IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**Docket No. 22-705**

**STATE OF WEST VIRGINIA,**

*Plaintiff Below, Respondent,*

**v.**

**JULIE BROWNING,**

*Defendant Below, Petitioner*

# RESPONDENT'S BRIEF

Appeal from the August 21, 2022, Order
Circuit Court of Fayette County
Case No. CC-10-2020-F-75

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Other Authorities**

## INTRODUCTION

Respondent, State of West Virginia, responds to Petitioner's brief filed by Julie Browning ("Petitioner"), by her counsel, pursuant to her appeal of an order of the Circuit Court of Fayette County (Circuit Court No. CC-10-2020-F-75) entered on August 21, 2022. Petitioner was convicted of Child Neglect Resulting in Death of Petitioner's eight year old step-daughter. Petitioner cannot show the circuit court abused its discretion in permitting the admission of other acts of neglect as intrinsic evidence, which is not subject to analysis under Rule 404(b) of the West Virginia Rules of Evidence. Further, the circuit court did not err in limiting cumulative and repetitive questioning of a non-incriminating co-defendant. As Petitioner has failed to demonstrate reversible error, the lower court's order should be affirmed.

## ASSIGNMENTS OF ERROR

Petitioner's first assignment of error alleges the circuit court of Fayette County abused its discretion by permitting the admission of prior acts of neglect as intrinsic evidence. Pet'r Br. 2. Petitioner's second assignment of error alleges the circuit court of Fayette County unconstitutionally limited Petitioner's right to cross examine a co-defendant by prohibiting questions that had already been answered on direct examination of that witness. Pet'r Br. 2.

## STATEMENT OF THE CASE

### A. Facts from December 26, 2018

On December 26, 2018, eight year old victim, R.B.[1] was pronounced dead at the

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[1] Pursuant to Rule 40(e) of the West Virginia Rules of Appellate Procedure, Respondent will refer to the minor victim by her full initials, R.B.

Plateau Medical Center in Oak Hill, West Virginia. A.R. 479. Ambulance driver Andrea Coleman testified she responded to a call regarding a seizure, and upon arrival at the home a woman, later identified as Sherrie Titchenell, carried out R.B.'s lifeless body. A.R. 399. Ms. Coleman stated R.B. was cyanotic, blue, lifeless, and was not breathing. A.R. 402. R.B. also had blotches all over her body. A.R. 400. Ms. Coleman testified R.B. was deceased before they got there, and they put R.B. in the ambulance to begin resuscitation. A.R. 399.

Upon arrival at the hospital, medical staff in the emergency room described R.B.'s color as very pale gray. A.R. 418. At the emergency room R.B. was noted to have no pulse, no rhythm on the cardiac monitor, pale, cool, no signs of life, and appeared to have been dead for some time. A.R. 438. Medical personnel testified R.B. had small scabbed areas around her neck and flanks, bruising noted to her sides and legs, and she had a burn like place on her right lower leg. A.R. 418. Medical staff initially estimated R.B. to be approximately four years old, rather than her actual age of eight, based on her being underweight, A.R. 469, and very small A.R. 451. Dr. Dilip Ghodasara, the emergency room physician at Plateau Medical Center, testified they attempted to take R.B's temperature but were unsuccessful because R.B. was so cold, A.R. 475, and the lowest range of the thermometer equipment only registers down to 84 degrees Fahrenheit. A.R. 498. Dr. Ghodasara stated this was a strong indicator that R.B. had been dead prior to arriving at the ER. A.R. 476. Dr. Ghodasara testified R.B. arrived at 11:55 a.m. and lifesaving treatment was administered until she was pronounced dead at 12:27 p.m. A.R. 479. Dr. Ghodasara indicated that they had concerns about abuse based on the appearance of the child. A.R. 500.

**B. Broken Femur**

In September 2015, R.B. suffered a fracture of her femur and was treated by Kara Gillespie, a physician assistant in the emergency room at Summersville Regional Medical Center. A.R. 686-

687. Ms. Gillespie testified the fracture of R.B's femur was a buckle fracture at the end of her thigh bone. A.R. 687. She further explained that a buckle fracture is the bone impacting on itself, and this type of femur fracture is considered child abuse until proven otherwise. A.R. 688. Ms. Gillesie testified the father and stepmother reported R.B. had kicked a wall during a temper tantrum and later complained of knee pain. A.R. 687. Ms. Gillespie testified that the explanation as to how the broken femur occurred was not consistent with the break. A.R. 688. Ms. Gillespie further explained that this type of injury would typically be caused by a child falling from a great height or a car accident. A.R. 688. Dr. Joan Phillips, a pediatrician specializing in child abuse cases, testified that fractures like the one R.B. suffered are a highly specific indicator of child abuse. A.R. 831. Dr. Phillips went on to explain "there's a bio medical way that they occurred and it's not by a kicking or impact. It is by torsion and rotation, so it's pulling and twisting and it pulls off the corner or the bottom of the bone." A.R. 831. Dr. Michele Staton, R.B.'s pediatrician, testified that no one reported to her that R.B. had broken her femur in 2015. A.R. 519. Regarding this failure to report R.B.'s femur fracture to her, Dr. Staton testified "I'd say that it's unreasonable that is usually something we are told." A.R. 519-520. Dr. Staton stated that when she learned R.B.'s broken leg was reported as being caused by kicking the wall, Dr. Staton opined "I think it is impossible for her to break her leg that way. That is the largest bone in your body and it requires extreme force to break that leg and that bone." A.R. 526-527. Dr. Staton further testified that "[t]he fracture with that method alone would have precipitated a call to CPS on my part, combined with weight loss would've been extremely, extremely concerning." A.R. 528. Dr. Brandon Workman, the psychiatrist who treated R.B., testified that he began treatment of the child in September of 2016 and was treating R.B. for emotional and mental conditions. A.R. 612. Dr. Workman testified he was never told about R.B's broken femur. A.R. 621. When asked if the

report that R.B. became so upset she kicked a wall and broke her own leg is information he should have been told, Dr. Workman stated "I think it would have been one of the examples that they would lead with." A.R. 621. Carrie Ciliberti, R.B's elementary school teacher, had concerns when R.B. came to school with a broken femur, and Ms. Ciliberti reported this injury to Child Protective Services. A.R. 1088.

**C. Bruising and burn marks**

At the emergency room, nurses observed small scabbed areas around R.B.'s neck and flanks, bruising noted on R.B.'s sides and legs, and she had a burn like place on her right lower leg. A.R. 418, 438. Dr. Ghodasara noted R.B. had a second degree burn on her right leg. A.R. 480. Dr. Ghodasara opined that the burn size could be consistent with the size of the end of a cigarette. A.R. 497. Further, Dr. Ghodasara noted several bruises and scratches on R.B.'s body. A.R. 482.

