

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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STATE OF WEST VIRGINIA, :

Appellee, :

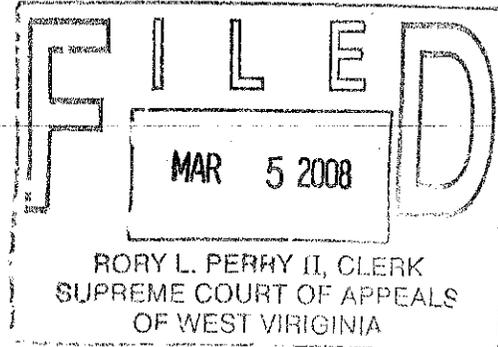
v. :

JOSHUA LEE SLATER, :

Appellant :

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No. 33659
Circuit Court of Kanawha County
No. 06-F-141



APPELLANT'S REPLY BRIEF

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POINT ONE: THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUSTAIN THE DAYTIME BURGLARY CONVICTION. MR. SLATER WAS CHARGED WITH “BREAKING AND ENTERING” A DWELLING IN THE DAYTIME — A CRIME THAT REQUIRES HIS ENTRY TO BE UNAUTHORIZED. IT WAS UNDISPUTED THAT MR. SLATER HAD PERMISSION TO ENTER THE HOUSE.
(Responding to pages 7-11 of Respondent’s Brief)

The State claims that the crime of burglary does not require a defendant’s entry into the burglarized premises be unauthorized. Respondent’s Brief, 9-10. Yet this Court held in State v. Plumley, 181 W.Va. 685, 689, 384 S.E.2d 130, 134 (1989), that the requirement of an unauthorized entry is the essence of the “breaking” requirement in the West Virginia burglary statute:

The West Virginia [nighttime] burglary statute’s departure from the traditional common law requirement of “breaking” is significant because breaking was a concept designed to deep out intruders, or to prevent trespass into the building, and *a person with authority to enter could not be said to have committed a breaking*. Citing La Fave and Scott, Substantive Criminal Law §8.13(b) (1986 ed.) (emphasis added). . . . Because the legislature has deleted the “breaking” requirement with regard to entry in the nighttime, the statutory offense of burglary of the dwelling house of another [in the nighttime] involves no unlawfulness of entry”.

The legislature did not, however, delete the “breaking” requirement for burglary in the daytime – the crime with which Mr. Slater was charged. The requirement of an unauthorized entry therefore still exists for that crime. See West Virginia Code, 61-3-11(a) (1993)(2005 Repl. Vol.).

While the State is correct in noting that the language of the statute does not use the words “unauthorized entry,” it is quite clear that in Plumley this Court held the statutory term

“breaking” is synonymous with “unauthorized entry.” Because a breaking is required for the crime with which Mr. Slater was charged, as a matter of law, the State was required to prove that his entry was unauthorized.

The State’s fall-back position is that even if they were legally required to prove Mr. Slater entered without authorization, the manner of his entry, by knocking out a window in the door, somehow invalidated his authority to enter. Respondent’s Brief, 10. The State cites no legal authority for this position. There is no such authority.

It is notable that the State concedes Mr. Slater had permission to enter his girlfriend’s house and also had a key to it. Respondent’s Brief, 10; Tr. 243-244. While his decision to enter by knocking out a window pane in the door may have exposed him to charges of damaging property or vandalism, it did not convert his permission to go inside into an unauthorized entry. There can be no doubt of this because Lori Walls, the owner of the house and supposed victim of the “burglary,” testified at trial that Mr. Slater had her permission and access to enter. Tr. 243-244.

The evidence was therefore legally and factually insufficient to sustain the charge of burglary, and that conviction should be vacated.

POINT TWO: 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 BY CONFINING HIS GIRLFRIEND IN THEIR TRAILER WAS TO PREVENT HER FROM LEAVING.
(Responding to pages 11-16 of Respondent's Brief)

The State asserts that this issue was not preserved, since it was first raised in a post-trial Motion for a New Trial (R.96, page 16), and not at a pre-verdict stage of the trial. Respondent's Brief 12-14. While the State is factually correct about when defense trial counsel first raised the issue, the issue was still properly preserved, because it was impossible for counsel to raise it at any earlier stage.

Jury verdicts in criminal cases are factually indeterminate. Juries in kidnaping cases, for example, are never required to state what facts they believe satisfied the element of a "concession." They merely return a verdict of guilty or not guilty on the kidnaping charge.

