
NO. 33299

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

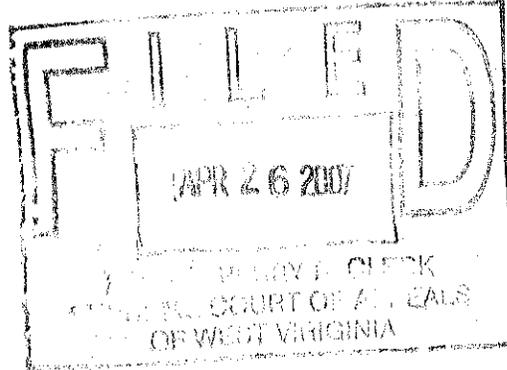
STATE OF WEST VIRGINIA,

Appellee,

v.

DANIEL B. BINGMAN,

Appellant.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

R. CHRISTOPHER SMITH
ASSISTANT ATTORNEY GENERAL
State Bar ID No. 7269
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

Counsel for Appellee

TABLE OF CONTENTS

	Page
I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW	1
II. STATEMENT OF FACTS	1
III. RESPONSE TO ASSIGNMENTS OF ERROR	3
IV. ARGUMENT	5
A. APPELLANT IS CORRECT THAT A TRIAL COURT IS BARRED FROM CONVICTING ONE OF A LESSER MISDEMEANOR OFFENSE WHERE THE FELONY OFFENSE CONTAINED IN THE INDICTMENT EMBRACES THE LESSER-INCLUDED MISDEMEANOR WHEN THE INDICTMENT WAS NOT RETURNED WITHIN ONE YEAR AFTER THE CRIME WAS COMMITTED, YET APPELLANT WAIVED ANY RIGHT OF THIS COURT TO REVIEW THIS MATTER DUE TO HIS DEFENSE COUNSEL'S REQUEST FOR JURY INSTRUCTIONS THAT CONTAINED THE MISDEMEANOR OFFENSE	5
1. The Standard of Review	5
2. While the Trial Court Convicted Appellant of the Lessor Misdemeanor Offense of Petit Larceny Where the Felony Charge of Grand Larceny Contained in the Indictment Was Returned After the One-Year Statute of Limitations for Misdemeanors Expired, Appellant Waived Any Right for this Court to Review the Matter Due to His Offering Instructions That Contained the Misdemeanor Offense	6
B. WHEN EXAMINING ALL OF THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION AS ESTABLISHED BY THIS COURT, THERE WAS INDEED SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF PETIT LARCENY AND THE VERDICT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE	10
1. Standard of Review	10
2. When Examining All of the Evidence in this Case in the Light Most Favorable to the Prosecution, There Was Ample Evidence Through the Testimony of the Witnesses for a	

Rational Trier of Fact to Convict Appellant of Petit Larceny
with Respect to the Farm Equipment in Question. Therefore,
the Verdict Was Not against the Weight of the Evidence 11

C. THE FACT THAT JUROR MOORE HAD A SON WHO WAS
EMPLOYED IN THE REGIONAL JAIL SYSTEM WAS NOT
GROUNDS FOR THE TRIAL COURT TO STRIKE HER FROM
THE PANEL FOR CAUSE. THERE WAS A THOROUGH
INQUIRY REGARDING HER POTENTIAL BIAS, AND SHE
MADE IT ABSOLUTELY CLEAR THAT SHE COULD BE
IMPARTIAL 14

1. The Standard of Review 14

2. Although Juror Moore Had a Son Employed in the Regional
Jail System, a Thorough Inquiry by the Court Occurred
Regarding Her Ability to Be Impartial During Voir Dire.
Upon Examination She Assured the Trial Court of Her
Impartiality; and Thus, Juror Moore Should Not Have Been
Removed for Cause 14

D. THE SENTENCE IMPOSED UPON APPELLANT WAS NOT
DISPROPORTIONATE TO THE OFFENSE AND DID NOT
VIOLATE HIS CONSTITUTIONAL RIGHT AGAINST CRUEL
AND UNUSUAL PUNISHMENT 17

1. The Standard of Review 17

2. When Examining the Trial Court's Sentence It Imposed on
Appellant for His Conviction of Petit Larceny Using the
Abuse of Discretion Standard Set Forth in Jones, It Did Not
Violate His Constitutional Right against Cruel and Unusual
Punishment and No Error Was Committed 17

