IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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Docket No. 22-710

STATE OF WEST VIRGINIA,

Respondent,

v.

MARTY L. BROWNING,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the August 21, 2022, Order
Circuit Court of Fayette County
Case No. CC-10-2020-F-74

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INTRODUCTION

Respondent, State of West Virginia, by counsel, respectfully provides the following response to the appellate brief filed by Marty L. Browning ("Petitioner") challenging the judgment of the Fayette County Circuit Court as contained in criminal action number 20-F-74. Petitioner's brief fails to allege any claim that entitles him to appellate relief. The circuit court correctly allowed for the admission of various prior instances of suspected abuse as part of the *res gestae* to the charged offenses set forth in Petitioner's indictment. Petitioner's claim that his right to examine or cross-examine witnesses was violated during his trial is also belied by the record, as Petitioner was afforded an opportunity to cross-examine each witness called by the State, was permitted to participate in the examination of all defense witnesses, and was permitted to conduct individual examination of his two co-defendants that testified at trial. In addition, Petitioner's right to a trial within three regular terms of court was honored, as three unexcused terms had not passed by the time his case proceeded to trial. Finally, Petitioner's claim that certain testimony was elicited in violation of his Sixth Amendment confrontation rights is also without merit. Petitioner's claims should be rejected, and this Court should affirm the judgment of the Fayette County Circuit Court.

ASSIGNMENTS OF ERROR

Petitioner advances four assignments of error in his appellate brief:

1. Petitioner states that the trial court erred, at a pretrial hearing February 8, 2022, in ruling that allegations of abuse and neglect of the child by Petitioner and his co-defendants in this matter, some having allegedly occurred in Nicholas County, West Virginia, some years ago, were all intrinsic to the crimes charged, rather than evidence of other acts pursuant to WVRE 404(b).

2. Petitioner states that the trial court erred by prohibiting at trial direct examination or cross examination by counsel for Petitioner, or counsel for either co-defendant, of witnesses called by counsel for a different co-defendant. While making an exception by allowing *direct* examination by each defense

counsel of the co-defendant's themselves, the trial court compounded its error by prohibiting *cross* examination of the co-defendants by counsel of [ ] each of the other co-defendants.

3. Petitioner assigns as error the denial by the trial court, prior to trial, of Petitioner's motion to dismiss the indictment for the reason that three terms of court had passed after the return of the indictment against Petitioner prior to the commencement of the trial June 6, 2022.

4. The circuit court erred when it permitted the hearsay testimony of R.B. and of Petitioner's co-defendants to be heard by the jury over a Confrontation Clause objection by counsel, and when prior order of the circuit court had ruled such hearsay inadmissible.

Pet'r's Br. 3-4 (capitalization altered).

STATEMENT OF THE CASE

A. Indictment and Summary of Underlying Facts

The Fayette County Grand Jury returned a two-count felony indictment jointly charging Petitioner and his two co-defendants, Julie Browning and Sherrie Titchenell,[1] each with one count of death of a child by parent, guardian, custodian, or other person by child abuse, and one count of child neglect resulting in death. A.R. Vol. I, 1-2. The indictment identifies the victim as "R.B.,"[2] and the date of the offenses ranged for August, 2014 through December 26, 2018. A.R. Vol. I, 1-2.

Upon R.B. arriving at the hospital, one of the first nurses to observe R.B. noted, much like the EMTs at the time they arrived and began treating R.B., that she had no signs of life. A.R. Vol. III, 31. In particular, the nurse observed that R.B. was "lifeless, no pulse, no rhythm on our cardiac

[1] Each of Petitioner's co-defendants have appeals presently pending before this court: *State of West Virginia v. Julie Browning*, Docket No.: 22-705, and *State of West Virginia v. Sherie M. Titchenell*, Docket No.: 22-719.

[2] Pursuant to Rule 40(e) of the West Virginia Rules of Appellate Procedure, Respondent will refer to minors by their full initials in order to prevent the disclosure of personal identifiers.

monitor, she was pale, cool, no signs of life, and appeared that she had been 'dead for some time.'" A.R. Vol. III, 52. Based upon these observations, as well as numerous apparent injuries observed on R.B.'s body upon her arrival at the hospital, it was determined that R.B.'s caretakers would not be permitted to see her while at the hospital. A.R. Vol. III, 31.

One of R.B.'s treating physicians noted that her body was so cold that the thermometers could not record her temperature upon arrival. A.R. Vol. III, 89. Subsequent medical analysis also revealed that R.B. showed signs of "dehydration or kidney failure or a combination of both." A.R. Vol. IV, 261. Medical professionals that reviewed R.B.'s medical records further concluded that she had been "sick for a number of days," that she had pneumonia, and that such infection "was there for a while" prior to her arrival at the hospital. A.R. Vol. IV, 264.

Dr. Moffett, a pediatric infectious disease specialist, observed from R.B.'s medical records and autopsy reports that R.B.'s lungs contained "big white blobs" of pus, and further signs indicating the presence of pneumonia. A.R. Vol. IV, 265. Dr. Moffett also observed that the condition R.B. was in at the time she arrived at the hospital was "not something that develops in a day." A.R. Vol. IV, 265. In fact, Dr. Moffett opined that R.B. likely could not, in the time immediately preceding her death, "sit up or stand" due to the advanced stage and degree of the pneumonia in her body. A.R. Vol. IV, 278.

The autopsy performed on R.B.'s body revealed that the cause of her death was due to "a very severe necrotizing bronchial pneumonia, meaning that an infection of the lungs to the point where the tissue is actually dying." A.R. Vol. IV, 94. The medical examiners also concluded that R.B. "likely had a period of sepsis before death where the lung infection had spread into the blood." A.R. Vol. IV, 94.

B. Pretrial Hearing Regarding Intrinsic Evidence

A hearing was held before the circuit court on February 8, 2022, regarding the admissibility of various prior instances of abuse and neglect of R.B. perpetrated by Petitioner and his two co-defendants. A.R. Vol. I, 136. At the hearing, the State elicited testimony from two witnesses regarding their personal observations that the State proffered was part of the res gestae of the charged offenses, and, therefore, was intrinsic to show a pattern of conduct and to provide context to the circumstances leading up to R.B.'s ultimate death. The State first offered testimony from a medical professional at a hospital that treated R.B. for a broken femur on September 2, 2015. A.R. Vol. I, 147-48. The medical professional recalled that R.B.'s caretakers—Petitioner and Julie Browning—explained that R.B. had right knee pain from an injury "she sustained the day before after she had apparently had a temper tantrum and kicked a wall." A.R. Vol. I, 147-48. Based upon the nature of R.B.'s injury, and the lack of any pre-existing condition that would render R.B.'s bones more susceptible to breaking, medical professional concluded that the injury was inconsistent with the cause as reported by Petitioner and Ms. Browning. A.R. Vol. I, 150.

The State also called Carrie Ciliberti, who was R.B.'s gym teacher during R.B.'s time in kindergarten and first grade in the Nicholas County school system. A.R. Vol. I, 169-72. Ms. Ciliberti testified that she recalled R.B. as an average kindergartener; she was "very lively, outgoing, [and] smart." A.R. Vol. I, 168. During R.B.'s time in kindergarten, however, Ms. Ciliberti recalled numerous behaviors and observations that lead her to worry that R.B. was possibly being abused at home. For example, Ms. Ciliberti recalled that R.B. was unusually "clingy" to her, and would seek out Ms. Ciliberti's attention while at school. A.R. 169-72. Throughout the year, this would progress to a point where R.B. would grab onto Ms. Ciliberti at the end of the day before the students were sent home and tell her that she wishes Ms. Ciliberti

was her mother, and that she wanted to stay at school. A.R. Vol. I, 169-72. Further heightening Ms. Ciliberti's suspicions that R.B. was being abused at home was R.B.'s broken femur that she suffered toward the beginning of her year in kindergarten. A.R. Vol. I, 170-71.

Ms. Ciliberti also recalled a time when lunch staff at school were "directed not to feed [R.B.] breakfast—that she had an eating disorder, and they would feed her at home." A.R. Vol. I, 173. Ms. Ciliberti disregarded these instructions and continued to feed R.B. breakfast. A.R. Vol. I, 173-74. Ms. Cilibert denied observing any "evidence or symptomology of a child that had an eating disorder," and, instead, noted that she "saw a child that was hungry," so she fed her. A.R. Vol. I, 174.

