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NO. 32978

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

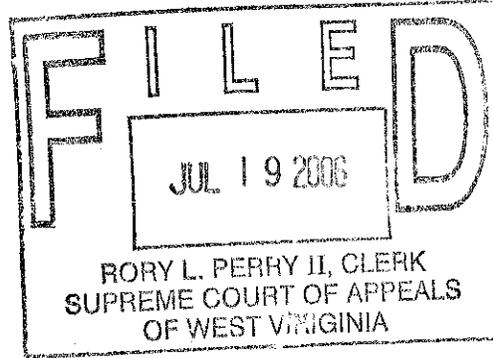
STATE OF WEST VIRGINIA,

*Appellee,*

v.

ERNEST JOHNSON,

*Appellant.*



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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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I.

STATEMENT OF THE CASE

This is an appeal by Ernest Johnson (“Appellant”) from the September 12, 2005, order of the Circuit Court of Cabell County (Ferguson, J.) sentencing him to life with mercy upon his conviction for Second Degree Robbery (a lesser-included offense of First Degree Robbery), and as a recidivist under West Virginia Code § 61-11-18.

II.

STATEMENT OF FACTS

At approximately 9:00, on the evening of June 21, 2002, the Appellant and his co-defendant, Allen Myers, robbed a convenience store on Norway Avenue in southeast Huntington. (Tr. 52, 62, 125.) The Appellant does not contest that he was present when the robbery occurred. (Tr. 35.) At trial the store clerk Charles Adams described what happened:

A: Okay, the [Appellant] – well, the other – Allen Myers, he said they needed – he needed change for a Twenty, and he reached into – he was reaching into his sock looking for it. And then he – then he looked up at me and he said, “You know what’s up. [The Appellant] has got a gun.” And then the defendant come running back at me. He said, “Give me all of the money now.”

Q: The defendant said that?

A: The defendant said that, yes, sir.

(Tr. 64.)

Q: Well, where – did he present a gun?

A: No. He didn’t. He never showed it.

....

A: He had his hand in his pocket like there was one, but I never –

....

Q: [The Appellant] had his hand in [his pocket] like this. (Demonstrating)

MR. MARTORELLA: Let the record show he is putting his hand in his pocket.

THE COURT: Right pocket.

MR. MARTORELLA: Right pocket. Okay.

BY MR. MARTORELLA:

Q: Okay. And while he had his hand in his right pocket he said he had a gun?

A: Yeah.

(Tr. 67-68.)

Mr. Adams opened the till and handed the Appellant \$200.00. (Tr. 68-69.) The Appellant then ordered him to disconnect his phone, and take the video surveillance tape from the machine

mounted in his office. (Tr. 69-70.) When the clerk told the Appellant that he did not have access to the tape, the Appellant threatened to kill him. (Tr. 69.) After several unsuccessful attempts to retrieve the tape, the Appellant and his co-defendant left the store. The State played the store surveillance tape to the jury and showed them still photos taken from it. (Tr. 74-75.) The jury identified the Appellant from the State's evidence.

Two days after the robbery the Appellant gave Huntington Police Detective Chris Sperry a voluntary statement in which he claimed that he had accompanied his co-defendant to the Marathon Station to break a twenty. Once they got there Mr. Myers robbed the store. (Tr. 157, 159, 160.) The Appellant admitted ordering the clerk to retrieve the surveillance tape. (Tr. 158-59.) Although he claimed that he did not participate in the robbery, he didn't want anyone to know he was in the store when the co-defendant robbed it. (Tr. 158.)

In addition to the store clerk's testimony, the State presented the testimony of the Appellant's co-defendant, Allen Myers. Mr. Myers had pled guilty to first-degree robbery--his name appears on the same indictment as the Appellant's--with a promise from the State that it would recommend forestry camp if Mr. Myers testified for the State at the Appellant's trial. (Tr. 250.) The State also agreed not to charge the co-defendant with an unrelated robbery which had occurred a week earlier. (Tr. 252.)

The defense spent the bulk of its time attacking the victim's credibility. Based on the testimony of the co-defendant, a convicted felon, diagnosed as homicidal and suicidal, who was dating the Appellant's cousin and appeared in court under the influence, and hearsay related to the jury by the Appellant's private investigator, defense counsel portrayed Mr. Adams as a "crack head"

who had staged the robbery with the co-defendant in order to obtain money for drugs. (Tr. 327, 336, 348, 371-372, 377-385, 386-388.)

After little more than an hour, the jury found the Appellant guilty of Second Degree Robbery after which the State announced its intent to file an information charging the Appellant as a recidivist under West Virginia Code § 61-11-19. (Tr. 592, 595.)

The State called two witnesses at the Appellant's recidivist hearing. Former Ascension Parish, Louisiana, Detective James Groody, Jr., introduced certified copies of a 1996 Bill of Information charging the Appellant with simple burglary, a copy of a guilty plea agreement signed by Ernest Johnson, and a fingerprint card. (Recid. Tr. 44-45; R. 181-90.) According to the documents Ernest Johnson was convicted of simple burglary and sentenced to three years suspended with time served. (*Id.* at 44.) Detective Groody testified that simple burglary is a felony in Louisiana. (*Id.* at 45.)

Louisiana Police Officer Mark Jones identified the Appellant, and testified that he had pled no contest to the felony charge of Indecent Behavior with a Juvenile, a lesser-included offense of Sexual Battery. (Recid. Tr. 70; R. 191-95.) The victim was 13. (Recid. Tr. 74.) Officer Jones was the arresting officer, but could not say for sure whether he was present when the Appellant entered his plea. (*Id.* at 71, 75.) The Appellant received probation.

The State then called Huntington Police Officer David Castle, an expert in the field of fingerprint comparison and identification. (Recid. Tr. 104-105.) After comparing the fingerprint card attached to the certified records previously introduced by Detective Groody with the Appellant's fingerprint card on file with the Huntington Police Department, Officer Castle opined that the prints matched. (Recid. Tr. 106-07.)

