trial court failed to timely provide her with grand jury and Rule 404(b) hearing transcripts and certain orders of the trial court. Petitioner, however, failed to object prior to or during trial to such delayed disclosure and never used the transcripts for impeachment purposes. Her claims, therefore, are without merit.

Petitioner's assignments of error are without merit and the trial court's February 19, 2020, Sentencing Order should be affirmed.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rule of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record in this case. Accordingly, this appeal is appropriate for resolution by memorandum decision. W.Va. R. App. P. 21.

VI. ARGUMENT

1. The trial court did not abuse its discretion in instructing the jury.

A. Standard of Review.

> "'A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury 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 mis[led] by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad 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. 4, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995)."

Syl. Pt. 1, *State v. Drakes*, 243 W.Va. 339, 844 S.E.2d 110 (2020). This Court will exercise de novo review when "an objection to a jury instruction is a challenge to a trial court's statement of the legal standard[.]" *Guthrie*, 194 W.Va. at 671, 461 S.E.2d at 177.

B. Battered Woman's Syndrome.

The first issue raised by Petitioner is whether the trial court erred in instructing the jury on the defense of Battered Woman's Syndrome. (Pet'r Br. 10–17.) Petitioner contends that although the trial court's instruction was a correct statement of law, it "only partially instructed the jury on the law of battered woman's syndrome, and mislead the jury on the applicable law." (Pet'r Br. 12.)

This Court has expressly disapproved the giving of such an instruction, because "the recommendation of mercy in a first degree murder case lies solely in the discretion of the jury." *State v. Triplett*, 187 W.Va. 760, 769, 421 S.E.2d 511, 520 (1992). Contrary to the argument advanced by Petitioner, this Court has consistently and adamantly refused to permit a trial court to suggest to the jury what it should consider. For example, in *State v. Miller*, 178 W.Va. 618, 363 S.E.2d 504 (1987), this Court emphasized that a jury has unfettered discretion to determine the question of mercy based solely on their impression of the defendant and the circumstances of the case. *Id.* The *Miller* Court explicitly stated that an instruction outlining factors for a jury to consider in determining whether to grant mercy *should not be given* because such an instruction leaves the jury "in the posture of not having the unfettered discretion of making the determination of mercy based solely on their impression of the defendant and the circumstances of the case." *Id.* This Court's decision in *Billotti v. Dodrill*, 183 W. Va. 48, 57, 394 S.E.2d 32, 41 (1990), underscored this principle:

> In the case now before us, the defendant argues that W.Va. Code § 62–3–15 provides no guidelines for the jury and appropriate factors for jury consideration were not listed in the instruction given by the trial court. However, in *State v. Miller,* 178 W.Va. 618, 363 S.E.2d 504 (1987), we addressed a situation in which the factors for jury consideration discussed in *Leach* had been delineated in an instruction that the defendant objected to upon appeal as having been "erroneous," "misleading and confusing." *Id.* 178 W.Va. at 620, 363 S.E.2d at 506. We stated that "[n]owhere in the opinion [Leach] did we suggest, much less direct, that a jury should be instructed on factors in determining whether to recommend mercy." *Id.* 178 W.Va. at 621, 363 S.E.2d at 507. Even more significantly, we noted that "[i]n jurisdictions where the decision to recommend mercy is left entirely within the discretion of the jury and is made binding on the trial court, it is uniformly held that an instruction which enumerates instances or suggests when a mercy recommendation might be appropriate is reversible error." *Id.* 178 W.Va. at 622, 363 S.E.2d at 508 (citations omitted). Thus, contrary to the argument now advanced by the defendant, we concluded in *Miller* that "an instruction outlining factors which a jury should consider in determining whether to grant mercy in a first degree murder case should not be given." *Id.* 178 W.Va. at 623, 363 S.E.2d at 509.

Billotti, 183 W. Va. at 57, 394 S.E.2d at 41. The *Billotti* Court, like the *Miller* Court, thus held that no instruction should be given outlining factors that a jury should consider in determining whether to grant mercy in a first degree murder case. *Id.*

The trial court instructed the jury on Battered Woman's Syndrome as provided by this Court's jurisprudence. (App. Vol. 1, 149.) Petitioner does not challenge the correctness or the legality of the trial court's instruction. Rather, Petitioner simply wanted an expanded instruction explaining in more detail the Battered Woman's Syndrome. Because the trial court, as Petitioner concedes, gave an appropriate instruction, her argument to the contrary is without merit and the trial court's decision should be affirmed.

C. Defense of Accident.

Petitioner further argues that the trial court erred in failing to instruct the jury on the defense of accident. (Pet'r Br. 17.) Petitioner's counsel, however, stated during opening remarks to the jury that this case was one of manslaughter and not murder and never raised the possibility of an accident as a valid defense. (App. Vol. 3A, 730–327, 740, 743.) Furthermore, the evidence at trial failed to demonstrate any accident. Accordingly, the trial court's decision should be affirmed.