In this vein, Ms. Ciliberti recalled that when R.B. returned to school after summer break to begin her first grade year, her weight had "dropped dramatically," to the point where "the same clothes she wore in kindergarten were hanging off of her in first grade." A.R. Vol. I, 175. She also observed R.B. to have "black circles under her eyes, she was pale—extremely thin." A.R. Vol. I, 175.

Sometime in August during R.B.'s first grade year, Ms. Ciliberti observed R.B. arrive at school dressed in long pants and a heavy sweatshirt. A.R. Vol. I, 176. This caught Ms. Ciliberti's attention because it was extremely hot that day, which she estimated to be around 95 degrees. A.R. Vol. I, 176. Ms. Ciliberti kept extra clothes in her office for students, and offered R.B. a t-shirt as it was more appropriate given the high temperatures that day. A.R. Vol. I, 177. R.B. accepted, but when she put the t-shirt on, Ms. Ciliberti observed a bruise on R.B.'s upper harm that appeared as a handprint. A.R. Vol. I, 177.

On another occasion, R.B. had asked Ms. Ciliberti if she wanted to see the "booboos on her leg." A.R. Vol. I, 177-78. R.B. showed them to Ms. Ciliberti, and stated that "my daddy says

I'm not allowed to show you these and if you have any questions you need to call my dad." A.R. Vol. I, 178.

During the course of Ms. Ciliberti's observations, she had called Child Protective Services a total of three times to report her suspicions that R.B. was being abused. A.R. Vol. I, 178. She explained that the first report followed R.B. coming to school with a broken leg, the second was after R.B. had showed her her "booboos," and the third report was made after another student had come to her and stated that they had visited R.B.'s home and that R.B. had been locked in the laundry room. A.R. Vol. I, 178-79.

At the conclusion of the hearing, the State argued that the evidence was admissible as intrinsic evidence. A.R. Vol. I, 231-32. Each of the defendants objected to the evidence being admitted as intrinsic evidence. A.R. Vol. I, 234-43.

After hearing arguments from all counsel, the circuit court concluded that the evidence was intrinsic, and not subject to analysis under Rule 404(b) of the West Virginia Rules of Evidence. A.R. Vol. I, 244. The circuit court further concluded that the evidence was "intrinsic to show the pattern, custom, and habits of treatment of this child by these individuals over a period of time." A.R. Vol. I, 244. The circuit court addressed the fact that the "pattern of abuse [and] neglect toward this child continued in Fayette County" after the defendants had moved from Nicholas County, and that "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. Vol. I, 244.

C. Petitioner's Motion to Dismiss for Violation of Three-Term Rule

On June 1, 2022, the parties held a final pretrial motions hearing before the jury trial that was scheduled to begin just a few days later on June 6, 2022. A.R. Vol. I, 301-02. At the conclusion of the hearing, the circuit court "specifically inquired of counsel if there was anything

else that needed to be addressed prior to the trial of this matter, to which counsel answered in the negative." A.R. Vol. I, 302. Nevertheless, on June 1, 2022, hours after the pretrial hearing, Petitioner's counsel filed a motion to dismiss with prejudice at 10:43 p.m., asserting that he and his co-defendants were entitled to dismissal with prejudice due to the State's failure to try them within three regular terms of court. A.R. Vol. I, 301.

The circuit court held a hearing on June 3, 2022, upon Petitioner's motion, despite there being a pretrial order requiring that "[a]ll motions must be filed and resolved at least forty-eight (48) hours prior to the trial of this matter." Based upon the court's pretrial order, and the circuit court's conclusion that Petitioner's motion was filed contrary to it, the circuit court found the motion to be untimely filed. A.R. Vol. I, 302.

In its order denying Petitioner's motion, the circuit court concluded that each of the disputed terms disputed by Petitioner were continuances that did not count toward the three-term calculation. A.R. Vol. I, 302. The circuit court noted that the only terms in dispute were the May 2021 term, the September 2021 term, and the January 2022 term, as Petitioner's motion conceded that all terms that had passed prior to the May 2021 term did not count towards the calculation. A.R Vol I, 303-04. In addressing Petitioner's claims that each of the above-referenced terms should be charged to the State, the Court noted that each continuance was precipitated by a motion to continue filed by the defense. A.R. Vol. I, 300-11.

Specifically, as to the September 2021 term of court, the circuit court concluded that continuance was charged to the defense because there was a defense motion to continue the trial from its October 22, 2021 trial date. A.R. Vol. I, 306. The circuit court granted the motion, and continued the matter into the January 2022 term of court. A.R. Vol. I, 306. There is no transcript

of this hearing in the record, and, further, there is no evidence that any party objected to the matter being continued from the September 2021 term to the January 2022 term.

The Circuit Court also noted that the continuance from the January 2022 term to the May 2022 term was the result of Petitioner being unavailable for a critical deposition hearing wherein the State sought to preserve the testimony of the two medical examiners due to their unavailability at trial based on health concerns and conflicting trial schedules. A.R. Vol. I, 307-08. The continuance was based on Petitioner's counsel's inability to appear in person was based on a recently scheduled out-of-state medical appointment that he could not miss, but offered to appear remotely. A.R. Vol. I, 308. The circuit court determined that such arrangements were improper, and invited error to the extent that technological mishaps could hinder the ability to clearly and adequately record and preserve the testimony of the two medical examiners. A.R. Vol. I, 309. Noting the difficulties involved in the situation, both of Petitioner's co-defendants agreed to continue the matter in order to alleviate Petitioner's counsel's inability to appear, as well as to the medical examiner's inability to be present to testify at the then-scheduled trial date. A.R. Vol. I, 308.

From a general standpoint, the circuit court explained that:

> It is also clear, the court was placed in a very difficult position when the defense would move for a continuance within the term of court, and object to continuing the matter outside of the term of court, when the sheer complexity of the matter, time necessary to conduct the trial, pandemic related societal and court restrictions, and the congestion of the Court's docket, prohibited the Court from being able to grant the motion as requested.
>
> In those instances, counsel was inviting error, as, under the circumstances as presented, the Court's denial of defense counsels' motions, when good cause actually existed to grant said motion(s), would likely be alleged error, and to grant the motion in part, but to continue the trial outside of the term, since it could not be rescheduled within the term, as shown herein, is now alleged to be error.

A.R. Vol. I, 310.

In addition, the circuit court's order reflects that throughout the pendency of the proceedings, it was limited in terms of when it could hold jury trials, as the COVID-19 protocols left only one courtroom available in the circuit, which had to be evenly split between two circuit court judges. A.R. Vol. I, 301-11. Because each judge was allotted "trial months" the circuit court was not able to schedule trials as easily due to the fact that it would have to take valuable trial days from the other circuit court judge.

D. Petitioner's Ability to Examine and Cross-Examine Witnesses

Given the nature of Petitioner being tried jointly with his two co-defendants, the circuit court imposed certain limitations with respect to the defendants' examinations of witnesses. These limitations, however, were only related to the questioning of witnesses called by the defense, as each defendant was afforded the opportunity to cross-examine each of the witnesses called by the State. *See generally*, A.R. Vol. II, 223; A.R. Vol. III, 27, 42, 75, 108, 118, 169, 173, 196, 260, 274, 276, A.R. Vol. IV, 32, 79, 116, 137, 201, 253, 305, A.R. Vol. V, 60, 119, 124, 145. Petitioner was given the opportunity to cross-examine B.M., but declined to do so. A.R. Vol. V, 217.

After the State had rested its case-in-chief, the circuit court convened the attorneys and inquired of the defense whether they had "discussed the list of witnesses and who was going to be responsible for direct examination of the witnesses." A.R. Vol. V, 238. One defense attorney indicated that they had not, to which the circuit court explained that "all three of you don't get to direct examination [sic] of the witness." A.R. Vol. V, 239. The circuit court further explained that "the way it's happened in the past is one counsel . . . will take witness A, then before he finishes with witness A, he'll ask co-counsel, you got any question you want me to ask . . . and if not, then the witness goes to [the State]." A.R. Vol. V, 239. Only one of the defense attorneys

made a comment to the court's statement, which was to say that it "makes perfect sense," and that he had no objection. A.R. Vol. V, 239.