V. CONCLUSION 20

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979)	10
<i>State ex rel. Cooper v. Caperton</i> , 196 W. Va. 208, 470 S.E.2d 162 (1996)	6
<i>State v. Beckett</i> , 172 W. Va. 817, 310 S.E.2d 883 (1983)	16
<i>State v. Boyd</i> , 209 W. Va. 90, 543 S.E.2d 647 (2000)	6, 8, 9
<i>State v. Brown</i> , 177 W. Va. 633, 355 S.E.2d 614 (1987)	14, 16
<i>State v. Guthrie</i> , 194 W. Va. 657, 461 S.E.2d 163 (1995)	10, 11, 12
<i>State v. Jones</i> , 216 W. Va. 666, 610 S.E.2d 1 (2004)	4, 17, 18
<i>State v. Leonard</i> , 209 W. Va. 98, 543 S.E.2d 655 (2000)	7
<i>State v. Miller</i> , 197 W. Va. 588, 476 S.E.2d 535 (1996)	5, 8
<i>State v. Starkey</i> , 161 W. Va. 517, 244 S.E.2d 219 (1978.)	11, 12
<i>State v. Tidwell</i> , 215 W. Va. 280, 599 S.E.2d 703 (2004)	9
<i>State v. Vance</i> , 164 W. Va. 216, 262 S.E.2d 423 (1980)	17
<i>State v. Wilson</i> , 157 W. Va. 1036, 207 S.E.2d 174 (1974)	14
<i>Stockton v. Leeke</i> , 237 S.E.2d 896 (S.C. 1977)	18
<i>Wanstreet v. Bordenkircher</i> , 166 W. Va. 523, 276 S.E.2d 205 (1981)	18
STATUTES:	
W. Va. Code § 61-13-3(a)	3, 7, 13
W. Va. Code § 61-13-3(b)	<i>passim</i>
W. Va. Code § 61-3-18	3

NO. 33299

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

DANIEL B. BINGMAN,

Appellant.

BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

**KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW**

This is an appeal by Daniel B. Bingman (hereinafter "Appellant") from the March 10, 2006, order of the Circuit Court of Gilmer County (Facemire, J.), which denied his motion for a new trial and sentenced him to a term of one year in the state penitentiary upon his conviction by a jury of one count of petit larceny in violation of West Virginia Code § 61-13-3(b). On appeal, Appellant claims that the circuit court committed various errors, denying him a fair trial.

II.

STATEMENT OF FACTS

This case arises out of real property in Gilmer County that was willed to four heirs of a property owner, Ms. Virginia Woofter Rafferty who lived in Akron, Ohio. (Tr., 186-97, Dec. 14,

2005.) Ms. Rafferty died in 1994, leaving the Gilmer County property in divided shares to her various heirs (*Id.* at 196.) Appellant's mother, Ramona Bingman, owns 2/6th of this real property through a 1/6 heirship and a purchase of 1/6th of it from Mr. Tommy Ross Gainer, the grandson of Ramona Bingman's aunt, Dora Gainor. (*Id.* at 200.) The offense for which Appellant was convicted in this case arises out of the property owned by his uncle, Roger Rafferty. Mr. Rafferty owns 3/6th of this property, acquiring 2/6 by heirship and purchasing 1/6th from his cousin, Richard Woofler. (Tr., 136, Dec. 13, 2005.)¹ Roger Rafferty owned various items of farming equipment that consisted of a rototiller, a brush hog, a potato plow, a spring harrow and a pig pole (*id.* at 147.) According to Mr. Rafferty, he purchased this equipment from Lemon's Tractor Supply solely on his own with no money from any heirship property. (*Id.* at 148-149.) Appellant took this equipment and sold it to Gerald and Shirley Ball of Grantsville on January 31, 2002, for \$500.00. (*Id.* at 171-72.) At the time of this purchase, Appellant represented himself to the Balls by another name, Jim West. (*Id.* at 172.)

On April 16, 2002, Roger Rafferty reported his farm equipment missing to Sergeant Larry Gerwig of the Gilmer County Sheriff's Department. (*Id.* at 83.) Sergeant Gerwig conducted an investigation, and after conducting an interview with Mr. Ball, the latter agreed to give the equipment to the Gilmer County Sheriff's Department. (*Id.* at 92-93.) The Balls never received the \$500.00 back for this purchase. (*Id.* at 174.)

At trial, Ms. Marilyn Matheny, a partner of Lemon's Farm Equipment, valued the equipment to be approximately \$1,200.00. (*Id.* at 125.) On December 14, 2005, the trial court found Appellant

¹Roger Rafferty gave approximately 9 of the 91 acres he owned to his daughter. (Tr., 135, Dec. 13, 2005.)

guilty of petit larceny in violation of West Virginia Code § 61-13-3(b), the lessor-included offense of grand larceny, a violation of West Virginia Code § 61-13-3(a).² (*Id.* at 288.)