2. The trial court properly found inadmissible the testimony of Marcus's previous intimate partner, Ms. Carbaugh, because her testimony was neither relevant nor more probative than prejudicial.

A. Standard of Review.

"'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*, 2014 W.Va. 58, 511 S.E.2d 469 (1998).' Syl. Pt. 11, *State v. Wasanyi*, 241 W.Va. 220, 821 S.E.2d 1 (2018)." *State ex rel. Wade v. Hummel*, 243 W.Va. 408, 412, 844 S.E.2d 443, 447 (2020). The

same discretionary standard applies when evidentiary rulings affect constitutional rights. *Id.* (citing *State v. Kaufman*, 227 W.Va. 537, 548, 711 S.E.2d 607, 618 (2011)).

B. The trial court properly conducted a *McGinnis* hearing and found the specific acts of domestic violence against Ms. Carbaugh irrelevant and more prejudicial than probative.

In her second assignment of error, Petitioner alleges that the trial court erred in not admitting testimony of Marcus's abuse of prior intimate partners, specifically Ms. Carbaugh. (Pet'r Br. 23–33.) Petitioner begins by comparing Ms. Carbaugh's relationship with Marcus as having been substantially similar to the relationship between Petitioner and Marcus. (Pet'r Br. 23–24.) She argues that the trial court abused its discretion in finding that Ms. Carbaugh's testimony was not relevant and was more prejudicial than probative. (Pet'r Br. 24–26.)

This Court has provided lower courts with both direction and discretion when determining the admissibility of Rule 404(b) evidence. In Syllabus Point 2 of *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994), this Court provided the following instructions for trial courts when tasked with determining the admissibility of evidence proffered under Rule 404(b):

> Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin,* 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

193 W.Va. 147, 455 S.E.2d 516. "In reviewing the admission of Rule 404(b) evidence, we review it in the light most favorable to the party offering the evidence, in this case the prosecution, maximizing its probative value and minimizing its prejudicial effect." *McGinnis*, 193 W.Va. at 159, 455 S.E.2d at 528. Under Rule 404(b), "it is presumed a defendant is protected from undue prejudice if the following requirements are met: (1) the prosecution offered the evidence for a proper purpose; (2) the evidence was relevant; (3) the trial court made an on-the-record Rule 403 determination that the probative value of the evidence is not substantially outweighed by its potential for unfair prejudice; and (4) the trial court gave a limiting instruction." Syl. Pt. 3, *State v. LaRock*, 196 W. Va. 294, 311, 470 S.E.2d 613, 630 (1996). Those criteria were satisfied here.

First, the trial court had a proper *McGinnis* hearing to determine the admissibility of the proffered evidence. (App. Vol. 1, 84–91.) As to the relevancy of the prior acts, this Court has held several times that prior acts of domestic violence are relevant in a case regarding domestic violence such as this one. *See State v. Dennis*, 216 W. Va. 331, 352, 607 S.E.2d 437, 458 (2004) (regarding prior acts of domestic violence: "These incidents were used to demonstrate Appellant's pattern of abusive and controlling behavior as a means of defining the turbulent nature of the relationship the victim had with Appellant"); *State v. James B.*, No. 15-0853, 2016 WL 6678987, at *2 (W.Va. Supreme Court, Nov. 14, 2016)(memorandum decision)("[W]e find no error in the circuit court's determination that the victim's testimony regarding petitioner's prior acts of violence was intrinsic evidence and that her testimony was also admissible under Rule 404(b).")

Nevertheless, for purposes of asserting a Battered Woman's Syndrome line of defense, the trial court acknowledged that Ms. Carbaugh's specific instances of domestic violence were not relevant to Petitioner's mindset. (App. Vol. 1, 85.) In *State v. Stewart*, 228 W.Va. 406, 414, 719 S.E.2d 876, 884 (2011), this Court stated that "[a]s 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." "[E]vidence 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." *Id.* at Syl. Pt. 3.

Petitioner never testified how Ms. Carbaugh's issues of domestic abuse and violence affected her own mental state at the pretrial hearing. Moreover, Petitioner failed to present pretrial any expert testimony that Ms. Carbaugh's issues affected her mental state. Furthermore, Ms. Carbaugh testified that she never spoke to Petitioner nor told her about any of the allegations of abuse by Marcus, with the exception of one Facebook message Petitioner sent Ms. Carbaugh. (App. Vol. 2, 591.) So, pursuant to Rule 401 of the West Virginia Rules of Evidence, the trial court properly concluded that Ms. Carbaugh's specific acts of domestic violence were not relevant to Petitioner's state of mind, because Petitioner had no knowledge of the violence against Ms. Carbaugh and the acts failed to make a fact more or less probable than it would be with the evidence. (App. Vol. 1, 86.)