One of Petitioner's co-defendants called the defense's first witness, and during a side bar held in the midst of his testimony, counsel for Petitioner asked if he would be permitted to pose questions to the witness. A.R. Vol. V, 253-54. The court said no, and that the defense does not "get three direct examinations." A.R. Vol. V, 254. Petitioner then asked "[w]hat about cross examination?" A.R. Vol. V, 254. The circuit court also said no, and noted that "this is a defense witness," and then reiterated its prior explanation that one attorney will conduct the direct examination for the defense, and that the parties may "confer with each other, I'm not going to limit that, but I'm not going to give you three direct examination[s]." A.R. Vol. V, 253. Petitioner did not offer any objection, nor did he attempt to claim that his client's interests were adverse to either of his co-defendants, necessitating his need to conduct his own individual examination of witnesses. A.R. Vol. V, 253-54.

Petitioner did not object to the circuit court's ruling as to the conduct of the defense's examination of its own witnesses until the next day of trial, after the defense had called four witnesses. A.R. Vol. VI, 19. The circuit court overruled Petitioner's objection. A.R. Vol. VI, 19.

Eventually, Petitioner's co-defendant, Julie Browning, took the stand to testify. A.R. Vol. VI, 250. At the conclusion of her counsel's direct examination, the circuit court stated that "I have to give other counsel an opportunity to ask this woman some questions before [the State] cross-examine[s]." A.R. Vol. VI, 250. Just as Ms. Titchenell's attorney was about to begin questioning, Ms. Browning's counsel asked if he could confer with Ms. Titchenell's counsel. A.R. Vol. VI, 296. Once Ms. Titchenell's attorney was finished questioning Ms. Browning, Petitioner's counsel was afforded the opportunity to question her. A.R. Vol. VI, 296. Petitioner's counsel asked if he

could "confer with [sic] a moment with these gentleman," after which the record reflects that he conferred with counsel for both of his co-defendants. A.R. Vol. VI, 296. After consulting with counsel, Petitioner's counsel advised that he did not desire to question Ms. Browning. A.R. 297.

Similarly, after Ms. Titchenell had been examined by her attorney, the court inquired of Petitioner whether he had any questions to pose to Ms. Titchenell, to which he advised that he did not. A.R. Vol. VI, 327.

E. Alleged Admission of Testimonial Hearsay Statements

During the trial testimony of Carrie Ciliberti, she testified that while she was R.B.'s teacher in Nicholas County in 2015 and 2016, she observed on two occasions that she saw bruises that appeared to be a handprint on R.B. A.R. Vol. V, 96. She also testified to the situation regarding R.B. arriving to school wearing inappropriate clothing with respect to the weather, and that she had given R.B. a t-shirt so that she did not have to wear the heavy sweatshirt in the summer heat. A.R. Vol. V, 99. She also testified that she told R.B. she could keep the shirt, but the following day, she came to school with the shirt "in a Wal-Mart bag, and she said, my daddy made me bring this back to you, you're not allowed to give me clothes." A.R. Vol. V, 99. She also testified that on another occasion, R.B. approached her during gym class and asked Ms. Ciliberti if she "wanted to see my booboos." A.R. Vol. V, 101. She also stated that after R.B. showed her the bruises and scabs on her legs, R.B. told her that "if you have any questions, I'm not allowed to answer you; you have to call my daddy and ask him." A.R. Vol. V. 102. At no point during any of the testimony mentioned above did either of the three defendants object.

At the conclusion of the State's direct examination of Ms. Ciliberti, each defendant was permitted to conduct cross-examination of her. A.R. Vol. V, 119-23.

Later that day, the State called R.B.'s older sister, B.M. to testify. A.R. Vol. V, 166. B.M. testified generally as to what life was like within the home that she shared with R.B. in the months and years prior to R.B.'s death. A.R. Vol. V, 166-75. Later in her testimony, B.M. testified that "Julie told [R.B] multiple times that she was going to be spending Christmas in the hospital, and asking if [R.B.] was okay with that, and she, [R.B] said she was." A.R. Vol. V, 197-98. No objection was offered regarding the above mentioned statements.

F. Verdict and Sentence

At the close of all evidence, the jury found Petitioner and his two co-defendants guilty of child neglect resulting in death. A.R. Vol. I, 38. All three were acquitted as to the charge of death of a child by a parent, guardian, custodian, or other person by child abuse. A.R. Vol. VII, 216. Based upon his conviction, the circuit court sentenced Petitioner to an indeterminate sentence of not less than three, nor more than fifteen years in the prison, which is reflected in the circuit court's August 21, 2022 sentencing order. A.R. Vol. I, 38.

It is from this order that Petitioner now appeals.

SUMMARY OF THE ARGUMENT

The circuit court committed no error in finding evidence of prior acts of abuse and neglect carried out by Petitioner and his co-defendants were admissible as part of the *res gestae* of the charged offenses. The evidence was not unfairly prejudicial, and was highly probative and illustrative in providing the jury with the context of the circumstances surrounding the relationship between R.B., Petitioner, and his co-defendants.

Petitioner's second assignment of error alleging that he was denied the opportunity to conduct examination or cross-examination of defense witnesses is without merit. Circuit courts have the discretion to impose reasonable limits with respect to the examination of witnesses.

Petitioner's claims that his rights were violated appear to be rooted in his belief that he is entitled to elicit friendly testimony from non-adversarial witnesses through leading questions. Nevertheless, the record reveals that Petitioner was afforded an opportunity to conduct full and fair cross-examination of all witnesses called by the State, was afforded the opportunity to conduct individual examination of the testifying co-defendants, and was provided limitless ability to confer with counsel for the other defendants during the examination of defense witnesses.

Petitioner's claim that he was denied his right to a speedy trial is also without merit. Petitioner's claim hinges on this Court's review of the May 2021, September 2021, and January 2022 terms of court. All of the continuances were instituted upon motions to continue filed by the defense. Petitioner claims that these terms should be charged to the State, simply because the motion to continue was presented as a motion to continue within term. These claims are wholly meritless, and supported by nothing in the record or in the relevant legal authorities.

Finally, Petitioner's claim that inadmissible testimonial statements were admitted in violation of his Sixth Amendment right to confrontation is misplaced. Petitioner failed to offer any objections to most, if not all, of the statements he claims were admitted in violation of his rights. Furthermore, Petitioner's arguments are conclusory in that they simply presume that the statements meet the requirements to trigger the protections afforded by the Sixth Amendment. Petitioner cannot meet his burden of proof regarding any of his assignments of error, and, as a result, this Court should affirm the judgment of the Fayette County Circuit Court.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rules 18(a)(3) and (4) of the West Virginia Rules of Appellate Procedure, oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record in this case. Therefore, this appeal is appropriate for resolution by

memorandum decision in accordance with Rule 21 of the West Virginia Rules of Appellate Procedure.

ARGUMENT

I. Standards of Review

"The evidentiary rulings of a circuit court, including those affecting constitutional rights, are reviewed under an abuse of discretion standard." *State v. Marple*, 197 W. Va. 47, 51, 475 S.E.2d 47, 51 (1996) (citations omitted). This Court recognized that "[e]ven if we find the circuit court abused its discretion, the error is not reversible unless the defendant was prejudiced." *Id.* (citing *State v. Guthrie*, 194 W. Va. 657, 684, 461 S.E.2d 163, 190 (1995)).

As to Petitioner's claim regarding his right to examine witnesses, this Court has held that "[t]he right of cross-examination is not an unlimited one and it is subject to the discretionary power of a trial court to restrict or limit such cross-examination where it is justified." Syl. Pt. 5, *State v. Hankish*, 147 W. Va. 123, 126 S.E.2d 42 (1962). His claim is also governed by the more general standard of review setting forth that "it is well settled that trial court's ruling on the admissibility of evidence, 'including those affecting constitutional rights, are reviewed under an abuse of discretion standard.'" *State v. Kennedy*, 229 W. Va. 756, 763, 735 S.E.2d 905, 912 (2012) (citations omitted).

As to Petitioner's claim that the circuit court erred in denying his motion to dismiss due to the alleged violation of the three term rule:

> This Court's standard of review concerning a motion to dismiss an indictment is, generally, de novo. However, in addition to the de novo standard, where the circuit court conducts an evidentiary hearing upon the motion, this Court's 'clearly erroneous' standard of review is invoked concerning the circuit court's findings of fact.