After deliberating less than 15 minutes the jury found that the Appellant was the same Ernest Johnson convicted of Simple Burglary of a Dwelling on December 16, 1996, and Indecent Behavior with a Juvenile on June 17, 1997. (Recid. Tr. 141-42.)

Upon consideration of arguments of counsel, and based on the jury's findings the trial court sentenced the Appellant to life with mercy. (Recid. Tr. 150.)

### III.

#### PROCEDURAL HISTORY

The Appellant was originally charged by criminal complaint signed by Detective Sperry and presented to Cabell County Magistrate Darrell Black on June 26, 2002. (R. 2.) The Appellant, by counsel, waived his preliminary hearing. (R. 7.) The Cabell County Grand Jury returned an indictment charging the Appellant and his co-defendant with one count of First Degree Robbery on September 10, 2002. (R. 14.)

The indictment read:

That on or about the 21st day of June, 2002, in the County of Cabell, State of West Virginia, ERNEST JOHNSON AND ALLEN MYERS jointly committed the offense of "1ST DEGREE ROBBERY" by unlawfully and feloniously robbing Charles Adams by using the threat of deadly force by threatening the presentment and use of a firearm and did steal money belonging to Marathon Gas Station, lawfully in care, custody and control of Charles Adams by virtue of his employment with Marathon Gas Station, against his will and against the peace and dignity of the State.

The Appellant's trial began on May 1, 2003. The trial court denied the Appellant's motions for Judgment of Acquittal as to the First Degree Robbery charge at the close of the State's evidence and at the close of trial. (Tr. 316-20; 494-95.) *See* W. Va. R. Crim. P. 29. After instruction on the elements of First Degree Robbery, Second Degree Robbery, and Petit Larceny, the jury convicted the Appellant of Second Degree Robbery.

The State filed its recidivist information on May 14, 2003. (R. 177.) The Appellant, by counsel, filed his notice of intent to appeal his conviction and motion for a grand jury transcript on July 2, 2003. (R. 197-98, 203-05.) Counsel filed "Defendant's Motion for Acquittal" on August 6, 2003, and a Motion for Arrest of Judgment on August 11, 2003. (R. 212-13, 218-19.) By order entered January 13, 2004, the court denied Appellant's Motion for Arrest of Judgment. (R. 267.)

After a one-day trial occurring on April 26, 2004, the jury found that the Appellant was the same individual who was convicted of two prior felonies in Louisiana. By order entered April 29, 2004, the court sentenced the Appellant to life with mercy. (R. 295.)

The Appellant, by counsel, filed a Motion to Dismiss/Set Aside Judgment in Recidivist Trial on May 14, 2004. The court convened an evidentiary hearing on the motion and by order dated October 18, 2004, denied the Appellant's motion to dismiss. (R. 317-22.)

The Appellant was re-sentenced for purposes of appeal on September 13, 2005. (R. 328-29.)

#### IV.

#### ARGUMENT

##### **A. THE APPELLANT HAS FAILED TO PROVE THAT THE INDICTMENT CONSTITUTED PLAIN ERROR.**

The Appellant's first three assignments of error address the sufficiency of the indictment. The Appellant claims that the indictment was fatally defective because it omitted an essential element of the offense, that the State constructively amended the indictment during trial, and that the indictment failed to allege facts sufficient to grant the trial court subject matter jurisdiction over the Appellant's case.

The Appellee concedes that the indictment misstates an essential element of First Degree Robbery--presentment of a firearm--but this defect does not require that this Court reverse the conviction. Because the Appellant failed to raise this issue until after his trial, this Court will liberally construe the indictment. The indictment includes all of the elements of Second Degree Robbery. Since the Appellant was convicted of this lesser-included offense, and has not alleged prejudice or unfair surprise, the jury's verdict rendered any error in the charging document harmless. Nor did the State constructively amend the indictment: An indictment for a greater offense necessarily encompasses all lesser-included offenses. Additionally, the Appellant's jurisdictional argument does not reflect the present state of the law. *See United States v. Cotton*, 535 U.S. 625 (2002).

The Appellant is asking this Court to overturn his conviction and sentence because of a clerical error without any evidence of prejudice or unfairness. He claims that the error itself merits reversal of his conviction: That is not the state of the law. A properly instructed petit jury convicted the Appellant of Second Degree Robbery--an offense clearly set forth in the indictment. After a trial in which, with one exception, even the Appellant failed to find fault, the Appellant is asking this Court to throw out this verdict based on a document which had no impact on the outcome of his trial, and to adopt an inflexible, bright-line rule of law not justified by precedent.

A decision by this Court adopting the Appellant's position would exalt form over substance.

1. **The Standard of Review.**

"Generally, the sufficiency of an indictment is reviewed *de novo*. An indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by practical rather than technical considerations." Syl. pt. 2, *State v. Palmer*, 210 W. Va. 372, 557

S.E.2d 779 (2001). “An indictment . . . for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based.” Syl. pt. 3, *State v. Hall*, 172 W. Va. 138, 304 S.E.2d 43 (1983) (citations omitted).

The plain error test, which applies when a defendant does not preserve an objection below, requires an appellate court to disregard errors that do not affect a defendant’s substantial rights. To prevail under this standard of review the Appellant must prove that there is an error, that is plain, and that affects substantial rights. Syl. pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). An error affects substantial rights only if “the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect.” Syl. pt. 7, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996); *Johnson v. United States*, 520 U.S. 461, 467 (1997); *See also* W. Va. R. Crim. P. 52(b).

This Court does not invoke the plain error doctrine lightly. Even if the Court finds plain error which affected the Appellant’s substantial rights, it will only reverse the conviction when there has been a “miscarriage of justice” or if the error “seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings.” *LaRock* (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993)); *see* Syl. pt. 4, in part, *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988) (“However, the [plain error] doctrine is to be used *sparingly* and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.”) (emphasis added).

