
NO. 33701

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

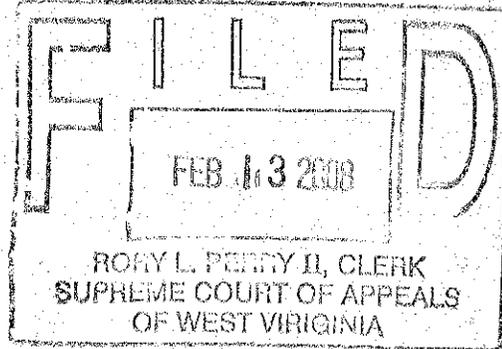
STATE OF WEST VIRGINIA,

Appellee,

v.

WILLIAM WOODSON,

Appellant.



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

ROBERT D. GOLDBERG
ASSISTANT ATTORNEY GENERAL
State Bar No. 7370
State Capitol, Room 26-E
Charleston, West Virginia 25305
(304) 558-2021

Counsel for Appellee

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

**KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW¹**

On September 26, 2005, a Kanawha County petit jury convicted Appellant William Woodson (hereafter "Appellant") on one count of First Degree Robbery (Count 1)² and one count of Malicious Wounding (Count 2).³ (R. at 86.) By order entered February 9, 2007, the Circuit Court of Kanawha

¹It is counsel for the Appellee's understanding that the Appellant has filed a post-petition motion to supplement the record. As counsel for the Appellant has not served a copy of this motion upon the Appellee, Appellee's counsel reserves the right to respond to this motion.

²West Virginia Code § 61-2-12(a)(2).

³West Virginia Code § 61-2-9(a).

County (Bloom, J.) re-sentenced the Appellant to thirty-five years on Count 1, and a consecutive sentence of one to five years on Count 2.⁴ (R. at 124-25.)

II.

STATEMENT OF FACTS

This case does not present this Court with a complex factual history. On December 5, 2004, the Appellant, along with co-defendant Edward Brown, repeatedly kicked and punched Timothy Barkey, stealing approximately \$6.00 from his pocket, and attempting to steal his mountain bike. This robbery occurred in the parking lot of the East End Mart at the corner of Washington and Ruffner Streets in Charleston, Kanawha County, West Virginia.

During the early evening hours of December 5 Mr. Barkey left his apartment on Brooks Street, pedaling his bicycle to the East End Mart to buy cigarettes. He had \$10 in his pocket. (Tr. 86-87.) Upon learning the market was closed Mr. Barkey rode across Ruffner to a nearby filling station/convenience store. After purchasing his cigarettes he began riding home, once again crossing Ruffner towards the top end of the East End Mart's parking lot. (Tr. 88.)

Upon reaching the lot Mr. Brown stopped Mr. Barkey and asked him for change. (Tr. 88.) He then said, "You are in the 'hood now, *we* are going to take your bike." (Tr. 89; emphasis added.) Brown began pushing the bike towards the center of the lot. Mr. Barkey tried to push in the opposite direction. The Appellant, seated in a wheelchair in the East End parking lot, began rolling in Mr. Brown's direction. (Tr. 90.)

⁴The Appellant was originally sentenced on October 27, 2005. (R. at 88.) The trial court re-sentenced him for purposes of appeal.

After Mr. Barkey pushed Brown away, both the Appellant and his co-defendant began beating and kicking him. The victim held onto his bike with one hand while covering himself with the other. (Tr. 91.) Although seated in a wheelchair, the Appellant got up and punched Mr. Barkey four or five times. (Tr. 118.) Both co-defendants continued to beat the victim with their fists until he dropped to the ground. (Tr. 91.) Once on the ground, the Appellant kicked him in the face. (Tr. 116-17.) Mr. Barkey was able to identify the tread on the Appellant's work boots. (Tr. 92.)