Syl. Pt. 1, *State v. Combs*, 247 W. Va. 1, 875 S.E.2d 139 (2022).

II. The circuit court properly admitted evidence of prior acts of abuse and neglect carried out by Petitioner and his co-defendants and directed at R.B. as part of the *res gestae* of the charged offenses, concluding that the evidence was relevant to establish a common habit of abuse, and to provide context to the circumstances surrounding R.B.'s death.

Petitioner's first assignment of error alleges that the circuit court erred in admitted evidence of prior instances of abuse and neglect of R.B. as intrinsic evidence. Pet'r's Br. 11. Petitioner states that the evidence could "possibly [be] 404(b) evidence," but denies that the evidence was intrinsic. Pet'r's Br. 11. In support of his argument, Petitioner claims that the "remoteness in time to the death of the child; . . . [the lack of] causality between these prior acts and R.B.'s death; and . . . some of the alleged acts had occurred in Nicholas County," all of which Petitioner claims points to the prior acts falling outside of the intrinsic category. Pet'r's Br. at 11. Petitioner's argument, however, is entirely misplaced, and does not provide any basis for this Court to find that the circuit court abused its discretion by allowing the admission of the evidence.

This Court has long recognized that before a determination is made as to the applicability of Rule 404(b) of the West Virginia Rules of Evidence, the first task a court must undertake is to "determine if the evidence is 'intrinsic' or 'extrinsic.'" *State v. Dennis*, 216 W. Va. 331, 351, 607 S.E.2d 437, 457 (2004) (quoting *State v. LaRock*, 196 W. Va. 294, 312 n. 29, 470 S.E.2d 613, 631 n. 29 (1996) (citing *State v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990))). "Intrinsic evidence" is that which is "inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged." *Id.* (citations and internal quotation marks omitted). It is "unquestionably true," in this respect, "that the prosecution is entitled to prove its case by evidence of its own choice." *Old Chief v. United States*, 519 U.S. 172, 186 (1997). And while evidence may "strik[e] hard just because it shows so much at once," it is also true that such evidence appropriately has "force beyond any linear scheme of reasoning, and as its pieces come

together a narrative gains momentum, with power not only to support conclusions, but to sustain the willingness of jurors to draw the inferences . . . necessary to reach an honest verdict." *Id.* at 187. It is, therefore, important to note that the State is entitled to "seek to place its evidence before the jurors, as much to tell the story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault." *Id.* This showing may be made by a proffer, and when a State's "proffer fits into the intrinsic category, evidence of other crimes should not be suppressed when those facts come in as *res gestae*—as part and parcel of the proof charged in the indictment." *Id.*

The utility of intrinsic evidence is a broad one; it allows the proponent of the testimony to provide context to the charged offense or offenses, it illustrates the whole picture to the jury, and is "appropriate in order to complete the story of the crime on trial by proving its immediate context or the res gestae." *Id.* (citations and internal quotation marks omitted).

In addressing similar claims, this Court has held that evidence of a defendant's prior threats to "kill himself, his landlord, [and] his girlfriend," along with additional evidence that he had made threats to a convenience store clerk and carried a gun, were all properly admissible at trial as intrinsic evidence to prove "context evidence illustrating why the appellant committed this murder." *State v. Hutchinson*, 215 W. Va. 313, 320-21, 599 S.E.2d 736, 743-44 (2004). Because this Court found the evidence was intrinsic, it held that the State was not required to provide a Rule 404(b) notice, and that petitioner's counsel had "no reason to object, and the circuit court had no reason to *sua sponte* exclude this evidence." *Id.* at 321, 599 S.E.2d at 744.

This Court has also held that the admission of two prior domestic violence incidents between a petitioner and his murder victim were properly admitted as intrinsic evidence at trial. *State v. McKinley*, 243 W. Va. 143, 154-55, 764 S.E.2d 303, 314-15 (2014). In reaching this

conclusion, this Court noted that "[o]ur cases have 'consistently held that evidence which is 'intrinsic' to the indicted charge is not governed by Rule 404(b)." *Id.* (quoting *State v. Harris*, 230 W. Va. 717, 722, 742 S.E.2d 133, 138 (2013)).

Despite Petitioner's contention to the contrary, there is nothing to separate the prior instances of abuse from the *res gestae* of the offenses for which he and his co-defendants were tried. The indictment charges Petitioner and his co-defendants with death of a child by a parent, guardian, custodian, or other person by child abuse and child neglect resulting in death. A.R. Vol. I, 1-2. The indictment further specifies that the abuse and neglect that resulted in R.B.'s death took place between August, 2014, and ended with R.B.'s death on December 26, 2018. A.R. Vol. I, 1. The evidence offered by the State as intrinsic evidence, namely, R.B.'s broken femur and the suspicious circumstances around it, her behaviors at school, the observation of visible injuries by school personnel, as well as her deteriorating physical condition between her kindergarten and first grade years all occurred in the time period specifically identified in the indictment.

Although Petitioner claims that these past instances were "remote" or "lacked causality" or occurred in a different county, none of these claims provide a basis for this Court to find error in the circuit court's conclusion that the evidence was intrinsic, and that it was properly admissible. The focus on where the conduct occurred is but a red herring in this matter.

"Remoteness" is typically not a basis to find intrinsic evidence inadmissible. "As a general rule remoteness goes to the weight to be accorded the evidence by the jury, rather than to admissibility." Syl. Pt. 5, *State v. Winebarger*, 217 W. Va. 117, 617 S.E.2d 467 (2005) (citations and internal quotation marks omitted).

> Whether evidence offered is too remote to be admissible upon the trial of a case is for the trial court to decide in the exercise of a sound discretion; and its action in excluding or admitting the evidence will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.

Id. at Syl. Pt. 6 (citation and internal quotation marks omitted).

The circuit court also spoke to the issue of remoteness during the hearing in which it found that the evidence was admissible as intrinsic evidence when it concluded that the evidence was not too remote, and that the jury could determine from the evidence that the abuse and neglect of R.B. was a "continuing pattern." A.R. Vol. I, 244. The circuit court also found that "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." *Id.* This ruling by the circuit court, and this Court's guidance in Syllabus Point 6 of *Winebarger*, leave Petitioner with an exceedingly high bar to meet if he is to succeed on his claim based upon a remoteness argument. To be sure, Petitioner cannot meet this burden, as the evidence is such that it demonstrates a continuous story detailing the consistent abuse that resulted in precipitous and noticeable declines in R.B.'s health and physical appearance.

As to Petitioner's claim that "causality" or the location of the offenses have any bearing on this determination, such claims are wholly meritless. Despite the parties' reliance on *State v. Dennis* below with respect to the county in which the prior instances of abuse and neglect occurred, Respondent asserts that this Court's decision in *Dennis* has no application to the alleged "venue" or "jurisdiction" claims addressed below. In dispelling with the notion that such analysis is at all relevant, this Court noted that "jurisdiction involves the inherent power of a the [sic] court to decide a criminal case, whereas venue relates to the particular county or city in which a court with jurisdiction may hear and determine a case." *Dennis*, at 342, 607 S.E.2d at 448 (citation omitted). "[u]nder the Constitution and laws of this state, a crime can be prosecuted and punished only the state and county where the alleged offense was committed." *Id.* (citation and internal quotation marks omitted).

The circuit court does not need to establish "venue" or "jurisdiction" in order to properly admit evidence that is offered as *res gestae*. Indeed, Petitioner and his co-defendants were not on trial for the prior instances of abuse in Nicholas County, nor were they subject to punishment with respect to any of the allegations contained in the intrinsic evidence offered at trial. It was merely presented to provide context and to provide the jury with the whole story regarding the specific charges for which Petitioner and his co-defendants were on trial.

Similarly, there is no "causality" requirement that must be shown prior to intrinsic evidence being properly admitted at trial. This Court has never adopted a requirement as the one Petitioner suggests, and to do so would effectively preclude the government from offering highly probative and relevant evidence at criminal trials. Moreover, Petitioner has cited to no authority that would support the premise of his argument in this respect.

