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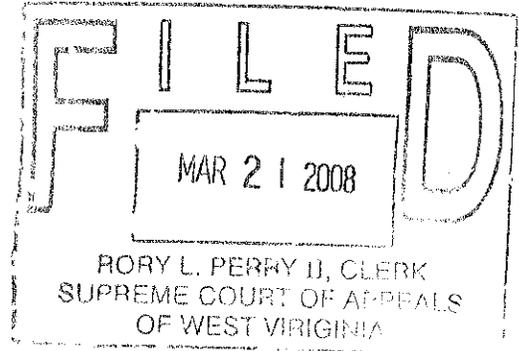
**IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA**

CHARLESTON, WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee,

VS.

ROBERT LEE SHINGLETON,
Defendant Below, Appellant.



An appeal from the Circuit Court of Kanawha County, West Virginia

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES3

THE KIND OF PROCEEDING AND NATURE
OF THE RULING IN THE CIRCUIT COURT4

STATEMENT OF FACTS7

ASSIGNMENT OF ERROR8

 I. The Trial Court abused its discretion by improperly refusing to
 give the jury an instruction on self-defense, over Defendant’s
 objection, thus depriving the defendant of Due Process of Law and
 unfairly prejudicing his defense.....8

POINTS AND AUTHORITIES RELIED UPON
AND APPELLANTS ARGUMENT AND DISCUSSION OF LAW.....9

PRAYER FOR RELIEF16

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<u>State v. Smith</u> , 170 W.Va. 295 S.E.2d 820 (1982)	10
<u>State v. Hayes</u> , 136 W.Va. 199, 67 S.E.2d 9 (1951).....	10
<u>State v. Smith</u> , W.Va., 193 S.E.2d 550 (1972)	10
<u>State v. Hinkle</u> , 200 W.Va. 280, 489 S.E.2d 257 (1996).....	10
<u>State v. Green</u> , 206 S.E.2d 923, 157 W.Va. 1031 (1974)	10, 11, 14
<u>State v. Foley</u> , 128 W.Va. 166, 35 S.E.2d 854 (1945)	11, 12
<u>State v. Kirtley</u> , 162 W.Va. 249, 252 S.E.2d 374 (1978)	13
 <u>CONSTITUTIONAL PROVISIONS</u>	
Amendment V, VI and XIV, West Virginia Constitution	16
Amendment V, VI, and XIV, United States Constitution.....	16
 <u>STATUTORY PROVISIONS</u>	
West Virginia Code, Section 61-2-9	9,11

**THE KIND OF PROCEEDING AND NATURE
OF THE RULING IN THE CIRCUIT COURT**

Initially, Appellant must apologize and concede that a factual error existed in his previously filed petition, as noted by Counsel for the State. That error being the absence of the Defendant's statement as properly admitted evidence in the jury trial before the Circuit Court. Although admitted and found as valid evidence in pretrial proceedings before the trial court, the Defendant's statement was never moved into evidence at the actual trial in this matter. The Defendant's statement as properly admitted evidence was a point relied upon in the Appellant's original petition for appeal. However, the absence of Defendant's statement on the record in his trial should not be dispositive of Appellant's argument before this Court regarding the refusal of the Trial Court to allow a self-defense instruction. Appellant's argument remains the same, and Appellant is of the position that evidence still exists upon the record which would allow the jury to be instructed as to self-defense.

The Defendant relied entirely upon the theory of self-defense at his trial in this matter. On August 31, 2004, Robert Lee Shingleton, at that time a young man 23 years of age, was approached by a 42 year old homosexual named Edward Ayers outside of Tidewater Grill in Charleston. At first, Mr. Ayers began to buy Robert Lee Shingleton drinks and engaged in idle talk. The turning point on this day, after Ayers purchased several drinks for this young straight man at numerous locations around Charleston, was when Robert Lee Shingleton was lured by a very intoxicated Mr. Ayers to Ayers' downtown apartment with the purpose of gaining sexual favors. At the first indication of contact of a sexual nature, Robert Lee Shingleton resisted, and he resisted with force.

Using no weapon save for his own fists, Robert Lee Shingleton hit Mr. Ayers in the face and then left him unconscious, but very much alive, lying in the floor of his own apartment.

At Robert Shingleton's trial in Kanawha County Circuit Court for Malicious Assault and Robbery many of these facts were undisputed. Robert Lee Shingleton made a sworn statement a little over a week after the incident to Charleston City Police Officers in which he admitted that he punched Mr. Ayers several times in self defense, after Mr. Shingleton felt that he was at the very least the victim of a Battery within the meaning of the West Virginia Code, and perhaps the target of an imminent sexual assault. This statement was accepted as valid evidence in a pre-trial hearing, but not, however, admitted at trial as evidence.

