
NO. 33659

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

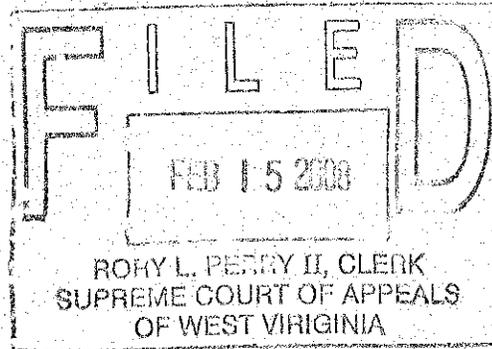
STATE OF WEST VIRGINIA,

Appellee,

v.

JOSHUA LEE SLATER,

Appellant.



BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

I.

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

This is an appeal by Joshua Lee Slater (hereinafter "Appellant") from the October 26, 2006, judgment of the Circuit Court of Kanawha County (Berger, J.), which sentenced him to life with mercy in the state penitentiary upon his conviction by a jury of one count of kidnapping in violation of West Virginia Code § 61-2-14a; one year in the regional jail upon his conviction by a jury of one count of domestic battery in violation of West Virginia Code § 61-2-28(a); five years in the state penitentiary upon his conviction by a jury of one count of wanton endangerment in violation of West Virginia Code § 61-7-12; and one-to-fifteen years in the state penitentiary upon his conviction by a jury of one count of burglary in violation of West Virginia Code § 61-3-11(a). On appeal, Appellant assigns several grounds of error.

II.

STATEMENT OF FACTS

The events of this case revolve around a domestic dispute between Appellant and his girlfriend, Angela Walls, on November 29, 2005. Appellant and Angela lived together in a trailer park in Sissonville and had two children, Kiera and Joshua, who were almost 21 months old and nine months old at this time, respectively. Between 6:00 and 7:00 a.m. on this day, Appellant woke Angela up and asked her if she took money and pills that belonged to him. (Tr. 159.) When she denied doing this, an argument broke out. (*Id.* at 160.)

During the argument, Appellant picked up a hammer and threw it at Angela, hitting her in the leg. (Tr. 163.) Angela tried to use the telephone, and Appellant grabbed it out of her hand and hit her in the head. (*Id.*) She testified that she was not sure whether this blow to the head was from the telephone or his hand. Eventually, Angela gathered the children and attempted to leave through the front door. At this point, Appellant pulled a gun on her and told her that he could not let her leave. (*Id.* at 162-63.) Appellant held the gun and told her that the children would never have another father. (*Id.* at 167.) Appellant then threatened to kill Angela. (*Id.* at 168.)

Appellant then ordered Angela to go into the bedroom, and he followed her there. (Tr. 169.) While there, Appellant picked up a .12 gauge shotgun that was in the bedroom, pointed it at Angela, and threatened to shoot her. (*Id.* at 175-76.) She told him if he shot her there, he would get in trouble for it. Then Appellant ordered her to put on camouflage clothing and a toboggan over her hair. Angela testified that she was crying when these events occurred. (*Id.* at 176-77.) Appellant then told his girlfriend that she had 14 hours to live. He said he was going to take the children to his aunt's house. (*Id.* at 179.) After that, he was going to take her out into the woods, tie her to a tree,

“buckshot” both of her knees, knock her teeth out so there would be no dental records, and set her body on fire so that no one could find her. (*Id.* at 178.) Appellant planned to use the shotgun because it belonged to a friend and could not be linked to him. (*Id.* at 175, 179.) He also told Angela that he would take her hunting and she would “accidentally” be shot, because she wasn’t wearing orange. (*Id.* at 195.) Angela testified she believed Appellant was going to kill her. (*Id.*)

While Appellant was sitting on the couch in the living room, Angela opened a window in the bedroom and covered it with a curtain. (Tr. 181.) She then put Joshua, the baby, in a playpen in the same bedroom. (*Id.* at 186.) Angela told Appellant that she was going to spend some time with her daughter since she did not have much time to live, and took Kiera to that bedroom. (*Id.* at 187.) Angela and her children escaped through the open window in the bedroom by her putting Joshua on a garbage bag of clothes outside the window, climbing out herself and then telling her daughter to come out the window to her. (*Id.*)

Angela picked up her children, got in her car and rushed to her parents’ house to get her mother. She did this because Appellant had also threatened to kill her whole family. (Tr. 187-88.) When she got there Angela told her mother what had happened, and they fled to her grandmother’s house, where her mother called the police. When Angela and her mother returned to the Walls’ house later that day, they found the window on the door broken. (*Id.* at 190-91.)

Lori Walls, Angela’s mother, testified at trial that her daughter arrived at her house between 9:00 and 10:00 a.m., blowing the horn in the driveway. When she saw Angela, she was crying. (Tr. 230.) Angela told her mother they needed to get out of the house because Appellant was going to kill them. (*Id.* at 231.) Mrs. Walls drove them to her mother-in-law’s house because Angela was too upset to drive, and was very emotional. (*Id.* at 233.) When she returned to her house later that

day, Lori Walls noted that in addition to the broken window, the door had also been kicked in. (*Id.* at 237-39.) Mrs. Walls testified that Appellant lived with her family for about six years from the age of 15, and was cared for just as if he were one of her own children. (*Id.* at 226-27, 243.) She stated that although Appellant had a key to her home, he didn't use it on that day. (*Id.* at 240-41.) Lori Walls said she wouldn't have minded if Appellant had used a key, because he had access to her home. Instead, Appellant "destroyed" her back door. (*Id.* at 244.)

Upon receiving a call from a dispatcher, Deputy Anna Kessell of the Kanawha County Sheriff's Department went to check out Angela's parents' house. (Tr. 253-56.) When the deputy went to the door, she noticed a male in the kitchen. Based on her research and the description given to her en route to the house, she identified this person as Appellant. (*Id.* at 256-57.) Appellant immediately fled the house and ran up a hillside. Deputy Kessell had no chance to catch up with Appellant and called for back-up.

Upon receiving back-up, Deputy Kessell and other law enforcement officers went into Angela's parents' house to determine if there were any victims or additional suspects there. While in the house, the officers found a 30-30 gauge Marlin rifle and a knit ski mask in the master bedroom as well as camouflage gloves on the living room floor. (Tr. 258.) When the rifle was taken into custody, it was discovered what appeared to be shards of glass on the barrel. (*Id.* at 266.) At trial, Deputy Kessell testified that Appellant told her that the gloves, ski mask and gun belonged to him. (*Id.* at 274-75.) Although Appellant gave the explanation at trial that he had the gun in order to eventually go hunting, he admitted that he walked to Angela's parents' house with the weapon. (*Id.* at 355.) Additionally, he admitted at trial that he knocked the door window out with the barrel of his gun. (*Id.* at 356.)