2. **Discussion.**

In Syl. pt. 1, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996), this Court held that, absent a timely objection, it construes indictments liberally:

Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure requires that a defendant must raise any objection to an indictment prior to trial. Although a challenge to a defective indictment is never waived, this Court literally will construe an indictment in favor of validity where a defendant fails timely to challenge its sufficiency. Without objection, the indictment should be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense under West Virginia law or for which the defendant was convicted.

*See also* W. Va. R. Crim. P. 12(b)(2) (defenses and objections based on defects in the indictment must be raised prior to trial); W. Va. R. Crim. P. 12(f) (“Failure by party to raise defenses or objections . . . which must be made prior to trial . . . may constitute waiver thereof, . . .”); *State v. Palmer*, 210 W. Va. 372, 376, 557 S.E.2d 779, 783 (2001) (“The purpose behind this rule is to prevent a criminal defendant from ‘sandbagging’ or deliberately foregoing raising an objection to an indictment so that the issue may later be used as a means of obtaining a new trial following conviction.”).<sup>1</sup>

The Appellant attempts to skirt the timeliness issue by arguing that the State knew about the defective indictment before trial. Admittedly counsel for the State knew that the indictment contained a clerical error. Before submitting the case to the Grand Jury he noted the error and correctly instructed the Grand Jury on the elements of First Degree Robbery. (Grand Jury Tr. 3-4.) At trial Appellant’s counsel moved for a judgment of acquittal at the close of the State’s case, and

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<sup>1</sup>A defendant may raise a post-trial challenge to the legality of a sentence resulting from a conviction initiated by a faulty indictment under W. Va. R. Crim. P. 35(a). *State v. Palmer*, 210 W. Va. at 375, 557 S.E.2d at 782 (case remanded for resentencing as misdemeanor under Rule 35(a) when indictment failed to list all elements of felony offense).

before the case was submitted to the jury. This motion focused on the evidence adduced at trial, not on the sufficiency of the indictment. *See State v. Rogers*, 209 W. Va. 348, 355, 547 S.E.2d 910, 917 (2001) (“The purpose of a motion for judgment of acquittal . . . is to afford a criminal defendant an opportunity to end the prosecution if there is insufficient evidence to prove that a crime has been committed. . . . The relevant inquiry when a motion for a judgment of acquittal is made is whether the evidence is sufficient to support a conviction of the crime charged.”) The Appellant did not challenge the sufficiency of the indictment until he filed an untimely Motion for Arrest of Judgment.

Most constitutional errors may be harmless, *Neder v. United States*, 527 U.S. 1, 8 (1999), and when the defendant fails to raise an objection below, the more stringent plain error review applies. *See Johnson v. United States*, 520 U.S. at 465-67. In *United States v. Cotton*, *supra*, the Supreme Court squarely rejected the lower court’s “bright-line” approach, ruling that failure to allege an essential element in an indictment, if not objected to at trial, does not constitute plain error *per se*.

In *Cotton* the government charged the defendant with running a large-scale drug distribution ring. The prosecution failed to allege the weight of the drugs in the indictment, and did not submit the issue to the jury. The United States Supreme Court then decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Under *Apprendi* the weight of the drugs sold potentially enhanced the defendant’s maximum sentence; therefore, the government was required to allege this fact in its indictment and submit it to the jury.<sup>2</sup> Because *Apprendi* was decided after the court sentenced the defendant he did not object to the indictment until after his sentencing. The lower court vacated his enhanced

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<sup>2</sup>*See Apprendi v. New Jersey*, 530 U.S. at 490 (“[O]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”). In federal prosecutions such enhancements are the “functional equivalent of an element of a greater offense than the one covered by the jury’s guilty verdict” and must be charged in the indictment. *Id.* at 476, 494 n.19.

sentence ruling “because an indictment setting forth all the essential elements of an offense is both mandatory and jurisdictional . . . a court is without jurisdiction to . . . impose a sentence for an offense not charged in the indictment.” *Cotton*, 535 U.S. at 629.

The Supreme Court reversed, holding that omission of a sentencing factor under *Apprendi* did not justify vacating the defendant’s sentence. The Court analogized the case to its decision in *Johnson v. United States, supra*, in which it had held that, in the face of overwhelming evidence, the trial court’s failure to instruct the jury on an element of an offense did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings under Fed. R. Crim. P. 52(b). The Court rejected the defendant’s argument that the indictment constituted a *per se* violation of his rights under the Grand Jury Clause of the Fifth Amendment:

Respondents emphasize that the Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts on a check of prosecutorial power. No doubt that is true. But that is surely no less true of the Sixth Amendment right to a petit jury which, unlike the grand jury, must find guilt beyond a reasonable doubt. The important role of the petit jury did not, however, prevent us in *Johnson* from applying the longstanding rule “that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make a timely assertion of the right  
.....

*Cotton*, 535 U.S. at 634 (citations omitted).

In the case at bar there is no evidence that the indictment “seriously affected the fairness, integrity or public reputation of the judicial proceedings.” Syl. pt. 7, *State v. Miller*, 194 W. Va. at 7, 459 S.E.2d at 118. The Appellant was convicted of Second Degree Robbery, an offense clearly set forth in the indictment. The jury’s verdict rendered the indictment’s defect harmless. Indeed, even if the jury had convicted the Appellant of First Degree Robbery, the remedy would be a remand for resentencing, not an outright dismissal. *See State v. Palmer*, 210 W. Va. at 375, 557 S.E.2d at

782 (case remanded for resentencing as misdemeanor when indictment failed to list all elements of felony offense).

The record does not suggest that the indictment affected the outcome of the trial. It was the Appellant who requested instructions on Second Degree Robbery and Petit Larceny. After being properly instructed by the trial court the jury found him guilty of Second Degree Robbery. The Appellant does not claim that his ability to mount a defense was prejudiced or that the State's theory of the case unfairly surprised him. His defense strategy did not focus on the elements of First and Second Degree Robbery. Instead, he attacked the victim claiming the robbery was staged. He would have mounted this same defense no matter what the charges.