To the extent that Petitioner claims in his brief that the circuit court failed to conduct a Rule 404(b) analysis, such a claim is without merit as the circuit court is not required to conduct such an analysis simply because the State intends to elicit evidence of prior acts. The evidence and the analysis conducted by the circuit court demonstrates that the evidence was indicative of a continuing pattern of abuse that took place for months, and even years, that culminated in R.B.'s death on December 26, 2018. Intrinsic evidence which is essential to the "indicted charge is not governed by Rule 404(b)." *State v. Harris*, 230 W.Va. 717, 722, 742 S.E.2d 133, 138 (2013). Petitioner's claim that the circuit court failed to conduct a 403 balancing test is also belied by the record, as it clearly appears in the trial court's analysis at the conclusion of the February 8, 2022 hearing. *See* A.R. Vol. I, 243-45.

From a practical standpoint regarding the 403 balancing test, the probative value of the evidence at issue here, and the contextual value that it provided to the jury cannot be understated.

The jury deciding Petitioner's case had the right to know about the abuse and neglect that R.B. endured prior to her death. "A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it." *Old Chief*, 519 U.S. at 189. Importantly,

> People who hear a story interrupted by gaps and abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.

Id.

The jury was told that an eight-year old child presented to the emergency room in an emaciated state and purple skin, a body temperature so low that the hospital's equipment could not record it, and with lungs filled with pus and dying tissue due to the untreated infection that was ravaging her body. The jury also heard from medical experts that subsequent analysis of R.B.'s body revealed that she was dehydrated, undernourished, and likely became septic at some point prior to her death. A child does not report to a hospital in such a condition merely because her caretakers did not believe that her illness was as bad as it actually was. *See* A.R. VI, 262. The jury was entitled to hear evidence about R.B.'s life prior to her death, because it clearly demonstrates that the condition she was in at the time she arrived at the hospital was not the result of caretakers simply failing to notice the severity of an illness. Being a parent is a difficult task. But for the jury to hear this evidence, and to hear Petitioner and his co-defendants argue that they did everything a responsible parent would do based upon their observations would be an affront to the overall truth-seeking function of our judicial system. This is especially true in light of the compelling proof—as testified to by those who personally witnessed the incidents—that R.B.'s condition was not the result of an isolated incident borne of some temporary distraction that

clouded her caretaker's ability to observe the severity of her illness. The intrinsic evidence that was admitted demonstrates just the opposite: that Petitioner and his co-defendants consistently and intentionally turned a blind-eye to the obvious needs of the eight-year old child that they were entrusted to care for and protect, and at times, intentionally deprived her of those needs.

To this end, Petitioner's argument that the court never conducted a 403 balancing test is absurd. "This Court reviews disputed evidence in the light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effects." *LaRock*, 196 W. Va. at 312, 470 S.E.2d at 631 (citations omitted). "Unfair prejudice does not mean damage to a defendant's case that results from the legitimate probative force of the evidence; rather, it refers to evidence which tends to suggest a decision on an improper basis." *Id.* (citation omitted). "Rule 403 was not intended to prohibit a prosecutor from presenting a full picture of a crime especially where the prior acts have relevance independent of simply proving the factors listed in Rule 404(b)." *Id.* at 313, 470 S.E.2d at 632. Most importantly to the present situation, however, is that Rule 403 does not serve to "force a prosecutor to eliminate details of a killing or the degree of malevolence exhibited by a defendant to his victim causing a victim's death." *Id.* Indeed, this Court in *LaRock*, followed this sentence by finding that "[w]e find the testimony was so highly probative that any possible prejudice evaporated in comparison to it." *Id.*

Petitioner's first assignment of error is wholly misplaced, and this Court should reject it. The judgment of the Fayette County Circuit Court should be affirmed.

III. Petitioner's Sixth Amendment right to conduct cross-examination or direct examination was not violated, as the circuit court's imposition of reasonable limitations regarding the examination of defense witnesses was an appropriate use of its discretion.

Petitioner's second assignment of error alleges that the circuit court deprived him of his ability to examine witnesses called by his co-defendants, as well as his ability to conduct cross-

examinations of such witnesses and his co-defendant's that testified at trial. Pet'r's Br. 20. The premise of Petitioner's argument, however, rests upon a misplaced interpretation of the relevant legal authorities, and is based upon his failure to recognize various critical components to the legal analysis.

There is no dispute that a criminal defendant on trial enjoys the right to "be confronted with the witnesses against him[.]" W. Va. Const., art. III, § 14. A defendant's "fundamental right to confront [his] accusers, which contemplates the opportunity of a meaningful cross-examination, is guaranteed by Article III, Section 14 of the West Virginia Constitution." Syl. Pt. 2, *State v. Bohon*, 211 W. Va. 277, 565 S.E.2d 399 (2002) (citations and internal quotation marks omitted).

As with nearly all constitutional rights, however, the right to confront witnesses is not without its limits. As this Court has recognized, the right to examination and cross-examination "is not an unlimited one, there being vested in the trial court discretionary power to restrict or limit the cross-examination." Syl. Pt. 2, in part, *State v. Justice*, 135 W. Va. 852, 65 S.E.2d 743 (1951). "[A] defendant's Sixth Amendment right '"to be confronted with the witnesses against him"' does 'not give defendants a plenary right to elicit friendly testimony.'" *United States v. Jinwright*, 683 F.3d 471, 483 (4th Cir. 2012) (quoting *United States v. Crockett*, 813 F.2d 1310, 1313 (4th Cir. 1987) (quoting U.S. Const. amend. VI))). In fact, the constitutional right to elicit friendly testimony is not rooted in the confrontation clause, but finds its basis in the defendants' right "'to have compulsory process for obtaining witnesses in his favor.'" *Id.*

When looking to whether a defendant's right to examine witnesses has been violated, it is critical to keep in mind that "the trial judge clearly has discretion to 'exercise reasonable control over the mode and order of interrogating witnesses in presenting evidence. . . .'; and in doing so, he must balance the fairness to both parties." Syl. Pt. 2, *Gable v. Kroger Co.*, 186 W. Va. 62, 410

S.E.2d 701 (1991) (citations omitted). This notion is also codified in Rule 611 of the West Virginia Rules of Evidence, which provides, in part, that "[t]he court should exercise reasonable control over the mode and order of examining witnesses, and presenting evidence," for the purpose of fostering effective procedures "for determining the truth," and to "avoid wasting time."

In the instant case, it is important to note that Petitioner and his co-defendants presented a united front throughout the pendency of the underlying proceedings. *See* A.R. Vol. I, 78 (defense counsel advising the court that "we are currently treating all motions that are filed by the defense as joint motions at this time."); Vol. I, 87 (one defense counsel advising that all co-defendants' counsels have been working together to prepare motions). The record also contains numerous instances in which it would have been difficult to ascertain which attorney represented which defendant based upon their practice of arguing on behalf of the defendants generally, as opposed to the defendant each attorney represented. And, while there is nothing wrong with this practice and, in many circumstances, it is an effective strategy, it directly contradicts any claim that Petitioner makes with respect to his interests being different than those of his co-defendants. All three defendants were charged with the same offenses, all three were joined in a single indictment, tried in a single trial, and presented the same defense. While it is true that one defendant being found guilty would not mean that the others were necessarily guilty, to argue that any aspect of the Petitioner's case was adverse to those of his co-defendants, and vice versa, is simply belied by the record.

With this in mind, Petitioner's claim that the circuit court erred in limiting his ability to conduct individual examination of defense witnesses has no legal support. Petitioner has failed to point to any prejudice he suffered as a result of the circuit court's limitation, other than to essentially claim that because he was not permitted to ask questions, he was prejudiced. But even

the claim that he was precluded from conducting individual examination of defense witnesses is not supported by the record. To be sure, the circuit court explicitly advised defense attorneys that there was no requirement that any particular attorney conduct the direct examination of certain witnesses. That was entirely a decision left to the discretion of the defense attorneys.

Moreover, the record reveals that Petitioner and his counsel were present when the circuit court set forth how examination of the defense witnesses would proceed. A.R. Vol. V, 253. The record also shows that at the time the circuit court advised counsel as to how examination of defense witnesses would be conducted, neither Petitioner, nor his co-defendants offered any objection. In fact, it was not until the second day of the defense's case-in-chief that Petitioner offered his first specific objection, which was offered in the midst of direct examination of the defense's fourth witness. A.R. Vol. VI, 19.

