IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-719

STATE OF WEST VIRGINIA
Respondent,

v.

SHERIE M. TITCHENELL,
Petitioner.

RESPONDENT'S BRIEF

Appeal from the August 21, 2022, Order
Circuit Court of Fayette County
Case No. 20-F-76

PATRICK MORRISEY
ATTORNEY GENERAL

GAIL V. LIPSCOMB
ASSISTANT ATTORNEY GENERAL
1900 Kanawha Blvd. E.
State Capitol, Bldg. 6, Ste. 406
Charleston, WV 25305
Telephone: (304) 558-5830
Facsimile: (304) 558-5833
State Bar No. 7007
Email: *Gail.V.Lipscomb@wvago.gov*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTRODUCTION

Respondent, State of West Virginia, responds to Petitioner Sherie Tichenell's brief ("Petitioner"), pursuant to her appeal of an order of the Circuit Court of Fayette County (Circuit Court No. CC-10-2020-F-76) entered on August 21, 2022. Petitioner was convicted of Child Neglect Resulting in Death of R.B., an eight-year-old female who was in Petitioner's care, custody and control. Petitioner fails to substantiate how the circuit court abused its discretion in permitting the admission of out-of-court statements made by the victim, R.B., prior to her death, and out-of-court statements made by the co-defendants which did not implicate or accuse Petitioner. Further, the circuit court did not err in limiting cumulative and repetitive questioning of common and joint defense witnesses and managing the method of examination of a non-adverse co-defendant. Additionally, the circuit court did not abuse its discretion by determining ongoing and prior acts of abuse and neglect were admissible as intrinsic evidence to complete the whole story of R.B.'s death. Finally, Petitioner has failed to provide any authority for her claim that intrinsic evidence of prior acts are subject to a jurisdictional determination when the intrinsic evidence is not a charged criminal offense. Since Petitioner has failed to illustrate any error, the lower court's order should be affirmed.

ASSIGNMENTS OF ERROR

Petitioner advances four assignments of error in her appellate brief:

1. The circuit court erred as a matter of law when it allowed the hearsay testimony of R.J.B. and Petitioner's co-defendants to be considered by the jury, over a confrontation clause and due process objection by counsel, and by prior order of the circuit court.

2. The circuit court erred as a matter of law when it prevented Petitioner's counsel from cross-examining Petitioner's co-defendant at trial, after adverse statements were made against Petitioner, and when the circuit court prevented Petitioner's counsel from directly examining defense witnesses.

3. The circuit court erred by abusing its judicial discretion when it failed to exercise any judicial discretion in allowing evidence of Petitioner's alleged prior bad acts, without a Rule 404(b) analysis, to be considered by the jury.

4. The circuit court lacked subject matter jurisdiction over those certain alleged bad acts of the Petitioner that occurred outside of Fayette County, and years prior to the death of R.J.B.

Pet'r's Br. 1 (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 her two co-defendants, Julie Browning and Marty Browning, 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. App. Vol. I, 23. The indictment identifies the victim as "R.B.,"[1] and the dates of the offenses in the indictment were August, 2014 through December 26, 2018, the date of R.B.'s death. App. Vol. I, 23.

When the ambulance responded to the residence, Petitioner Sherie Titchenell carried out R.B.'s lifeless body. App. Vol. III, 13. The emergency medical provider testified R.B. was deceased before they got there, and they put R.B. in the ambulance to begin resuscitation. App. Vol. III, 13. 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. App. Vol. III, 52. Medical personnel testified R.B. had small scabbed areas around her neck and flanks, and bruising noted to her sides and legs. App. Vol. III, 32. Dr. Ghodasara, the emergency room physician at Plateau Medical Center, noted R.B. had a second degree burn on her right leg, App.

[1] 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.

Vol. III, 94, and several bruises and scratches on her body. App. Vol. III 96. Attempts by medical providers to take R.B's temperature were unsuccessful because R.B.'s body was colder than the lowest range detectible by the thermometer equipment. App. Vol. III, 112. 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. App. Vol. III, 93. Dr. Ghodasara indicated that medical staff had concerns about abuse based on the appearance of the child. App. Vol. III, 114.

During the autopsy, examination of R.B's lung revealed pus pouring out of the cut surfaces, which indicated a severe infection of the lung. App. Vol. IV, 46. Dr. Allen Ray Mock, Chief Medical Examiner, 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 . . . ." App. Vol. IV, 94. Medical experts explained there would have been a period of sepsis before death where the lung infection had spread into the blood. App. Vol. IV, 94. R.B's lab results were indicative of dehydration and kidney failure, and "the infection that was present in [R.B.'s] lungs . . . collaborates that her pneumonia was not just present that morning; . . . it was there for a while." App. Vol. IV, 261.

R.B.'s pediatrician testified R.B. lost a significant amount of weight ending in the 2nd percentile of growth for children R.B.'s age just before her death. App. Vol. III, 138. A medical examiner testified a weight percentage under 5% is considered starvation. App. Vol. IV, 67. All physicians testifying on behalf of the State agreed that deprivation of food and water would have made R.B. susceptible to infection and affect her ability to fight an infection. App. Vol, III, 143-144, Vol. IV, 98, 168, 274. Dr. Moffett, a pediatric infection disease physician, testified R.B. would have shortness of breath "maybe to the point of gasping . . . may have told people I can't breathe, my chest hurts" and that she didn't feel well. App. Vol. IV, 268. Dr. Moffett further

testified that "I think probably [R.B.] was suffocating. I think she was probably gasping at times for air . . . she might not have even really been conscious at the very end, I don't think." App. Vol. IV, 307. Dr. Moffett opined that R.B. likely, in the time immediately preceding her death, could not have "sit up or stand" due to the advanced stage and degree of the pneumonia in her body. App. Vol. IV, 278. When asked whether a normal reasonable adult would readily observe these signs and symptoms, medical experts testified "any layperson would recognize the child was very ill," App. Vol. IV, 95-96, and a reasonable adult would have observed symptoms of pneumonia for several days, possibly longer, App. Vol. III, 143. Dr. Moffett confirmed that because the pneumonia wasn't treated, R.B.'s body "went to sepsis, shock and death." App. Vol. IV, 271. "[R.B.] should not have died. If she would've gotten treatment and appropriate antibiotics, she would've survived." App. Vol. IV, 282.