**D. Lack of nutrition and starvation**

R.B.'s pediatrician, Dr. Staton, testified that she began seeing R.B. in 2014 and she had appropriate weight gain early on, then she lost a significant amount of weight. A.R. 524. Dr. Staton testified that R.B's ending growth percentile was the second percentile for children her age. A.R. 526. Dr. Can Meton Savasman, Deputy Medical Examiner who performed the autopsy of R.B., testified that according to the growth chart for children her age, R.B.'s weight was under 5%. A.R. 742. Dr. Savasman testified as to why a weight under 5% was notable by stating, "[a]ll I can say to you, starvation is an incident—event under 5% weight, its data information. . . . My job is information and data." A.R. 742. Dr. Joan Phillips, a child abuse pediatrician, testified that children should be growing consistently on the same growth curve, and R.B. was maintaining a steady growth curve up to age 6 years of age. A.R. 828. Dr. Phillips testified R.B. was growing at around the 77$^{th}$ percentile, then at age 6 dropped down to the 59$^{th}$ percentile, and then between the

age of 6 and 8 R.B.'s weight dropped so much that at age 8 she was down to the 2nd percentile. A.R. 828. Dr. Phillips opined that "a child who's been growing normally with no chronic illness and then has a sudden decrease in her growth would be certainly a red flag or trigger that . . . she wasn't getting enough nutrition." A.R. 830. In testifying regarding her review of the school records, Dr. Phillips noted R.B. was not given permission by her caretakers to eat breakfast at school, but her sister was permitted to eat breakfast at school. A.R. 842. Ms. Ciliberti testified she was told by R.B.'s caretakers that R.B. should not be given any breakfast at school, that R.B. had an eating disorder, and R.B. would be fed at home. A.R. 1092. Ms. Ciliberti testified that "[R.B.] was hungry, and I think she was afraid to tell us she was hungry." A.R. 1093. Ms. Ciliberti testified that R.B. ate everything she was given at school and would actually lick her tray. A.R. 1094. Ms. Ciliberti testified that she voiced concerns over the health and safety of R.B. to the principal and the Board Superintendent when she learned that R.B. was to be homeschooled. A.R. 1110. Ms. Ciliberti testified, "I told the Board Superintendent that if [R.B.] was allowed to be withdrawn and homeschooled that she would die." A.R. 1110. Dr. Phillips also made a correlation after R.B. began homeschooling and the significant decrease in R.B.'s weight. A.R. 893.

**E. Reporting by caretakers**

Maria Parks, a pediatric nurse in Dr. Staton's office who had treated R.B. in the past, testified that she had concerns regarding the accuracy of Petitioner's reporting during office visits because "the claim the [Petitioner] was making didn't match the presentation in the office of [R.B.] herself." A.R. 567. Ms. Parks stated she felt something was off, and had concerns about abuse of R.B. from her observations of the family. A.R. 566-567. Dr. Michele Staton, R.B.'s pediatrician, testified that most often Petitioner was the person reporting information to her at the office visits. A.R. 516. Dr. Staton testified "R.B. would not talk to me. I tried to ask her questions directly; all

the questions were answered by the caretakers." A.R. 522. During the two year period that he treated the child, Dr. Workman testified he only spoke with the child individually one time. A.R. 613. Dr. Workman testified that the behavioral symptoms of R.B. reported by Petitioner were behaviors of acting out, anxiety type things, depression symptoms, the Petitioner's frustrating over R.B.'s eating. A.R. 615. Dr. Workman testified he personally never observed R.B. engage in the behaviors being reported. A.R. 615. When asked during his testimony who reported the behavioral symptoms of R.B. in which he relied upon for prescribing the medications, he responded "[m]ost of the time it was the stepmother [Petitioner]." A.R. 650. Katie Tharp, a psychologist who interacted with R.B., testified that she saw R.B. to rule out behavior problems and questions about her eating and sleeping habits. A.R. 586-587. Ms. Tharp testified that she did not observe any behavior that was not typical of her age, and that "[R.B.] was obedient within the timeframe of the intake." A.R. 588. She indicated that she saw R.B. on two visits and that it was her observation R.B. did not exhibit any mental issues or problems, and she never saw R.B. again. A.R. 590, 592.

Dr. Mock expressed concern during his testimony at the "alarming number of . . . psychiatric medications that this 8-year-old was on." A.R. 774. Dr. Mock also questioned the validity of R.B.'s numerous psychiatric diagnosis by stating "schools were independent and they can make observation, and when the schools denied any disruptive behaviors it makes me question that diagnosis and the veracity of the parents] account." A.R. 776. "The circumstances of the presentation would be mostly from family members that would describe signs and symptoms . . . they diagnosed a child with a binge eating disorder, yet she is underweight. So a lot of it was conflicting." A.R. 776-777. Dr. Mock testified that in designating the manor of death of R.B. to be undetermined, "there were potentially contributory findings [that] warranted further investigation" A.R. 785. Dr. Mock further testified that when there are "competing manors that I

am unable to resolve . . . that's what the undetermined classification is for and that's what occurred in this case." A.R. 786.

Dr. Staton also testified it was reported by Petitioner that R.B. had episodes of hypoglycemia, and based on the [Petitioner's] report Dr. Staton sent a note to inform the school that R.B. should be provided regular snacks to regulate her blood sugar. A.R. 544. Dr. Staton testified that Petitioner subsequently reported R.B.'s glucose was no longer a concern and explained that "[s]tepmom [Petitioner] brought her in because the school was giving her snacks for her blood glucose level, and she said they would not stop doing that without documentation from me." A.R. 545. Dr. Staton further testified that "[t]he only information I have is what was provided from the caregivers . . . I let the school know they were not required to provide [R.B.] snacks. That does not mean they cannot provide [R.B.] snacks; they are just not required to do so. A.R. 545.

Dr. Phillips suggested R.B. may have been subject to medical child abuse, which occurs when a child receives medical care or medication that can be harmful or potentially harmful to the child because the caretaker has given either distorted or false information to the medical provider. A.R. 833. Dr. Phillips explained regarding the care of a child, the doctor assumes what they are being told is truthful information, and if this information is distorted or untrue the child receives excessive care or mediations. A.R. 833. Dr. Phillips testified she had concerns related to the extensive psychotropic medication R.B. was on. A.R. 834. Dr. Phillips testified she questioned the prescribing of these medications given the school reports indicating R.B. did not get into trouble at school. A.R. 842. During her testimony, Dr. Phillips pointed out discrepancies in the caretakers' reporting of [R.B.'s] symptoms, and noted the reporting of different symptoms to the psychiatrist that were omitted to the pediatrician, or were reported as the opposite information.