Deputy L.S. Deitz was dispatched by Deputy Kessell and went to an apartment complex where one of Appellant's relatives lived. With the help of Angela's father, Deputy Deitz identified Appellant sitting in the passenger's side of a Ford Probe on the side of the road. (*Id.* at 306-07.) At that point, Deputy Deitz, Lieutenant Robbins, Sergeant Mathis and a state trooper apprehended Appellant. (*Id.* at 307.)

On July 26, 2007, the jury convicted Appellant of kidnapping with a recommendation of mercy, domestic battery, wanton endangerment and burglary. (R. at 93; Tr. 436-37.)

III.

RESPONSE TO ASSIGNMENTS OF ERROR

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

1. The evidence was legally insufficient to sustain the burglary conviction because Mr. Slater was charged with breaking and entering a dwelling in the daytime – a crime which requires that his entry to be unauthorized. It was undisputed that Mr. Slater had permission to enter the house.

State's Response:

The elements necessary to convict Appellant of daytime burglary were satisfied in this case. Appellant did break and enter Angela Walls' parents' house with the intent to commit a crime therein; that is, to murder its occupants. Although Appellant had prior permission to enter the house using a key, he did not have permission to break a window and kick in the door to gain entry on the day in question, in light of the circumstances.

2. The kidnaping statute requires that in addition to confining a victim, a defendant intend to obtain from the victim a "concession," beyond the simple act of confining. The evidence was legally insufficient to sustain Mr. Slater's kidnaping conviction because the trial judge found as a matter of both fact and law that the only "concession" Mr. Slater sought or obtained by confining his live-in girlfriend to their trailer was to prevent her from leaving.

State's Response:

Appellant failed to preserve this assignment of error at trial. Nevertheless, the evidence supported a finding by the jury that the concession or advantage Appellant was attempting to gain by confining Angela Walls was the eventual taking of her life under cover of darkness, so as to avoid detection or apprehension. Therefore, the statutory elements of kidnapping were met, and the evidence was legally sufficient to sustain the conviction.

3. Mr. Slater, who is 23 years old and has had no prior criminal record was sentenced to life plus sixteen years for a crime in which everyone agrees there was no physical injury worse than a minor bruise, and no property damage greater than a broken window. This sentence is so disproportionate and excessive that it violates Article 3, Section 5 of the West Virginia Constitution and the Cruel and Unusual Punishment clauses of the Eighth and Fourteenth Amendments to the United States Constitution.

State's Response:

Appellant's sentence was within statutory limits and was not based on any impermissible factors. The sentence of life with mercy was decided by the jury when it convicted Appellant of kidnapping, and was therefore not within the sentencing court's discretion. Given the statutory presumption for consecutive sentencing, and based upon the facts of this case, the circuit court did not abuse its discretion in imposing consecutive sentences for Appellant's other crimes.

4. The deliberating jurors sent the judge a note asking two proper questions reflecting that they did not understand the legal elements of wanton endangerment. The judge improperly refused to answer either of the questions, and ordered the jury to continue deliberating without any further explanation of the law.

State's Response:

Appellant did not object to the court's ruling or request that the jurors be given any additional instructions, thereby waiving any right to have the jury reinstructed. There was no violation of due

process, and thus no plain error by the trial court, because the jury's questions did not pertain to any essential element of the crime.

5. The trial judge violated the federal and state constitutional principles enunciated in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450 (1979), *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881 (1975), *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970), *Morissette v. United States*, 342 U.S. 246 (1952), and *State v. O'Connell*, 163 W. Va. 366, 256 S.E.2d 429 (1979), by suggesting to the jury that it would be reasonable for them to adopt an inference that the defendant intended his acts as well as the natural and probable consequences of those acts.

State's Response:

Because Appellant expressly waived any objection to the court's charge at trial, it cannot be reviewed by this Court even for plain error. Nevertheless, the instruction in question did not presume any material element of the crime or shift any burden to Appellant. There was no abuse of discretion with respect to the jury instructions in this case, and Appellant's due process rights were not violated.

IV.

ARGUMENT

- A. THE EVIDENCE WAS SUFFICIENT TO SUPPORT APPELLANT'S CONVICTION FOR BURGLARY IN THAT ALL OF THE ELEMENTS OF THE CRIME WERE SATISFIED. THERE IS NO "UNAUTHORIZED ENTRY" REQUIREMENT FOR DAYTIME BURGLARY; EVEN SO, APPELLANT'S BREAKING AND ENTERING WAS NOT AUTHORIZED.**

Appellant attempts to make a distinction between daytime and nighttime burglary, claiming that the former must be an unauthorized entry. However, neither the statutory language nor case law makes such a distinction. Additionally, despite the fact that Appellant previously had permission to enter his girlfriend's parents' house at will using a key, there was no consent to break into the

house in this instance and under these circumstances. Thus, the evidence was legally sufficient to sustain the conviction.

1. **The Standard of Review.**

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. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

2. **All of the Elements of Daytime Burglary Were Met in this Case. Despite the Fact That There Is No Legal Basis for Appellant's Claim, the Entry in Question Was Unauthorized.**

Appellant makes the dubious claim that daytime burglary—the offense he committed in this case—has a requirement that the entry must be unauthorized, whereas nighttime burglary does not. Appellant reasons that since he had prior access and authorization to enter his girlfriend's parents' house and this entry occurred during the daytime, his actions did not constitute a burglary. This is incorrect, however. According to West Virginia Code § 61-3-11(a) [1993], the statutory definition of burglary is as follows:

Burglary shall be a felony and any person convicted thereof shall be confined in the penitentiary not less than one nor more than fifteen years. If any person shall, in the nighttime, break and enter, or enter without breaking, or shall, in the daytime, break and enter, the dwelling house, or an outhouse adjoining thereto or occupied therewith, of another, with intent to commit a crime therein, he shall be deemed guilty of burglary.