B. Pretrial Hearings and Ruling on Intrinsic Evidence

The circuit court conducted an *in camera* hearing on February 8, 2018, where it heard the proffer of evidence regarding prior abuse and neglect incidences sought to be introduced as intrinsic evidence by the State. App. Vol. VIII, 8-9. The State called two witnesses to testify at the hearing regarding the prior incidences they had observed: Kara Gillespie, who treated R.B.'s broken femur in 2015, App. Vol. VIII, 11, and Cary Ciliberti, who was R.B.'s elementary school teacher in Nicholas County, App. Vol. VIII, 31. Kara Gillespie, a physician assistant in the emergency room at Summersville Regional Medical Center, testified the father and stepmother brought R.B. to the emergency room explaining that R.B. was complaining of knee pain after she had a temper tantrum and kicked a wall the day before. App. Vol. VIII, 12. Upon examination it was discovered that R.B. had a right femur fracture. App. Vol. VIII, 14. Ms. Gillespie testified that a healthy five year old child would not have obtained this type of fracture by kicking a wall.

App. Vol. VIII, 15. Ms. Gillespie further indicated that because the explanation was not consistent with this type of injury, it is suspect for child abuse. App. Vol. VIII, 24.

Cary Ciliberti testified she had R.B. in her class in kindergarten in Nicholas County, West Virginia. App. Vol. VIII, 31-32. Ms. Ciliberti testified she had strong suspicions of child abuse after R.B. came to school with a broken leg. App. Vol. VIII, 34. Ms. Ciliberti relayed that she had breakfast duty every day and the breakfast staff was directed by Petitioner not to feed R.B. in the mornings, she had an eating disorder, and they would feed her at home. App. Vol. VIII, 37. When R.B. came back in first grade her weight had dropped drastically and the same clothes she wore in kindergarten were hanging off of her. App. Vol. VIII, 39. Ms. Ciliberti recalled R.B. wearing a long sleeve sweatshirt in 95 degree weather, and she gave her a T-shirt to wear instead. App. Vol. VIII, 40. When R.B. changed her shirt, Ms. Ciliberti observed a handprint on her upper arm. App. Vol. VIII, 41. R.B. brought the T-shirt back in tears and told Mr. Ciliberti that "my daddy said I can't take your clothes—that you aren't' allowed to give me clothes. App. Vol. VIII, 41. On another occasion, R.B. asked Ms. Cilibert if she wanted to see R.B.'s "booboos" on her leg. App. Vol. VIII, 42. After R.B. showed her the "booboos", R.B. stated "my daddy says I'm not allowed to show you these and if you have any questions you need to call my dad." App. Vol. VIII, 42. Ms. Ciliberti testified that she made three referrals to CPS regarding R.B. App. Vol. VIII, 42. The first time was regarding R.B.'s broken leg, the second was when R.B. showed her the bruises on her leg, and the third time was after another child had visited the home and disclosed R.B. was locked in the laundry room. App. Vol. VIII, 42-43. Ms. Ciliberti testified when she learned R.B. was being withdrawn to be homeschooled, she told the superintendent of schools that if R.B. was home schooled that she would die within a year. App. Vol. VIII, 44. At the close of the *in camera* testimony the court heard the arguments of all counsel, and 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." App. Vol. VIII, 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.

App. Vol. VIII, 108. Further, the court found " 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 in Fayette County." App. Vol. VIII, 109. The circuit court noted the objections of the defendants. App. Vol. VIII, 109. The circuit court also noted at the February 8, 2018, pretrial hearing that Petitioner did not move to sever her trial from the other co-defendants, choosing instead to proceed in a joint trial. App. Vol. VIII, 113.

C. Trial Testimony of R.B.'s out-of-court statements

Cary Ciliberti, R.B's elementary school teacher, testified R.B. was dressed inappropriately for hot weather, and wore long pants and long sleeves. App. Vol. V, 92. Ms. Ciliberti testified R.B. wore the same pink sweatshirt often, and was sweating. App. Vol. V, 95. On one occasion, Ms. Ciliberti stated she gave R.B. a t-shirt to wear and as R.B. was changing her shirt she noticed a handprint on R.B.'s arm. App. Vol. V, 95. R.B. brought the shirt back to Ms. Ciliberti and told her that her father made her bring the t-shirt back, and that Ms. Ciliberti was not permitted to give clothes to R.B. anymore. App. Vol. V, 99. Ms. Ciliberti recalled that R.B. asked her on one occasion if she wanted to see R.B.'s "booboos", and R.B. showed Ms. Ciliberti numerous bruises and marks on her body. App. Vol. V, 102. After R.B. showed her the marks on her body, R.B. stated if she had any questions about R.B.'s bruising, "I'm not allowed to answer you; you have

to call my daddy and ask him." App. Vol. V, 102. When R.B. came back to school in first grade her weight had "dropped dramatically" and "the same clothes she wore in kindergarten were hanging off of her in first grade." App. Vol. V, 103. Ms. Ciliberti also observed R.B. to have "black circles under her eyes, she was pale—extremely thin." App. Vol. V, 104. Ms. Ciliberti testified she made CPS referrals and no one ever came back to do any further investigation. App. Vol. V, 111-112. Ms. Ciliberti voiced concerns over the health and safety of R.B. to the principal and the Superintendent when she learned that R.B. was to be homeschooled. App. Vol. V, 107. Ms. Ciliberti testified, "I told the Board Superintendent that if [R.B.] was allowed to be withdrawn and homeschooled that she would die." App. Vol. V, 107.

B.M., step-sister to R.B., testified Petitioner would frequently hit R.B., App. Vol. V, 173-174, and B.M. observed bruising and marks on R.B., App. Vol. V, 214. B.M. testified "[t]here would be days [R.B.] would go hungry." App. Vol. V, 188. When asked if any of the children in the house were treated the way R.B. was treated, B.M responded, "[n]o, sir. . . It seems as if [R.B] was always being punished even if she hadn't done anything to deserve so." App. Vol. V, 187.

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. . . When [R.B] breezed [breathed], it sounded like she was snoring, you know like when a pug breathes . . . sounded like she couldn't breathe, like she was fighting for her air." App. Vol. V, 196. B.M. recalled that "Julie 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." App. Vol. V, 197-198. 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. App. Vol. V, 198. B.M. testified she observed R.B. to be very sick on Christmas Eve but did not see anyone give R.B. medicine, food, or water, and R.B.

was in bed the entire time. App. Vol. V, 199. B.M. recalled that "[Petitioner] claimed that [R.B.] was not sick and that she was faking it for attention." App. Vol. V, 197. B.M. testified that R.B. was so sick that R.B. could not get up to get herself something to drink or eat. App. Vol. V, 199. B.M. further testified that R.B. was too sick to open her Christmas presents, and B.M. was concerned that R.B. was very seriously ill. App. Vol. V, 218.