III.

RESPONSE TO ASSIGNMENTS OF ERROR

Appellant's assignments of error are quoted below, followed by the State's responses:

- A. THE DEFENDANT WAS INDICTED FOR A FELONY MORE THAN ONE YEAR AFTER THE ALLEGED DATE IT WAS COMMITTED, AND THE DEFENDANT WAS CONVICTED OF A LESSOR INCLUDED OFFENSE, WHICH IS THEREFORE BARRED BY THE STATUTE OF LIMITATIONS; AND THE DEFENDANT HAVING REQUESTED A MISDEMEANOR INSTRUCTION DOES NOT WAIVE THIS ERROR.

State's Response:

While the trial court convicted Appellant of the lessor-included misdemeanor offense of petit larceny where the felony charge of grand larceny contained in the indictment was returned after the one-year statute of limitations for misdemeanors expired, Appellant waived any right for this Court to review the matter due to his offering the instructions that contained the misdemeanor offense.

- B. THE STATE DID NOT MAKE A PRIMA FACIE CASE, AND THE VERDICT IS THEREFORE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

State's Response:

When examining all of the evidence in this case in the light most favorable to the prosecution, there was ample evidence through the testimony of the witnesses for a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt and an impartial jury to

²Appellant was also indicted on March 9, 2005, for transferring stolen property in violation of West Virginia Code § 61-3-18 for which he was found not guilty and grand larceny of standing timber in violation of § 61-13-3(a) which was dismissed. (R. at 2-3; Tr., 288, 227, Dec. 14, 2005.)

convict Appellant of petit larceny with respect to the farm equipment in question. Therefore, the verdict was not against the weight of the evidence.

C. A JUROR WAS SEATED WHO HAD A SON EMPLOYED IN LAW ENFORCEMENT, AT A REGIONAL JAIL.

State's Response:

Although Juror Moore had a son employed in the regional jail system, a thorough inquiry by the court occurred regarding her ability to be impartial during voir dire. Upon examination she assured the trial court of her impartiality; and, thus, Juror Moore should not have been removed for cause.

D. THE SENTENCE IS DISPROPORTIONATE TO THE OFFENSE.

State's Response:

When examining the trial court's sentence it imposed on Appellant for his conviction of petit larceny using the deferential abuse of discretion standard set forth in *State v. Jones*, 216 W. Va. 666, 610 S.E.2d 1 (2004), it did not violate his constitutional right against cruel and unusual punishment and no error was committed.

IV.

ARGUMENT

- A. **APPELLANT IS CORRECT THAT A TRIAL COURT IS BARRED FROM CONVICTING ONE OF A LESSER MISDEMEANOR OFFENSE WHERE THE FELONY OFFENSE CONTAINED IN THE INDICTMENT EMBRACES THE LESSER-INCLUDED MISDEMEANOR WHEN THE INDICTMENT WAS NOT RETURNED WITHIN ONE YEAR AFTER THE CRIME WAS COMMITTED, YET APPELLANT WAIVED ANY RIGHT OF THIS COURT TO REVIEW THIS MATTER DUE TO HIS DEFENSE COUNSEL'S REQUEST FOR JURY INSTRUCTIONS THAT CONTAINED THE MISDEMEANOR OFFENSE.**

Appellant correctly asserts that one cannot be convicted of a lesser misdemeanor offense where the felony contained in the indictment embraces the it and the indictment is not returned within the one-year statute of limitations period for misdemeanor offenses expires. However, Appellant waived any right for this Court to review this matter due to his defense counsel's failure to object to the jury instructions that gave the jurors the option to convict Appellant of the misdemeanor offense of petit larceny rather than the felony of grand larceny. In fact, Appellant took an active role in formulating the jury instructions that included this misdemeanor offense by his defense counsel's offering instructions containing the misdemeanor. Accordingly, no error occurred.

1. **The Standard of Review.**

Ordinarily, a defendant who has not proffered a particular claim or defense in the trial court may not unveil it on appeal. Indeed, if any principle is settled in this jurisdiction, it is that, absent the most extraordinary circumstances, legal theories not raised properly in the lower court cannot be broached for the first time on appeal. We have invoked this principle with a near religious fervor. This variant of the "raise or waive" rule cannot be dismissed lightly as a mere technicality. The rule is founded upon important considerations of fairness, judicial economy, and practical wisdom.