Nor can he claim that he was not on notice as to the nature of the State's case. The State provided him with voluminous pre-trial discovery including a copy of a police report describing a statement by the store clerk: "[The clerk] provided a statement that they had asked for change and after he opened the register to provide the change one of the males stated something to the fact that they had a gun and stated, 'that you know the drill.'" (R. 24.) In a second narrative Huntington Police Officer Randy Charlton states,

"The complainant stated that on 6/21/02 at approximately 2059 hours the listed suspects robbed the Marathon Store at 145 Norway Avenue. The complainant stated that Suspect 1 came to the store and stated, 'You know the drill, we've got a gun. Give me the f\*\*\*ing money.' The suspects then backed the complainant back inside the store, and the complainant gave them an undisclosed amount of money."

(R. 33.)

Clearly, defense counsel understood the nature of the charges. Before trial he filed "Defendant's Motion for Lesser Included Offense Jury Instruction" requesting instructions on the

elements of non-aggravated robbery and simple larceny. He also raised this issue during a pre-trial motion hearing. (R. 108; 4/30/03 Hr'g. Tr. 22-23.)

The Appellant cannot claim that the indictment failed to protect him against re-trial based on the same set of facts. Syl. pt. 1, in part, *State v. Furner*, 161 W. Va. 680, 245 S.E.2d 618 (1979) (An indictment is sufficient if it permits a defendant to plead his conviction as a bar to later prosecution for the same offense.). The indictment clearly states that on June 21, 2002, the Appellant, by using the threat of deadly force, robbed a Marathon Gas Station in Cabell County, West Virginia, and stole money in the "care, custody and control of [the store clerk] Charles Adams." (R. 4.)

The State did not constructively amend the indictment. "An indictment is constructively amended when the proof at trial broadens the basis of conviction beyond that charged in an indictment." *United States v. Patino*, 962 F.2d 263, 265 (2d. Cir. 1992). The facts adduced at trial were the same facts alleged in the indictment. After hearing the evidence, the jury convicted him of Second Degree Robbery, a lesser-included offense of First Degree Robbery. (Tr. 521-26, 538-39.) A defendant may be tried and convicted on grounds narrower than those set forth in the indictment. *See United States v. Miller*, 417 U.S. 130, 136 (1985) ("As long as the crime and elements of the offense that sustain the conviction are fully and clearly set out in the indictment, the right to a grand jury is not normally violated by the fact that the indictment alleges more crimes, or other means of committing the same crime.").

The trial court denied the Appellant's motion for a judgment of acquittal twice, ruling that the presentment issue was a question of fact for the jury. It properly instructed the jury that they

could not convict the Appellant of First Degree Robbery unless the State proved beyond a reasonable doubt that the defendant had presented a firearm. (Tr. 537.)

The Appellant also argues that the indictment's failure to allege "presentment of a firearm" deprived the trial court of subject matter jurisdiction. This argument does not reflect the current state of the law. From the late nineteenth century until 2002, the United States Supreme Court followed a strict "jurisdictional" view, meaning that an indictment which failed to allege all of the elements of an offense did not confer subject matter jurisdiction on the trial court. *See Ex Parte Bain*, 121 U.S. 1 (1887), *overruled by United States v. Cotton*, 535 U.S. 625 (2002). Thus, any judgment rendered by that court was subject to attack at any point in the proceeding. *Cotton* overruled *Bain*, noting that "*Bain's* elastic concept of jurisdiction" was the product of a time when the Court could only reverse a criminal conviction if the trial court lacked jurisdiction. Given the changes in law, *Bain's* expansive interpretation of jurisdiction "is not what the term means today, i.e, the Court's statutory or constitutional power to adjudicate the case[.]" and that "insofar as it held that a defective indictment deprives the court of jurisdiction, *Bain* is overruled." *Cotton*, 535 U.S. at 630.

The West Virginia Constitution provides, "Circuit courts shall have original and general jurisdiction of . . . all crimes and misdemeanors." W. Va. Const. art. 8, § 6; *see also* W. Va. Code § 51-2-2. "In the context of a criminal case, jurisdiction involves the inherent power of the court to decide a criminal case" *State v. Dennis*, 216 W. Va. 331, 343, 607 S.E.2d 437, 449 (2004). A defendant seeking to appeal his conviction may file a petition with the West Virginia Supreme Court of Appeals. If he fails, he may pursue post-conviction relief. Given the availability and broad scope of review in this State, *Cotton's* rejection of *Bain's* "expansive" interpretation of "jurisdiction" is substantially persuasive. Failure to allege an element of an offense in the charging instrument goes

to the merits of the case, not to “the inherent power of the [circuit] court to decide a criminal case.”

These powers are set forth in the State Constitution, the paramount law of this State.

Therefore, the Appellant’s conviction should not be reversed on these grounds. This Court should hold that any errors in the charging document do not rise to the level of plain error, and that the trial court retained jurisdiction over the Appellant’s case, notwithstanding these errors.

**B. THE APPELLANT HAS NOT PRESENTED EVIDENCE SUGGESTING THAT THE STATE VIOLATED THE PROMPT PRESENTMENT RULE.**

The Appellant next argues that his pre-trial statement was obtained in violation of the “prompt presentment” rule. During an *in-camera* hearing the arresting officer testified that he took a statement from the Appellant after he had arrested him, but before he had taken him before a magistrate.

The Appellant has failed to make out a violation of the “prompt presentment” rule. There is no concrete evidence suggesting that the officer intentionally delayed presenting the Appellant to a magistrate in order to extract a confession from him. A confession is not inadmissible simply because it is given by a defendant after his arrest. The arresting officer did not pressure or coerce the Appellant into giving his statement. After reading him his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), the Appellant voluntarily signed a waiver form.<sup>3</sup> The officer then asked the Appellant to tell his side of the story. The Appellant launched into a profanity laced tirade, but did not inculcate himself. The officer did not ask a single question and turned off the tape after the Appellant was done. The statement was voluntary, and obtained after the Appellant had waived his *Miranda* rights. There is no evidence that it was coerced.

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<sup>3</sup>The Appellant does not claim that the waiver was involuntary for any reason other than the State’s alleged violation of the prompt presentment rule.