A.R. 836. Dr. Phillips testified to an example of this discrepancy where it was reported to the pediatrician R.B. was eating a well-balanced diet, but reported to the psychiatrist who was prescribing medications that R.B. was binge eating and vomiting. A.R. 837. Dr. Phillips testified to R.B.'s reported episodes by the caretakers of high blood sugar that was never documented, and misleading information about why R.B. was being homeschooled. A.R. 837-838. Further, Dr. Phillips testified that R.B.'s caretakers never reported her broken leg to the pediatrician or the psychiatrist. A.R. 840. Dr. Phillips expressed her concern regarding these reports of the caretakers noting that "distorted or inaccurate information was given a lot . . ." A.R. 838.

**F. Facts related to cause of death**

Dr. Can Metin Savasman, forensic medical doctor and Deputy Chief Medical Examiner in Charleston, West Virginia, testified that he performed the autopsy of R.B. on December 27, 2018. A.R. 720. Dr. Savasman indicated that upon his initial observation of R.B.'s body he found certain impurities of the lung that are exclusively seen in infection diseases. A.R. 720. After cutting the lung for examination, Dr. Savasman testified that pus was pouring out of the cut surfaces of the lung, which indicated a severe infection of the lung. A.R. 721-722. Dr. Savasman testified R.B.'s cause of death was due to "necrotizing, bronchial pneumonia . . . sepsis due to necrotizing, bronchial phenomena [pneumonia] with damage . . . ." A.R. 724. Dr. Allen Ray Mock, Chief Medical Examiner for West Virginia, testified that he reviewed the autopsy findings of Dr. Savasman and concluded R.B. died from "very severe necrotizing bronchial pneumonia, meaning that an infection of the lungs to the point where the tissue was actually dying and I found that to be the cause of death . . ." A.R. 769. Dr. Mock continued his findings regarding R.B.'s cause of death by explaining there would likely be "a period of sepsis before death where the lung infection

had spread into the blood causing some external findings, but it was really . . . infection of the lungs that led to her death. A.R. 769.

Dr. Staton testified that pneumonia is very treatable. A.R. 528. Dr. Staton testified that deprivation of food and water would have an effect on a child's immune system and make it more difficult to fight off infection or be more susceptible to an infection. A.R. 529-530. Dr. Mock testified that deprivation of nutrition or food would affect R.B.'s ability to fight this type of infection. A.R. 773. Dr. Mock explained that "[w]hen you are having nutritional deficiency your immune system is depressed and you have a less aggressive response to evading organisms that can set up in your lungs and cause an infection." A.R. 773. Dr. Mock explained that "a dehydrated patient is also a vulnerable state, especially during sepsis where you have a disruption of your coagulation cascade, you have problems clotting, [and] both of those could be contributory in a negative way." A.R. 773. Dr. Phillips testified that "the literature is very clear . . . the infectious disease literature, is that if there's a malnutrition or under nutrition, so being not fed enough, that there is a risk of mortality and mostly to three things, one of those being pneumonia." A.R. 843. Dr. Moffett further testified that "[R.B.] was an undernourished child because she was well below the normal growth for a child her age. And so [R.B.'s] under nutrition may have really contributed to her susceptibility for getting pneumonia, fighting pneumonia." A.R. 949. "We know that worldwide children who are undernourished or malnourished are at risk for infection. And the leading three causes of death worldwide of children are pneumonia, diarrhea, diseases and malaria . . . ." A.R. 949. Dr. Moffett testified the lack of nutrition by R.B.'s caretakers would have made R.B. more likely to contract this illness. A.R. 950.

When asked what type of symptoms would be seen by the caretakers prior to R.B.'s death, Dr. Mock testified a parent would have observed R.B. "coughing up green nastiness

. . . could cause shortness of breath, she might've had a fever . . . She might be ashen or pale or grayish, very lethargic and fatigued and just ill, just very ill." A.R. 770. After looking at the lung tissue under a microscope, Dr. Mock stated that R.B's body had begun forming scar tissue, which would take a few days to happen. A.R. 770. Dr. Mock testified the parents of R.B. would see shortness of breath "maybe to the point of gasping . . . some external findings in the skin as the body tried to attack this infection and now it's moving to the bloodstream . . . you could start to see leakage of the superficial vessels in the skin, causing purpuric rash or have a red purple stippled rash . . . on top of that ashen appearance, and possibly high fever." A.R. 771. When asked whether a normal reasonable parent would be able to readily observe these signs and symptoms, Dr. Mock testified that "[a]ny layperson would recognize the child was very ill." A.R. 771. Dr. Mock continued to testify that R.B.'s medications would not have masked any of the symptoms for the pneumonia, and the symptoms "would've been obvious to you and I." A.R. 775. Dr. Staton testified that a reasonable parent would have observed symptoms of pneumonia for several days, possibly longer. A.R. 529. Dr. Moffett explained that R.B. would have trouble breathing and may vomit and not have much appetite. A.R. 943. Dr. Moffett further testified, "I think [R.B.] was sick for a while and probably likely was dehydrated, which can lead to, if you're not getting enough fluid, your kidneys can shut down and then you're in septic shock and you have an overwhelming infection . . ." A.R. 937-939. Dr. Moffett testified that R.B's elevated levels in the lab results are "present in dehydration or kidney failure or a combination of both." A.R. 936. Dr. Moffett testified that by reviewing the lab results it was her opinion R.B. was dehydrated. A.R. 936. Dr. Moffet testified further that R.B. had seriously low protein and albumin levels which are important because "low albumin is a

signal that something serious is going on . . . the infection that was present in [R.B.'s] lungs . . . this collaborates that her pneumonia was not just present that morning; . . . it was there for a while." A.R. 937-939. Dr. Moffett testified that R.B. would have felt bad, breathing harder and "probably felt the sensation that she couldn't breathe, and maybe have told people I don't feel well, I can't breathe, my chest hurts." A.R. 943. Dr. Moffett further testified that "I think probably [R.B.] was suffocating. I think she was probably gasping at times for air and as – she might not have even really been conscious at the very end, I don't think." A.R. 982. Dr. Moffett further testified regarding whether R.B. knew she was dying by stating, "[s]he may not have known in the sense that it was the end, but I'm telling you she knew how bad she felt. She knew it was really bad . . ." A.R. 984. Dr. Moffett testified because the pneumonia wasn't treated "it went to sepsis, shock and death." A.R. 946. Dr. Moffett testified that "[R.B.] should not have died. If she would've gotten treatment and appropriate antibiotics, she would've survived." A.R. 957.