State v. Miller, 197 W. Va. 588, 597, 476 S.E.2d 535, 544 (1996).

To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. The rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace. The forfeiture rule that we apply today fosters worthwhile systemic ends and courts will be the losers if we permit the rule to be easily evaded. It must be emphasized that the contours for appeal are shaped at the circuit court level by setting forth with particularity and at the appropriate time the legal ground upon which the parties intend to rely.

State ex rel. Cooper v. Caperton, 196 W. Va. 208, 216, 470 S.E.2d 162, 170 (1996) (citation omitted).

Specifically relating to the situation where defense counsel actually requests that jury instructions contain a lesser misdemeanor offense that is embraced by the felony in the indictment after the one-year statute of limitations period for misdemeanors has run its course, this Court has held the following:

When a defendant is not indicted within one year of the date on which an offense is committed but requests the circuit court to instruct the jury on a time-barred lesser included offense, the defendant by that act waives the statute of limitations defense contained in W.Va. Code § 61-11-9.

Syl. Pt. 3, *State v. Boyd*, 209 W. Va. 90, 543 S.E.2d 647 (2000).

2. **While the Trial Court Convicted Appellant of the Lessor Misdemeanor Offense of Petit Larceny Where the Felony Charge of Grand Larceny Contained in the Indictment Was Returned After the One-Year Statute of Limitations for Misdemeanors Expired, Appellant Waived Any Right for this Court to Review the Matter Due to His Offering Instructions That Contained the Misdemeanor Offense.**

The State concedes that one cannot be convicted of a lesser misdemeanor offense when the indictment contains a felony charge that embraces the misdemeanor where it is not returned before the one-year statute of limitations for misdemeanors expires. This Court has held,

The provision of [West Virginia] Code, 61-11-9, which provides that 'A prosecution for a misdemeanor shall be commenced within one year after the offense was committed, read *in pari materia* with [West Virginia] Code, 62-2-1, which provides that 'Prosecutions for offenses against the State, unless otherwise provided, shall be by presentment or indictment' serves to bar a conviction of a misdemeanor had under an indictment for a felony, which embraces the misdemeanor, where the indictment was not returned within one year after the offense charged therein was committed.

Syl. Pt., *State v. Leonard*, 209 W. Va. 98, 543 S.E.2d 655 (2000). Additionally, it is true that the offense in question occurred on January 31, 2002, and the indictment for the felony offense of grand larceny for stealing farm equipment, in violation of West Virginia Code § 61-3-13(a), against Appellant was returned on March 9, 2005. (Tr., 172, Dec. 13, 2005; R. at 2.) According to Appellant, he was previously indicted for grand larceny on March 4, 2003, but this indictment was later dismissed on October 25, 2004; this indictment being more than a year after the expiration of the one-year statute of limitations for misdemeanor offenses as well. (*See* Appellant's Brief at 3, 8.) The jury did find Appellant guilty of the lesser misdemeanor offense of petit larceny for Appellant stealing the farm equipment in question due to its belief that the equipment that was stolen was valued less than \$1,000.00 per the trial judge's instructions. (Tr., 256-58, 288, Dec. 14, 2005.)

Despite Appellant's correct analysis of this issue, at no time during the trial did Appellant object to the jury instructions that contained the lesser misdemeanor offense of petit larceny that created the possibility to convict him of the misdemeanor offense after the statute of limitations ran its course. There was an extensive bench conference after both parties concluded their respective cases-in-chief. At this time, the judge outlined all of the offenses and included the misdemeanor offense of petit larceny if the jury believed beyond a reasonable doubt that Appellant did steal the farm equipment, yet the same was valued less than \$1,000.00. (*Id.* at 236-40.) When the judge read

the portion of the instructions to the jurors with respect to grand and petit larceny vis-a-vis the value of the farm equipment, Appellant did not object. (*Id.* at 273-74.)

In *Miller, supra*, this Court held that before an issue may be properly addressed on appeal, the circuit court must first be given an opportunity to apply controlling legal principles to the facts presented. By failing to object and raising the argument regarding misdemeanor convictions being barred when the one-year statute of limitations has expired before the indictment containing a felony offense that embraces it is returned, Appellant deprived the circuit court of that important opportunity. Appellant clearly did not articulate this issue with distinction to preserve it for appellate review. There is no doubt that Appellant failed to make an objection to this jury instruction giving rise to his misdemeanor conviction.

When the bench conference took place, Appellant's defense counsel actually played an active role in establishing these instructions and even stated the following:

But I think that we . . . somewhere uh, make uh, allowance uh, either as Instruction Number 1, or Instruction Number 2 for the uh, for the lessor included offense. I mean, we're, we're obviously, obviously think that you know, under Count 1, it could be grand larceny or petit larceny.