Mr. Ayers' testimony at trial was inconclusive since he was admittedly intoxicated on the date in question. Mr. Ayers' level of intoxication was corroborated by the testimony of the cab driver who transported the two men to Mr. Ayers' apartment. Mr. Ayers' testimony reflects that he was indeed punched by Mr. Shingleton at least once.

Robert Lee Shingleton refused to take the stand in his own defense, or to call any witnesses on his behalf. Mr. Shingleton relied solely upon the evidence as presented, including but not limited to Mr. Ayers testimony evidencing distress on Mr. Shingleton's part immediately following a sexual advance from Mr. Ayers, and accordingly upon an argument of self-defense to the jury.

At the close off all evidence, the Trial Court refused to allow any instruction as to self-defense, over the objection of the Defense. The Jury returned a verdict of acquittal

as to the Count of Robbery, and the Jury returned a guilty verdict as to the Count of Malicious Assault.

The State of West Virginia later filed an information seeking punishment under the recidivist statute for repeat offenders based upon a prior conviction of Forgery out of Taylor County. After his plea of guilty to the aforementioned information, Mr. Shingleton was sentenced under the recidivist statute to the penitentiary of this State for an indeterminate term of not less than four (4) years nor more than ten (10) years, with credit for time served.

STATEMENT OF FACTS

It is undisputed that Robert Lee Shingleton punched Mr. Ayers' in the face on August 31, 2004. This is established by Mr. Ayers' testimony at trial (Tr. Vol I, pg. 103, lines 22-23) and the testimony of Dr. Richard Umstadt (Tr. Vol II, pg. 47, lines 21-24, pg. 48 lines 1-8) which verified that Ayers' suffered from blunt force trauma to his face. However, in considering the trial courts decision not to allow a self-defense instruction, the events leading up to this act must be considered and weighed.

Mr. Ayers' testimony admits that he made a sexual advance by placing his hand upon Robert Lee Shingleton's thigh when the men returned to Ayers' apartment. (Tr. Vol. I, pg. 103, lines 3-5). Mr. Ayers Later in the trial, at the close of all evidence, defense counsel made an argument for the inclusion of an instruction to the jury on self-defense, which motion was denied, and objected to by the Defense (Tr. Vol. II, pgs. 71-76). During this colloquy, the Trial Judge, out of the presence of the jury, stated,

“Your client was a lot, lot less intoxicated, according to the cab driver than the victim. So just looking at those pieces of testimony and a drunk, person intoxicated, touching another person's leg as amounting to some kind of man endangering attack or assault? I don't think so, Mr. Gaylock. **Not enough to give an instruction. But if you want to get up and argue that to the jury, you go right on.**” (Tr. Vol. II, pg 75, lines 12-22) (emphasis added).

The Trail Court also denied Defense motion for new trial at a hearing on July 6, 2005, in which the Defense argued again for the inclusion of a self-defense instruction. (Pre and Post Trial Motion Tr., Pages 15-20).

ASSIGNMENT OF ERROR

1. The Trial Court abused its discretion by improperly refusing to give the jury an instruction on self-defense, over Defendant's objection, thus depriving the defendant of Due Process of Law and unfairly prejudicing his defense.

POINTS AND AUTHOITIES RELIED UPON
AND APPELLANT'S ARGUMENT AND DISCUSSION OF LAW

The Trial Court abused its discretion by improperly refusing to give the jury an instruction on self-defense, over Defendant's objection, thus depriving the defendant of Due Process of Law and unfairly prejudicing his defense.

I. POINTS AND AUTHORITIES RELIED UPON

The West Virginia Code defines the offense of simple Battery, in part, as when "any person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of another." W.Va. Code § 61-2-9. Under the same statute, the crime of Assault is defined, in part, as when any person "unlawfully commits an act which places another in reasonable apprehension of immediately receiving a violent injury." *Id.*

There existed no mandate at law permitting Mr. Ayers to fondle or in any way touch Robert Lee Shingleton on August 31, 2004. Mr. Ayers himself admitted that his touching created an offense to Robert Lee Shingleton on direct examination when he stated in refernce to Robert Shingleton's demeanor after the touching that, "He seemed to get upset . . .". (Tr. Vol. I, pg. 103, lines 3-12). Furthermore, on direct examination of the State, when Mr. Ayer's was asked the question regarding the day in question, "Was there a time when things, when something happened in the house?" the alleged victim responded "Yes. I guess when I put my hand down by the side, it seemed like he got nervous or something . . ." (Tr. Vol. I, pg. 102, lines 10-14). Hence, under the definitions of both the offense of simple Battery and Assault, there existed at Trial

evidence that the alleged victim, Mr. Ayers, had committed at least one perceived violent offense against the person of Robert Lee Shingleton prior to Mr. Shingleton's punching Mr. Ayers in the face.