1. **The Standard of Review.**

“Where the issue on an appeal from the circuit court is clearly a question of law involving an interpretation of a statute, we apply *de novo* standard of review.” Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 139, 459 S.E.2d 415, 416 (1995).

2. **Discussion.**

Under West Virginia Code § 62-1-5(a)(1) and Rule 5(a) of the West Virginia Rules of Criminal Procedure an officer making an arrest under a warrant issued upon a complaint must take the arrested person before a neutral and detached magistrate without “unnecessary delay.” “The delay in taking a defendant to a magistrate may be a critical factor [in the totality of the circumstances making a confession involuntary and hence inadmissible] where it appears that the primary purpose of the delay was to obtain a confession from the defendant.” Syl. pt. 6, *State v. Persinger*, 169 W. Va. 121, 122, 286 S.E.2d 261, 263 (1982).

Approximately five days after the robbery Huntington Detective Chris Sperry arrested the Appellant. He then interviewed him at the Huntington Police Station. (Tr. 122.) After Officer Sperry informed him of his *Miranda* rights, the Appellant voluntarily signed a waiver form. (*Id.*) When asked whether he had participated in the robbery, the Appellant responded “I ain’t robbed no mother f\*\*\*er.” (Tr. 125-26.) Detective Sperry testified that he arrested the Appellant and his co-defendant at approximately 5:20 p.m., and took the Appellant’s statement at 6:45 p.m. (Tr. 122, 144; R. 25.) Before interviewing the Appellant, Detective Sperry interviewed his co-defendant. (Tr. 144.)

During an *in camera* hearing the Appellant claimed that he was drunk when he waived his *Miranda* rights. (Tr. 133-37.) Detective Sperry testified that the Appellant appeared to understand

his rights, and was not under the influence of alcohol. (Tr. 123, 126.) The State also played the portion of an audio tape of the statement where the detective informed the Appellant of his rights, and the Appellant agreed to waive them. (Tr. 125.) After hearing the tape and the testimony, the trial court credited Detective Sperry's testimony and found the statement voluntary. (Tr. at 142-43.)

At trial the Appellant's counsel raised this argument as an afterthought. Defense counsel mentioned it once during the *in camera* hearing, and did not present argument in support of his position. (Tr. 142.) The only argument factually developed by the defense at trial was the Appellant's intoxicated state and the effect it had on his decision to waive his *Miranda* rights. Therefore, there is scant evidence from which this Court could conclude that the State violated the Appellant's prompt presentment rights.

The Appellant premises his argument on the approximately one and one-half hour delay between the arrest and the Appellant's statement. The Appellant has not pointed to a single piece of evidence suggesting that the police failed to do something which they should have done during this period. *See Metoyer v. United States*, 250 F.2d 30, 32 (C.A.D.C. 1957) ("Implicit in the definition [of delay] . . . is the inference that something the police should have done was not done with reasonable speed under the circumstances.") There is no evidence that a magistrate was available to arraign the Appellant and his co-defendant immediately after their arrest, or that the delay was attributable to routine booking matters.

Nor is there evidence that the delay played any part in the Appellant's decision to make a statement. *See State v. Humphrey*, 177 W. Va. 264, 269, 351 S.E.2d 613, 618 (1986) ("In short, delay, if it is to render a confession inadmissible, must have been operative in inducing the confession, . . .")(citations omitted). Although the Appellant was under arrest, he had not yet been

charged. After the detective asked the Appellant to tell his side of the story, the Appellant went on a spontaneous rant peppered with outbursts of profanity and references to his "jacket." (Tr. 125, 155-63.) There is no evidence that the detective coerced or threatened the Appellant. He did not subject him to relentless questioning or undue pressure. Indeed, he did not say a word or ask a question during the Appellant's tirade. The Appellant's statement wasn't inculpatory and once he was finished the detective turned off the tape. He did not detain the Appellant any further. *See State v. Wickline*, 184 W. Va. 12, 16, 399 S.E.2d 42, 46 (1990) (Necessary delays occasioned by such factors as determining whether a charging document should be issued charging the arrestee with a crime do not violate the prompt presentment rule.)

The delay itself was *de minimis*, lasting approximately an hour and a half. The Appellant's interview lasted less than 15 minutes. (Tr. 163.) He spent the bulk of his time waiting. This Court has held that similar delays did not violate the prompt presentment rule. *See State v. Humphrey*, 177 W. Va. at 269, 351 S.E.2d at 617 (Delay of one and one-half hours for purposes of obtaining a written statement from defendant is not a violation of the prompt presentment rule.).

**C. THE RECIDIVIST SENTENCE WAS PROPORTIONATE.**

The Appellant next claims that his life sentence was disproportionate to both the triggering offense (Second Degree Robbery), and the predicate felonies (Simple Burglary and Indecent Behavior with a Juvenile). The Appellant claims that these offenses were not violent, but merely presented the possibility of violence. Therefore, a life sentence is not constitutionally proportionate to the nature of the offenses.

In fact, the Appellant has an extensive history of arrests and convictions for violent and potentially violent offenses dating back to his 18th birthday. He has repeatedly committed grave offenses and despite terms of incarceration has re-offended.

Additionally, neither the recidivist statutes nor this Court's precedent require a defendant actually commit violent acts before he may be charged as a recidivist. The potential for violence inherent in the crimes of robbery and burglary is sufficient.

**1. The Standard of Review.**

"In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the West Virginia Constitution consideration is given to the nature of the offense, the legislative purpose behind the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction." Syl. pt. 5 *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 524, 276 S.E.2d 205, 207 (1981).

The appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5, will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to the other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the most serious penalties and therefore justify application of the recidivist statute.

Syl. pt. 7, *State v. Beck*, 167 W. Va. 830, 831, 286 S.E.2d 234, 236 (1981).

**2. Discussion.**

The Appellant next claims that his life sentence, imposed under the State's recidivist statute, is disproportionate under Article III, Section 5 of the West Virginia Constitution, "Penalties shall be proportioned to the character and degree of the offense." The Appellant contends that neither his

two prior felony convictions or his triggering conviction involved violence; therefore, a life sentence is constitutionally disproportionate.