D. Trial Testimony of Marty Browning's out-of-court statements

Maria Parks, a pediatric nurse, testified she had concerns R.B. was being abused because the claims made by the caretakers "didn't match the presentation in the office of [R.B.] herself." App. Vol. III, 181. Ms. Parks testified that R.B. would wear long sleeves and long pants on a hot day and she felt something was "off" from her observations of the family. App. Vol. III, 180-181. Ms. Parks testified that on one occasion while she was preparing to administer R.B.'s routine vaccination, she heard Marty Browning tell R.B. that if she cried Mr. Browning would "punch the shit out of her other arm." App. Vol. III, 188. Ms. Parks testified she immediately documented this comment in R.B's medical chart. App. Vol. III, 192.

Richard Looney testified he was a friend of Marty Browning, App. Vol. IV, 228 and the families did things together, App. Vol. IV, 248. Mr. Looney testified he recalled a phone conversation between Marty Browning and Julie Browning on December 20, 2018 while Marty Browning was at Mr. Looney's house. App. Vol. IV, 242. Mr. Looney testified he could hear Julie Browning's voice on the other end of the call, and after Marty Browning ended the call, he stated to Mr. Looney the phone call was from Julie Browning telling him that R.B. was sick and needed to go the hospital. App. Vol. IV, 242.

E. Trial Testimony of Co-defendant Julie Browning

Co-defendant Julie Browning testified she knew R.B. was sick during the Christmas holiday, but did not recognize the severity of R.B.'s illness. App. Vol. VI, 252. Mrs. Browning observed R.B. "had a runny nose and she was coughing a little bit." App. Vol. VI, 256. Mrs. Browning testified that on December 24, 2018, she observed R.B. was getting a little worse, and R.B. "was coughing a little more . . . just a little bit." App. Vol. VI, 256. Mrs. Browning testified that on December 25, 2018, Petitioner took R.B.'s temperature after dinner and stated R.B. did not have a fever. App. Vol. VI, 264. Mrs. Browning testified R.B. told her she was really tired and didn't feel good. App. Vol. VI, 264. Mrs. Browning testified on the evening of December 25, 2018, she gave R.B. Tylenol, App. Vol. VI, 263, and recalled Petitioner changing R.B.'s clothes because R.B. had thrown up, App. Vol. VI, 265A.R. 1593. Mrs. Browning testified they had placed locks on the door where R.B. slept "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." App. Vol. VI, 282. In response to questioning as to whether she observed R.B. struggling to breathe, Mrs. Browning testified she did not. App. Vol. VI, 263. Mrs. Browning 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." App. Vol. VI, 266. Mrs. Browning testified "[t]hat's one of my last memories of [R.B.]. I should've take her to the doctor." App. Vol. VI, 267. Mrs. Browning testified she did not see R.B. the following morning. App. Vol. VI, 268. Mrs. Browning woke up and went to work around 8:00 or 9:00; Marty Browning had already left for work, and no one else was up. App. Vol. VI, 268. Mrs. Browning testified that she saw a missed call around lunch time, and read a text from Petitioner that R.B. had a seizure. App. Vol. VI, 268.

Mrs. Browning left work immediately, App. Vol. VI, 268, but went home first at Petitioner's direction to get R.B.'s medications to take to the hospital, App. Vol. VI, 270.

F. Testimony of Petitioner

Petitioner testified she could not recall any details regarding the incident where R.B.'s femur was broken. App. Vol. VI, 335. Petitioner had no memory of where she was when R.B. broke her femur, or if she was even home, App. Vol. VI, 335, but did recall that "Julie and Marty took her to the hospital, but I did not go," App. Vol. VI, 335. Petitioner testified on December 25, 2018, R.B. "had sniffles. She had a little cough." App. Vol. VI, 328. Petitioner testified prior to December 26, 2018, she did not believe R.B's illness was an emergency. App. Vol. VI, 343. Petitioner testified she was not awake when Marty Browning and Julie Browning went to work on December 26, 2018. App. Vol. VI, 339. Petitioner testified when she called 911, R.B. was not purple but that R.B. was gasping. App. Vol. VI, 343. Petitioner 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." App. Vol. VI, 345.

G. Trial Management of Witness Examinations

During the trial, all defense counsels continued to function as one defense, and objected to evidence on each other's behalf against the State. App. Vol. III, 182. Petitioner was given the opportunity to cross-examine all of the State's witnesses. App. Vol. II, 6- Vol. V. 220. In managing the trial regarding this joint defense, the court imposed certain limitations with respect to examination of defense witnesses. App. Vol. V, 239, 253, 254. The court explained that the defense will not get to conduct three separate direct examinations of the same witness. App. Vol. V, 239, 253, 254. "[O]ne counsel will take [a] witness . . . then before he finishes . . . he'll ask co-counsel, you got any questions you want me to ask . . . and if not, then the witness goes to [the State]." App.

Vol. V, 239. Counsel for co-defendant Julie Browning responded that this process "makes perfect sense" and there was no objection from any defense counsel. App. Vol. V, 239. Petitioner was permitted to object freely to the State's questioning of defense witnesses regardless of which defense counsel performed the direct examination. App. Vol. V, 291-292, Vol VI, 41. Petitioner's counsel conducted the direct examination of the following defense witness: Bryanna Baker, App. Vol. V, 291, Treva Grose, App. Vol. VI. 45, Josie Peck, App. Vol. VI, 64, Donna Jaber, App. Vol.VI, 82, Michael Castle, App. Vol. VI, 205, and Renee Cannon, App. Vol. VI, 219. Petitioner's counsel also conferred with all other defense counsel during the questioning of Donna Jaber before resuming the direct examination. App. Vol. VI, 94. Petitioner did not object to the release of the witness Lynia Castle, and did not reserve her right to recall this witness for further questioning, App Vol. VI, 290, nor reserve the right to recall Issa Jaber, App. Vol. VI, 257, James Cannon, App. Vol. VI, 23, Samantha Cannon, App. Vol. VI, 44, or Cyril Wecht, App. Vol. VI, 192.