Upon subduing Mr. Barkey, Brown took the \$6.00 dollars from his pocket and both the Appellant and his co-defendant left. (Tr. 92.) The victim got back on his bike and returned to his apartment. After cleaning a considerable amount of blood from his face, he called the police. (Tr. 93.)

Because one of his eyes was swollen shut he was unable to seek medical treatment that evening. The next day he went to CAMC General's emergency room. (Tr. 97.) According to CAMC emergency room Dr. Brendan O'Brien he treated Mr. Barkey for a fractured nose brought about by severe maxillofacial trauma. (Tr. 77-78.) Mr. Barkey also suffered from pain, swelling, and bruising, including two black eyes. Dr. O'Brien referred him to a maxillofacial specialist. There is no evidence suggesting that the victim followed up.

III.

ARGUMENT

A. THE EVIDENCE IN QUESTION IS INTRINSIC, NOT 404(b), EVIDENCE.

1. The Standard of Review.

“The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.” Syl. pt. 10, *State v. Huffman*, 141 W. Va. 55, 57, 87 S.E.2d 541, 544 (1955).

2. Discussion.

In his first assignment of error the Appellant mis-characterizes contextual evidence as character evidence. He then claims that the trial court erroneously admitted this evidence before conducting a 404(b) *in camera* hearing pursuant to Syllabus point 2 of *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994).

Before a trial court applies West Virginia Rule of Evidence 404(b), it must decide whether the evidence in question is intrinsic or extrinsic to the incident in question. *State v. LaRock*, 196 W. Va. 294, 312 n.29, 470 S.E.2d 613, 631 n.29 (1996). Intrinsic evidence is so “inextricably intertwined” with evidence of the crime that they form a “single criminal episode.” *Id.* Admission of this evidence does not trigger application of Rule 404(b).

The Appellant first points to an exchange between defense counsel and the victim describing the dangerous character of both the neighborhood and the individuals loitering at the corner of Ruffner and Washington. Appellant claims, “Such introduction and illusion [*sic*] as to the Defendant as being either a street person or a person who contributes to a dangerous and violent area of

Charleston, in which the crime is alleged to have occurred, was highly prejudicial and improper.”

(Pet. for Appeal at 10.)

The Petitioner’s characterization of the record is without merit. Defense counsel never described his client as one of those bad people hanging out on the corner. Moreover, the evidence was clearly probative. The location of the offense is intertwined with the offense itself. The victim’s belief that the corner was unsafe explained his conduct. It explained why he went back towards the East End Mart parking lot instead of taking a direct route back home. (Tr. 105.)

The Appellant’s position confuses the set with the actors. The evidence in question is not character evidence and does not fall within the parameters of West Virginia Rule of Evidence 404(b).

Appellant next points to a statement by Brown asking the victim if he “needed anything.” (Tr. 111-12.) The victim interpreted the statement as an offer by Brown to sell him drugs. Again, this evidence was not introduced as character evidence under 404(b). It was intrinsic evidence which set and described the scene for the jury. The victim testified that Brown grabbed his bike and asked him if he “needed anything.” (Tr. 112.) He then asked the victim if he had any money. After the victim told him no, Brown said, “You’re in the hood now, we’re going to take your bike.” (Tr. 112-13.)

Brown’s statement does not constitute character evidence; it was a link in the chain of events leading up to the robbery.

B. THE ISSUE OF RACE WAS NEVER INJECTED INTO APPELLANT'S TRIAL.

1. The Standard of Review.

Appellate courts give strict scrutiny to cases involving the alleged wrongful injection of race, . . . in criminal cases. Where the issues are wrongfully injected, reversal is usually the result.

State v. Guthrie, 194 W. Va. 657, 681, 461 S.E.2d 163, 187 (1995).

2. Discussion.

The Appellant next claims that both the State and defense counsel improperly injected the issue of race into his trial. To prevail, the Appellant must first demonstrate that the evidence contemplated the issue of race. Appellant must then prove that the evidence's probative value was substantially outweighed by the danger of unfair prejudice.