In the past this Court has included a “defendant’s past criminal history, and his proclivity to engage in violent acts” in its proportionality calculations. *State v. Ross*, 184 W. Va. 579, 582, 402 S.E.2d 248, 251 (1983) (citations omitted). The Appellant’s criminal history shows a propensity to commit violent offenses. In addition to the two sentence-enhancing felonies used by the State in its recidivist proceeding the Appellant was arrested for Aggravated Battery, Simple Robbery, Disturbing the Peace, and Resisting Arrest less than a month after his 18th birthday.<sup>4</sup> (R. 36.) On December 12, 1993, the Appellant was charged with Unauthorized Entry into an Inhabited Dwelling. On August 15, 1996, the Appellant was charged with Simple Battery, and Theft. (*Id.*)

The Appellant was sentenced to probation for his first predicate felony, Simple Burglary, on December 16, 1996. (R. 183.) The court revoked the Appellant’s probation on November 18, 1998. (R. 188.) While on probation the Appellant was charged with Sexual Battery. On June 16, 1997, he pled guilty to Indecent Behavior with a Juvenile. (R. 193.) The court revoked this probation on February 23, 1998. (R. 195.)

The triggering offense in this case is Second Degree Robbery. Robbery is an inherently violent crime. Under the common law it was defined as “[t]he felonious taking of money or goods of value from the person of another or in his presence, against his will by force or putting him in fear.” *State v. Young*, 134 W. Va. 771, 779-780, 61 S.E.2d 734, 739 (1950) (citations omitted.) The Appellant discounts the severity of his conduct by claiming that it only presented the “mere

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<sup>4</sup>According to the Appellant’s motion to suppress 404(b) evidence, the Appellant later pled guilty to the felony of Simple Robbery. (R. 105.) Simple Robbery is a crime of violence under Louisiana law. See *State v. Lindsey*, 770 So. 2d 339, 344 (La. 2000).

possibility of violence.” (Appellant’s Petition at 36.) This Court has addressed the potential for violence inherent in the offense of aggravated robbery. *See State v. Adams*, 211 W. Va. 231, 234, 565 S.E.2d 353, 356 (2002) Although the Appellant was convicted of second degree robbery, his conduct would have constituted aggravated robbery under the old statute.

Nor has this Court ever held that a life sentence offends the proportionality principles of the State Constitution if the triggering felony did not involve actual violence. In *State v. Housden*, 184 W. Va. 171, 174, 399 S.E.2d 882, 885 (1990), this Court found that a felony conviction for burglary carried the potential for violence, even though the defendant had taken steps to ensure that the victim would not be present when he committed the offense, and was an appropriate predicate felony under the recidivist statute:

Consequently, even though the appellant asserts that he ascertained that the victim was not present before he burglarized his home and took some \$6,000.00 in personal property, that did not render the crime nonviolent in nature. The potential for threatened harm or violence to either the victim, had he returned home at the time the crime was committed or to another innocent person such as the victim’s son, who testified that he was regularly checking on the home for his father, still existed at the time the appellant committed the crime.

This Court again rejected this argument in *State v. Adams*, 211 W. Va. 231, 234, 565 S.E.2d 353, 356 (2002):

Although Mr. Adams correctly argues that there was no injury to the victim in this case, this fact does not diminish the inherent potential for injury or even death that can occur in an aggravated robbery crime.

In *State ex. rel. Appleby v. Recht*, 213 W. Va. 503, 515, 583 S.E.2d 800, 812 (2002), this Court rejected the same argument from a defendant challenging the proportionality of a life recidivist sentence upon his conviction for DUI, third offense :

[The Appellant] cites *Solem v. Helm*, 463 U.S. 277, 296-297, 103 S.Ct. 3001, 3013, 77 L.Ed.2d 637, 653 (1983) for the proposition that crimes such as burglary and DUI, third offense, are “relatively minor.” We strongly disagree with the *Solem* majority. We join in the recognition of the *Solem* dissenters that “[a]t the very least, respondent’s burglaries and his third offense drunk driving posed a real risk of serious harm to others. It is sheer fortuity that the places respondent burglarized were unoccupied and that he killed no pedestrians while behind the wheel.” *Id.* at 315-16, 103 S.Ct. at 3023, 77 L.Ed.2d at 665 (Burger, C.J., Rhenquist, O’Connor & White JJ., dissenting.)

In the case at bar, the jury found that the Appellant and his co-defendant entered a public store and threatened the clerk with deadly force if he did not hand over the money from the till. Such circumstances are pregnant with the possibility of violence.

The Appellant cites this Court to *State v. Miller*, 184 W. Va. 462, 400 S.E.2d 897 (1990) (*per curiam*) as support for his position. The facts of *Miller* are readily distinguishable from the case at bar. In *Miller* the defendant’s predicate felonies included breaking and entering of a business when he was 16, forging and uttering a \$423.23 check, and obtaining \$30.56 under false pretenses. *Id.* at 463, 400 S.E.2d at 898. Although the triggering felony was a violent crime, the Court found that the underlying felonies, spread out over a period of 25 years, did not demonstrate a propensity for violence. Thus, a life sentence was unfairly disproportionate.

The Appellant’s prior felonies are not mere property crimes. The State proved that he was convicted of Indecent Behavior with a Juvenile, and Simple Burglary. Both crimes involve violence or potential violence. *Martin v. Leverette*, 161 W. Va. 547, 555, 244 S.E.2d 39, 43-44 (1978) (Burglary is a serious crime which involves the threat of violence against a person.); *State v. Evans*, 203 W. Va. 446, 449, 508 S.E.2d 606, 610 (1998) (“We expressly reject Evans’ contention that burglary does not constitute a crime of violence.”); *State v. Whatley*, 867 So. 2d 955, 959 (La. 2004) (“The offense of indecent behavior with a juvenile is a heinous crime. It involves the use of innocent

children to satisfy the sexual desires of an adult and requires the commission of a 'lewd and lascivious act' upon, or in the presence of a child.").