The court permitted Petitioner the opportunity to conduct her own independent examination of the co-defendant testifying during the defense's case. App. Vol. VI, 296. During the testimony of co-defendant Julie Browning, Petitioner conferred with the other co-defendants' counsel prior to examining Mrs. Browning. App. Vol. VI. 296. After this conference with the other defense counsels, Petitioner asked only one question of Mrs. Browning, "Did you ever witness your sister [Petitioner] abuse [R.B.]?" App. Vol. VI, 296.

H. Verdict and Sentencing

The jury found Petitioner and her co-defendants guilty of Child Neglect Resulting in Death as contained in Count Two of the indictment, and not guilty of Death of a Child by a Parent, Guardian, Custodian, or other Person by Child Abuse contained in Count One. App. Vol. VII, 217. The court imposed the statutory designated sentence of not less than three nor more that fifteen

years in the state penitentiary for Petitioner's conviction of the felony offense, Child Neglect Resulting in Death, in its sentencing order dated August 21, 2018. App. Vol. I, 54. It is from this sentencing order that Petitioner now appeals.

SUMMARY OF THE ARGUMENT

Petitioner's claim that the circuit court erred by permitting the admission of "testimonial" statements over a defense objection pursuant to Petitioner's Confrontation Clause and due process rights is misplaced. Petitioner failed to offer any objections to the statements she claims were admitted in violation of her rights. Furthermore, Petitioner's arguments are conclusory in that Petitioner simply presumes the out-of-court statements meet the requirements to trigger the protections afforded by the Sixth Amendment, without the proper analysis or sufficient supporting circumstances. The circuit court committed no error in finding evidence of prior acts of abuse and neglect carried out by Petitioner and her 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 her co-defendants.

Petitioner's second assignment of error alleging that she was denied the opportunity to cross-examination her co-defendant who testified as part of the defense is without merit. Petitioner was afforded the opportunity to conduct cross-examination of all adverse witnesses called in the State's case-in-chief, and had the opportunity to independently examine a non-adverse co-defendant testifying as part of the defense. A circuit court has the discretion to impose reasonable limits with respect to the examination of witnesses. The court properly managed the trial to avoid wasting time and confusing the jury with three direct examinations of the same witnesses.

Petitioner was provided the unfettered ability to confer with the other defense counsels during the examination of mutual defense witnesses to conduct one joint direct examination.

Regarding Petitioner's third assignment of error, the circuit court did not abuse its discretion in finding evidence of prior acts of abuse and neglect by Petitioner and her co-defendants was intrinsic evidence and admissible as part of the *res gestae* of the charged offenses. The intrinsic evidence was not unfairly prejudicial, and was highly probative to illustrative to the jury the circumstances and complete story surrounding R.B.'s death.

Finally, Petitioner fails to assert any relevant authority or support for her contention that a jurisdictional determination is required to present prior acts as intrinsic evidence in a prosecution for properly charged criminal offenses. Intrinsic evidence is not a charged offense and not subject to a jurisdiction or venue determination. As these claims are wholly meritless, Petitioner cannot meet her burden of proof regarding any of the 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. Standard 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). 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 136 (2013) (internal quotation marks and citation 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 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)).

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).

As to Petitioner's claim regarding her 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). Petitioner's claim is also governed by the more general standard of review setting forth that "it is well settled that [a] 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).

II. The circuit court did not abuse its discretion by admitting R.B.'s out-of-court statements at trial, and the out-of-court statements made by Petitioner's co-defendants.

Petitioner's first assignment of error alleges that out-of-court statements made by both R.B. and Petitioner's co-defendants should not have been admitted at trial because the statements are testimonial hearsay. Pet'r's Br. 12. Petitioner argues the admission of these statements was permitted despite objections from the defense alleging a confrontation and due process violation. Pet'r's Br. 12. The record demonstrates that Petitioner was afforded all of her rights under the Confrontation Clause; therefore, no error was committed.

a. Out-of-court statements made by R.B. to Carrie Ciliberti

Petitioner claims the out-of-court statement made by R.B. to Ms. Ciliberti about R.B.'s bruises stating, "I'm not allowed to answer you; you have to call my daddy and ask him," App. Vol. V, 84, is testimonial hearsay and its admission at trial violated Petitioner's confrontation rights under the Sixth Amendment of the United States Constitution. Pet'r's Br. 13. Petitioner also asserts R.B.'s statement to Ms. Ciliberti that she was not permitted to keep the shirt Ms. Ciliberti gave her, and Ms. Ciliberti was not permitted to give R.B. clothes is testimonial hearsay that was improperly admitted.[2] Pet'r's Br. 16. Further, Petitioner asserts the testimony of B.M. as to R.B.'s out-of-court statement that she wanted to go the hospital, "[R.B.] said she wanted to [go to the hospital], yes," Pet'r's Br. 13, is testimonial hearsay and was improperly admitted over a defense

[2] This statement by R.B. is alleged under the heading in Petitioner's brief entitled "Statements of Co-defendants used at trial" as an out-of-court statement of co-defendant Marty Browning. Upon further scrutiny, however, it is actually a statement made by R.B. and Respondent will address it as such in this section.

confrontation clause objection. Pet'r's Br. 14. Petitioner cites one case, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006), to support her argument; however, the *Mechling* decision does not support Petitioner's claim, and is not applicable to the case at hand.

Petitioner misunderstands the application of the *Mechling* holding regarding the admission of a non-testifying declarant's statements. Relying on the United States Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004), this Court recognized that out-of-court statements of a non-testifying witness that are "testimonial" in nature are not admissible against a defendant unless the witness is deemed unavailable, and the defendant had a prior opportunity to cross-examine the unavailable witness. *Martin,* 2013 WL 5676628, at *2. This Court explained that "only 'testimonial statements' cause the declarant to be a 'witness' subject to the constraints of the Confrontation Clause." *Mechling,* 219 W. Va. at 373, 633 S.E.2d at 318. The *Mechling* Court went on to make clear that "[n]on-testimonial statements by an unavailable declarant, on the other hand, are not precluded from use by the Confrontation Clause." *Mechling,* 219 W. Va. at 373, 633 S.E.2d at 318.