There exists no evidence in the Trail record that Mr. Shingleton himself did any act to induce Mr. Ayers to grab him or touch him in any way. The general rule is that a person accused of an assault does not lose his right to assert self-defense, unless he said or did something calculated to induce an attack upon himself. Syllabus, State v. Smith, 170 W.Va. 295 S.E.2d 820 (1982).

Where there is competent evidence tending to support a theory it is error for the trial court to refuse to give a proper instruction presenting such theory when requested to do so. State v. Hayes, 136 W.Va. 199, 67 S.E.2d 9 (1951); State v. Smith, W.Va., 193 S.E.2d 550 (1972). As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion; by contrast, the question of whether a jury was properly instructed is a question of law, and the review is de novo. Syllabus Point 1, State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996). In the case of State v. Green, 206 S.E.2d 923, 157 W.Va. 1031 (1974), this Court held that even though the testimony and evidence in the trial was conflicting and confusing, there was enough evidence to instruct the jury as to self-defense even where the homicide happened in a bar, the person killed was not even the assailant, and the shot occurred at close range after a cooling off period. Id at 1034.

II. APPELLANT'S ARGUMENT AND DISCUSSION OF LAW

Under the facts as previously stated herein, the evidence in the present case is similar to that in Green, supra. As in Green, we have in the present case alcohol use which serves to cloud all parties' memories which evidence was presented to the jury entirely during the testimony of the alleged victim himself as well as the cab driver, Chris Neely. As stated previously, Mr. Ayers placed on the record evidence that Mr. Shingleton was obviously disturbed and upset by his advances. (Tr. Vol. I, pgs. 102-103).

This Court has previously held that, where, in a trial for murder, there is competent evidence tending to show that the accused believed, and had reasonable grounds to believe, that he was in danger of losing his life or suffering great bodily harm at the hands of several assailants acting together, he may defend against any or all of said assailants, and it is reversible error for the trial court to refuse to instruct the jury to that effect. Syllabus Point 4, State v. Foley, 128 W.Va. 166, 35 S.E.2d 854 (1945). Although this is not a murder case, the same principles apply, in as much as the application of the theory of self-defense being based upon a subjective standard of belief of the accused.

In the present case, evidence clearly exists on the record that the Petitioner herein believed himself to be in danger or at the very least perceived the sexual advance as inappropriate and of an "insulting or provoking nature" as defined by the aforementioned battery statute. W.Va. Code § 61-2-9. The reasonableness of the Defendant's belief is best left to the confines of the jury deliberation room. And yet in the trial transcript it is clear that the Trial Judge made the sole decision on the reasonableness of Defendant's

belief and actions. In this respect, and at the risk of duplicity, the Court should again consider the Trail Courts's ruling when it said,

“Your client was a lot, lot less intoxicated, according to the cab driver than the victim. So just looking at those pieces of testimony and a drunk, person intoxicated, touching another person's leg as amounting to some kind of man endangering attack or assault? I don't think so, Mr. Gaylock. **Not enough to give an instruction. But if you want to get up and argue that to the jury, you go right on.**” (Tr. Vol. II, pg 75, lines 12-22) (emphasis added).

Simply because the Trail Judge failed to appreciate the battery to Mr. Shingleton's person it does not necessarily follow that the jury would not. Had the jury been instructed on self-defense, they would have been forced to consider the incident from the perspective of the Defendant, and not just the alleged victim. Syllabus Point 4, State v. Foley, 128 W.Va. 166, 35 S.E.2d 854 (1945).

In the present case, the jury would have been aware of Mr. Ayer's homosexuality, as well as the fact that the alleged “victim” had been plying the Defendant with alcohol for hours prior to inducing the Defendant to Mr. Ayers' home, wherein Mr. Ayers, a 41 year old man, made obviously unwanted sexual advances on an intoxicated heterosexual man in his early twenties. The reasonableness of Mr. Shingleton's response should have been weighed by the jury from his unique perspective on this day, and not solely by the Trial Judge.

