IN THE CIRCUIT COURT OF [*county*] COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,

v. [*case number*]

Hon. [*name*]

[*name-all caps*],

 Defendant.

DEFENDANT’S INSTRUCTION NO. \_\_\_\_

 Count \_\_ of the indictment charges the defendant with Third Offense Domestic Violence.

You may return one of three verdicts under this Count of the indictment:

(1) guilty of Third Offense Domestic Violence;

(2) guilty of Domestic Battery or

(3) not guilty.

 Third Offense Domestic Violence occurs when a family or household member commits either Domestic Assault or Domestic Battery, having been previously twice convicted of Domestic Assault or Domestic Battery or other predicate offense, [insert predicate offense under W. Va. Code §§ 61–2–9(b), 61–2–9(c), or 61–2–14g(a), where the victim was a family or household member], specifically, [insert description of offense]; or having previously been granted a period of pretrial diversion pursuant to W. Va. Code § 61–11–22 for a violation of W. Va. Code §§ 61–2–28(a), 61–2–28(b), 61–2–9(b) or (c), or 61–2–14g(a)], specifically, [insert particular offense at issue], where such third Domestic Assault or Domestic Battery occurs within ten years of the prior convictions.

 Domestic Battery occurs when a family or household member unlawfully and intentionally makes physical contact with force capable of causing physical pain or injury to another family or household member, or unlawfully and intentionally causes physical harm to another family or household member.

 Domestic Assault occurs when a family or household member unlawfully attempts to use force capable of causing physical pain or injury against another family or household member or unlawfully commits an act which places another family or household member in reasonable apprehension of immediately suffering physical pain or injury.

 “Family member” or “Household member” means a current or former spouse, a current or former sexual or intimate partner, a person with whom the defendant has a child in common, a person with whom the defendant cohabits or has cohabited, a parent or guardian, the defendant’s child or ward, or a member of the defendant’s household at the time of the offense.

 The burden is on the State to prove the defendant’s guilt beyond a reasonable doubt and the defendant is not required to prove [himself] [herself] innocent. [He] [She] is presumed by the law to be innocent of this charge and this presumption remains with [him] [her] throughout the entire trial.

 Before the defendant can be convicted of Third Offense Domestic Violence the State must overcome the presumption that the defendant is innocent and prove beyond a reasonable doubt that:

1. the defendant, -

2. in [insert county] County, West Virginia,

3. on or about the \_\_ day of [insert month], [insert year],

4. unlawfully and intentionally,

5. {made physical contact with force capable of causing physical pain or injury to the person of [insert name(s) of victim(s)]} {caused physical harm to the person of [insert name(s) of victim(s)]}

6. who was a family or household member,

7. of which family or household the defendant was also a member,

8. and on the \_\_ day of [insert month], [insert year],

9. the defendant was previously {convicted of Domestic [Battery] [Assault] {a violation of [61–2–9(b)] [61–2–9(c)] [61–2–14g(a)]} {given a Pretrial Diversion based upon a charge of [Domestic Battery] [Domestic Assault] [insert other predicate offense ]}

10. and on the \_\_ day of [insert month], [insert year],

11. the defendant was previously {convicted of Domestic [Battery] [Assault] {a violation of [61–2–9(b)] [61–2–9(c)] [61–2–14g(a)]} {given a Pretrial Diversion based upon a charge of [Domestic Battery] [Domestic Assault] [insert other predicate offense ]} on the \_\_ day of [insert month], [insert year],

12. and the previous convictions were within ten (10) years of the current violation.

 If, after impartially considering, weighing and comparing all the evidence (that of both the State and the defendant), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find the defendant guilty of Third Offense Domestic Violence as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the defendant not guilty (and deliberate on the lesser included offense of Domestic Battery).

 Before the defendant can be convicted of Domestic Battery, the State must overcome the presumption that the defendant is innocent and prove to your satisfaction beyond a reasonable doubt that:

1. the defendant,

2. in [insert county] County, West Virginia,

3. on or about the \_\_ day of [insert month], [insert year],

4. unlawfully and intentionally

5. {made physical contact capable of causing physical pain or injury to the person of [insert name(s) of victim(s)]} {caused physical harm to the person of [insert name(s) of victim(s)]},

6. who was a family or household member,

7. of which family or household the defendant was also a member.

 If, after impartially considering, weighing and comparing all the evidence (that of both the State and the defendant), you are convinced beyond a reasonable doubt of the truth of the charge as to each of these elements, you may find defendant guilty of Domestic Battery as charged. If you have a reasonable doubt of the truth of the charge as to any one or more of these elements, you shall find the defendant not guilty.

GIVEN:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

REFUSED:\_\_\_\_\_\_\_\_\_\_\_\_\_

MODIFIED:\_\_\_\_\_\_\_\_\_\_\_\_

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 JUDGE