As to Petitioner's assertion that he was improperly prevented from cross-examining witnesses called by his co-defendants, or to cross-examine the co-defendants themselves, is likewise without merit. While a more nuanced analysis than the preceding claim, the legal authority is clear that the right to cross-examination is not intended to mean that a defendant is entitled to elicit friendly testimony from a non-hostile witness through leading questions.

Addressing a similar situation to that presented in the instant case, the United States Supreme Court refused to find that a trial court's decision to prevent a defendant from cross-examining his co-defendant did not implicate a violation of any constitutional rights. *Nelson v. O'Neil*, 402 U.S. 622, 629 (1971). The facts in *Nelson* involved the conviction of two individuals, "Runnels" and "respondent", for kidnapping, robbery, and vehicle theft. *Id.* at 623. During the course of their joint trial, a police officer testified that "Runnels had made an unsworn oral statement admitting the crimes and implicating the respondent as his confederate [sic]." *Id.* at 624.

The trial judge rules that the testimony was "admissible against Runnels, but instructed the jury that it could not consider it against the respondent." *Id.*

Runnels would eventually take the stand in his own defense, at which point he was asked on direct examination about the unsworn statement mentioned during the police officer's testimony. *Id.* Runnels "flatly denied" making the statement, and went on to "vigorously assert[ ] that the substance of the statement imputed to him was false." *Id.* He was cross-examined by the State with respect to the statement, and he maintained that he did not make the statement, and that the substance of it testified to by the officer was false. *Id.*

During the pendency of respondent's case, the United States Supreme Court decided *Bruton v. United States*, 391 U.S. 123 (1968), wherein it held that "under certain circumstances the Confrontation Clause of the Sixth Amendment, applicable to the States through the Fourteenth, is violated when a codefendant's confession implicating the defendant is placed before the jury at their joint trial." *Id.* The federal district court deciding respondent's case "ruled that the respondent's conviction had to be set aside under *Bruton* . . . and the Court of Appeals for the Ninth Circuit affirmed." *Id.*

The United States Supreme Court began its analysis by noting that its decision in *Bruton* provided that "the 'confrontation' guaranteed by the Sixth and Fourteenth Amendments is confrontation at trial—that is, the absence of the defendant at the time the codefendant allegedly made the out-of-court statement is immaterial, so long as the declarant can be cross-examined[.]" *Id.* at 626. The Supreme Court further noted its holding in *Bruton*, wherein in stated that:

> Plainly, the introduction of (the codefendant's) confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination since (the codefendant) did not take the stand. Petitioner thus was denied his constitutional right of confrontation.

Id. at 628 (quoting *Bruton*, 391 U.S. at 127-28).

The Supreme Court in *Nelson*, however, found that the facts did not warrant the same result as those presented in *Bruton*. The Supreme Court noted that "it would be unrealistic in the extreme in the circumstances here presented to hold that the respondent was denied either the opportunity or the benefit of a full and effective cross-examination of Runnels." *Id.* at 629. This conclusion was supported by the Supreme Court's recognition that even though the statement attributed to Runnels that was offered at trial through the testimony of a police officer implicated the respondent, Runnels' subsequent testimony wherein he denied that he made the statement, and that the substance of it as testified to by the police officer was false, rendered the need for cross-examination inapplicable. *Id.* "For once Runnels had testified that the statement was false, it could hardly have profited the respondent for his counsel through cross-examination to try to shake that testimony." *Id.* "If the jury were to believe that the statement was false as to Runnels, it could hardly conclude that it was not false as to the respondent as well." *Id.*

The Supreme Court's holding in *Nelson* clearly stands for the notion that the right to cross-examine a witness is not triggered merely because a witness testifies, or an out-of-court statement was offered at trial. There are multiple factors that must be taken into consideration when assessing the scope of one's right to cross-examine those who testify at trial.

Despite Petitioner's claims he was denied his right to cross-examine his co-defendants, Petitioner has pointed to no testimony either offered that would profit from his counsel's attempt to "shake that testimony" "through cross-examination." *Nelson*, at 629. Thus, it becomes apparent that Petitioner believes he was entitled to cross-examine a witness that was not hostile or adverse to him, and whom did not testify to anything that could remotely be construed as incriminating with respect to his case.

The West Virginia Rules of Evidence provide that leading questions, which are typically the hallmark of cross-examination, "should not be used on direct examination," and that leading questions should be allowed, under most circumstances, "on cross-examination" and "when a party calls a hostile witness, an expert witness, an adverse party, or a witness identified with an adverse party." Taking this one logical step further, this Court has held that "[t]he right of cross-examination is not an unlimited one and it is subject to the discretionary power of a trial court to restrict or limit such cross-examination where it is justified." Syl. Pt. 5, *State v. Hankish*, 147 W. Va. 123, 126 S.E.2d 42 (1962). Similarly, this Court has, for more than a century, recognized that:

> In the absence of special circumstances, one introducing a witness has no right to elicit from him the evidence he desires by propounding leading questions, and where the trial court sustains an objection to a question because it is leading, if the party offering the evidence would have the benefit of it, he must reform his question so as to overcome the objection upon that ground.

Syllabus, *State v. Price*, 92 W. Va. 542, 115 S.E.2d 393 (1922); *see also* Syllabus, *Hendricks v. Monongahela W. Penn. Pub. Serv. Co.*, 111 W. Va. 576, 163 S.E.2d 411 (1932) ("Generally, a party introducing witness should not be permitted to elicit information by leading questions").

It is evident that the underlying record contains numerous instances in which the Petitioner and his co-defendants worked together to defend against the indictment brought against them. It is also worth noting that this cooperative approach continued throughout Petitioner's trial. The circuit court was correct in considering witnesses called by any of the defense witnesses as a witness for the defense, in general. It is obvious from the record that none of the witnesses called by the defense, nor the testifying co-defendants were hostile or adverse to Petitioner.

An "adverse party," is one "whose interests in a transaction, dispute, or lawsuit are opposed to another party's interests." *Party*, BLACK'S LAW DICTIONARY (11th ed. 2019). A "hostile witness" is one "who is biased against the examining party, is unwilling to testify, or is identified

with an adverse party. A hostile witness may be asked leading questions on direct examination." *Witness*, BLACK'S LAW DICTIONARY (11th ed. 2019). If Petitioner truly believed that any of the defense witnesses or testifying co-defendants were hostile or adverse to his interests, there is no reason why he could not have moved to have them considered as hostile witnesses, and thus preserve that particular issue for appeal. But Petitioner did not do that. What is perhaps most confounding about Petitioner's argument in this respect is that he argues that there are a number of questions that he would have asked his co-defendant, Julie Browning, if given the opportunity to conduct cross-examination. Pet'r's Br. 24-25. The transcript, however, clearly shows that the circuit court gave him two opportunities to question Ms. Browning, and both times, Petitioner declined to do so. A.R. Vol. VI, 297, 314. Why Petitioner required the ability to cross-examine Ms. Browning as to the issues identified in his brief is left unexplained by Petitioner. In fact, there is no discernible reason why he could not have effectively developed testimony through direct examination. Petitioner similarly declined the opportunity to question Ms. Titchenell following her direct examination by her attorney. A.R. Vol. VI, 327.

One would expect that if there was such critical information that needed developed during the testimony of a particular witness, questions would be posed regardless of whether the questioning was through direct or cross-examination. Simply stated, Petitioner's claims that his right to examine witnesses was violated rings hollow, especially in light of his unequivocal decision to forego questioning those very witnesses that he now claims he was prevented from examining. Petitioner's arguments in this respect are disingenuous, and certainly do not entitle him to any relief.

IV. Petitioner's right to trial within three regular terms of court was not violated.

Petitioner's third assignment of error alleges that at the time he and his co-defendants' joint trial began on June 6, 2022, three regular terms of court had passed, entitling them to dismissal of the indictment with prejudice. Pet'r's Br. at 28. Petitioner concedes that each term that had passed from the term of indictment until the May 2021 term of court were excused. Pet'r's Br. 29. This leaves four terms relevant for this Court to review to address Petitioner's claims: the May 2021 term, the September 2021 term, and the January 2022 term. Petitioner's trial commenced on June 6, 2022, during the May 2022 term of court. Should this Court find that any of the above mentioned terms were excused, Petitioner's claim fails. *See State v. Paul C.*, 244 W. Va. 329, 336, 853 S.E.2d 569, 576 (2020) (recognizing that if one of three terms of court is excused, the right to trial within three terms of court is not violated, and there is no need to analyze the remaining two terms).