(*Id.* at 237.) In fact, Appellant's defense counsel even included the option of finding him guilty of the misdemeanor offense of petit larceny in the Defendant's Proposed Jury Instructions. (R. at 79.) As stated above, in *Boyd, supra*, this Court has held that when a defendant requests the court to instruct the jury on a time-barred misdemeanor offense in which the felony in the indictment embraces, he or she has waived the statute of limitations defense where the offense occurred after the one-year period for misdemeanors has expired. Similarly, where a defendant requested an improper instruction of a lessor-included offense of unlawful assault where he was charged in the

indictment with assault in the commission of a felony and later claimed error by the trial court, this Court held, “[The defendant] requested the charge, was convicted under the charge and benefitted from the charge. He cannot now complain of the result.” *State v. Tidwell*, 215 W. Va. 280, 599 S.E.2d 703, 706 (2004) (citing *Boyd, supra*, 209 W. Va. at 94, 543 S.E.2d at 651). Due to Appellant’s failure to object to the jury instructions on a potential petit larceny conviction and his defense counsel’s request to instruct the jury on the same, there is no doubt that a waiver occurred. This Court need not go any further in examining this matter.

Appellant cites an exception supposedly cut out by this Court in *Boyd, supra*, whereby the holding does not apply where the State obtains an indictment and subsequently entered a nolle prosequi so that a new indictment could be obtained on the same offense. It does appear that Appellant was previously indicted on charges nearly identical to those in the present case on March 4, 2003, where the indictment was later dismissed without prejudice upon the State’s motion to nolle prosequi. (See Appellant’s Brief at 9; R. at 27.) Yet Appellant cites no evidence that the State was engaging in bad faith or trying to avoid the statute of limitations provision in its dismissal of the March 4, 2003 indictment and the subsequent filing of the indictment in the present case on March 9, 2005. Further, this Court did not specifically hold that this situation amounts to an exception to *Boyd*. Specifically, the Court stated the following:

We do not have a situation here where the State obtained an indictment and subsequently entered a nolle prosequi so that a new indictment could be obtained on the same offense which did not violate the statute of limitations. If that were the case, the result *might be different*.

See *Boyd*, 209 W. Va. at 82 n.2, 543 S.E.2d at 650 n.2 (emphasis added). Appellant is citing dicta in *Boyd* to assert that there is an exception to this waiver rule. Further, the Court merely states that

the result in *Boyd* "might be different" if a nolle prosequi is granted and a subsequent indictment is obtained. In light of this, Appellant makes a very dubious argument for this Court to make an exception to the *Boyd* waiver rule at best; and thus, this appeal should be denied.

B. WHEN EXAMINING ALL OF THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION AS ESTABLISHED BY THIS COURT, THERE WAS INDEED SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF PETIT LARCENY AND THE VERDICT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

Appellant states that there is insufficient evidence in the case at bar to convict him of petit larceny and that the verdict was against the weight of the evidence. However, when examining all of the evidence in the light most favorable to the State, there is indeed sufficient evidence for a rational trier of fact to find Appellant guilty of this offense beyond a reasonable doubt. There was ample testimony at trial to convict Appellant of this crime. Therefore, the verdict was not against the weight of the evidence.

1. Standard of Review.

In *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), this Court adopted the federal standard of review for sufficiency of the evidence as set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979), in holding that a verdict of guilty will not be set aside due to insufficiency of the evidence if, reviewing the evidence in the light most favorable to the prosecution, the appellate court finds that "any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." 194 W. Va. at 667-68, 461 S.E.2d at 173-74 (quoting *Jackson*.) The Court made

it clear that the burden is on a defendant to overturn the presumption of correctness in a jury's verdict, and that the State is entitled to all inferences in favor of that verdict.³

With respect to jury verdicts, this Court held the following:

In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.

Syl. Pt. 1, *State v. Starkey*, 161 W. Va. 517, 244 S.E.2d 219 (1978).