When the kidnaping count was submitted to the jury, and even later when the jury returned a guilty verdict against Mr. Slater on that count, there was no way of knowing whether the jurors believed the concession Mr. Slater sought was the custody of his children (as argued by the State in closing argument, Tr. 410), the ability to more easily commit murder (as argued by the State for the first time in this appeal, Respondent's Brief, 14-15), or even some other concession the jurors perceived in the facts that was not argued by the State. Consequently, there was no basis for defense counsel to point to the jury's options and their ultimate verdict and say that their reason for finding a concession was legally wrong.

All this changed at sentencing, when for the first time the trial court, in response to

counsel's sentencing motion, made a factual finding that the "concession" supporting the kidnaping verdict was only that Mr. Slater kept his girlfriend from leaving their trailer.

I find that there was concession in that he was able to gain control over her and kept her from leaving. Tr. 447. (emphasis added).

It was not until the trial court made this finding of fact that the legal issue raised in this appeal came into existence, and could have been raised. Of course, by that time, defense counsel had already made his Motion for a New Trial, and that motion had been denied. While counsel probably could have asked the trial judge to reconsider her decision on that motion in light of her new finding of fact, such a request was not required, and would surely have been futile, since the trial judge saw nothing inconsistent about her rulings.

The State also argues that even if the issue was preserved, there were several alternative theories on which a concession could be found, so the evidence was not insufficient to establish that element of kidnaping. Respondent's Brief, 14-15. The State's argument fails, however, because as soon as the trial court made a definitive finding of fact about the "concession," alternative theories became irrelevant. Without such a finding of fact, the State would be correct – the jury *might* have accepted an alternative theory. After the court's finding of fact, though, there is no room for speculation – the jury's verdict rested on the finding articulated by the trial judge, that the "concession" was that Mr. Slater kept her from leaving.

Although the State claims that this finding of fact only applies to the court's sentencing determination, Respondent's Brief, 13, it cites no authority for the proposition that a judicial finding of fact is only applicable to the issue raised at the time the finding was made. And there is no such legal authority. Findings of fact become law of the case and are binding on all

subsequent litigation in the case. This is particularly true in kidnaping cases. The statute defining the elements and punishment for kidnaping permits the trial judge to make findings of fact at sentencing. Among those findings are: whether the victim was returned or permitted to return safely; whether the victim suffered bodily harm; and whether the defendant obtained "any concession or advantage of any sort." West Virginia Code, 61-2-14a(a)(3, 4) (1999)(2005 Repl. Vol.). If the trial judge opts to make these findings of fact, they are sufficiently binding to overrule the jury's mercy/no mercy determination. More important, when the Supreme Court of Appeals reviews a kidnaping case, these findings of fact are binding on the appellate courts, and entitled to the same degree and standard of deference as any other factual determinations. As this Court recognized in State v. Farmer, 193 W.Va. 84, 88, 454 S.E.2d 378, 382 (1994), if the trial court chooses to make factual findings at the sentencing stage of a kidnaping case, those findings are not only binding, but entitled to so much deference that they (and the sentence they support) may not be overturned on appeal unless the trial court abused its discretion and based the sentence on impermissible factors.

Finally, it is important to note that the State does not argue that the trial court's finding would be sufficient to uphold the kidnaping verdict. As noted in Appellant's principal brief, a confinement in itself does not satisfy the concession requirement of the kidnaping statute.

Appellant's Brief, 13-14.

POINT THREE: MR. SLATER IS 23 YEARS OLD AND HAS NO PRIOR CRIMINAL RECORD. HE WAS SENTENCED TO LIFE PLUS SIXTEEN YEARS FOR A CRIME IN WHICH HE CAUSED ONLY MINOR BRUISES AND A BROKEN WINDOW. THE SENTENCE IS SO EXCESSIVE AND DISPROPORTIONATE THAT IT VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSES OF THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS. (Responding to pages 16-21 of Respondent's Brief)

The most important thing to remember about the sentencing in this case is that Mr. Slater's offenses caused no damage greater than minor bruises and a broken window. For this he received the same sentence he would have gotten had he murdered the victim.