B.M., step-sister to R.B., testified the children were instructed not to tell the authorities about things going on in the house, and they should say everything is fine. A.R. 1181. B.M. testified there was typically no food provided at the house in the morning, and B.M. would eat breakfast at school. A.R. 1185-1186. B.M. was asked if any of the children in the house were treated the way R.B was treated, and B.M testified, "[n]o, sir. . . It seems as if [R.B] was always being punished even if she hadn't done anything to deserve so." A.R. 1190. B.M. testified further that "[t]here would be days [R.B.] would go hungry. At some point [R.B.] had learned that she could leave her room at night when Sherrie was sleeping and go into the kitchen to eat." A.R. 1191. B.M. testified that R.B. was deprived of water as punishment, and on one occasion saw R.B. drinking water out of a toilet. A.R. 1195.

B.M. testified that prior to R.B.'s death, R.B. had been sick for several days, and "[you] could tell visibly that [R.B.] was sick. [R.B.] claimed that she felt sick . . . I do remember her saying that, yes. When [R.B] breezed [breathed], it sounded like she was snoring, you know like when a pug breathes." A.R. 1199. B.M. went on to testify that "[R.B] sounded like she couldn't breathe, like she was fighting for her air . . ." A.R. 1199. B.M. recalled that "[Petitioner] told [R.B] multiple times that [R.B] was going to be spending Christmas in the hospital and asking if [R.B] was okay with that, and [R.B.] said she was. [R.B.] said she wanted to [go to the hospital], yes." A.R. 1201. B.M. recalled the adults discussing who was going to take [R.B.] to the hospital Christmas Eve or the day before, but no one did. A.R. 1201. B.M. testified R.B. was very sick on Christmas Eve. A.R. 1202. B.M. testified did not see anyone give R.B. medicine, food, or water, and R.B. was in bed the entire time. A.R. 1202. B.M. testified that R.B. was so sick that she could not get up to get herself something to drink or eat. A.R. 1202. B.M. further testified that R.B. was too sick to open her presents and B.M. was concerned that R.B. was very seriously ill. A.R. 1221.

Dr. Staton testified she did not receive any calls from R.B.'s caregivers seeking advice or treatment for R.B. during the Christmas holiday in 2018. A.R. 530. Dr. Staton testified that she can be contacted at any time, including Christmas, and the procedure is that if "they call my office, there is a recording, they can leave a message and it pages me and I will call then back." A.R. 530. Dr. Staton testified that the emergency room at the hospital is open every day. A.R. 531

B.M. testified that on December 26, 2018 she recalls being told she was going to a friend's house and when she left her room "Sherrie had [R.B.] like sitting upright over her shoulder walking—kind of speed walking out to the ambulance. . . [R.B] was purple." A.R. 1203-1204. When B.M. was asked how she responded to investigation questions about what was going on in the house at the time of R.B's death, B.M. testified that "I continued

to lie . . . and I reminded [the younger children] of the lies they were supposed to say [because] they hadn't been properly told what they were supposed to say." A.R. 1206.

**G. Petitioner's testimony**

The Petitioner testified she knew R.B. was sick, but did not recognize how sick R.B. was. A.R. 1580. According to Petitioner's testimony, on December 23rd R.B. was playing outside with the other children, and when R.B. came inside Petitioner testified R.B. "had a runny nose and she was coughing a little bit." A.R. 1584. Petitioner testified that on December 24th she observed R.B. was getting a little worse, and R.B. "was coughing a little more . . . just a little bit." A.R. 1586. Petitioner's testimony regarding Christmas Day was that R.B. was outside playing. A.R. 1588. Petitioner testified that she "noticed that [R.B.] was more congested, it was getting worse, but I just didn't know it was that bad." A.R. 1590. Petitioner testified she gave R.B. Tylenol the evening of December 25, 2018, and in response to questioning as to whether she observed R.B. struggling to breathe, Petitioner testified R.B. did not have labored breathing. A.R. 1591. Petitioner testified that on the evening of December 25, 2018, Sherrie was changing R.B.'s clothes and Sherrie indicated that R.B. had thrown up. A.R. 1593. Petitioner testified that "[o]ne of the last things [R.B.] told me [was] she couldn't walk. I asked her why can't you walk and she said cause [sic] her scars were hurting." A.R. 1594. Petitioner testified "[t]hat's one of my last memories of [R.B.]. I should've take her to the doctor." A.R. 1595. Petitioner testified she woke up the next morning and went to work around 8:00 or 9:00, Marty had left earlier that morning for work, and no one else was up. A.R. 1596. Petitioner testified that she did not see R.B. that morning. A.R. 1596. Petitioner testified they had placed locks on the door where R.B. slept because R.B. "had a binge eating disorder that she was diagnosed with, and we wanted to make sure that, especially at night when everyone was sleeping, that she didn't get out and eat too much of something or eat

something she shouldn't have." A.R. 1610. Petitioner testified that after Petitioner went to work, she saw a missed call around lunch time and then saw a text from Sherrie that R.B. had a seizure. A.R. 1596. Petitioner testified she left work immediately. A.R. 1596. Petitioner stated she did not go to the hospital, but went home to get R.B.'s medications to see if any of the medications could have caused a seizure. A.R. 1598.

**H. Co-defendant Sherrie Titchenell's testimony**

Sherrie Titchenell, co-defendant, testified she could not recall any details regarding the incident where R.B.'s femur was broken. A.R. 1661. Ms. Titchenell's testimony was that she had no memory of where she was when R.B. broke her femur, or if she was even home. A.R. 1663. Ms. Titchenell did recall during her testimony that "I do know that Julie and Marty took her to the hospital, but I did not go." A.R. 1663. Ms. Titchenell presented and identified a few family pictures during her testimony. A.R. 1652. Ms. Titchenell presented a picture depicting R.B. opening Christmas packages, and Ms. Titchenell testified she took the picture Christmas Day 2018. A.R. 1654-1655. Ms. Titchenell testified she recalled on Christmas Day 2018, that R.B. "had sniffles. She had a little cough" A.R. 1656. Ms. Titchenell testified she did not believe R.B's illness was an emergency, but agreed that R.B. died within 24 hours of the picture she testified she took the day before. A.R. 1657. Ms. Titchenell testified R.B. was not purple when she called 911, but that R.B. was gasping. A.R. 1671. Ms. Titchenell agreed she gave a statement to police that described R.B. as having her eyes open and staring, "but it was like she didn't see me." A.R. 1673. Ms. Titchenell stated she did not recall being present when Petitioner says she gave R.B. Tylenol the night before R.B.'s death. A.R. 1674. Ms. Titchenell further testified she believed that Petitioner tried to call R.B.'s doctor prior to the child's death. A.R. 1674. Ms. Titchenell testified Petitioner was at work on the day of R.B's death. A.R. 1667.