2. **When Examining All of the Evidence in this Case in the Light Most Favorable to the Prosecution, There Was Ample Evidence Through the Testimony of the Witnesses for a Rational Trier of Fact to Convict Appellant of Petit Larceny with Respect to the Farm Equipment in Question. Therefore, the Verdict Was Not against the Weight of the Evidence.**

When looking at the evidence in the light most favorable to the prosecution as mandated in *Guthrie, supra*, there is no doubt that the evidence was sufficient so that a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt and an impartial jury could have convicted Appellant of petit larceny, and his claim that the conviction was against the weight of the evidence is groundless. It was established at trial that Roger Rafferty owned 3/6th of the heirship property in question in this case where the farm equipment that belonged to him was located. (Tr., 136, 146, Dec. 13, 2005.) Before he reported the equipment missing, it was actually

³ “[A] criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution.” *Guthrie*, 194 W. Va. at 669, 461 S.E.2d at 175.

located near a house on the property he owned. (*Id.* at 147.) According to Mr. Rafferty, he purchased this farm equipment at Lemon's Tractor Supply from his own money rather than any heirship money. (*Id.* at 147-48.) Mr. Rafferty testified that the equipment in question was solely his property and that he did not give any share of it to any of his family members. (*Id.* at 149.) Roger Rafferty discovered this farm equipment missing on April 15, 2002, and reported this to Sergeant Larry Gerwig of the Gilmer County Sheriff's Department. (*Id.* at 83.) Sergeant Gerwig testified that upon an investigation, he discovered that Appellant sold this farm equipment to Mr. Gerald Ball. (*Id.* at 92-93.) Ms. Shirley Ball then testified that on January 31, 2002, Appellant sold this farm equipment to her late husband, Gerald Ball for \$500.00. (*Id.* at 171-72.)

When applying the holdings of Guthrie, *supra*, and Starkey, *supra*, it is beyond dispute that the evidence was sufficient to allow a rational trier of fact to find the essential elements of the offense beyond a reasonable doubt and an impartial jury to convict Appellant of petit larceny when it is examined in the light most favorable to the prosecution. West Virginia Code § 61-13-3(b) defines petit larceny as follows:

If a person commits simple larceny of goods or chattels of the value of less than one thousand dollars, such person is guilty of a misdemeanor, designated petit larceny, and, upon conviction thereof, shall be confined in jail for a term not to exceed one year or fined not to exceed two thousand five hundred dollars, or both, in the discretion of the court.

Evidence brought forth at trial established that Appellant sold equipment purchased exclusively by his uncle, Roger Rafferty, that was situated on land owned by the latter to the Balls for \$500.00. (Tr., 92-93, 171-72, Dec. 13, 2005.)

In fact, Appellant could have been convicted of grand larceny of this farm equipment as was contained in Count I of the indictment and charged to the jury. (Tr., 256-58, Dec. 14, 2005.) Petit

larceny was the lesser-included misdemeanor offense contained in the jury instructions if the jurors found Appellant was guilty beyond a reasonable doubt of stealing, taking and carrying away the property in question without consent to permanently deprive the person of it where it was valued less than \$1,000.00, per the request of Appellant's counsel. (Tr., 256, Dec. 14, 2005; R. at 78-79.) At trial, Ms. Marilyn Matheny, a partner at Lemon's Equipment in Parkersburg, West Virginia, testified that she estimated the farm equipment in question to be valued as much as \$1,200.00. (Tr., 125, Dec. 13, 2005.) According to West Virginia Code § 61-13-3(a), grand larceny is defined as follows:

If a person commits simple larceny of goods or chattels of the value of one thousand dollars or more, such person is guilty of a felony, designated grand larceny, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one nor more than ten years, or, in the discretion of the court, be confined in jail not more than one year and shall be fined not more than two thousand five hundred dollars.

In light of all of the sufficiency of the evidence presented, an impartial jury could have found Appellant guilty of grand larceny beyond a reasonable doubt. The jury determined the value of this property to be less than \$1,000.00 and found him guilty beyond a reasonable doubt of the lesser-included offense of petit larceny. The evidence was indeed sufficient for a rational trier of fact to find the essential elements of this offense beyond a reasonable doubt and an impartial jury to convict Appellant of this offense. Thus, the verdict was not against the weight of the evidence.

- C. **THE FACT THAT JUROR MOORE HAD A SON WHO WAS EMPLOYED IN THE REGIONAL JAIL SYSTEM WAS NOT GROUNDS FOR THE TRIAL COURT TO STRIKE HER FROM THE PANEL FOR CAUSE. THERE WAS A THOROUGH INQUIRY REGARDING HER POTENTIAL BIAS, AND SHE MADE IT ABSOLUTELY CLEAR THAT SHE COULD BE IMPARTIAL.**

Appellant asserts that he was denied a fair trial because a juror in the case had a son employed in the regional jail system. He states that she should have been removed for cause. However, the mere fact that a jury member has some connection to someone who works in a jail system is no-ground for the trial court to remove him or her for cause. An inquiry was conducted on this juror by the trial court, and it was established that she had no bias for or against any party to the case.