Appellant claims that the "cumulative effect of which was highly prejudicial, confusing, and inflammatory and had a likely prejudicial, confusing, and inflammatory effect on the jury, such as to cause the jury to return a verdict of guilty, where the evidence presented by the State was insufficient to sustain such a verdict." (Pet. for Appeal at 13.)

Appellant first points to defense counsel's objection to the racial composition of the venire. (Tr. 46.) Clearly, defense counsel was merely doing his job. The Sixth Amendment to the Federal Constitution guarantees a panel of jurors representing a fair cross-section of the community. *Duren v. Missouri*, 439 U.S. 357, 364 (1979).⁵

⁵In order to prevail on a *Duren* claim a defendant must prove: (1) there is a distinctive group in the community; (2) that the representation of the group is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under presentation is due to systematic exclusion of the group in the jury selection process. *Duren*, 439 U.S. at 364. See also *United States v. Weaver*, 267 F.3d 231 (3d Cir. 2001); *State v. Hobbs*, 168 W. Va. 13, 25, 282 S.E.2d 258, 266 (1981).

During the course of the robbery Brown, an African American, told the victim, a white man, that he was in the "hood" now, and that "we" were going to take the victim's bike. (Tr. at 111.)

Appellant claims that the term "hood" clearly references the Appellant's African-American heritage, and that:

"Although the prosecution made a point of stressing 'We' referred to both Mr. Brown and [the Appellant], *as logical a conclusion* to the meaning of the statement is that Mr. Barkey was claiming that Mr. Brown indicated that he, a white man, was in the 'hood' and that "We", or African-Americans in general, were going to take your bike for being in the wrong neighborhood."

(Pet. for Appeal at 16; emphasis added.)

The Appellant's self-serving guess as to what the jury might have felt is irrelevant. Indeed he concedes that a logical juror could have understood the term "we" as referring to Brown and the Appellant and not the African-American community as a whole. Neither side attributed the term "the hood" to the Appellant's race. *See State v. Guthrie*, 194 W. Va. at 679-80, 461 S.E.2d at 185 (witness asked about defendant's prejudices against blacks). Neither side stated, or implied, that the corner of Washington and Ruffner is solely occupied by African-Americans. Neither side used the issue of race to cloud the Appellant's credibility. *C.f. W. Va. R. Evid. 610* (mention of religion).

The statement itself was probative. Brown first asked the Appellant for some change. When the Appellant said he had none, Brown grabbed his bike. He then made an inculpatory statement laying bare his felonious before the jury. Unlike *Guthrie*, Brown's statement was intrinsically intertwined with the offense itself. *Guthrie*, 194 W. Va. at 681, 461 S.E.2d at 187 (evidence regarding defendant's racial prejudices irrelevant to case at bar).

C. THE CO-DEFENDANT'S STATEMENTS WERE STATEMENTS OF INTENT.

1. The Standard of Review.

We have stated that the “[f]ailure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.” Syllabus Point 5, *State ex. rel. Grob v. Blair*, 158 W. Va. 647, 214 S.E.2d 330 (1975). . . . “An error in admitting plainly relevant evidence which possibly influenced the jury . . . adversely to a litigant cannot . . . be conceived of as harmless.” *Chapman v. California*, 386 U.S. 18, 23-24 (1967). “Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction.” *State v. Jenkins*, 195 W. Va. 620, 629, 466 S.E.2d 471, 480 (1995) quoting Syllabus Point 20, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974). Moreover, once an error of constitutional dimensions is shown, the burden is upon “the beneficiary of a constitutional error” - usually the State- “to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman*, 386 U.S. at 24.

State v. Mechling, 219 W. Va. 366, 371, 633 S.E.2d 311, 316 (2006).

2. Discussion.

Appellant next claims that the State violated his constitutional right to confront the witnesses against him under the Sixth Amendment to the Federal Constitution, and Section 14, Article III of the State Constitution by allowing the victim to testify about out-of-court statements made by Brown during the robbery. The only concrete example cited by the Appellant is a statement by Brown. Specifically, the Appellant points to Brown’s statement “We are going to take your bike now.”