### I. Pretrial hearings and trial

The circuit court noted at the pretrial stage that Petitioner did not make a motion to sever her trial from the other co-defendants, choosing instead to proceed in a joint trial. A.R. 113. Petitioner and the co-defendants represented to the court that they were conducting their defense in a joint effort, treating all motions as joint motions at the pretrial hearings. A.R. 128. This unified defense was reiterated when a co-defendant's counsel represented "the defense, working together, I believe has put forth anywhere between five to seven motions." A.R. 137. Petitioner acknowledged this joint effort through her counsel who stated he had filed a motion "[i]n addition to jointly. . . arguing . . . joining in those motions." A.R. 138. Further, the court recognized this joint and unified effort when inquiring about a procedural matter raised jointly by the co-defendants, "Well, like I say, if all of your co-counsel agree with that, then just prepare an order." A.R. 140. Additionally, all defense counsels objected to evidence on each other's behalf against the State. A.R. 568-572. During presentation of the joint defense at trial, the court inquired if Petitioner would like to examine Ms. Titchenell when it asked Petitioner's counsel "[a]ll right. Mr. Plants, do you have questions of this witness [Ms. Titchenell]?" A.R. 1655. Petitioner's counsel responded "No, Your Honor." A.R. 1655. The jury found Petitioner guilty of Child Neglect Resulting in Death as contained in Count Two of the indictment, and Petitioner was sentenced to not less than three nor more that fifteen years in the state penitentiary. A.R. 37. From this, Petitioner now appeals.

## SUMMARY OF ARGUMENT

The circuit court did not abuse its discretion in determining prior acts of neglect were intrinsic evidence to the crime of Child Neglect Resulting in Death. Because the court determined the specific acts sought to be admitted were part of the full story leading up to the child's death,

the evidence was not extrinsic and not subject to a Rule 404(b) analysis pursuant to *State v McGinnis,* 193 W.Va. 147, 455 S.E.2d 516 (1994).

Further, the circuit court did not commit error in limiting the mode and extent of Petitioner's examination of a non-incriminatory co-defendant. The court was within its discretion to curb repetitive and cumulative questions so as not to confuse the jury. Moreover, Petitioner was given ample opportunity to question the witness and expressly declined to ask any questions whatsoever.

## STATEMENT REGARDING ORAL ARGUMENTS 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.

## ARGUMENT

### I. Standard of Review

When reviewing a trial court's actions concerning the admissibility of evidence, this Court has held, "[t]he action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion." Syl. Pt. 2, *State v. Harris,* 230 W.Va. 717, 742 S.E.2d 133 (2013)(quotation omitted). "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. 8, *State v. Blevins*, 231 W.Va. 135, 744 S.E.2d 245 (2013) (quoting Syl. Pt. 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998)).

This Court reviews the Petitioner's Confrontation Clause claim under a multi-faceted standard of review: "Three separate levels of scrutiny apply to Confrontation Clause claims: The circuit court's order is reviewed for abuse of discretion; its factual findings are reviewed for clear error; and its legal rulings are reviewed de novo." *State v. Martin*, No. 13-0112, 2013 WL 5676628, at *2 (W. Va. Supreme Court, Oct. 18, 2013) (memorandum decision)(citation omitted).

## II. The trial court did not abuse its discretion in ruling the State's evidence of other acts was admissible as intrinsic evidence, and not Rule 404(b).

Petitioner's first assignment of error claims the trial court erroneously ruled the State's evidence of other acts was admissible as intrinsic evidence, rather than extrinsic evidence of prior bad acts pursuant to the West Virginia Rules of Evidence Rule 404(b), and, as such, the court failed to conduct the proper analysis for admissibility under *McGinnis,* 193 W.Va. 147, 455 S.E.2d 516. Pet 'r Br. 14. Petitioner alleges the specific evidence of previous injuries sustained by the child, as well as the child's physical health including: evidence of previous bruises and a cigarette burn; suffering a broken femur; and starvation and deprivation of drinking water, which resulted in R.B. drinking from a toilet, were impermissibly admitted by the State at trial. Pet'r Br. 3.

As part of a circuit court's determination regarding the admissibility of other acts, a Rule 404(b) analysis is only triggered *after* a finding is made that the anticipated evidence is, in fact, extrinsic. Importantly, "[b]efore determining that Rule 404(b) applies in this case, we must first determine if the 'other bad acts' were intrinsic evidence or extrinsic evidence." *Harris*, 230 W.Va. at 721, 742 S.E.2d at 137 (quotation omitted). Extrinsic bad act evidence is governed by Rule 404(b) of the West Virginia Rules of Evidence because it "is extraneous and is not intimately connected or blended with the factual circumstances of the charged offense." *Id.* at 722, 742 S.E.2d at 138 (internal quotations and citation omitted).

This Court has provided solid guidance in identifying when evidence is *intrinsic* evidence. "'Other act' evidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined'. . . or the other acts were 'necessary preliminaries' to the crime charged." *State v. LaRock*, 196 W.Va. 294, 312 n. 29, 470 S.E.2d 613, 631 n. 29 (quoting *United States v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990)). "Under our jurisprudence, there is a clear distinction between evidence offered as res jestae [sic] of the offense charged and Rule 404(b) evidence." *State v. Biehl*, 224 W.Va. 584, 589, 687 S.E.2d 367, 372 (2009)(*per curiam*); *State v. Slater*, 212 W.Va. 113, 119, 569 S.E.2d 189, 195 (2002)(*per curiam*)("After considering the testimony at issue, we agree with the circuit court that the evidence was 'intrinsic' to the indicted charge and, therefore, not governed by Rule 404(b)"). This Court in *Harris* explained that evidence is admissible as intrinsic evidence if it furnishes part of the context of the crime, is necessary for a full presentation of the case, or is "so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its 'environment' [that it is necessary] to complete the story of the crime on trial by proving its immediate context[.]" *Harris*, 230 W. Va. at 721-22, 742 S.E.2d at 137-38 (quoting *Williams*, 900 F.3d at 825)(further noting that evidence is intrinsic and admissible where the "uncharged offense is so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other . . . ."). "This Court has consistently held that evidence which is '"intrinsic"' to the indicted charge is not governed by Rule 404(b)." *Id.* at 722, 742 S.E.2d at 138 (gathering cases); *State v. Cyrus*, 222 W.Va. 214, 664 S.E.2d 99 (2008)(*per curiam*).

The United States Supreme Court has expressed the importance of intrinsic evidence to satisfy juror expectations in deciding a story's truth, stating "the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story." *Old Chief v. United States*, 519 U.S.