While *Crawford* did not expressly establish a bright line definition of a testimonial statement, subsequent cases have formed the parameters for defining the necessary analysis in this determination. This Court also relied on the United States Supreme Court's opinion in *Davis v. Washington*, 547 U.S. 813 (2006), noting the narrowed parameters with respect to construing certain statements as testimonial or non-testimonial statements. *Mechling,* 219 W.Va. at 374, 633 S.E.2d 319. The *Davis* Court specifically refined its holding in *Crawford* to explain that the Confrontation Clause only prohibits the use of a statement made during "interrogations [by law enforcement] solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator." *Davis*, 547 U.S. at 826. Applying this guidance to the facts

presented in *Mechling*, this Court explained that *Davis* explicitly stated that "[w]itness statements made to law enforcement officers that are comparable to those that would be given in a courtroom—that is, statements about 'what happened'—are testimonial statements . . . ." *Mechling*, 219 W. Va. at 376, 633 S.E.2d at 321. The *Mechling* Court pared down *Crawford* and *Davis* into three applicable points. *Id.* at 376, 633 S.E.2d at 321. First, a statement would be testimonial if it is "a statement that is made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* Second, "a witness's statement taken by a law enforcement officer in the course of an interrogation . . . when . . . there is no ongoing emergency" would qualify as a testimonial statement. *Id.* Third, "a court assessing whether a witness's out-of-court statement is 'testimonial' should focus more upon the witness statement, and less upon any interrogator's questions." *Id.* at 376-377, 633 S.E.2d at 321-322.

In further defining whether a particular statement is testimonial or not, the United States Supreme Court adopted what is known as the "primary purpose" test. *Ohio v. Clark*, 576 U.S. 237, 243-44 (2015). The primary purpose test requires courts to consider "all of the relevant circumstances" surrounding the statement, and 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).

In applying these guidelines for a "testimonial" determination in West Virginia, this Court explained in *Martin*, that the recorded statement of a defendant's accomplice during an undercover

drug purchase was not testimonial because "[t]here is no evidence that McCormick knew he was speaking with a government informant. Rather, the evidence supports that he believed he was speaking with a drug customer. Therefore, his statements are not testimonial." *Martin*, 2013 WL 5676628, at *3. The *Martin* Court further dispensed with the petitioner's argument suggesting that an analysis as to whether an out-of-court statement is "testimonial" should be viewed from petitioner's perspective, rather than the declarant's perspective, by stating "[t]his argument misconstrues the well-settled law on the Confrontation Clause". *Id.* at *4 n.2 (quoting *United States v. Udeozor,* 515 F.3d 260 (4th Cir.2008), holding that the "'common nucleus' of the 'core class' of testimonial statement is whether a reasonable person in the *declarant's position* would have expected his statement to be used at trial—that is, whether a *declarant* would have expected or intended to 'bear witness' against another in a later proceeding.") (emphasis added).

In the present case, R.B.'s out-of-court statement made to Ms. Ciliberti informing her that "I'm not allowed to answer you; you have to call my daddy and ask him," App. Vol. V, 84, and R.B.'s statement to Ms. Ciliberti that she was not permitted to give R.B. clothes anymore, App. Vol. V, 99, are not testimonial hearsay statements as contemplated by *Crawford*. In applying the first focus point established in *Mechling,* this Court must look to whether R.B., at the time she made the statement to Ms. Ciliberti, had the reasonable expectation her statement would be later used at trial. Petitioner incorrectly suggests that because Ms. Ciliberti had previously made a report to CPS expressing her concerns of abuse, Pet'r's Br. 13, this determination should focus on *Ms. Ciliberti's* perspective. The *Martin* and *Udeozar* holdings have expressly and unequivocally rejected this notion explaining it is the *unavailable declarant's perception* at the time the statement was given that is relevant. R.B. did not make this statement to law enforcement to explain how

she got the bruise nor to explain how she got them, and, thus, the second focus of *Mechling* is not satisfied.

In considering the third focus point in *Mechling* to "focus more upon the witness statement, and less upon any interrogator's questions," there is no evidence that R.B.'s statements were anything more than an innocent six-year-old's comments shared with her beloved teacher. Petitioner cannot demonstrate from the record that R.B. had any expectation whatsoever her disclosure to Ms. Ciliberti would be subsequently used at trial. While Petitioner relies heavily on *Mechling* to support her claim, the current facts differ greatly from the facts contained in *Mechling.* The witness in *Mechling* was the victim of domestic violence and did not testify at trial. The statement admitted was the victim's out-of-court statement to law enforcement officers who responded to the report of a domestic violence incident that had occurred. *Id.* Clearly the out-of-court statement in *Mechling* falls squarely into the category of 'testimonial' hearsay because it was given to law enforcement for the purpose of disclosing what happened after the incident occurred and offered at trial for the truth of the matter asserted. Because the relevant facts regarding the out-of-court statement in the current matter differ substantially from the facts in *Mechling,* the *Mechling* decision is not applicable to the instant case. Thus, R.B.'s out-of-court statements were not "testimonial" hearsay and did not violate Petitioner's Confrontation Clause rights.

To complete the admissibility analysis for out-of-court statements, "[t]he Court looks at whether the statements contained assertions, whether they are testimonial in nature, and whether they are being offered for the truth of the matter asserted." *Martin,* 2013 WL 5676628, at *2 (citing *State v. Waldron*, 228 W. Va. 577, 723 S.E.2d 402 (2012)). "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) (quoting *Estes v. State*, 249 P.3d 313, 316 (Alaska Ct. App. 2011)). "It is important to emphasize again that, aside from the testimonial versus 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.'" *Waldron*, 228 W. Va. at 581, 723 S.E.2d at 406 (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). In holding an accomplice's out-of-court statement was not hearsay, this Court in *Martin* explained "[w]hether McCormick's statements were true, i.e., that he was speaking with petitioner on the phone, and that the petitioner had marijuana, is irrelevant." *Martin*, 2013 WL 5676628, at *3. The *Martin* Court found the statement merely indicated the motivation for the accomplice to drive to petitioner's house. *Id.*

After a determination that R.B.'s statements are not "testimonial" in nature, this Court must then analyze whether the out-of-court statements are hearsay, whether they are admissible under an exception to the Rules Against Hearsay, or whether the out-of-court statements are, in fact, not hearsay. In the matter at hand, the statements of R.B. made after offering to show Ms. Ciliberti her booboos, then informing Ms. Ciliberti that any questions should be directed to R.B.'s father, and that her father said she was not permitted to give R.B. clothes anymore, do not qualify as hearsay. Whether R.B.'s statements to Ms. Ciliberti were true is irrelevant. The State did not present this evidence to prove that Marty Browning actually told R.B. these things; thus, it was not admitted for the truth of the matter asserted. It is only relevant to explain the numerous factors contributing to Ms. Ciliberti's concerns, coupled with her own observations of R.B. that motivated

her to make a report to CPS, and express her worry for R.B.'s wellbeing to the school Superintendent. Thus, it is important that it was *said* by R.B., not whether it is a true statement. Accordingly, R.B.'s statements to Ms. Ciliberti were not hearsay and were properly admitted.