In Footnote 3 of his brief the Appellant states, “Such statements are detailed in other sections of this Brief, but include the statements of co-defendant Brown among others and examples are replete throughout the record of the trial of this case.” (Appellant’s Brief at 25.) Appellee has no idea what the Appellant is talking about. Nor should he have to search through the record looking for examples. “It is counsel’s obligation to present this Court with specific references to the

designated record that is relied upon by the parties. . . . We serve notice on counsel that in future appeals, we will take as nonexisting all facts that do not appear in the designated record *and will ignore those issues where the missing record is needed to give factual support to the claim.*” *State v. Honaker*, 193 W. Va. 51, 56 n.4, 454 S.E.2d 96, 101 n.4 (1994) (emphasis added).

“Appellate courts frequently refuse to address issues that appellants. . . fail to develop in their brief. . . . Indeed, [i]t is . . . well. . . settled that causal mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal.” *State v. Lilly*, 194 W. Va. 595, 605 n.16, 461 S.E.2d 101, 111 n.16 (1995). Although the Appellant offers plenty of legal citations, he omits the factual basis of his claim. His decision forces the Appellee to pick out these alleged statements, and then argue against them. Appellant’s lack of factual development is fatal to his claim. This Court should ignore it.

Appellant’s only concrete example is Brown’s statement “We are going to take your bike now.” The threshold issue under *Crawford v. Washington*, 541 U.S. 36 (2004), is whether the statement was testimonial. An out-of-court statement is testimonial if it is made to law enforcement or during the course of an official investigation. *United States v. Gibson*, 409 F.3d 325, 338 (6th Cir. 2005); *Crawford*, 541 U.S. at 51 (“An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”).

Brown’s statement was not made to law enforcement, nor with the intent of furthering an already established criminal investigation, or in contemplation of a forthcoming one. It was, in fact, a statement of criminal intent. *See* W. Va. R. Evid. 803(3) (statement of declarant’s state of mind or physical condition such as intent not excluded by the hearsay rule). “A declarant’s statement of intent may also be admitted against a non-declarant when there is independent evidence which

connects the declarant's statement to the non-declarant's activities." *United States v. Best*, 219 F.3d 192, 198 (2d Cir. 1992); *United States v. Delvecchio*, 816 F.2d 859, 863 (2d Cir. 1987).

The state of mind exception is a firmly rooted exception to the hearsay rule. *Pizano v. Davis*, 05-703722006, 2006 U.S. Dist., WL 4975357, at * 8 (2006) and cases cited therein. Thus, the victim's recounting of Brown's statement did not violate the Appellant's rights under the state and federal confrontation clauses.

Nor did the State violate the Appellant's state and federal constitutional rights by using Brown's statement as substantive evidence of Appellant's guilt. The testimony was supported by independent evidence linking the Appellant to the crime. After Brown told the victim that he and the Appellant intended to rob him of his bike, he pulled it towards the Appellant. (Tr. 89-90.) After Brown hit him, the Appellant got up from his wheelchair and began punching the victim. (Tr. 91.) Once he and Brown got the victim on the floor, the Appellant seated himself in his wheelchair and began kicking the victim in the face with his work boots. (Tr. 91-92.) After they had recovered \$6.00 from the victim's pocket, the Appellant said "Well, that's all he's got, let him go." (Tr. 92.)

D. THE STATE ADDUCED SUFFICIENT EVIDENCE TO CONVICT THE APPELLANT.

1. The Standard of Review.

A verdict of guilty will not be set aside due to insufficiency of the evidence if, reviewing the evidence in the light most favorable to the prosecution, the appellate court finds that "any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt."

State v. Guthrie, 194 W. Va. at 668, 461 S.E.2d at 173.