172, 190 (1997). "The jury is entitled to know the 'setting' of a case. It cannot be expected to make its decision in a void without knowledge of the time, place and circumstances of the acts which form the basis of the charge." *Harris,* 230 W.Va. at 721-22, 742 S.E.2d at 137-38 (quotations and citations omitted). Intrinsic evidence, commonly referred to as *res gestae* evidence, "is vitally important in many trials." *Id.* at 723, 742 S.E.2d at 139 (quoting *Old Chief,* 519 U.S. at 189).

> It enables the factfinder to see the full picture so that the evidence will not be confusing and prevents gaps in a narrative of occurrences which might induce unwanted speculation." *United States v. Metz*, 34 M.J. 349, 351 (C.M.A. 1992) (footnote and citation omitted). Admission of evidence of a criminal defendant's prior bad acts, received to establish the circumstances of the crime on trial describing its immediate context, has been approved in many other jurisdictions following the adoption of the Rules of Evidence. *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171, 174 (1990).

*Id.* at 723, 742 S.E.2d at 139. When considering these factors, "[h]istorical evidence of uncharged prior acts which is inextricably intertwined with the charged crime is admissible over a Rule 403 objection [and is] not intended to prohibit a prosecutor from presenting a full picture of a crime . . . ." *LaRock*, 196 W.Va. at 313, 470 S.E.2d at 632. The introduction of intrinsic evidence gives the jury a complete picture of the charged crime and avoids fragmentizing the case. *See Harris,* 230 W. Va. 717, 742 S.E.2d 133; *State v. Masters*, 622 F.2d 83 (1980). Both this Court and the United States Supreme Court have recognized that "jurors do not want abstract cases; they demand a coherent evidentiary narrative and, without this narrative, may penalize the State—the party with the burden of evidentiary persuasion." *Old Chief,* 519 U.S. 172, 188-89. This premise is consistent with other jurisdictions wherein, "[t]he law allows the introduction of evidence for the purpose of showing that there is more than one act upon which proof of an element of an offense may be

based." *Harris*, 230 W.Va. at 723, 742 S.E.2d at 139 (quoting *State v. Arceo*, 84 Hawai'I 1, 928 P.2d 843 (1996)).

Accordingly, once a determination is made by the circuit court that prior acts are relevant and admissible as *intrinsic* evidence, a Rule 404(b) analysis is not required. Rather, the remaining analysis for the admissibility of such evidence is the determination of relevance and the balancing test pursuant to Rule 403. W. Va. R. Evid. 403. It is axiomatic that irrelevant evidence is inadmissible at trial. *See* W. Va. R. Evid. 402. Relevant evidence—evidence that "has any tendency to make a fact [of consequence] more or less probable"—is generally admissible at trial subject to the balancing test embedded in West Virginia Rule of Evidence 403. *Compare* W. Va. R. Evid. 401(a), (b) *with* W. Va. R. Evid. 403. *Cf.* Syl. Pt. 9, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994) (noting that the rules of evidence "strongly encourage the admission of as much evidence as possible" subject to Rule 403's balancing test). This balancing test compels the admission of relevant evidence so long as its probative value is not substantially outweighed by a danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or [is] cumulative[.]" W. V. R. Evid. 403.

The trial court "enjoys broad discretion" in conducting this balancing test. Syl. Pt. 10, in part, *Derr*, 192 W. Va. 165, 451 S.E.2d 731. "Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion." Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983) (citing *State v. Louk,* W.Va., 301 S.E.2d 596, 599 (1983)). It is, therefore, well-established that a determination regarding the admissibility of evidence is "essentially a matter of trial conduct, and [its] discretion will not be overturned absent a showing of clear abuse." Syl. Pt. 8, *State v. Rollins*, 233 W. Va. 715, 760 S.E.2d 529 (2014) (quoting Syl. Pt. 10, in part, *Derr*, 192 W. Va. 165, 451 S.E.2d 731.

In the case at hand, the circuit court conducted an *in camera* hearing where it heard the evidence sought to be introduced by the State. After the close of the *in camera* testimony, and arguments by all counsel, the court made the following ruling:

> I don't think this is 404(b) evidence I think it is intrinsic evidence to show common scheme, pattern, design . . . I don't think its 404(b) evidence.

A.R. 103.

> Court feels that the evidence of these—the medical personnel from Summersville Hospital and the testimony of the teacher that had this child in kindergarten and first grade –that their evidence is admissible. As I indicated earlier, I don't think its 404(b) evidence, but intrinsic to show the pattern, custom, and habits of treatment of this child by these individuals over a period of time . . . these events are not so isolated in time that the jury can't draw a conclusion that it was a continuing pattern on behalf of these Defendants.

A.R. 108.

> But it is evidence I think that the jury should hear that tells the whole story regarding how this child was treated by these folks that had her custody in Nicholas County and also had her custody here Fayette County.

A.R. 109.

To properly present a complete story, it was critical for the State to explain to the jury the ongoing acts of abuse and neglect resulting in the demise of R.B.'s physical health while in the care of Petitioner, and how this pattern of neglect substantially contributed to R.B's cause of death. This is precisely where the full presentation of circumstances as to how R.B. came to be in such a deteriorated condition in Petitioner's care must be shown. Examples of these failures by Petitioner included the disregard of documentation and concerns from outside sources regarding R.B.'s extreme weight loss down to the 2nd percentile resulting in R.B.'s fragile health, A.R. 828, and causing R.B. to be extremely susceptible to infection, as well as destroying R.B's ability to fight infection. A.R. 773, 949. The expert testimony of Dr. Staton, A.R. 529; Dr. Savasman, A.R. 742;

Dr. Mock, A.R. 773; Dr. Phillips, A.R. 843; and Dr. Moffett, A.R. 949, informed the jury that R.B.'s physical condition was so depleted by dehydration and lack of nutrition that her body was unable to fight the untreated pneumonia and sepsis infection. Petitioner conceded she did not seek medical attention for R.B. prior to R.B.'s death. A.R. 1623. Additionally, Petitioner's ongoing conduct such as: interaction with medical providers wherein Petitioner purposely omitted pertinent information, A.R. 519, 621, promoting other unsubstantiated or inconsistent information regarding R.B. behavior and health, A.R. 567, 776-777, the withholding of food and water as punishment causing R.B. to drink out of the toilet A.R. 1195, a strongly suspicious fracture of R.B.'s femur coupled with an explanation inconsistent with the medical evidence, A.R. 688, 528, deprivation of nutrition in the home; A.R. 1185-1186, 1191, maltreatment of the child, A.R. 1190, and accounts of unexplained bruising and a second degree burn, A.R. 480, 482, are all inextricably intertwined to the charged crime of Child Neglect Resulting in Death and provide compelling evidence to explain what R.B. endured leading up to her death.