From the facts outlined above, there is no doubt that Appellant entered the Walls' house by breaking into it. Specifically, he knocked the glass out of the door with the barrel of his gun. (Tr. 239, 266, and 352.) In fact, Appellant admitted to doing so. (*Id.* at 356.) He also kicked the door in, leaving his footprint. (*Id.* at 238, 245.) While at their trailer, Appellant had threatened to kill Angela numerous times. (*Id.* at 168, 176, and 178.) At one point, Appellant threatened to kill both Angela and her family. (*Id.* at 189.) When Angela arrived at her parents' house after escaping from the trailer, she told her mother that they had to leave because Appellant was going to kill them. (*Id.* at 231.) From these facts, a jury could reasonably conclude that Appellant entered his girlfriend's parents' house to commit a crime, most likely murder.

Appellant cites *State v. Louk*, 169 W. Va. 24, 285 S.E.2d 432 (1981), in asserting that an unauthorized entry must occur for a daytime burglary conviction. In addressing the question of whether larceny was a lesser included offense of burglary, this Court in *Louk* compared the statutory elements with the common law definition of burglary, noting: "Our statute is consistent with the conclusion of most courts that the burglary is complete once there has been an unauthorized entry and a showing that there was an intent to commit a felony." *Id.* at 26, 285 S.E.2d at 434 (citations omitted). However, this discussion was not material to the Court's decision in *Louk*, and the opinion made no distinction between daytime and nighttime burglary with respect to the issue of an unauthorized entry.

Appellant also relies on *State v. Plumley*, 181 W. Va. 685, 688-89, 384 S.E.2d 130, 133-34 (1989), for his assertion that when the Legislature amended West Virginia Code § 61-3-11(a) and removed the requirement of "breaking" for nighttime burglary, it also removed the requirement that the entry be unauthorized; but this was only applicable to the nighttime offense. (*See* Appellant's

Brief at 11.) However, that is not what this Court held in *Plumley*. *Plumley* involved a nighttime burglary in which the defendant entered a man's house to commit larceny when the latter gave consent for him to enter, but it was through fraud. The Court held that "the plain language of the statute indicates that the consent of the occupant obtained through fraud or threat of force is not a defense to the crime of burglary." *Plumley*, 181 W. Va. at 688, 384 S.E.2d at 133. There was no distinction made between daytime and nighttime burglary in this opinion either; it merely dealt with entry via fraud for purposes of a nighttime burglary conviction.

This Court in *Plumley* noted that "[s]ome states have attempted to include some of the common law 'breaking' element [of nighttime burglary] by requiring the entry to be 'unlawful' or be 'unauthorized.'" *Id.* at 688 n.2, 384 S.E.2d at 133 n.2 (citation omitted). Discussing the above-quoted language from *Louk*, the Court in *Plumley* also clarified that "our statute does not specify that the entry be unauthorized." 181 W. Va. at 689 n.6, 384 S.E.2d at 134 n.6. Thus, it appears that while an "unauthorized entry" was required at common law, our burglary statute now contains no such requirement. What is also apparent from the Court's discussion is that any "breaking" of a dwelling house, whether at night or during the day, may be equated with an "unauthorized entry."

Appellant's assertion that his daytime entry was authorized is also invalid. It is true that Appellant had prior permission to enter his girlfriend's parents' house and possessed a key to it. (Tr. 243-44.) Had he used his key to gain entry to the house at any other time, Mrs. Walls likely would not have objected. However, it is apparent from her testimony that when Appellant broke the door window, kicked in the door and entered her house on the day in question, he did not have her consent. After Angela fled to her parents' house and told her mother they needed to leave because Appellant wanted to kill them, Lori Walls testified that she did not return to her home until the police

informed her that Appellant had been arrested. (Tr. 245.) Under these facts, the jury could well have found that once Appellant threatened Angela's and her family's lives, his authorization to enter the house ended.

So under West Virginia Code § 61-3-11(a), all of the elements of daytime burglary were satisfied in this case. Appellant broke into the Walls' house by knocking out the door window with the barrel of his gun in order to commit the crime of murder; he clearly stated that he intended to kill Angela and her family. The jury could indeed find Appellant guilty of this offense beyond a reasonable doubt. Thus, his conviction should not be reversed on this ground.

B. APPELLANT FAILED TO PRESERVE HIS ASSIGNMENT OF ERROR REGARDING THE SUFFICIENCY OF THE EVIDENCE OF KIDNAPPING. REGARDLESS, THE EVIDENCE AT TRIAL WAS LEGALLY SUFFICIENT TO SUSTAIN THE VERDICT.

Appellant argues that the evidence was legally insufficient to convict him of kidnapping his girlfriend and that his due process rights were thereby violated, because the element of a "concession" was not satisfied. (Appellant's Brief at 14.) Because this issue was not preserved at trial, it is not ripe for appellate review. Even so, the evidence demonstrates that the concession or advantage that Appellant was attempting to gain through his confinement of Angela Walls was the eventual taking of her life by murdering her in the woods, which he planned on doing several hours later under cover of darkness. Consequently, the evidence was sufficient for a jury to convict Appellant of kidnapping beyond a reasonable doubt.

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).

"[A] jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." Syl. Pt. 3, in part, *State v. Guthrie*, *supra*.

2. **Because Appellant Did Not Raise the Issue of a "Concession" Until After the Verdict, He Failed to Preserve this Claim for Appellate Review.**

The kidnapping statute, West Virginia Code § 61-2-14a [1999], provides in relevant part:

(a) Any person who, by force, threat, duress, fraud or enticement take, confine, conceal, or decoy, inveigle or entice away, or transport into or out of this state or within this state, or otherwise kidnap any other person, or hold hostage any other person *for the purpose or with the intent of taking, receiving, demanding or extorting from such person, or from any other person or persons, any ransom, money or other thing, or any concession or advantage of any sort, or for the purpose or with the intent of shielding or protecting himself, herself or others from bodily harm or of evading capture or arrest after he or she or they have committed a crime* shall be guilty of a felony and, upon conviction, shall be punished by confinement by the division of corrections for life, and, notwithstanding the provisions of article twelve, chapter sixty-two of this code, shall not be eligible for parole: Provided, That the following exceptions shall apply: (1) A jury may, in their discretion, recommend mercy, and if such recommendation is added to their verdict, such person shall be eligible for parole in accordance with the provisions of said article twelve[.]

(Emphasis added.)

Appellant contends that there was no concession demanded or obtained by his confinement of Angela in the trailer before she escaped, and therefore his conviction was not supported by the evidence. However, this defense was never raised by Appellant at trial. Rather, he argued that the kidnapping was merely "incidental" to the offenses of battery and wanton endangerment. (*See R. 34; Tr. 326-331.*) Appellant made this argument for the first time in his post-trial Motion For a New

Trial, and then only in passing. (*See* R. 96, p. 16.) The circuit court denied the motion without a hearing, by Order entered October 2, 2006. (R. 99.)