b. B.M.'s testimony of R.B.'s out-of-court statements

Similarly, B.M.'s testimony that R.B. told Petitioner and co-defendant Julie Browning that she wanted to go to the hospital is not testimonial hearsay, and does not violate Petitioner's Confrontation Clause rights. The record demonstrates that R.B. had no expectation her pleas to Petitioner and her co-defendant requesting to go to the hospital would be later used at trial. R.B. was simply trying to impress upon Petitioner and her co-defendants that she was not "faking it," and was so sick she wanted to spend Christmas in the hospital. App. Vol.V, 178-181. Thus, R.B.'s out-of-court statement does not meet the definition of "testimonial" hearsay.

While R.B.'s out-of-court statement in this instance is hearsay because it was admitted for the truth of the matter asserted, this hearsay statement falls squarely within Rule 803(3) Exception to Hearsay as a "[t]hen-existing mental, emotional or physical condition." R.B. was desperately trying to impress upon Petitioner and the co-defendants the severity of her then existing grave physical condition, to no avail. Because R.B.'s statement comes under the firmly rooted hearsay exception in Rule 803(3), R.B.'s statement was properly admitted.

c. Out-of-court statements of co-defendant Marty Browning

Petitioner claims the testimony of Maria Parks recounting the out-of-court statement of Marty Browning in which he states to R.B. if she cries during her vaccinations that he will "punch the shit out of her other arm," App. Vol. III 181-188, was improperly admitted over a *Crawford* objection. Pet'r's Br. 16. Once again, Petitioner misunderstands the construct governing this out-of-court statement, as the statement is neither a testimonial statement, nor hearsay, and was

properly admitted. Similar to the analysis above for R.B.'s out-of-court statements to Ms. Ciliberti, the determination whether the application of *Crawford* applies to Marty Browning's out-of-court statement must first start with a determination of whether the statement was "testimonial."

In examining and applying the *Mechling* factors, the record does not demonstrate Marty Browning's statement was made with the expectation it would be later used at trial; nor was it given to law enforcement pursuant to an investigation, and no questions were asked prompting the statement. The statement was Mr. Browning's own self-initiated comment to R.B. Therefore, it is not testimonial in nature. Nor was the statement admitted for its truth as to whether he was going to punch R.B.'s arm. The statement was admitted to explain why Maria Parks made a notation in R.B.'s pediatric chart. Moreover, the statement is not hearsay pursuant to West Virginia Rules of Evidence Rule 801(d)(2)(A) where "the statement is offered against an opposing party. . . and was made by the party", and therefore, was properly admitted in the joint trial of all the defendants. *See United States v. Tolliver,* 454 F.3d 660 (7th Cir.2006) (holding in a joint trial that the admission of one of the co-defendant's statements "constitute admissions by a party-opponent, and, as such, those statements are, by definition, not hearsay under Federal Rule of Evidence 801(d)(2)(A)."). [3]

Petitioner alleges she was prejudiced by the admission of this statement because co-defendant Marty Browning did not testify; and therefore, she was not given the opportunity to "prove she had no knowledge of this event." Pet'r's Br. 16. Notwithstanding the fact that this statement is not hearsay and is properly admissible as demonstrated above, this assertion by Petitioner is completely unfounded. Marty Browning's comment to R.B. while at a pediatrician

[3] West Virginia Rules of Evidence Rule 801(d)(2)(A) is taken verbatim from the current federal rule. See W.Va. R. Evid. 801.

appointment was not an accusation against Petitioner, and therefore, is not prejudicial to Petitioner. Additionally, Petitioner had the opportunity to cross-examine Maria Parks to clarify Petitioner had no involvement, and expressly chose not to question Ms. Parks on this issue. App. Vol. IV, 189-195. In fact, Petitioner had the best opportunity to "prove she had no knowledge of the event" during her own testimony and chose not to address it. App. Vol VI, 316-348. Petitioner cannot now claim she was prejudiced by her own failure to capitalize on the opportunity to clarify this point. Thus, Marty Browning's out-of-court statement was properly admitted and did not violate Petitioner's rights.

Petitioner also complains that Marty Browning's out-of-court statement on December 20, 2018, as testified to by Richard Looney, was improperly admitted at trial. App. Vol. IV, 242-243. Once again, this out-of-court statement of Marty Browning is not hearsay as it was not admitted for the truth of the matter asserted against Petitioner. The statement does not implicate or mention Petitioner at all. Petitioner was provided ample opportunity to cross examine Mr. Looney to establish Petitioner was not part of, nor the subject of, the conversation. Petitioner chose not to utilize her cross-examination opportunity of Mr. Looney during the State's case. Nor did Petitioner ask questions of co-defendant Julie Browning regarding this conversation during Mrs. Browning's testimony, despite the fact that Mrs. Browning was the other participant in the phone conversation testified to by Mr. Looney. In addition, Petitioner, again, could have clarified this point during her own testimony if she felt it was important to do so. Petitioner did not even mention this issue in her own testimony. Similar to the statement of Marty Browning testified to by Maria Parks, this too is not hearsay pursuant to Rule 801(d)(2)(A), and properly admissible. *See Tolliver,* 454 F.3d 660.

d. Out-of-court Statements of Petitioner and Julie Browning

Petitioner further claims the out-of-court statements made by both Petitioner and Julie Browning discussing the need to take R.B. to the hospital were improperly admitted. Pet'r's Br. 17. Once again, these statements are admissible under Rule 801(d)(2)(A) as a statement by an opposing party, and are explicitly not hearsay. Petitioner had the opportunity to cross-examine B.M. to test the truthfulness of her testimony regarding these statements, and expressly chose not to do so. Further, Petitioner was given the opportunity to question Julie Browning, and chose to ask only one question. App. Vol VI, 296. Finally, Petitioner could have directly rebutted the truthfulness of these out-of-court statements during her own testimony and chose not to do so. Instead, Petitioner testified that she knew R.B. was sick but did not think it was an emergency. App. Vol. VI, 329. "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). Thus, Petitioner's rights were not violated, and the court did not abuse its discretion in permitting the admission of the co-defendants' out-of-court statements at trial. As such, Petitioner's argument fails.