Fayette County is situated in the 12th Judicial Circuit, and has three terms of court each year which commence on the second Tuesday in January, May, and September. W. Va. T. C. R. 2.12.

This Court has long recognized that there are four factors to consider when assessing whether a "defendant has been denied a trial without unreasonable delay," which looks to: "(1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant." Syl. Pt. 4, in part, *Frank A. v. Ames*, 246 W. Va. 145, 866 S.E.2d 210 (2021) (citation and internal quotation marks omitted). When considering the circumstances in conjunction with these factors, this Court should balance "the conduct of the defendant against the conduct of the State," and that it should be considered on a "case-by-case basis and no one factor is either necessary or sufficient to support a finding that the defendant has been denied a speedy trial." *Id.* (citation and internal quotation marks omitted).

When balancing the conduct of the defendant against the conduct of the state, this Court has held that:

> Any term in which a defendant procures a continuance of a trial on his own motion after an indictment is returned, or otherwise prevents a trial from being held, is not counted as one of the three term sin favor of discharge from prosecution under the provisions of Code, 62-3-21, as amended.

Syl. Pt. 2, *State ex rel. Spadafore v. Fox*, 155 W. Va. 674, 186 S.E.2d 833 (1972). Relevant to the circumstances presented in the instant appeal, however, this Court has also opined that:

> We do not think that the language used in the statute, "on motion of the accused," means that the accused party must make a formal motion in the court in which the indictment is pending in order to charge him with the delay in bringing him to trial. *If he instigates a proceeding which forces a continuance of the case at a particular term of court, he will not be permitted to take advantage of the delay thus occasioned.*

State ex rel. Farley v. Kramer, 153 W. Va. 159, 172-73, 169 S.E.2d 106, 114-15 (1969) (emphasis added). In relying on this precedent, this Court in *State v. Paul C.*, found that a term in which Petitioner's counsel made an informal motion to continue five days prior to trial and, in doing so, noted that it had "several more motions to file" based upon issues that were discussed during the hearing. *Id.* at 336, 853 S.E.2d at 576. When Petitioner's counsel made this motion, the circuit court responded by stating, "Well, this case is not ready for trial for Tuesday. . . . [petitioner's counsel] has some motions and things that she needs to file and I suspect that's true." *Id.* Petitioner agreed, and the "State suggested a new trial date of August 14, 2018, during the next term of court, to which Petitioner's counsel also agreed, along with the acknowledgment that the recent election of a new judge and the court's busy docket might postpone the trial even further." *Id.*

Similar to the facts presented in *Paul C.*, this Court can dispense with Petitioner's claim by looking no further than the September 2021 term of court. Much like nearly every other continuance of the trial date in this matter, the continuance of trial from the September 2021 term

of court into the January 2022 term of court was preceded by the filing of a motion to continue by the defense. A.R. Vol. I, 8. The basis of the motion to continue was to "receive, review, and respond to the State's newly disclosed expert witness' opinions." *Id.* The record provided by Petitioner contains no transcript from this hearing, and the only evidence before this Court is the circuit court's order granting the continuance, which provides only that "defense counsel for Ms. Titchenell made a motion to continue the matter, to which the State did not object. The Court, having considered the matter, GRANTS the motion aforesaid and continued the matter to the January 2022 term of Court." A.R. Vol. I, 24-25.

Although Petitioner claims in his brief that none of the defendants waived their right to trial within that term of court, such contention is not accompanied by any citation to the record, presumably because there is nothing in the record to support it. Pet'r's Br. 30. Instead, the only evidence in the record demonstrates that the continuance was upon a motion filed by the defense, that the State did not object, and the circuit court ordered the matter continued into the January 2022 term of court. This, alone, is fatal to Petitioner's ability to succeed on this particular claim. Petitioner's contention that none of the defendants waived their right to a trial within the September 2021 term of court is entirely speculative, and based upon nothing more than convenient, and self-serving arguments completely detached from any discernible facts in the record. Thus, the order granting the continuance is the only evidence before this Court, which contains nothing to support Petitioner's assertions. Petitioner's claim, therefore, must fail. *See State ex rel. Erlewine v. Thompson*, 156 W. Va. 714, 718, 207 S.E.2d 105, 107 (1973) ("A court of record speaks only through its orders and the order in the record of this case shows that the defendant was not available for trial on the indictment when the term in question began").

With respect to the January 2022 term, the record also reveals that Petitioner's conduct necessitated a continuance to the following term. The circuit court's ultimate decision to continue the trial to the May 2022 term was due to Petitioner's counsel's unavailability to appear in person for a critical deposition hearing wherein the State sought to preserve the testimony of the two medical examiners due to their unavailability for trial because of medical issues and conflicting trial appearances. A.R. Vol. I, 29-30.

Petitioner's claim that the continuance from the January 2022 term to the May 2022 term should be credited to the State strains credulity. To be sure, the State did absolutely nothing to necessitate the continuance, and had done everything it could to ensure that trial was able to proceed on March 1, 2022, within the January 2022 term. It was because of a recently scheduled medical appointment, personal to only counsel for the Petitioner, and the risk of an inaccurate, or insufficient record being created due to Petitioner's counsel's appearance at the hearing remotely that necessitated the continuance. Indeed, Petitioner's unavailability and his subsequent notice to the court was just weeks before the March 1, 2022 trial date.

While medical appointments are certainly important and should constitute good cause to continue proceedings, it seems inherently unfair to charge the passing of a term of court to the State that was rendered necessary, despite the attempts of the State to ensure the trial commenced within the term, because of a last minute scheduling conflict on the part of one of the defense attorneys. Under no reasonable theory should the January 2022 term be charged to the State because it did absolutely nothing to cause the continuance into the May, 2022 term.

With respect to the May, 2022 term of court, such continuance should also be charged to the defense. The continuance to the next term of court was based, in part, on a motion to continue filed by the defense, and further based upon the limited resources necessary to conduct a jury trial

in light of the various protocols in place due to the COVID-19 pandemic. A.R. Vol I, 304. There is no authority upon which Petitioner can reasonably rely that would stand for the notion that the defense is able to file motions to continue, and may avoid having any term that may pass as a result charged to them simply by demanding that the continuance be "within the term," with no respect given to the circuit court's other obligations, as well as those of the opposing party. For this Court to condone such conduct would create a situation where defense attorneys could simply "run out the clock" so to speak, and obtain dismissals based upon technicalities simply because they included a talismanic phrase in each of their motions to continue.

Petitioner's right to a trial within three regular terms of court was not violated, and this Court should, accordingly, affirm the judgment of the Fayette County Circuit Court.

V. Petitioner's Sixth Amendment Rights were not violated by the admission of statements that he claims were inadmissible testimonial hearsay. Each of the statements were either not testimony, were not hearsay, or both. As a result, the statements did not fall under the protections afforded by the Sixth Amendment.

In his fourth and final assignment of error, Petitioner asserts that the circuit court erred in allowing the State to "elicit hearsay of R. B., and the adverse testimony of one of Petitioner's co-defendants, in violation of Petitioner's Sixth Amendment right of confrontation." Pet'r's Br. at 33. With respect the allegedly improper "hearsay" statements of R.B., Petitioner points to certain statements elicited during trial from Carrie Ciliberti, R.B.'s teacher during kindergarten and first grade in Nicholas County, as well as statements testified to by B.M., R.B.'s older sister. Pet'r's Br. at 33-35. Petitioner next asserts that the State elicited testimony regarding certain statements made by Petitioner's co-defendants that were elicited during the State's case-in-chief. Pet'r's Br. at 35-37.

1. The lack of timely objections to the challenged testimony

"Our rules clearly indicate that a party who wishes to predicate error upon a court's admission of evidence must timely object to that evidence." *State v. Jenkins*, 204 W. Va. 347, 351, 512 S.E.2d 860, 864 (1998). This general rule is further embodied in Rule 103(a) of the West Virginia Rules of Evidence, which provides: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Rule 103(b) further provides that: "In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context."