During the sentencing hearing, Appellant asked the circuit court to consider sentencing him under Subsection (a)(4) of the statute,¹ which provides for a possible sentence of 10-30 years if the victim is returned alive without physical injury, and “there is no concession gained.” (*See* Tr. 445.) The circuit court denied his request, stating “I find that there was concession [gained] in that he was able to gain control over her and kept her from leaving; and I also find, consistent with the statutory language, she was not returned.” (*Id.* at 447.) These findings by the court were made for the sole purpose of determining what sentence would be appropriate under the statute. They cannot be construed as circumscribing the verdict of the jury, as the sole finder of the facts. Nor can they preserve a claim for appellate review that Appellant forfeited by failing to raise it at trial.

¹West Virginia Code § 61-2-14a(a) [1999] also provides:

(2) if such person pleads guilty, the court may, in its discretion, provide that such person shall be eligible for parole in accordance with the provisions of said article twelve, and, if the court so provides, such person shall be eligible for parole in accordance with the provisions of said article twelve in the same manner and with like effect as if such person had been found guilty by the verdict of a jury and the jury had recommended mercy; (3) in all cases where the person against whom the offense is committed is returned, or is permitted to return, alive, without bodily harm having been inflicted upon him, but after ransom, money or other thing, or any concession or advantage of any sort has been paid or yielded, the punishment shall be confinement by the division of corrections for a definite term of years not less than twenty nor more than fifty; (4) in all cases where the person against whom the offense is committed is returned, or is permitted to return, alive, without bodily harm having been inflicted upon him or her, but without ransom, money or other thing, or any concession or advantage of any sort having been paid or yielded, the punishment shall be confinement by the division of corrections for a definite term of years not less than ten nor more than thirty.

This Court has emphasized 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 present his due process argument below, Appellant deprived the circuit court of that important opportunity.

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).

Accordingly, this Court should apply the forfeiture rule to Appellant's current assignment of error, and refuse to address it on appeal.

3. **The Concession or Advantage Appellant Was Attempting to Gain from the Confinement of Angela Walls was the Eventual Taking of Her Life. Therefore, the Statutory Elements of Kidnapping Were Met, and the Evidence Was Legally Sufficient to Support the Conviction.**

Regardless of whether this issue was preserved, Appellant's argument fails. As is readily apparent from reviewing the highlighted language of the quoted statute, there are *several* alternative means by which the "intent" element of the crime of kidnapping may be satisfied. Appellant focuses on only one—obtaining a "concession" from the victim—arguing that it was not proven in his case.

In their indictment, the grand jurors alleged that Appellant had kidnapped Angela Walls for the purpose and with the intent of taking, receiving, demanding, and extorting from the said Angela D. Walls and other persons, any ransom, money and other thing and any concession and advantage of any sort, and for the purpose and with the intent of shielding and protecting himself and others from bodily harm *and of evading*

capture and arrest after he the said JOSHUA LEE SLATER had committed a crime, and said crime was committed by the said JOSHUA LEE SLATER, with the use, presentment and brandishing of a firearm, to-wit: a rifle[.]

(R. 1; emphasis added.)

This specific language was not part of the court's instructions to the jury, but provides one theory under which the conviction may be sustained. The trial jurors could have easily found that Appellant confined Angela Walls to prevent her from reporting his earlier crimes to the authorities. Appellant himself in his Motion for a New Trial suggested a second theory supported by the evidence: that Appellant's purpose in preventing Angela from leaving was to secure the "concession or advantage" of keeping his children with him. (See R. 96, p.16.) He did not want her to leave and take the children, and knew that she would not leave without them—as Angela so testified. (See Tr. 202-03, 218.)

However, the theory most strongly supported by the evidence is that *the taking of Angela's life that evening* was the intended "concession or advantage" sought to be gained by Appellant. As previously discussed, Appellant prevented Angela Walls from leaving the trailer by threat of a gun, and told her that she "had 14 hours" to live. (Tr. 178.) Given that it was between 7:00 and 8:00 a.m. when he said this, the inescapable conclusion is that Appellant was waiting until well after dark to carry out his murder plans. After that, Appellant told Angela, he was going to take her into the woods, tie her to a tree, "buckshot" both of her knees, knock her teeth out so as to prevent anyone from finding her dental records, and set her body on fire so that no one could identify her. (*Id.*) The intention of murdering Angela under cover of darkness in order to escape detection or apprehension was doubtlessly the concession or advantage sought by Appellant, coupled with the pleasure of torturing her with thoughts of her own impending death. Under these facts, a jury could find him

guilty beyond a reasonable doubt of this offense. Therefore, Appellant's due process rights were not violated, and his conviction should not be reversed on this ground.

C. APPELLANT'S SENTENCE WAS NOT DISPROPORTIONATE TO THE OFFENSES FOR WHICH HE WAS CONVICTED. THE SENTENCE IMPOSED WAS WITHIN STATUTORY LIMITS AND GUIDELINES AND WAS NOT BASED ON IMPROPER FACTORS.

Appellant argues that the sentence imposed on him was disproportionate to the offenses for which he was convicted. This claim is made primarily due to Appellant's age and the fact that he had no prior criminal history. However, when examining the facts and the reasoning behind the trial judge's sentence, there was no disproportionate sentence imposed. It was within the statutory limits and was not based on improper factors. When the record is examined, the sentence does not violate the deferential standard applied by this Court regarding this issue.

1. The Standard of Review.

"Sentences imposed by the trial court, if within statutory limits and if not based on some [im] permissible factor, are not subject to appellate review." Syllabus Point 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E. 2d 504 (1982).

Syl. Pt. 4, *State ex. rel. Hatcher v. McBride*, ___ W. Va. ___, ___ S.E.2d ___, 2007 WL 3317186 (2007); Syl. Pt. 5, *State v. Watkins*, 214 W. Va. 477, 590 S.E. 2d 670 (2003); Syl. Pt. 4, *State v. Neal*, 179 W. Va. 705, 371 S.E. 2d 633 (1988).

The Supreme Court of Appeals reviews sentencing orders, including orders of restitution made in connection with a defendant's sentencing, under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.

Syl. Pt. 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997); *see also Watkins, supra* at 480, 590 S.E.2d at 673.