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 co-defendant was unconstitutionally limited. Pet'r's Br. 18. Petitioner asserts she was prevented from cross-examining her co-defendant Julie Browning, and the circuit court's limitation of the examination to permit only direct examination questions violated her constitutional rights. Pet'r's Br. 19. Further, Petitioner claims she was denied effective assistance of counsel by not being permitted to conduct an independent examination of defense witnesses. Pet'r's Br. 22.

a. Examination of a Co-Defendant Defense Witness

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 means 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, 316 (1974). 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 *Pointer*, the United States Supreme Court of Appeals reiterated that the constitutional goal of a trial is fairness. *Pointer*, 380 U.S. 400, 405.

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." 475 U.S. 673, 679, (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam) (emphasis in original). The Fourth Circuit Court of Appeals' decision in *Crockett* 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." *Crockett*, 813 F.2d at 1313. "All the cases make clear that the trigger for the right of confrontation is an *incriminatory* statement." *Id.* at 1315. (emphasis added). This right of confrontation through cross-examination is not intended to permit a defendant to elicit friendly testimony from a non-hostile witness through leading questions. *Id.* 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.

The United States Supreme Court has also previously found that a trial court's decision preventing a defendant from cross-examining his non-accusing co-defendant did not violate any constitutional rights. *Nelson v. O'Neil*, 402 U.S. 622, 629 (1971). The *Nelson* decision clearly stands for the notion that the right to cross-examine a co-defendant is not triggered merely because the co-defendant testifies, or simply because an out-of-court statement was offered at trial. *Id.* Rather, specific criteria is necessary for a court to find that a violation occurred. *Id.*

As such, the case law detailing a defendant's right to confront his accuser in the form of cross-examination refers to the *incriminating* testimony of an *adverse* witness. In the instant case, the co-defendant witness, Julie Browning, was not called as an adverse witness to Petitioner. Mrs. Browning was called as a defense witness. Petitioner has failed to demonstrate any inconsistencies between Mrs. Browning and Petitioner's testimony, or anything that could reasonably be construed as incriminating toward Petitioner. More importantly, Petitioner has failed to point to or identify *what, specifically*, she wished to ask the witness, nor demonstrate that she was prevented from doing so. Petitioner was afforded the opportunity to independently question this co-defendant

witness; therefore, Petitioner's Confrontation Clause rights were not violated. After Mrs. Browning was examined by her own counsel, Petitioner was offered a fair and reasonable means to challenge the credibility and truthfulness of the witness, and chose not to utilize this opportunity. Rather, Petitioner conferred with the other co-defendants' counsel and Petitioner asked only one question of Mrs. Browning, "Did you ever witness your sister [Petitioner] abuse [R.B.]?" App. Vol. VI, 296. Julie Browning unequivocally answered, "No." App. Vol. VI, 296. Nor did Petitioner chose to rebut, disagree, or refute any of these facts during her own testimony which directly followed Mrs. Browning's testimony. Petitioner cannot now complain of her intentional decisions.

b. Direct Examination Limitations of Co-Defendant Witnesses

Throughout all pretrial proceedings and the joint trial, Petitioner and her co-defendants presented a "united front" by conducting their defense and trial strategy in a joint effort, and maintaining R.B.'s death was not the result of wrongdoing by any of them. Petitioner and her co-defendants expressly treated all motions as joint motions at the pretrial hearings, and defense counsel objected to evidence on each other's behalf, App. Vol. III. 182. None of Petitioner's co-defendants accused Petitioner of any wrongdoing, nor adversely affected or contradicted Petitioner's own testimony.

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). "[T]he 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). 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 *Rodoussakis*, 204 W. Va. 58, 511 S.E.2d 469).

"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 [sic] 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." *Id.* at 603, 476 S.E.2d at 550; *State v. Fields*, 225 W. Va. 753, 760, 696 S.E.2d 269, 276 (2010) ("a trial court always has inherent authority to regulate and control the proceedings before it and to protect the integrity of the judicial system.") (quoting *Clark v. Druckman,* 218 W.Va. 427, 435, 624 S.E.2d 864, 872 (2005)).

Here, Petitioner has failed to point to a specific rule or statutory violation in support of this assertion. Nor has Petitioner demonstrated *how* said violation prejudiced Petitioner in posing an unacceptable threat to a fair trial. Moreover, Petitioner's failure to cite how, *specifically*, the court's procedures caused actual or inherent prejudice is wholly insufficient. In other words,

Petitioner simply saying so, does not make it so. 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. Given that Petitioner's defense was presented as a coordinated and cooperative joint defense between all co-defendants, who shared all the same defense witnesses, the court properly managed the trial to avoid cumulative and repetitive questions of three direct examinations of the same witness that may confuse the jury. A.R. Vol. V, 239, 253, 254. Petitioner did not object to the circuit court's trial management, and in fact, co-defendant's Julie Browning's counsel indicated this "makes perfect sense." App. Vol. V, 239. "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." W. Va. R. Evid. 103(b).

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). As Petitioner fails to point to any relevant or felicitous authority to support this claim, Petitioner's argument must fail.

c. Ineffective Assistance of Counsel

Petitioner claims she was denied effective assistance of counsel by not being permitted to conduct an independent examination of defense witnesses. Pet'r's Br. 22 Notwithstanding the court's full discretion to exercise reasonable control over the mode and order of examining witnesses, and the absence of any abuse of discretion by the court in doing so, an ineffective assistance of counsel claim is not properly raised on a direct appeal. "In past cases, this Court has cautioned that '[i]neffective assistance claims raised on direct appeal are presumptively subject to dismissal.'" *State v. Woodson*, 222 W. Va. 607, 621, 671 S.E.2d 438, 452 (2008) (quoting *State v. Miller*, 197 W.Va. at 611, 476 S.E.2d at 558); *State ex rel. Daniel v. Legursky*, 195 W. Va. 314, 318 n.1, 465 S.E.2d 416, 420 n.1 (1995) ("Traditionally, ineffective assistance of counsel claims are not cognizable on direct appeal."); *see also State v. Martin R.*, No. 15 0580, 2016 WL 1456077, at *3 (W. Va. Apr. 12, 2016) (memorandum decision) (same); *State v. Brichner*, No. 14-0659, 2015 WL 1236005, at *2 (W. Va. Supreme Court, Mar. 16, 2015) (memorandum decision) ("As an initial matter, we observe that petitioner's ineffective assistance of counsel claims are not properly before this Court on a direct appeal."). Indeed, this Court has held that "[i]t is the extremely rare case when this Court will find ineffective assistance of counsel . . . on a direct appeal." Syl. Pt. 10, in part, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992).