1. **The Standard of Review.**

“The true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court.” Syl. Pt. 1, *State v. Wilson*, 157 W. Va. 1036, 207 S.E.2d 174 (1974). Syl. Pt. 3, *State v. Brown*, 177 W. Va. 633, 355 S.E.2d 614 (1987).

2. **Although Juror Moore Had a Son Employed in the Regional Jail System, a Thorough Inquiry by the Court Occurred Regarding Her Ability to Be Impartial During Voir Dire. Upon Examination She Assured the Trial Court of Her Impartiality; and Thus, Juror Moore Should Not Have Been Removed for Cause.**

Appellant incorrectly contends that due to the mere fact that Juror Moore had a son who worked for the regional jail system at the time of the trial, she should have been removed for cause by the court. He states that he was denied the right to an impartial jury on this basis. This is not the case, however. An inquiry was undertaken by the trial court during voir dire to determine if she had

any biases or prejudices for or against any party. Juror Moore expressed her ability to be absolutely impartial during this examination. Specifically, the following questioning occurred during voir dire:

Court: . . . Are you or any of your immediate family members, members of any prosecutorial agency? Employee of the prosecutor of Gilmer County, or any prosecutor's office, United States' Attorneys Office, or any office such as that? Are you or any members of your immediate family, law enforcement officers or employed by law enforcement? Law enforcement being a municipality of the Gilmer, or Glenville rather, Gilmer County Sheriff's Department, West Virginia State Police, West Virginia Department of Natural Resources, Gilmer FCI, Central Regional Jail, or anything of that sort? Yes, ma'am.

Moore: I have a son that works for the regional jail.

* * *

Court: Ok. And the fact that you have a son that re . . . works for the regional jail system, would that cause you to have any bias or prejudice for or against the State?

Moore: (Inaudible).

Court: Ok. Would it cause you, have, been can . . . would it cause you to have any bias or prejudice for or against the State?

Moore: No, no.

Court: Ok. Would it cause you to have any bias or prejudice for or against the defendant?

Moore: No.

Court: And do you believe that you can listen to the testimony adduced from the witness stand, follow the instructions of the Court, and render a fair and impartial verdict?

Moore: Yes.

(Tr., 7-8, Dec. 13, 2005.)

Regarding prospective jurors who are related to members or employees of law enforcement agencies, this Court has held the following:

A prospective juror's consanguineal, marital or social relationship with an employee of a law enforcement agency does not operate as a per se disqualification for cause in a criminal case unless the law enforcement official is actively involved in the prosecution of the case. After establishing that such a relationship exists, a party has a right to obtain individual voir dire of the challenged juror to determine possible prejudice or bias arising from the relationship.

Syl. Pt. 6, *State v. Beckett*, 172 W. Va. 817, 310 S.E.2d 883 (1983). Clearly, the mere fact that Juror Moore had a son that worked in a regional jail did not constitute an active involvement in the prosecution of the case. Despite the fact that this relationship to law enforcement did not amount to a per se disqualification for cause, the trial court conducted an extensive inquiry regarding potential bias or prejudice. It was established during this inquiry that Juror Moore could indeed be impartial toward Appellant. Oddly, Appellant cites this same case to establish that the failure to remove this juror for cause denied him a fair trial. In *Beckett*, the Court ruled that the failure of the trial court to strike two prospective jurors for cause where one was a sister of a magistrate and the other was a brother of a deputy sheriff who was a jailer at a county jail was not error. Similarly, in *Brown*, this Court held that prospective jurors who were related to or acquainted with law enforcement officers or court personnel yet were not related to or acquainted with those in any way connected to the proceedings against the defendant did not disqualify them.

There is no doubt that the trial court established that Juror Moore had no bias or prejudice against Appellant and could be impartial as established in *Brown*. Additionally, it is worth noting that Appellant admits that his counsel at trial did not make a motion to strike Juror Moore for cause

nor use a peremptory strike to remove her. (See Appellant's Brief at 15.) Accordingly, the trial court did not err in its decision not to remove this juror for cause, and Appellant was not denied a fair trial.

D. THE SENTENCE IMPOSED UPON APPELLANT WAS NOT DISPROPORTIONATE TO THE OFFENSE AND DID NOT VIOLATE HIS CONSTITUTIONAL RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Appellant contends that the sentence of one-year imprisonment for his conviction of petit larceny in violation of West Virginia Code § 61-13-3(b) was disproportionate to the offense and violated his constitutional right against cruel and unusual punishment under both the West Virginia and United States Constitutions. Yet when the abuse of discretion standard is applied, the trial court did not commit error in imposing the one-year imprisonment sentence.