2. **The Sentence Imposed on Appellant Was Within the Statutory Limits and Was Not Based on Impermissible Factors. Therefore, No Abuse of Discretion Occurred.**

Appellant makes the claim that the sentence imposed on him was disproportionate, and thus a violation of the Cruel and Unusual Punishment Clauses of the United States and West Virginia Constitutions. As previously stated, Appellant was sentenced to life imprisonment with mercy for kidnapping, one year for domestic battery, five years for wanton endangerment, and one-to-fifteen years for burglary, all to run consecutively. (Tr. 459-60; R. at 103.) His claim is primarily based on the fact that he was 23 years of age at the time of the offenses and has no prior criminal record. (See Appellant's Brief at 15; Tr. 448.) Additionally, Appellant makes the dubious argument that the only damage he caused in committing these offenses were "minor bruises on the face and leg" of Angela Walls and a "broken window pane" to Lori Walls' house. (See Appellant Brief at 15.) However, when examining precedent set by this Court along with the facts of this case, there was no disproportionate sentence imposed.

Subject to certain narrowly drawn exceptions, this Court has consistently held that sentencing decisions rest within the sound discretion of the trial court. "The Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, in part, *State v. Lucas, supra*. The balance struck by the sentencing judge in weighing competing sentencing factors will not be disturbed by this Court unless it is manifestly unsupported by reason. See *State v. Redman*, 213 W. Va. 175, 181, 578 S.E.2d 369, 375 (2003) ("Our system of criminal jurisprudence views a trial court's discretion during the sentencing phase of a criminal proceeding as a critical component of the process."); *State v. Head*, 198 W. Va. 298, 306, 480 S.E.2d 507, 515 (1996) (Cleckley, J., concurring) ("Circuit court

judges have a right to believe that so long as they have not violated a law or acted in a nefariously discriminatory way in imposing sentences, this Court will not sift through the nooks and crannies of their decisions determined on finding that which is not there.”).

As this Court held in *Hatcher, Watkins, and Neal, supra*, so long as a sentence is within the statutory limits and is not based on impermissible factors, this Court will not subject it to appellate review. This is indeed a very deferential standard, and Appellant’s sentence does not violate it. All of the sentences imposed for each offense of which Appellant was convicted were within their respective statutory limits.

The statutory sentence for kidnapping is life in the penitentiary; although the jury in rendering its verdict may recommend mercy, as happened in this case. See West Virginia Code § 61-2-14a(a)(1). Appellant’s sentence of life with mercy was thus decided by the jury when it convicted him of kidnapping, and was not within the sentencing court’s discretion unless Appellant’s offense satisfied the factors set forth in Subsections (a)(3) or (4) *supra*, n.1. The circuit court found these exceptions to be inapplicable, because the victim *was not returned* by Appellant but escaped. (Tr. 447.) Appellant’s remaining sentences were in accordance with their statutory penalties. See W. Va. Code § 61-3-11(a) (burglary); § 61-7-12 (wanton endangerment); and § 61-2-28(a) (domestic battery). Thus, Appellant’s only complaint can be that the circuit court made these sentences consecutive. However, there is a statutory *presumption* in this State that sentences for multiple offenses will be *consecutive*, unless the trial court in its discretion determines that they will be concurrent:

When any person is convicted of two or more offenses, before sentence is pronounced for either, the confinement to which he may be sentenced upon the second, or any subsequent conviction, shall commence at the termination of the

previous term or terms of confinement, unless, in the discretion of the trial court, the second or any subsequent conviction is ordered by the court to run concurrently with the first term of imprisonment imposed.

W. Va. Code § 61-11-21 [1923].

Under the circumstances of this case, the circuit court did not abuse its discretion in imposing consecutive sentences for Appellant's other crimes.

The trial judge stated that she found the facts of this case to be "particularly egregious." (Tr. 456.) In particular, the judge based the sentence on the fact that Appellant had the intention of killing Angela. During the sentencing hearing, the trial judge stated:

And I say that [Appellant was criminally responsible and knew what he was doing] based on the evidence of the comments that you made to Ms. Walls there in the trailer about killing her, taking her to the bedroom and forcing her to change into camouflage clothing and telling her why, that you were going to kill her and pretend that it was a hunting accident; threatening to knock out her teeth and to shoot her and to burn her body so that no one would know that had happened to her.

Once you learned that she had left, you did exactly what she thought you would do. You went to her mother's home, you broke out a window in a door in order to gain access. And when the police came to the home, when you discovered that they were there, you fled. All of these facts and circumstances indicate a person who is cognizant of what's going on, who is thinking. You thought out plans of how to kill her without being caught, based on your verbalization.

(Tr. 456-57.)

There is no doubt that this sentence was based on a permissible factor; that Appellant intended to brutally murder his girlfriend. Appellant stated numerous times that he was going to kill Angela, told her to dress in camouflage and discussed his horrific and calculated plan of the act with her and, when she escaped, went to her parents' house with a gun to go through with it. Regarding this, the trial judge went on in the hearing to state:

When I listened to the testimony and even when I listened to your testimony, there's no doubt in my mind, given the threats that you had made that day, had you found her at Ms. Wall's, at her mother's, that she would not be here today.

(*Id.* at 459.) In light of this, the sentence imposed was not disproportionate.

Appellant also claims that the sentence is excessive because his girlfriend and her mother spoke at the sentencing hearing for leniency on his behalf. (*See* Appellant Brief at 15, 17.) While this is true, the trial judge found this to be characteristic of a girlfriend suffering from "battered woman's syndrome" and discounted it. Specifically, the judge stated,

And quite frankly, from this bench I never want to be in a position of abusing a defendant or his or her family, but Ms. Walls through her testimony, through her comments to the Probation Department and her comments today, exhibits the behavior of someone who is an abused mate or partner. Nothing that she has done would show otherwise. Her conduct has been, quite frankly, that of someone who is an abused spouse or mate or partner.

The conduct that led us here today is particularly atrocious. It happened with your children in the home, the very children that it's claimed that you're a great father of. It happened to someone who had borne your children, who was close to you. A lot of times people in the community and even people in the legal community want to lessen domestic violence, that it's different from an attack on a stranger. And it comes from those old adages of people saying that they should keep what goes on in their home private. I view it, quite frankly, just the opposite. I think that we have a right to expect more from the people that we love and who care about and people who would be parts of our family or as a higher duty not to harm us, in my opinion, than a stranger does. So I think it's particularly atrocious, the conduct with the weapons, leaving the weapon on the bed at her mother's home, looking for her.