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

Petitioner's third assignment of error claims the trial court erroneously ruled the State's evidence of other acts was admissible as intrinsic evidence, rather than prior bad acts pursuant to West Virginia Rules of Evidence Rule 404(b); and, as such, the court failed to conduct the proper

analysis for admissibility. Pet'r's Br. 23. Petitioner identifies the improperly admitted evidence as prior "evidence of abuse and neglect from Nicholas County, West Virginia". Pet'r's Br. 23.

As part of a circuit court's determination regarding the admissibility of other acts, "[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." *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))); *Harris*, 230 W.Va. at 721, 742 S.E.2d at 137 (quotation omitted). Thus, a Rule 404(b) analysis is only triggered *after* a finding is made that the anticipated evidence is in fact, extrinsic, and "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 and determining 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." *LaRock*, at 312 n. 29, 470 S.E.2d at 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).

Harris, 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. 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*, 928 P.2d 843 (Haw. 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)). "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, *Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469). 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. The circuit court went on the explain its ruling by stating,

> 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. In summarizing its findings as to the relevance of the evidence, the circuit court determined,

> 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.

R.B.'s official cause of death from necrotizing pneumonia cannot be fully explained by being viewed in a small vacuum. 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. The ongoing pattern of prior abuse and neglect was critical for the State to present a complete story explaining the relevant history behind Petitioner's final failure to exercise reasonable care ultimately leading to R.B's death. Petitioner's disregard of R.B.'s extreme weight loss down to the 2nd percentile resulting in R.B.'s fragile health, App. Vol. III, 153,) is a necessary precursor to demonstrate how R.B. became highly susceptible to infection. The expert testimony of numerous physicians informed the jury that R.B.'s physical health from ongoing caregiver neglect 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. and did not acknowledge R.B.'s condition to be an emergency. App. Vol. VI, 329. 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 R.B., 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 a complete picture of how R.B. died. These prior acts of abuse and neglect demonstrate Petitioner's ongoing 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.

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 its determination. 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; *see also 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 ongoing conduct 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.

V. The trial court did not lack jurisdiction to permit the admission of intrinsic evidence of prior acts occurring in another county. Jurisdictional and venue considerations only apply to charged criminal offenses, and have no application to uncharged intrinsic evidence.

Petitioner's fourth assignment of error claims her constitutional right to be tried where her charged criminal offenses occurred were violated when the court permitted the admission of

uncharged intrinsic prior acts occurring in another county to be introduced at Petitioner's trial. Pet'r's Br. 27. Despite the State's initial reliance on *State v. Dennis* in the lower court regarding venue and jurisdiction of a charged offense, and Petitioner's reliance on *Dennis* in her appeal brief, there is no requirement that prior uncharged acts of intrinsic evidence must have been conducted in the same county as the *charged* offenses being prosecuted to be properly admissible.

"Under the Constitution and laws of this state, a crime can be prosecuted and punished only within the state and county where the alleged offense was committed." *Id.,* (citation and internal quotation marks omitted). The *Dennis* facts are significantly distinguishable from the case at hand, as the *Dennis* case involved *charged* offenses that continued to be committed in two separate states, Ohio and West Virginia. *Id.* at 341, 607, S.E.2d 448. As Petitioner's claim is specific to *uncharged* offenses admitted as intrinsic evidence, the Court's decision in *Dennis* has no application to the current matter. Petitioner was not *charged* or *prosecuted* in Fayette County for any criminal offenses occurring in another county. The prior uncharged acts of abuse and neglect were admitted as intrinsic evidence, not *charged* offenses. Petitioner and her co-defendants were not being prosecuted for any acts identified as intrinsic evidence at trial, and were not subject to punishment with respect to any of the acts admitted as intrinsic evidence. These acts was merely presented to provide to the jury the context, setting, and circumstances leading up to R.B.'s death—the charged offense—which "is vitally important in many trials." *Old Chief,* 519 U.S. at 189. Moreover, once again, since the acts complained of are *uncharged* acts, Petitioner's assertion that Rule 8(a)(2) of the West Virginia Rules of Criminal Procedure governing mandatory joinder, and requiring all charged offenses arising out of the same act or transition be prosecuted in a single prosecution, is wholly inapplicable.

The circuit court does not need to establish "venue" or "jurisdiction" in order to properly admit evidence that is offered as *res gestae* and not serving as the basis of any criminal charges. Petitioner conflates the requirements of jurisdiction for criminal charges to cover prior bad act evidence; put simply, Petitioner is wrong. Petitioner has cited to no germane authority that would support the premise of her argument in this respect, and this court has never adopted a requirement as Petitioner suggests. Therefore, Petitioner's assertion is without merit.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court to affirm the order of the Fayette County Circuit Court as contained in the criminal action against Petitioner in case number 20-F-76.

Respectfully Submitted,
STATE OF WEST VIRGINIA,
Respondent,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

GAIL V. LIPSCOMB (W.Va. State Bar #7007)
Counsel for Respondent
Assistant Attorney General
Office of the Attorney General
Appellate Division
1900 Kanawha Blvd. East
State Capitol
Building 6, Suite 406
Charleston, WV 25305
Telephone: (304) 558-5830
Fax: (304) 558-5833
Email: *Gail.V.Lipscomb@wvago.gov*

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-719

STATE OF WEST VIRGINIA,
Respondent,,

v.

SHERIE M. TITCHENELL
Petitioner.

CERTIFICATE OF SERVICE

I, Gail V. Lipscomb, do hereby certify that on the 24th day of April 2023, I served a true and accurate copy of the foregoing ***"Respondent's Brief"*** on the below-listed individuals *via* the West Virginia Supreme Court of Appeals E-filing System, File & ServeXpress, pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure; and further, a courtesy copy was mailed through the Unites States mail, postage prepaid, to the following at the addresses below:

Evan J. Dove, Esq.
Clay Law Firm, PLLC
P.O. Box 746
Fayetteville, WV 25840
evandove@paulclaylaw.com

Gail V. Lipscomb (W.Va. State Bar No. 7007)
Assistant Attorney General