The intrinsic evidence of negligent conduct by Petitioner was properly admitted to demonstrate Petitioner's pattern of neglectful behavior and consistent disregard of R.B's extremely deteriorating health; ultimately proving that at the time of R.B.'s death Petitioner's actions in turning a blind eye to the readily observable signs of R.B.'s grave condition and fatal illness was not reasonable. Because these contributing prior acts of abuse and neglect leading up to R.B.'s death explained the pattern of neglectful treatment giving rise to R.B.'s seriously deteriorated physical condition, and explains R.B.'s inability to fight the severe infection resulting in her death, R.B.'s official cause of death from pneumonia cannot be viewed in a vacuum. Rather, the ongoing pattern of neglect was necessary to present a complete story explaining the relevant history behind Petitioner's final failure to exercise reasonable care.

Here, the circuit court acted soundly and rationally in permitting the admissibility of the prior acts as *intrinsic* evidence. Accordingly, the circuit court did not abuse its discretion in determining said evidence was admissible as intrinsic evidence. This Court in *State v. McKinley,* 234 W. Va. 143, 764 S.E.2d 303 (2014), held,

> [a]fter carefully reviewing the record, we cannot say that the trial court abused its discretion in finding that the prior acts constituted intrinsic evidence, not subject to Rule 404(b) analysis. While the acts were not part of a 'single criminal episode' . . . to the charged offenses, it is difficult to conclude that the evidence was not necessary 'to complete the story of the crimes on trial' or otherwise provide context to the crimes charged.

*Id.* at 155, 764 S.E.2d at 315; *State v. Hutchinson,* 215 W.Va. 313, 321, 599 S.E.2d 736, 744 (2004) ("We find that the evidence which the appellant challenges on this appeal was merely presented as context evidence illustrating why the appellant committed this murder. It portrayed to the jurors the complete story of the inextricably linked events of the day and amounted to intrinsic evidence."). Petitioner cannot demonstrate the circuit court abused its discretion in concluding the evidence of continuing incidents of uncharged child neglect and abuse was intrinsic to the crime charged, as this conduct was part of a continuous series of actions—and inactions—all of which were closely and intimately linked to the charged crimes. Therefore, Petitioner's argument lacks merit, and this Court should find the circuit court did not abuse its discretion by admitting the relevant evidence as intrinsic evidence.

### III. The trial court did not error when it imposed reasonable limits on Petitioner's examination of a non-accusing co-defendant, and did not impermissibly deny Petitioner's constitutional right of cross examination.

Petitioner's second assignment of error claims her right to cross-examine a codefendant was unconstitutionally limited. Pet'r Br. 2. Petitioner claims the circuit court erred in prohibiting the Petitioner from asking questions to a codefendant regarding facts that had already been

answered by direct examination of that witness. Pet'r Br. 2. Petitioner asserts she should have been able to freely question the testifying co-defendant in cross examination, without limitation, and that the circuit court's refusal to grant her such broad latitude violated her constitutional rights. Pet'r Br. 19.

The Sixth Amendment to the United States constitution provides in relevant part: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. Const. amend VI; *State v. Mullens*, 179 W. Va. 567, 573 n. 2, 371 S.E.2d 64, 70 n. 2 (1988). This right of an accused to confront the witnesses against him "is a fundamental right made obligatory on the States by the Fourteenth Amendment." *Mullens*, at 570, 371 S.E.2d at 67; *Pointer* v. *Texas*, 380 U.S. 400, 403 (1965). "Cross-examination is the principle mean by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation . . . ." *Davis v. Alaska*, 415 U.S. 308 (1974). The United States Supreme Court in *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) made clear that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 679, (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)(per curiam)(emphasis in original). *United States v. Crockett*, 813 F.2d 1310, 1313 (4th Cir. 1987) provides guidance to explain the scope of cross-examination of a co-defendant under the Confrontation Clause by stating "a defendant has a right to cross-examine a codefendant only if the codefendant's testimony was incriminatory." *Id.* at 1313. "All the cases make clear that the trigger for the right of confrontation is an *incriminatory* statement." *Id.* at 1315. (emphasis added). The *Crockett* court held the lower court's decision to deny cross examination was permissible because the "testimony failed to give rise to any incriminating inference which

Crockett had a right to challenge", and was consistent with the purpose of the Confrontation Clause. *Id.* at 1315. In *Pointer*, the United States Supreme Court of Appeals reiterated that the constitutional goal of a trial is fairness. *Pointer*, 380 U.S. 400, 405. This Court in *State v. Lawson*, 128 W. Va. 136, 139, 36 S.E.2d 26, 28 (1945) has held "[t]he bias of the witness and his interest in the event of the prosecution are not collateral, and may always be proved to enable the jury to estimate his credibility." *State v. Lawson*, 128 W. Va. 136, 139, 36 S.E.2d 26, 28 (1945).

As such, the case law detailing a defendant's right to confront his accuser in the form of cross-examination refers to the testimony of an *adverse* witness. In the instant case, however, this co-defendant witness was not called as an adverse witness to Petitioner. Petitioner was afforded the opportunity to question this co-defendant witness, and therefore, Petitioner's Confrontation Clause rights were not violated. Petitioner claims she was prohibited from asking questions to "flush out potential inconsistencies of [Ms. Titchenell's] testimony." Pet'r Br. 19. This assertion by Petitioner is simply not the case. Petitioner was given the opportunity to question Ms. Titchenell and to challenge her credibility and truthfulness as Petitioner deemed necessary. A.R. 1655. Petitioner *expressly declined* this opportunity. A.R. 1655. After Ms. Titchenell was examined by her own counsel, the court specifically asked Petitioner's counsel, Mr. Plants, "[D]o you have questions of this witness [Ms. Titchenell]?" A.R. 1655. To which, Petitioner's counsel responded, "No, Your Honor." *Id.* Petitioner had a second opportunity to question Ms. Titchenell after redirect. A.R. 1676. Again, the court inquired of Petitioner if she wanted to ask any questions, and she declined. A.R. 1676. Therefore, Petitioner was given ample opportunity for examination of the witness, and specifically chose not to ask any questions of the witness. Petitioner was offered a fair and reasonable means to challenge the credibility and truthfulness of the witness, and chose not to utilize this option. Petitioner cannot now complain of her intentional decision.