(*Id.* at 458-59.) Accordingly, the fact that Angela and her mother spoke on Appellant's behalf does not establish that the sentence was based on impermissible grounds.

Appellant places great reliance on the decision of *State v. Richardson*, 214 W. Va. 410, 589 S.E.2d 552 (2003), wherein this Court reduced the defendant's kidnapping sentence from 30 to 10 years. However, it should be remembered that Richardson entered a guilty plea to that offense,

giving the trial court greater discretion in sentencing. Moreover, as this Court has repeatedly held, each case must be examined in light of its particular facts and circumstances. There is no formula that may be applied in determining the appropriate sentence in a case; which is why we rely on the sound discretion of the sentencing judge.

In applying the standard of review set by this Court, the sentence imposed by the trial court was not disproportionate. It was primarily based on Appellant's plan to murder his girlfriend. There was no violation of the Cruel and Unusual Punishment Clauses of the Fifth and Fourteenth Amendments of the United States Constitution or Article 3, Section 5 of the West Virginia Constitution, and Appellant is not entitled to a reversal on this ground.

D. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN FAILING TO GIVE ADDITIONAL INSTRUCTIONS TO THE JURY THAT WERE NOT REQUESTED BY APPELLANT'S COUNSEL, AND WERE NOT RELEVANT TO ANY ESSENTIAL ELEMENT OF THE OFFENSE.

During their deliberations, jurors asked two questions regarding the offense of wanton endangerment, and the trial judge did not reinstruct them. However, Appellant never requested that the members of the jury be given any additional instructions, thereby waiving any right to have the jury reinstructed. Additionally, because no objection was made, the trial court's ruling can only be reviewed by this Court for plain error. There was no violation of due process, and thus no plain error, because the jury's questions did not pertain to any essential element of the crime.

1. The Standard of Review.

“Where it clearly and objectively appears in a criminal case from statements of the jurors that the jury has failed to comprehend an instruction on a critical element of the crime or a constitutionally protected right, the trial court must, *on*

request of defense counsel, reinstruct the jury.” Syllabus Point 2, *State v. McClure*, 163 W.Va. 33, 253 S.E.2d 555 (1979).

Syl. Pt. 2, *State v. Lutz*, 183 W. Va. 234, 395 S.E.2d 478 (1988) (emphasis added).

To trigger application of the “plain error” doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

Syl. Pt. 7, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

2. **Appellant’s Counsel Did Not Object or Request Additional Jury Instructions, Thereby Waiving Any Right to Reinstruction.**

During their deliberations, jurors sent the following two questions to the court:

Under “wanton endangerment,” does it matter if the gun is loaded?

Does “wanton endangerment” lie on the one with the gun or the perception of person it is pointed at?

(Tr. 433.) After reading these questions into the record, the trial judge informed the parties, “I’m going to bring them in and tell them that they have all the legal instructions that I can give them in order to find their verdict.” To which Appellant’s counsel (Nathan Hicks, Jr.) responded, “Yes, ma’am.” (*Id.*) The judge then had the jurors brought into the courtroom, where she read their note, and advised them as follows:

Mr. Davis [jury foreperson] and ladies and gentlemen of the jury, I instruct you that you have the Court's instructions. That's the only law that I can provide for you upon which you can base your verdicts.

(Tr. 434.) The jury returned its verdicts 52 minutes later. (*Id.* at 435.)

At no time prior to the verdict was there any objection or request for additional instructions from the defense. Because Appellant forfeited this claim of error on appeal by failing to raise it at trial, the circuit court's ruling in this regard may only be reviewed for plain error.

3. **There Was No Plain Error Because the Jury's Questions Did Not Deal With Any Essential Element of the Crime of Wanton Endangerment.**

Appellant contends that it was reversible error for the trial court to refuse to answer the jury's questions, arguing that they dealt with essential elements of the offense and demonstrated confusion about the law. (Appellant's Brief at 20.) The State disagrees. The jury's questions did not involve any constitutionally protected right, nor did they touch on any critical element of the crime. Therefore, the trial judge was not required to answer them.

The jury instruction defining "wanton endangerment" was as follows:

The Court instructs the jury that any person who wantonly performs any act with a firearm which creates a substantial risk of death or serious bodily injury to another shall be guilty of a felony.

(Tr. 406.)² This instruction is basically identical to the statutory language for this offense. West Virginia Code § 61-7-12 [1994] states, in pertinent part,

Any person who wantonly performs any act with a firearm which creates a substantial risk of death or serious bodily injury to another shall be guilty of a felony, and, upon conviction thereof, shall be confined in the penitentiary for a definite term

²The instructions also included definitions for the terms "firearm," "serious bodily injury," and "wanton act." (*See* Tr. 406.) The definition given for "firearm" was "any weapon which will expel a projectile by action of any explosion." (*Id.*) *See* W.Va. Code § 61-7-2(11) [2002].

of years of not less than one year nor more than five years, or, in the discretion of the court, confined in the county jail for not more than one year, or fined not less than two hundred fifty dollars nor more than two thousand five hundred dollars, or both.

The trial judge, in essence, stated that she could not explain this instruction any further than what had already been given. Indeed, the court's charge to the jury already contained all the "law" that the court could provide regarding this offense. Under the statute, there is no requirement that the firearm be loaded, and the definition of the offense does not speak to subjective perceptions of the participants, but rather suggests an objective standard.

This Court has indicated that the crime of wanton endangerment may be performed even with an *unloaded* firearm. Addressing the issue of whether a conviction for wanton endangerment requires the discharge of the firearm, the Court held:

Because the offense of wanton endangerment with a firearm is defined, not in terms of whether the firearm is discharged, but merely with reference to the commission of "any act," the discharge of a firearm is not an element of West Virginia Code § 61-7-12. Our interpretation of this statute is in accord with that of other states that have addressed this issue. *See State v. Moore*, 2000 WL 1612705 (Tenn. Crim. App. 2000) (holding that firing of weapon was not an element of offense of reckless endangerment with a deadly weapon under Tenn. Rev. Code § 39-13-103(a)-(b)); *see also Bracksieck v. State*, 691 N.E.2d 1273, 1275 (Ind.App.1998) (stating that the court "can envision no situation in which pointing a loaded firearm at another person does not also create a substantial risk of bodily injury to that person"); *Key v. Commonwealth*, 840 S.W.2d 827, 829 (Ky.Ct.App.1992) (recognizing that pointing of gun, whether loaded *or unloaded*, constitutes conduct that creates substantial danger of death or serious injury); *State v. Meier*, 422 N.W.2d 381 (N.D.1988) (upholding conviction for reckless endangerment where defendant pointed *unloaded* rifle at two police officers); *In re ALJ v. State*, 836 P.2d 307 (Wyo.1992) (holding that pointing of *unloaded* gun at another creates violent situation supporting conviction of reckless endangerment provided firearm not pointed for defensive purposes). Accordingly, we find no basis for error with Appellant's conviction on the charge of wanton endangerment with a firearm.