Furthermore, pursuant to Rule 403 of the West Virginia Rules of Evidence, the probative value of Ms. Carbaugh's testimony was outweighed by its potential for confusion. (App. Vol. 1, 86.) This is because the allegations of abuse from Ms. Carbaugh were voluminous and would likely confuse the jury. (App. Vol. 1, 86.) Accordingly, the trial court did not abuse its discretion in finding the specific acts testified to by Ms. Carbaugh neither relevant nor more probative than prejudicial to Petitioner's state of mind.

C. The trial court properly concluded that Ms. Carbaugh's testimony was inadmissible under Rule 404(b) of the West Virginia Rules of Evidence.

Petitioner argues that Ms. Carbaugh's testimony was admissible to demonstrate that Marcus's domestic abuse was not an isolated act, but rather "a pattern of conduct that demonstrated how the abuser controls and dominates his or her romantic partners." (Pet'r Br. 30.) West Virginia Rule of Evidence 404(b)(1) provides, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." West Virginia Rule of Evidence 404(b)(2), however, further provides, "[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." "W.Va. R. Evid. 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. Edward Charles L.*, 183 W. Va. 641, 647, 398 S.E.2d 123, 129 (1990).

Here, Petitioner sought to introduce evidence from Ms. Carbaugh to demonstrate that Marcus was a rapist in general and that her actions were in self-defense because the firearm went off unintentionally. Nevertheless, no self-defense argument was made and evidence of prior bad acts—domestic violence—to Ms. Carbaugh simply was not relevant to Petitioner. The trial court's rulings should be affirmed.

3. The State did not open the door to allow testimony of Ms. Carbaugh.

A. Standard of Review.

"'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*, 2014 W.Va. 58, 511 S.E.2d 469 (1998).' Syl. Pt. 11, *State v. Wasanyi*, 241 W.Va. 220, 821 S.E.2d 1 (2018)." *State ex rel. Wade v. Hummel*, 243 W.Va. 408, 412, 844 S.E.2d 443, 447 (2020). The

same discretionary standard applies when evidentiary rulings affect constitutional rights. *Id.* (citing *State v. Kaufman*, 227 W.Va. 537, 548, 711 S.E.2d 607, 618 (2011)).

B. The State did not open the door to allow Ms. Carbaugh to testify at trial.

Petitioner argues that on direct examination of Stephanie Reed, Petitioner's mother, she testified about Marcus's reaction to the Ms. Carbaugh posted on Facebook regarding Marcus repeatedly raping her. (Pet'r Br. 33.) On cross-examination by the State, Ms. Reed was asked whether Marcus had any criminal record. (Pet'r Br. 33.) Petitioner asserts that this line of questioning by the State opened the door to allow Ms. Carbaugh to testify about the abuse she suffered from Marcus. (Pet'r Br. 34.)

In *State v. Baker*, 230 W.Va. 407, 738 S.E.2d 909 (2013), this Court recognized the "opening the door" doctrine as operating "to prevent a defendant from successfully excluding from the prosecution's case-in-chief inadmissible evidence and then selectively introducing pieces of this evidence for the defendant's own advantage, without allowing the prosecution to place the evidence in its proper context." (citing *State v. James*, 677 A.2d 734, 742 (N.J. 1996)). The Court went on to state that the doctrine allows the admission of evidence not otherwise relevant or admissible in order to respond to "(1) admissible evidence that generates an issue, or (2) inadmissible evidence admitted by the court over objection." *Baker*, 230 W.Va. at 412, 738 S.E.2d at 914 (internal citation omitted).

Petitioner argues that, in effect, the State inquired of Stephanie Reed whether the allegations in Ms. Carbaugh's poem were true by asking if Marcus had ever been charged for such conduct. The State posits that its line of questioning did not open the door to Marcus's criminal history, thereby allowing further testimony regarding certain acts committed by Marcus. To the

extent, however, that the State opened the door such error was harmless. The trial court, therefore, did not abuse its discretion in disallowing testimony regarding Marcus's other bad acts.

4. The trial court did not abuse its discretion in finding the body camera footage admissible.

A. Standard of Review.

"'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*, 2014 W.Va. 58, 511 S.E.2d 469 (1998).' Syl. Pt. 11, *State v. Wasanyi*, 241 W.Va. 220, 821 S.E.2d 1 (2018)." *State ex rel. Wade v. Hummel*, 243 W.Va. 408, 412, 844 S.E.2d 443, 447 (2020). The same discretionary standard applies when evidentiary rulings affect constitutional rights. *Id.* (citing *State v. Kaufman*, 227 W.Va. 537, 548, 711 S.E.2d 607, 618 (2011)).