After the Testimony of Mr. Ayers, not only would a self-defense instruction have been warranted, but the burden should have shifted to the state to prove that Mr. Shingleton did not act out of self-defense. This Court has previously found in regards to

a murder case that, “once there is sufficient evidence in the case to create a reasonable doubt that the killing resulted from the defendant acting in self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense.” State v. Kirtley, 162 W.Va. 249 at 262, 252 S.E.2d 374 at 381 (1978). Also in Kirtley this Court stated, “The important point which our cases have emphasized is that the heat of passion engendered by provocation and resulting in an intentional killing “cannot be traced to a malignant heart, but it is imputable to human frailty. Passion and malice are not convertible terms, so that an act prompted by the one cannot be said to proceed from the other.” Id. at 376, quoting State v. Ponce, 124 W.Va. at 128, 19 S.E.2d at 222.

It should be noted in this regard that the jury acquitted Mr. Shingleton of the charge of robbery. The alleged act of robbery was relied upon as the sole motive for the punching of the alleged victim by Mr. Shingleton, and thus the required element of malice, when in closing argument the State commented, “[h]e (Mr. Shingleton) became a predator who found his mark, Edward Stanley Ayers. He thought he could roll a gay guy for money and other things without consequences . . .” (Tr. Vol. II, pg 83, lines 2-7). Without the motive of monetary gain and hence robbery, which act the jury ultimately decided did not occur, the question is presented as to what motive the jury eventually did subscribe to Mr. Shingleton for the malicious assault of which he was eventually convicted. The only remaining motive for the punching of Mr. Ayers, absent robbery, was the perceived assault upon his person, reasonable or otherwise.

Additionally, the jury was ultimately subjected to arguments concerning self-defense by both the prosecution and the defense in closing. The State argued in closing, “Folks, why does someone, **if there were a threat**, and in this case, I’m not conceding

there was one, **if there were a threat**, why would you keep hitting someone after the threat ended?" (Tr. Vol. II, pg 88, lines 19-24) (Emphasis added). The Defense later posed a question in its' closing directly related to the issue now before this Court, notably with permission and encouragement of the Trail Judge, when it asked:

"The question is, is it reasonable for Mr. Shingleton, at that point, with all the liquor that's been drunk, with everything that's gone on up to that point, is it reasonable for Mr. Shingleton to believe that he's about to be sexually assaulted? He's about to be sexually assaulted by a man who he knows to be a homosexual, he is about to sexually assaulted by someone who potentially could give him a life-threatening disease if he succeeds." (Tr. Vol. II, pg 97, lines 1-13).

However, without an instruction as to what self-defense entails and the application of such a defense to the present case, the men and women of the jury were unable to properly deliberate upon this issue as presented. And, absent a robbery as motive, with an instruction as to self-defense it is, at the very least, conceivable that Mr. Shingleton would have been acquitted of all charges.

Thus, the evidence in the present case would support at least a cursory consideration by the jury of self-defense. This Court stated its opinion regarding just such a case in Green when it said, "[i]t appears form the evidence that the defendant was entitled to at least one instruction on self-defense and thus, the trial court's refusal do so is reversible error." Green, supra at 1035.

Furthermore and in conclusion, the foregoing error constitutes a wholesale and pervasive violation of Mr. Shingleton's constitutional rights as the same are secured by the Fifth, Sixth and Fourteenth Amendments to both the West Virginia and the United

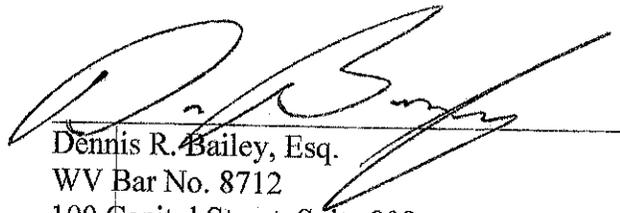
States Constitutions. West Virginia Constitution, Amend. V, VI, and XIV, and United States Constitution Amend. V, VI, XIV respectively.

RELIEF REQUESTED

For the foregoing reasons, Robert Lee Shingleton requests the Court reverse his conviction and sentence, set aside the verdict of the jury, and remand his case to the Circuit Court for a new trial.

Respectfully submitted,

ROBERT LEE SHINGLETON
By Counsel

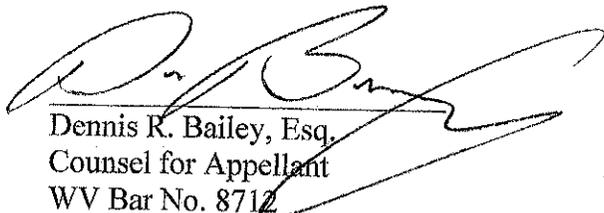


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CERTIFICATE OF SERVICE

I, Dennis R. Bailey, Counsel for the Petitioner herein, Robert Lee Shingleton, do hereby certify that I have served the forgoing *Brief of Appellant* by mailing, via first class United States mail, postage prepaid, a true copy hereof, to the following designated parties, on this the 21st day of March, 2008:

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