State v. Hulbert, 209 W. Va. 217, 544 S.E.2d 919, 930 (2001) (emphasis added).

Because the question of whether the firearm was loaded (or whether the person at whom it was pointed perceived it as such) does not appear to be material to the offense, the circuit court did not commit plain error in failing to answer the jury's questions on these issues. There was no due process violation because these questions were not relevant to any critical element of the offense, and thus could not have prejudiced Appellant.

Admittedly, the evidence at trial was unclear whether the rifle Appellant pointed at Angela Walls was loaded. Remarkably, no one asked the police officers or Appellant that question. Officers did recover the Appellant's rifle and five 30-30 cartridges from the Walls home after Appellant fled the scene. (Tr. 258, 264.) And Angela certainly must have *believed* it to be loaded, or she would not have done Appellant's bidding. Thus, even if wanton endangerment requires a loaded weapon, this evidence could support a jury finding that the weapon was loaded. Therefore, any error in the trial court's failure to further instruct the jury was harmless. The trial court's ruling was therefore not plain error, because it did not "seriously affect the fairness, integrity, or public reputation of the judicial proceedings," Syl. Pt. 7, *State v. LaRock, supra*. Given Appellant's failure to object or to request a reinstruction, thus forfeiting his right to appeal the trial court's ruling, there is no basis for reversal on this ground.

E. APPELLANT EXPRESSLY WAIVED ANY OBJECTION TO THE COURT'S CHARGE, FORECLOSING APPELLATE REVIEW EVEN FOR PLAIN ERROR. THERE WAS NO DUE PROCESS VIOLATION BECAUSE THE JURY INSTRUCTION REGARDING INTENT DID NOT PRESUME ANY ELEMENT OF THE OFFENSE OR SHIFT ANY BURDEN TO APPELLANT.

Appellant asserts that the trial court's instruction regarding the inference of intent improperly shifted the burden of persuasion to the defense, implied that the judge had a personal opinion on the subject, and constituted plain error. However, Appellant expressly waived any objection to this

instruction at trial, thereby foreclosing appellate review even for plain error. Nevertheless, the instruction satisfied due process because it did not presume any element of the offense or shift any burden to Appellant.

1. **The Standard of Review.**

A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

Syl. Pt. 4, *State v. Guthrie, supra*.

In a criminal prosecution, it is constitutional error to give an instruction which supplies by presumption any material element of the crime charged.

Syl. Pt. 1, *State v. O'Connell*, 163 W. Va. 366, 256 S.E.2d 429 (1979).

Under the "plain error" doctrine, "waiver" of error must be distinguished from "forfeiture" of a right. *A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined.* By contrast, mere forfeiture of a right -- the failure to make timely assertion of the right -- does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is "plain." To be "plain," the error must be "clear" or "obvious."

Syl. Pt. 8, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995) (emphasis added).

2. **Because Appellant Expressly Waived Any Objection to This Instruction at Trial, There Is No Error, Plain or Otherwise.**

The jury instruction in question here was as follows:

It is reasonable to infer that a person ordinarily intends to do that which he does or which is the natural or probable consequence of his knowing acts. The jury may draw the inference that a person intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act or conscious omission. Any such inference drawn is entitled to be considered by the jury in determining whether or not the State has proved beyond a reasonable doubt the required criminal intent.

(Tr. 401-02.) This instruction was part of the trial court's charge to the jury. (See R. 89, p. 9.)

Appellant's counsel did not object to this instruction, and in fact expressly *waived* any such objection at trial. Discussing the court's charge to the jury, defense counsel stated:

MR. HICKS: I believe I'm entitled to – or I'm going to ask you for an instruction that relates to the incidental nature of this kidnapping.

THE COURT: Uh-huh.

MR. HICKS: That would be my only comment. In all other respects, *I have no objections*. I would just ask you to give an instruction that – to the extent that the alleged kidnapping was incidental to other crimes.

(Tr. 377; emphasis added.) After discussing the Appellant's requested instruction on kidnapping, the following exchange occurred:

THE COURT: All right. I want to take some time during the luncheon recess and plod about this incidental issue, because as I understand it, there are no other objections to the charge. Is that correct?

MR. HICKS: *I have none*, your Honor.

(Tr. 385; emphasis added.)

Before a reviewing court analyzes an alleged error under the plain error doctrine, it first must ask "whether there has in fact been error at all." *Miller*, 194 W. Va. at 18, 459 S.E.2d at 129. When the circuit court asked if there were any objections to the charge, Appellant's counsel *twice* stated

that he had none, thus intentionally relinquishing his right to challenge the jury instructions. Accordingly, *there is no error* to review, plain or otherwise. *Id.*³

Because Appellant voluntarily waived any issue he may have had with regard to the jury charge, the circuit court committed no error by giving this instruction to the jury. Consequently, the circuit court did not abuse its discretion, and this Court need not determine what effect it might have had on Appellant's trial. As this Court noted in *State v. Knuckles*, 196 W. Va. 416, 421, 473 S.E.2d 131, 136 (1996), "waiver necessarily precludes salvage by plain error review." Should this Court nevertheless decide to proceed under a "plain error" analysis, a similar conclusion is inevitable; that is, the circuit court did not commit "plain error that affect[ed] the substantial rights of [the] defendant." *Miller*, 194 W. Va. at 18, 459 S.E.2d at 129.