B. The trial court properly determined that the body camera footage was relevant and neither gruesome nor unduly prejudicial.

Petitioner alleges that the trial court erred in admitting the body camera footage, finding that it was not gruesome and unduly prejudicial. (Pet'r Br. 36–46.) The admission of photographs over an objection that the photos are gruesome is evaluated on a case-by-case basis pursuant to Rules 401, 402, and 403 of the West Virginia Rules of Evidence. Syl. Pt. 8, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Here, Petitioner asserts the trial court erred in finding the body camera footage was relevant. (Pet'r Br. 38.) The trial court properly found that the body camera footage was directly relevant because it showed a still living victim and addressed the elements of intent and malice. (App. Vol. 1, 214.) Despite Petitioner's defense that the shooting was accidental or the result of Battered Woman's Syndrome, the video demonstrated that Marcus remained alive when she left

the house without seeking medical treatment. Thus, the video was the only evidence of how the body was presented when the second officer on the scene arrived, prior to paramedics.

Furthermore, under the *McGinnis* analysis and Rule 403, the trial court properly determined that the probative value of this evidence outweighed any prejudice. (App. Vol. 1, 214.) To the extent that the video showed more graphic footage of the victim's head, the trial court directed that the video cease playing at the point the towels were removed so that the footage was not gruesome. (App. Vol. 1, 214.) Accordingly, the trial court's decision should be affirmed.

5. The trial court did not err in bifurcating the guilty phase from the mercy phase of the trial.

Petitioner alleges that the trial court erred in granting the State's motion to bifurcate because she was unable to present "relevant character evidence, including her not being at risk to reoffend." (Pet'r Br. 46–48.) Specifically, she asserts that in response to the State's admission of the body camera footage, she "was unable to present evidence pertaining to her past, present, or future character." (Pet'r Br. 47.)

In Syllabus Point 6 of *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996), this Court held that in determining whether to bifurcate, the following factors should be considered by the trial court:

> (a)Whether limiting instructions to the jury would be effective; (b) whether a party desires to introduce evidence solely for sentencing purposes but not on the merits; (c) whether evidence would be admissible on sentencing but would not be admissible on the merits or vice versa; (d) whether either party can demonstrate unfair prejudice or disadvantage by bifurcation; (e) whether a unitary trial would cause the parties to forego introducing relevant evidence for sentencing purposes; and (f) whether bifurcation unreasonably would lengthen the trial.

Petitioner takes issue only with the fact that she was unable to present and past character evidence. (Pet'r Br. 47.) Despite her assertion, at trial, Petitioner presented her character evidence in the form of her high school soccer coach, principal, secretary, teachers, as well as family, co-

workers, and acquaintances. (App. Vol. 5A, 222–43.) In determining whether to bifurcate, the trial court "has enormous discretion and rarely will its ruling constitute reversible error." *LaRock*, 196 W.Va. at 315, 470 S.E.2d at 634. At the pretrial hearing, the trial court found Petitioner failed to demonstrate she would be forced to forego introducing relevant evidence for sentencing purposes and was unable to demonstrate prejudice. Accordingly, the trial court's decision should be affirmed.

6. Petitioner was not denied due process protections or her right to confront witnesses against her when she failed to timely receive grand jury transcript proceedings and the transcript of the Rule 404(b) hearing held by the trial court.

In her final assignment of error, Petitioner alleges her defense was hampered by the court reporter's failure to provide timely and adequate transcripts of grand jury proceedings and the trial court's Rule 404(b) hearing. (Pet'r Br. 48.) Undoubtedly, the Sixth Amendment to the United States Constitution and § 14, Article III of the West Virginia Constitution guarantees an accused the right to confront and cross-examine witnesses against her. Petitioner contends that she did not receive the transcript of the Rule 404(b) hearing until the morning of those witnesses' testimony, which rendered her unable to fully and fairly cross-examine the State's witnesses. Despite Petitioner's contention, Petitioner failed to note her objection to the late disclosed transcripts prior to or during trial and never used the transcripts for impeachment purposes at trial. Consequently, Petitioner has failed to demonstrate her confrontation or due process rights were abridged and to the extent any such error existed, it was harmless as Petitioner has failed to indicate how she would have used the transcripts at trial. Accordingly, Petitioner's claim is without merit.

VII. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the Circuit Court of Barbour County's February 19, 2020, Sentencing Order.

Respectfully Submitted,

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Respondent,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0227

STATE OF WEST VIRGINIA,

Respondent,

v.

CARLI RENAE REED,

Petitioner.

CERTIFICATE OF SERVICE

I, Mary Beth Niday, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, October 4, 2021, and addressed as follows:

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