Unlike the defendant in *Miller* the Appellant's offenses were not spread out over a period of 25 years. Between December of 1996 and June of 1997, the Appellant was convicted of two felonies. He committed one of these felonies while on probation for the other. (R. 188, 189, 193, 195.) Although he was twice sentenced to supervised probation, the Appellant violated both times.<sup>5</sup> Prior to these convictions he was arrested for Aggravated Robbery, Aggravated Battery, Illegal Use of a Weapon, Simple Battery, Disturbing the Peace, Resisting an Officer, and Simple Criminal Damage.<sup>6</sup> (R. 36.)

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<sup>5</sup>The transcript of the December 1996 guilty plea colloquy states,

This Court accepts your plea bargain and states for the record that because there is an undue risk that during the period of a suspended sentence or probation the defendant would commit another crime.

The defendant is in need of correctional treatment or a custodial environment that can be provided most effectively by his commitment to an institution, and

IT IS THE SENTENCE OF THIS COURT that the defendant be committed to the Department of Corrections for a term of 3 YEARS DOC.

The above sentence to be suspended on the following conditions:

1. That he be placed on Supervised Probation for 3 years and pay a monthly probation supervision fee of \$25.00.

(R. 188-89.)

<sup>6</sup>During the Appellant's recidivist hearing Detective James Groody of the Gonzales, Louisiana, Police Department testified that he had previous dealings with the Appellant and that the Appellant had been a "regular fixture" in the Gonzales area. (Recid. Tr. 42.)

This Court has stated “[t]he primary purpose of this State’s recidivist statutes. . . is to deter felony offenders, meaning persons who have been convicted and sentenced previously on a penitentiary offense, from committing subsequent felony offenses.” Syl. pt. 3, in part, *State v. Jones*, 187 W. Va. 600, 602, 420 S.E.2d 736, 737 (1992). After examining the Appellant’s record, the nature of his offenses, and the short time period in which they were committed, it is clear that the Appellant is exactly the sort of defendant the recidivist statute was meant to deter. The State properly pursued a recidivist sentence in this matter, and the jury properly convicted the Appellant. The community will be best served if this defendant is taken off the streets. Therefore, the Appellant’s argument is without merit.

**D. THE EVIDENTIARY RULINGS OF THE TRIAL COURT DURING THE RECIDIVIST HEARING WERE NOT AN ABUSE OF DISCRETION OR CONSTITUTED HARMLESS ERROR.**

The Appellant’s last assignments of error concern certain evidentiary rulings by the trial court during his recidivist trial. The trial court exercised its sound discretion before making these rulings. Even if this Court were to find that they were in error, given the overwhelming evidence introduced by the State, including the testimony of a fingerprint expert, these errors were harmless.

**1. The Standard of Review.**

“The 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. 10, *State v. Huffman*, 141 W. Va. 55, 57, 87 S.E.2d 541, 544 (1955).

“Competency of a witness to testify is a legal issue that is decided by the trial judge. It is the duty of the court to ascertain if a witness is competent. However, it is not error if the judge fails individually to conduct the examination unless requested to do so by the parties.” 1 Franklin D.

Cleckley, *Handbook on Evidence for West Virginia Lawyers*, § 6-1(C)(2) at 6-28 (4th ed. 2000) (footnotes omitted). “The West Virginia Supreme Court of Appeals has suggested repeatedly that the competence of a witness is discretionary with the trial judge and her ruling will not be reversed unless there is a plain and clear abuse.” *Id.* at § 6-1(C)(3) (footnotes omitted).

**2. Discussion.**

The State’s first witness, Detective James Groody of the Gonzales, Louisiana, Police Department proffered certified copies of a transcript of the Appellant’s plea to Simple Burglary, a copy of a document entitled “criminal minutes” summarizing what had occurred during the Appellant’s guilty plea, and setting forth his sentence, and a fingerprint card. (Recid. Tr. 42-43, 44; R. 183-87, 189.)

On cross-examination Detective Groody testified that the Appellant had originally been charged with Simple Burglary of an Inhabited Dwelling, but had pled to the reduced charge of Simple Burglary. (Recid. Tr. 51.) He also testified that he had not been the investigating officer in this case, and that he might have been present at the Appellant’s plea hearing, but could not recall. (*Id.* at 54-55.) The detective produced a picture of the Appellant, but could not connect the picture to the documents regarding the Appellant’s prior offense. The trial court refused to admit the picture. (*Id.* at 63-64.)

Officer Mark Jones of the Hammond, Louisiana, Police Department identified the Appellant as the Ernest Johnson who pled guilty to Indecent Behavior with a Juvenile. (Recid. Tr. 66-67.) Officer Jones produced a picture of the Appellant which the State then marked as an exhibit. (*Id.* at 67.) The back of the picture contained the words “Sexual Battery.” Upon objection from defense counsel the trial court redacted those words and admitted the picture into evidence:

MR. CRAIG: My problem with this [photograph] is this right here. That's not the crime that he was convicted of . . .

THE COURT: Are you talking about this date or what?

MR. CRAIG: -- this right here.

THE COURT: Wasn't that in the --

MR. CRAIG: No. That's not the same -- it's not the same.

THE COURT: Well, we will take that out, then.

MR. MARTORELLA: Your Honor, can I approach --

THE COURT: Well, go --

MR. MARTORELLA: -- before you start marking --

THE COURT: Hold on a minute.

....

MR. MARTORELLA: Your honor, the Sexual Battery was reduced --

THE COURT: I understand, but we are interested in what he pled guilty to.

MR. MARTORELLA: Okay. I don't see it. All right. If you need to mark that out, mark it out. I don't see the difference.

(Recid. Tr. 68-69.)