The significance of Rule 103 has been recognized as providing that "the objecting party should not benefit from an insufficient objection if the grounds asserted in a valid objection could have been obviated had the objecting party alerted the offering party to the true nature of the objection." *State v. DeGraw*, 196 W. Va. 261, 272, 470 S.E.2d 215, 216 (1996) (quoting 1 Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers § 1–7(C)(2) at 78 (3rd ed. 1994).

Petitioner failed to offer any objections to the testimony offered by Carrie Ciliberti regarding her observations as to R.B.'s injuries, and the statements R.B. made to her while at school. A.R. Vol. V, 81, 96, 100-103. Based upon this Court's holding in *DeGraw*, Petitioner's failure to offer a valid objection should render any claim of error relating to this testimony waived.

Next, Petitioner asserts that R.B.'s older sister, B.M. offered certain statements during her trial testimony that Petitioner claims were inadmissible hearsay statements. Pet'r's Br. 34. These statements included her recollection as to hearing R.B. tell Petitioner's co-defendant that "she wanted to go to the hospital," even though that would means she would be there during Christmas. *Id.* (citing A.R. Vol. V, 197-98).

Similar to the testimony Petitioner challenges as offered by Ms. Ciliberti, the record contains absolutely no objections to the line of questions that elicited the testimony from B.M. that Petitioner now claims was erroneously admitted. A.R. Vol. V, 196-200. Thus, any alleged error that may have flowed from the admission of this testimony was waived by Petitioner, and he cannot now demand relief for an error that neither he, nor any of his co-defendants though worthy to voice an objection at the times the statements were offered.

Finally, Petitioner claims that "B.M. testified, over the hearsay and confrontation-clause objections of counsel, that Ms. Titchenell had told her to deny, if asked at school or by CPS, the alleged abuse in the home." Pet'r's Br. 36 (citing App. Vol. V, 178-182). While Petitioner did offer an objection around the time this testimony was elicited, it can hardly be said that the objection related to this line of testimony. That is because the objection did not occur until after the State had asked B.M. multiple questions as to this issue, and Petitioner supported his objection by stating that "[t]his witness *is about to—is about to report hearsay.*" A.R. Vol. V. 179 (emphasis added).

Petitioner's contention that he objected to this line of testimony is tenuous, at best. A plain reading of the transcript as to the specific reason for Petitioner's objection clearly indicates that his objection was not to testimony that had already been elicited, but to testimony that he *anticipated* that the State was about to elicit. While nuanced, this is a critical consideration, as Petitioner is required to offer timely objections that reasonably place the court and other parties on notice as to the alleged infirmity so that the issue may be corrected. *Jenkins*, 204 W. Va. at 351, 512 S.E.2d at 864; *see also State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996) ("To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. . . . parties must

speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace.") Petitioner's objection as to this issue was not sufficient to preserve the issue for appeal. This claim is waived, and this Court should accordingly reject it without further consideration.

2. Petitioner's Confrontation Rights were not violated.

The current interpretation of the Confrontation Clause contained in the Sixth Amendment to the United States Constitution, as well as Article III, § 14 of the West Virginia Constitute is rooted in the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, the Supreme Court defined a witness for purposes of the Confrontation Clause as one "who bear[s] testimony," defined as "a solemn declaration or affirmation made for the purpose of establishing or proving some fact," and the Confrontation Clause prevents the admission of such testimony when the statements were made by a non-testifying witness, unless that witness is "unavailable to testify, and the defendant had had a prior opportunity for cross examination." *Id.* 541 U.S. at 51, 54.

To help identify whether a particular statement is testimonial or not, the Supreme Court adopted what is known as the "primary purpose" test in order to help determine whether a particular statement is "testimonial," which would trigger the application of the Confrontation Clause, or non-testimonial, which is not subject to the protections afforded by the Confrontation Clause. *Ohio v. Clark*, 576 U.S. 237, 243-44 (2015). The primary purpose test requires courts to consider "all of the relevant circumstances," and that, if the primary purpose is not tied to some intention to create a record for a later trial, such statement "is not within the scope of the [Confrontation] Clause." *Michigan v. Bryant*, 562 U.S. 344, 358, 368 (2011). "In the end, the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of

the conversation was to 'creat[e] an out-of-court substitute for trial testimony." *Clark*, 576 U.S. at 243-44 (quoting *Bryant*, 562 U.S. at 358).

The Supreme Court in *Clark* noted that statements made to school teachers and other similar individuals may implication Confrontation Clause issues, but that "such statements are much less likely to be testimonial than statement to law enforcement officers." *Id.* at 246.

In addition, that "[i]t is important to emphasize again that, aside from the testimonial verses non testimonial issue, a crucial aspect of *Crawford* is that it only covers hearsay, *i.e.*, out-of-court statements 'offered in evidence to prove the truth of the matter asserted.'" *State v. Waldron*, 228 W. Va. 577, 581, 723 S.E.2d 402, 406 (2012) (citation omitted). "[T]he Sixth Amendment's confrontation clause bars evidence that is *both* 'testimonial' and 'hearsay,' but it does not bar the testimonial evidence if that evidence is not hearsay." *State v. Lambert*, 232 W. Va. 104, 112, 750 S.E.2d 657, 665 (2013. "Where the out-of-court statements of a non-testifying individual are introduced into evidence solely to provide foundation or context for understanding a defendant's responses to those statements, the statements are offered for a non-hearsay purpose and the introduction of the evidence does not violate the defendant's rights under *Crawford.*" *Id.* (citations and internal quotation marks omitted). (2013) (quoting *Estes v. State*, 249 P.3d 313, 316 (Alaska Ct. App. 2011)).

The testimony of B.M. pointed to by Petitioner regarding her testimony that Ms. Titchenell told her to lie to authorities does not involve any issues relevant to the Confrontation Clause. While it is arguable that the statement may be testimonial, the evidence clearly was not offered to prove the truth of the matter asserted. Rather, it was offered to provide context as to why B.M.'s trial testimony was different from what she had previously told to authorities regarding the abuse R.B.

endured prior to her death and in the immediate aftermath. This testimony is, therefore, not hearsay, and not subject to the protections afforded by the Sixth Amendment.

The same can be said with respect to Petitioner's argument regarding the testimony of Richard Looney. Pet'r's Br. 36. The testimony Petitioner alludes to involves Mr. Looney's testimony that he was present when Petitioner took a phone call from Ms. Browning, and that he heard Ms. Browning indicate that R.B. was sick and Petitioner needed to take her to the hospital. A.R. Vol. IV, 242-43. Petitioner claims that the testimony was essentially arguing to prove that "R.B. was sick, [and] yet [they] declined to take her to the hospital." Pet'r's. Br. at 36. Although Petitioner claims that this was to prove that Petitioner and his co-defendants knew that R.B. was sick and that they chose to not take her to the hospital, such contention was not part of the testimony. The testimony itself was not offered in order to prove that R.B. was sick or that the Petitioner and his co-defendants chose to forego taking R.B. to the hospital. The evidence was offered in order to prove that the parties were aware that R.B.'s condition was poor, but the statement alone has nothing to do with whether she was actually sick or not. The statement in question is far more probative as to its tendency to show the Petitioner's and Ms. Browning's knowledge of the circumstances, as opposed to whether R.B. was actually sick, and needed to go to the hospital.

Petitioner has failed to demonstrate that there was any violation of his Sixth Amendment right to confront witnesses, or that there was any testimonial hearsay that was improperly admitted at trial. Because Petitioner has failed to meet his burden of proof with respect to this claim, this Court should affirm the judgment of the Fayette County Circuit Court.

CONCLUSION

Based upon the foregoing, Respondent respectfully prays this Honorable Court affirm the judgment of the Fayette County Circuit Court as contained in criminal action number 20-F-74.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-710

STATE OF WEST VIRGINIA,

Respondent,

v.

MARTY L. BROWNING,

Petitioner.

CERTIFICATE OF SERVICE

I, William E. Longwell, do hereby certify that on the 19th day of April, 2023, I served a true and accurate copy of the foregoing **RESPONDENT'S BRIEF** upon the below-listed individuals via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure, and further, a courtesy copy was mailed to said individuals at the addresses below.

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