It is axiomatic that "the punishment should fit the crime." Something is seriously wrong when a convicted person who caused no serious injury (however serious its statutory classification) receives the same punishment as someone who committed an intentional killing. This is particularly true under the West Virginia Constitution, which has an explicit clause requiring that criminal sentencing be proportional. West Virginia Constitution, Article III, Section 5. As noted in Appellant's principal brief, Mr. Slater's sentence was far greater than that imposed on similarly situated defendants who committed far more harmful crimes. State v. Richardson, 214 W.Va. 410, 589 S.E.2d 552 (2003); Appellant's Brief, 15-18. For these reasons, the sentence imposed by the trial judge was constitutionally improper.

Finally, the State asserts that the trial court did not consider any impermissible factors when it sentenced Mr. Slater. Respondent's Brief, 18-20. Yet in one very significant way, the trial court gave great weight to a highly impermissible factor.

Angela Walls testified on Mr. Slater's behalf at sentencing, and urged the court to be

lenient. As noted by the State, Respondent's Brief, 20, the trial judge rejected Ms. Walls's testimony, and upbraided her, stating that her testimony only showed that she is an abused spouse suffering from "battered woman's syndrome." Respondent's Brief, 20; Tr. 458-459.

To the best of our knowledge, the trial judge is not qualified to diagnose Angela Walls's mental condition, and not qualified to determine whether someone suffers from "battered woman's syndrome" based upon their brief testimony at a sentencing hearing. It is grossly improper for a judge to base a sentence, in whole or in part, on such a determination. Even worse, the trial court's diagnosis put Mr. Slater in an untenable position: If Angela Walls requested a harsh sentence, the court would view that as a factor supporting imposition of a harsh sentence; if she requested a lenient sentence, that merely showed that she was mentally ill as a result of abuse, and would be another factor supporting imposition of a harsh sentence. This kind of "heads I win, tails you lose" sentencing process cannot pass constitutional muster.

POINT FOUR: THE DELIBERATING JURORS SENT THE JUDGE A NOTE ASKING TWO PROPER QUESTIONS ABOUT THE LEGAL DEFINITION OF WANTON ENDANGERMENT. AT LEAST ONE OF THESE QUESTIONS INVOLVED AN ESSENTIAL ELEMENT OF THE CRIME. IT WAS PLAIN ERROR FOR THE TRIAL JUDGE TO REFUSE TO ANSWER EITHER QUESTION. (Responding to pages 23-25 of Respondent's Brief)

While the jurors were deliberating, they sent a note asking two questions about the law of wanton endangerment:

[1] Under wanton endangerment does it matter if the gun is loaded?

[2] Does wanton endangerment lie on the one with the gun or the perception of the person it is pointed at? Tr. 433.

The trial judge refused to answer either question.

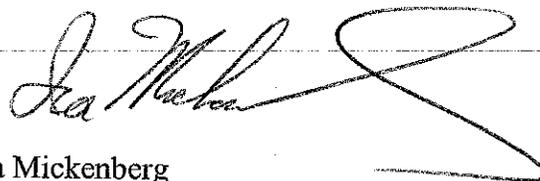
The State asserts that it was not plain error for the court to refuse to answer, because these questions "did not deal with any essential element of the crime of wanton endangerment."

Respondent's Brief, 23. In support of this argument, the State cites authority from other states for the notion that a person may be convicted of wanton endangerment even if the gun is not loaded. However, even if we assume, *arguendo*, that it doesn't matter whether the gun was loaded, the jury's second question goes directly to the risk element of wanton endangerment – whose perception of the risk matters? The victim's? The suspect's? Or is it an objective test? The trial court never said anything to the jury about the proper standard. But it seems clear that the jury's verdict could easily be different, depending on how the question is answered. For example, if they incorrectly believed the statute allowed for conviction based upon the victim's subjective perception, they could have convicted even if they believed there was no actual

danger. It is impossible to tell whether this happened, but it is certain that the jury was concerned enough to ask a question, and the judge insisted on leaving them in the dark.

Because the jury's questions concerned an essential element of the crime charged, it was plain error for the court to refuse to answer it.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Ira Mickenberg". The signature is written in black ink and is positioned above the typed name and address.

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CERTIFICATE OF SERVICE

I, Gregory L. Ayers, do hereby certify that on the 5th day of March, 2008, I served a copy of the attached Appellant's Reply Brief, by mail, upon:

Dawn E. Warfield
Deputy Attorney General
State Capitol, Room 26-E
Charleston, WV 25305


Gregory L. Ayers