3. **Appellant's Due Process Rights Were Not Violated Because The Instruction in Question Did Not Presume a Material Element of the Crime or Shift Any Burden to Appellant.**

Appellant contends that the court's instruction regarding intent is improper "because it shifts the burden to the defense to rebut the inference of intent while simultaneously informing the jury that the judge believes it would be reasonable for the jurors to make such an inference in [Appellant]'s case." (Appellant's Brief at 22.) However, using the deferential standard set forth in *Guthrie, supra*,

³The facts in this case are similar to the facts in *Miller*. In *Miller*, the defendant argued, *inter alia*, that the circuit court's general charge to the jury was insufficient because no self-defense instruction was included within the court's charge. However, defense counsel did not submit a self-defense instruction when given the opportunity to do so, did not object to the circuit court's failure to include such an instruction, and explicitly stated to the judge that the defense was satisfied with the proposed instructions and *had no objection to the jury charge*. See 194 W. Va. at 17, 459 S.E.2d at 128. This Court rejected Miller's insufficient jury charge claim for two reasons; more significantly, because she "waived any issues she might have had regarding an improper or insufficient jury charge" by explicitly agreeing to the proffered charge. *Id.* at 19, 459 S.E.2d at 130. In both cases, the defense intentionally relinquished a known right.

and examining it in light of established precedent, this Court should find that this instruction did not shift any burden to Appellant, and did not constitute reversible error.

Appellant's argument relies on the Supreme Court's decisions in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450 (1979), and the decision of this Court in *State v. O'Connell*, 163 W. Va. 366, 256 S.E.2d 429 (1979). These cases hold that instructions regarding intent that create a mandatory or conclusive presumption, or that shift the burden of persuasion to the defendant on this essential element of the crime, violate due process. However, the instruction given in Appellant's case, which merely allows a permissive inference of intent, does not shift any burden of persuasion to the defense and does not constitute reversible error.

The instruction struck down in *Sandstrom* stated that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." 442 U.S. at 513, 99 S. Ct. at 2453. The Supreme Court held that the instruction violated the Fourteenth Amendment because jurors may have interpreted the presumption as conclusive or as shifting the burden of persuasion. In the present case, the instruction was permissive rather than mandatory.

In Syllabus Point 1 of *State v. O'Connell*, supra, this Court held: "In a criminal prosecution, it is constitutional error to give an instruction which supplies by presumption any material element of the crime charged." However, the instruction in *O'Connell* that was held to be unconstitutional read: "The Court instructs the jury that a man is presumed to intend that which he does, or which is the immediate and necessary consequences of his act." 163 W. Va. at 366-67, 256 S.E.2d at 430. This is clearly impermissible presumptive language that shifts the burden of proof, and is distinguishable from that employed in the case at bar. There was nothing presumptive or conclusive in the language of the court's instruction in the present case.

In *United States v. Spiegel*, 604 F.2d 961 (5th Cir. 1979), where remarkably similar language was used in the instructions as in the instant case, the Court of Appeals for the Fifth Circuit distinguished it from the instruction condemned in *Sandstrom*, holding: "Here the court merely informed the jury that they *might* infer intent from knowing acts; this is clearly correct." *Spiegel*, 604 F.2d at 968 (emphasis in original).⁴ Similarly, in *United States v. Mayo*, 646 F.2d 369, 375 (9th Cir. 1980), the Ninth Circuit was faced with instructions regarding intent that stated the following:

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. As I have said, it is entirely up to you to decide what facts to find from the evidence.

The Court of Appeals found these instructions to be distinguishable from those given in *Sandstrom*, and held that the trial court did not tell the jury to presume intent from a voluntary act but merely permitted the jury to infer intent. *Id.*

This Court distinguished its prior holding in *O'Connell, supra*, in *State v. Greenlief*, 168 W. Va. 561, 285 S.E.2d 391 (1981), upholding the constitutionality of an instruction that stated, "[t]he court instructs the jury that there is a *permissible inference of fact* that a man intends that which he does, or which is the immediate and necessary consequence of this act." *Id.* at 566-67, 285 S.E.2d at 395 (emphasis in original). The Court held that this instruction was "a permissible

⁴The Court in *Spiegel* cited with approval its recommended instruction on intent adopted in *United States v. Chiantese*, 560 F.2d 1244, 1255-56 (5th Cir. 1977), and which is virtually identical to the instruction at issue here:

It is reasonable to infer that a person ordinarily intends the natural and probable consequences of his knowing acts. The jury may draw the inference that the accused intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any intentional act or conscious omission. Any such inference drawn is entitled to be considered by the jury in determining whether or not the government has proved beyond a reasonable doubt that the defendant possessed the required criminal intent.

inference of fact" which was not mandatory or binding at all, and did not serve to shift any of the burden of proof to the defendant. *Id.*

The language of the instruction given in this case with respect to intent was merely permissive, as was that given in *Greenlief*, which this Court held to be constitutional, as well as the respective instructions upheld by the Courts of Appeal in *Spiegel* and *Mayo, supra*. Further, the instruction in this case is distinguishable from the mandatory, presumptive and conclusive language of the instructions employed in *Sandstrom* and *O'Connell, supra*, which were ruled unconstitutional by the United States Supreme Court and this Court, respectively. Thus, Appellant's conviction did not violate the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution nor that of Article III, Section 19 of the West Virginia Constitution. Accordingly, his conviction should not be reversed on this ground.

Appellant also argues that this instruction constituted plain error because it amounted to the trial judge giving her opinion to the jury on the element of intent. Again, because Appellant waived any objection to this instruction at trial, this claim cannot be reviewed even for plain error. Even so, his argument fails. The trial judge did not at any time during Appellant's trial express her opinion about the evidence, and the permissive language of this constitutionally acceptable instruction does not become mandatory, and thus unconstitutional, simply because a judge utters it. Appellant has cited no case law that supports his position, because there is none. There was no violation of fundamental fairness that would have prejudiced Appellant under the standard established for plain error in *State v. Miller, supra*. Appellant's claim in this regard should therefore be rejected by this Court.

V.

CONCLUSION

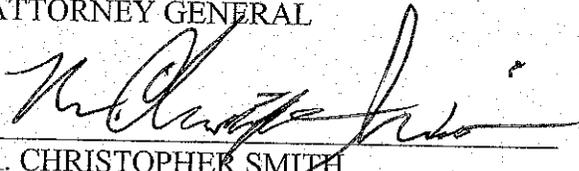
For the foregoing reasons, the judgment of the Circuit Court of Kanawha County should be affirmed by this Honorable Court.

Respectfully submitted,

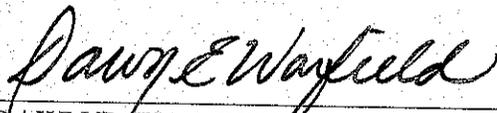
State of West Virginia,
Appellee,

By counsel,

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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 15th day of February, 2008, addressed as follows:

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