1. The Standard of Review.

The Supreme Court of Appeals reviews sentencing orders under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.

Sentences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review.

Syl. Pts. 1 and 2, *State v. Jones*, 216 W. Va. 666, 610 S.E.2d 1 (2004).

2. When Examining the Trial Court's Sentence It Imposed on Appellant for His Conviction of Petit Larceny Using the Abuse of Discretion Standard Set Forth in Jones, It Did Not Violate His Constitutional Right against Cruel and Unusual Punishment and No Error Was Committed.

Appellant is correct in his citing this Court's prior holding stating, "Penalties shall be proportioned to the character and degree of the offense." Syl. Pt. 8, *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980). However, when the record is examined in its entirety, the sentence imposed did not violate Appellant's constitutional right against cruel and unusual punishment contained in

Article III, Section 5 of the West Virginia Constitution and the Eighth Amendment to the United States Constitution. Appellant cites a subjective test in making this constitutional claim established in a Supreme Court of South Carolina case, *Stockton v. Leeke*, 237 S.E.2d 896, 897 (S.C. 1977), where it was held that the Court must determine if the sentence shocks the conscience of the court and society. However, Appellant cites no case law where this standard has been adopted by this jurisdiction. Additionally, Appellant fails to give any rationale or reasoning as to why this one-year sentence would rise to such a level to be deemed unconstitutional.

Appellant then cites a second objective test found in *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 276 S.E.2d 205 (1981). In that case, this Court held,

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, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction.

Id., Syl. Pt. 5. Yet again, Appellant cites no proof that this sentence violated such a test.

When applying the deferential standard as established in *Jones, supra*, this was not an abuse of discretion by the trial court when it sentenced Appellant to a term of one-year imprisonment. As noted above, Appellant fails to articulate how the constitutional standard of the prohibition against cruel and unusual punishment was violated. Additionally, no statutory standard was violated in that West Virginia Code § 61-13-3(b) permits the sentencing of one found guilty of the offense of petit larceny of imprisonment not to exceed one year. This one-year sentence was based on various factors including a pre-sentence report, Appellant's lack of remorse and the trial judge's finding a lack of any credibility on the part of Appellant. (R. at 102-03; Tr., 24, Feb. 27, 2006.) Appellant had ample opportunity to testify regarding the sentence during the sentencing hearing. (Tr., 13-22,

Feb. 27, 2006.) Upon his testimony, the trial judge stated that he found Appellant had a lack of credibility. (*Id.* at 24.) Through the pre-sentence investigation and the sentencing hearing, the judge concluded that Appellant had an extensive criminal history and it appeared that he had a history of taking advantage of others. (*Id.*) Appellant was seeking a sentence of probation in which he could work, yet it was found that he intended to be employed at a strip club which would violate the probationary terms of not being present in a place where alcohol is served. (*Id.*)

Another factor to consider is that although the jury found Appellant guilty of petit larceny for stealing the farm equipment, he very well could have been convicted of grand larceny for stealing property valued in excess of \$1,000.00. As previously mentioned, Ms. Marilyn Matheny, a partner at Lemon's Equipment in Parkersburg, West Virginia, testified that she estimated the farm equipment in question to be valued as high as \$1,200.00. (Tr., 125, Dec. 13, 2006.) In light of this as well as the numerous factors that went into the judge's decision on the imposition of the one-year sentence, there was no abuse of discretion by the trial court. Accordingly, no error was committed, and Appellant's constitutional rights were not violated.

V.

CONCLUSION

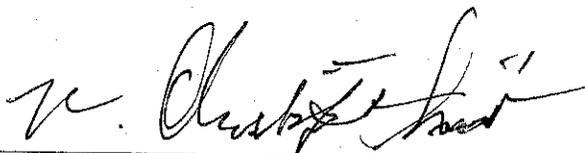
For the foregoing reasons, the judgment of the Circuit Court of Gilmer County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

A handwritten signature in cursive script, appearing to read "R. Christopher Smith", written over a horizontal line.

R. CHRISTOPHER SMITH
ASSISTANT ATTORNEY GENERAL
State Bar ID No. 7269
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 26th day of April, 2007, addressed as follows:

Roger D. Curry, Esq.
Curry & Swisher, PLLC
1414 Country Club Road
Fairmont, West Virginia 26554



R. CHRISTOPHER SMITH