Moreover, Petitioner claims that potential inconsistencies were not adequately flushed out but fails to point specifically to instances in the record where such existed. Pet'r Br. at 19. In fact, Petitioner recognizes that Ms. Titchenell was as critical witness. *Id.* Yet, Petitioner's actions belie her claim as the record shows that Petitioner declined questioning Ms. Titchenell after direct examination by her counsel. A.R. 1655. Testimony from both Petitioner and Ms. Titchenell recount the same facts and are not in conflict as to the day R.B. died. A.R. 1595-1597, 1666-1671. Petitioner has failed to demonstrate any inconsistencies in Ms. Titchenell's testimony, or anything that could reasonably be construed as incriminating toward Petitioner. Petitioner was expressly asked if she wished to question the witness, and Petitioner expressly declined to ask any questions.

Throughout all pretrial proceedings, as well as Petitioner's choice to proceed with a joint trial, Petitioner and her co-defendants presented a "united front" by conducting their defense and trial strategy in a joint effort, and treating all motions as joint motions at the pretrial hearings. A.R. 128. Additionally, all defense counsel objected to evidence on each other's behalf, A.R. 568-572, and consistently maintained R.B.'s contraction of pneumonia causing her death was not the result of any wrongdoing by any of them. Ms. Titchenell's testimony did not implicate Petitioner of any wrongdoing, nor adversely affect or contradict Petitioner's own testimony. Therefore, Ms. Titchenell's testimony was not incriminatory, nor inconsistent to Petitioner; and Petitioner was expressly provided the opportunity to question Ms. Titchenell. Since Petitioner intentionally and voluntarily rejected this opportunity, her argument is without merit.

Petitioner further alleges she was only permitted to ask questions that "had not already been answered" on direct examination of Ms. Titchenell. A court can place reasonable limits on cross-examination to reduce potential confusion of the jury and potential prejudice to a codefendant. *See United States v. Bodden,* 736 F.2d 142, 145 (4th Cir.1984); *United States v.*

*Crockett*, 813 F.2d 1310, 1312 (4th Cir. 1987). Rule 611 of the West Virginia Rules Evidence provides: "The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: . . . make those procedures effective for determining the truth . . .avoid wasting time; and . . .protect witnesses from harassment or undue embarrassment."

> It is properly within the trial judge's discretion to prevent one party from repeating a question already asked by that party. Where there is more than one defendant or defense attorney, it may also be proper to prevent one defense attorney from repeating a question already asked by another defense attorney. See, e. g., *United States v. Miller,* 463 F.2d 600, 601 (1st Cir. 1972).

*United States v. Caudle*, 606 F.2d 451, 456 (4th Cir. 1979). A "trial judge has broad discretion to control the scope and extent of cross-examination." *Id.* at 458. See *U.S. v. Billups*, 226 F. App'x 312, 319-20 (4th Cir. 2007). "[T]the circuit court has considerable discretion to determine the proper scope of cross-examination . . . and the danger of prejudice, confusion, or delay raised by the evidence sought to be adduced." *State v. Bradshaw*, 193 W. Va. 519, 540–41, 457 S.E.2d 456, 477–78 (1995). "The West Virginia Rules of Evidence . . . allocate significant discretion to the trial court in making evidentiary and procedural rulings. . . . Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard." *Barlow v. Hester Indus., Inc.*, 198 W. Va. 118, 130, 479 S.E.2d 628, 640 (1996). It is, therefore, 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." *State v. Grantham*, No. 12-1293, 2013 WL 6152080 (W.Va. Supreme Court, November 22, 2013)(memorandum decision), (quoting *State v. Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469 (1998)).

"To succeed on an abuse of discretion claim regarding the judicial management of a criminal trial, a defendant must point to a specific rule or statutory violation and then must show that the measures or procedures taken by the trial judge either actually or inherently were prejudicial." Syl. Pt. 3, *State v. Miller*, 197 W. Va. 588, 593, 476 S.E.2d 535, 540 (1996). "Mindful that case management is a matter within the ken of the trial court, we cannot say the procedure presented was so inherently prejudicial as to impose an unacceptable threat to the defendant's right to a fair trial. *State v. Miller*, 197 W. Va. 588, 603, 476 S.E.2d 535, 550 (1996); *State v. Fields*, 225 W. Va. 753, 760, 696 S.E.2d 269, 276 (2010)(quoting *Clark v. Druckman,* 218 W.Va. 427, 435, 624 S.E.2d 864, 872 (2005) ("a trial court always has inherent authority to regulate and control the proceedings before it and to protect the integrity of the judicial system.")).

Here, the circuit court was fully within its discretion to control the mode of examining witnesses to avoid wasting time and confusing the jury pursuant to Rule 611 of the West Virginia Rules of Evidence. The court permitted Petitioner cross-examination of all witnesses that were adverse and incriminatory to Petitioner. Ms. Titchenell was called as a witness by the defense, not as an adverse or incriminatory witness to Petitioner, and Petitioner was provided the opportunity to examine Ms. Titchenell to test her credibility. Given that Ms. Titchenell was presented as part of a coordinated and cooperative defense between all co-defendants, the court properly managed the trial to avoid cumulative and repetitive questions that may confuse the jury while still providing adequate opportunity for Petitioner to challenge the truthfulness of Ms. Titchenell's testimony. The circuit court exercised reasonable control over the mode and order of examining witnesses pursuant to Rule 611, and the court did not abuse its discretion. The record demonstrates that Petitioner was afforded her right under the Confrontation Clause, and expressly declined; therefore, no error was committed, and her claim fails.

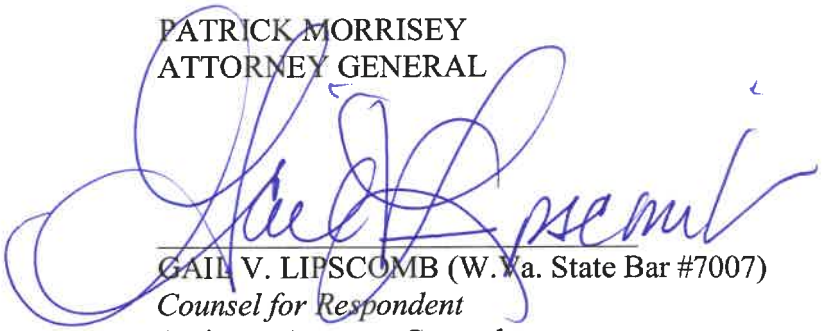
## CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court to affirm the circuit court's order and Petitioner's conviction.

Respectfully Submitted,
**STATE OF WEST VIRGINIA,**
*Respondent,*

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Docket No. 22-705**

**STATE OF WEST VIRGINIA,**

*Plaintiff Below, Respondent,*

**v.**

**JULIE BROWNING,**

*Defendant Below, Petitioner.*

## CERTIFICATE OF SERVICE

I, Gail V. Lipscomb, counsel for the Respondent, hereby certify that on April 10, 2023, I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, to be served on the below-listed individuals by effecting service through the File & ServeXpress e-filing system:

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