The Appellant claims that the prosecutor deliberately held the back of the picture up in front of the jury so that they could read the writing on the back. There is nothing in the record to corroborate counsel's assertion that the jury actual saw this writing, or was able to read it. Counsel did not object, he simply asked the prosecutor to keep the picture down. (Recid. Tr. 67.) Once the writing was redacted, counsel did not object to the picture's admissibility nor did he request a

mistrial or a special instruction by the court. If the writing on this photo was as obvious and damaging as counsel would now have this Court believe, the record does not reflect any efforts to mitigate this damage.

Counsel limited the scope of his objection to the writing on the back of the photo. The court sustained counsel's objection and redacted this language. If counsel had an objection to the prosecutor's conduct, he did not raise it. Therefore, it is waived.

The Appellant also claims that the trial court's refusal to redact the words "Sexual Battery" from a document which misstated the Appellant's birthday constituted reversible error. Detective Groody testified, without objection, that the Ernest Johnson convicted of Simple Burglary was born on August 16, 1974. (Recid. Tr. 47.) Officer Moore testified that the Ernest Johnson convicted of Indecent Behavior with a Juvenile was also born on August 16, 1974. (*Id.* at 70.) He then identified the Appellant as the Ernest Johnson charged with the predicate felony. (*Id.* at 71.)

During his cross-examination defense counsel produced a document which stated that the "Ernest Johnson," who was convicted of Indecent Behavior with a Juvenile, was born on August 16, 1975.<sup>7</sup> (Recid. Tr. 75.) The document also contained a different social security number. (Recid. Tr. at 76.) This document also stated that Ernest Johnson had originally been charged with Sexual Battery. Appellant's counsel sought to introduce the document with the original charge redacted out. (Recid. Tr. 92.) The trial court held that the document was admissible, but refused to redact out the original charge. (Recid. Tr. 95.)

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<sup>7</sup>It is not clear from the record which document the Appellant was referring to. Both criminal minutes state that Ernest Johnson, born August 16, 1974, was convicted of Simple Burglary and Indecent Behavior with a Juvenile. (R. 189, 193.)

If the court's ruling was error, it was clearly harmless. The document clearly contained a typographical error. Taken within the context of the certified copies of court documents stating that Ernest Johnson was born on August 16, 1974, the testimony of the Louisiana officers, and the testimony of the State fingerprint expert, the admissibility of the document would have been minimally probative.

Counsel also contends that both Detective Groody and Officer Jones were not competent witnesses because they had not participated in the investigation or prosecution of the predicate felonies, and were not present when the Appellant entered his pleas. Both Detective Groody and Officer Jones introduced certified copies of court documents, including fingerprint cards, stating that an Ernest Johnson pled guilty to Simple Burglary and Indecent Behavior with a Juvenile. Officer Jones arrested the Appellant for Indecent Behavior with a Juvenile and testified that he was present when the Appellant entered his plea. (Recid. Tr. 72-73.) On cross-examination the officer backtracked, stating that he believed he was present when the Appellant entered his plea. (Recid. Tr. 75.)

Detective Groody testified that he knew the Appellant as Ernest Johnson, a resident from Gonzales, Louisiana. (Recid. Tr. 42.) At that point defense counsel objected. Because the State had not tried to elicit testimony from the detective connecting the Appellant to the predicate felony the court overruled counsel's objection. (*Id.*) Later the State asked the detective if the Appellant was the same Ernest Johnson named in the certified court documents. Counsel did not object to the question, nor did he object to the detective's answers. (Recid. Tr. 49.) He did explore the matter effectively on cross-examination. (Recid. Tr. 52.) Officer Jones initially testified, without objection,

that the Appellant was the same Ernest Johnson convicted of Indecent Behavior with a Juvenile in Louisiana. (Recid. Tr. 66.)

It is clear that the Appellant waived any competency objections. His only objection was premature. When the officers connected the Appellant to the predicate felonies, counsel remained silent. "Failure to make timely and proper objection constitutes a waiver of the right to raise the questions thereafter either in the trial court or in the appellate court." Syl. pt. 3 *State v. Asbury*, 187 W. Va. 87, 88, 415 S.E.2d 891, 892 (1992) (quoting Syl. pt. 6, *Yuncke v. Welker*, 128 W. Va. 299, 36 S.E.2d 410 (1945)).

Even if this Court were to find that the Appellant had preserved his objection below the outcome is no different. If there was error, it was harmless:

Where improper evidence of a nonconstitutional nature is introduced by the State at a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.

Syl. pt. 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55, 56 (1979).

The evidence introduced by the State proving that the Appellant was the same Ernest Johnson convicted of the two predicate felonies was overwhelming. The officers introduced certified copies of the state conviction records identifying Ernest Johnson as the individual previously convicted of the two felonies. The State also introduced the expert testimony of fingerprint analyst David Castle, who testified that the prints in the fingerprint cards provided by Detective Groody and Officer Jones matched the Appellant's fingerprints. (Recid. Tr. 105-07.) Obviously, the jury found

the State's case convincing: they deliberated for less than 20 minutes before returning a verdict.

(Recid. Tr.142.)

V.

CONCLUSION

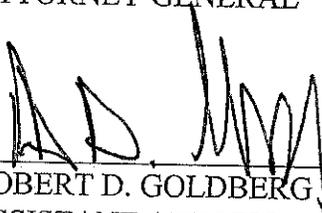
For the foregoing reasons, the judgment of the Circuit Court of Cabell County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,  
Appellee,

By counsel

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL



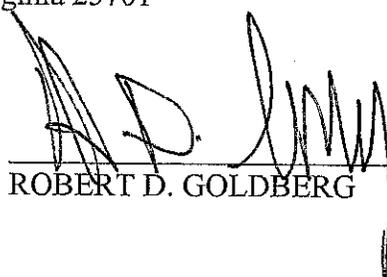
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**CERTIFICATE OF SERVICE**

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Appellee's Brief State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, with first-class postage prepaid, on this 19<sup>th</sup> day of July 2006, addressed as follows:

A. Courtney Craig, Esq.  
910 4th Avenue, Suite 1112  
Huntington, West Virginia 25701

  
\_\_\_\_\_  
ROBERT D. GOLDBERG