Where a defendant is convicted of a particular substantive offense, the test of the sufficiency of the evidence to support the conviction necessarily involves consideration of the traditional distinctions between parties to offenses. Thus, a

person may be convicted of a crime so long as the evidence demonstrates that he acted as an accessory before the fact, as a principle in the second degree, or as a principle in the first degree in the commission of such offense.

Syl. pt. 8, *State v. Fortner*, 182 W. Va. 345, 387 S.E.2d 812 (1989).

2. **Discussion.**

Appellant next claims that the State failed to adduce constitutionally sufficient evidence supporting either the robbery count, or the malicious wounding count. Specifically, the Appellant argues that there was no evidence that the Appellant took the \$6.00 from Mr. Barkey's pocket, received any part of the \$6.00, and that there was *no evidence* that the Appellant acted with malice or that he caused Barkey bodily injury with the intent to maim, disfigure, disable or kill him.⁶ (Appellant's Brief at 28.)

The Appellant also points to a perceived variance between the language of the indictment, and the evidence the State presented to the jury. The indictment charged the Appellant with robbery and malicious wounding. (R. at 1-2.) Appellant claims that the State's theory of the case described the Appellant as an accessory, not a principle. A criminal defendant may be convicted of an offense if he acted as an accessory before the fact, a principal in the second degree, or a principal in the first degree. *State v. Foster*, No. 33323, 2007 WL 4150582 (W. Va. Nov. 19, 2007).

The Appellant was a principal in the second degree. Syl. pt. 5, *State v. Fortner* (a person who is present, aiding and abetting the fact to be done is a principal in the second degree.). Although he did not reach inside the victim's pocket and take his money, he actively participated in the

⁶At trial the Appellant denied participating in the robbery, or kicking the victim. (Tr.161.) Prior to sentencing he admitted kicking Mr. Barkey. (Sent. Hr'g at 11, 12.)

commission of the robbery.⁷ He placed himself in the middle of the parking lot. Brown grabbed the victim and pushed him in the Appellant's direction. The Appellant rose out of his wheelchair and began punching the victim. Once he and Brown dropped him to the ground, they kicked and punched the victim until Brown took \$6.00 from his pocket.

Appellant claims that there was no evidence that he ever intended to take the victim's \$6.00. His statement lacks merit. The evidence clearly demonstrates that he and Brown viciously beat the victim until he gave up the money. Such conduct suggests an intent to take.

Appellant also claims that his confinement to a wheelchair constituted reasonable doubt *per se*. The Appellant's condition was never kept from the jury. The victim testified that the Appellant rose from his wheelchair to participate in the offense. The jury found the victim's testimony credible. Appellant is asking this Court to re-weigh these credibility determinations without proving an abuse of discretion. Clearly, this Court should not do so at this stage of the case.

Appellant's sufficiency of the evidence argument regarding the malicious wounding count is difficult to understand. Unlike the robbery count, the Appellant participated in the crime from the beginning to its completion. The victim testified that the Appellant and Brown, without provocation, intentionally and repeatedly punched and kicked him until he fell to the ground. When the victim tried to get up the perpetrators continued kicking him in the face. The victim identified the tread on the boots the Appellant used to kick him in his face. Upon his return home he wiped a substantial amount of blood off of his face. He eyes swelled until they were shut. CAMC emergency room Doctor O'Hara testified that the victim suffered a broken nose brought about by facial trauma.

⁷In fact, the Appellant was a principal in the first degree. The State proved that he attempted to steal Mr. Barkey's bike. The State did not include this charge in the indictment. (Tr. 1.)

Appellant claims that the State failed to prove malice, or intent. Proof of kicking, if severe enough, is sufficient to prove that a defendant acted with the intent to maim, disable, disfigure or kill. *Fletcher v. Commonwealth*, 166 S.E.2d 269 (Va. 1969).⁸ In the case at bar, the victim was kicked so severely that he suffered a broken nose. The damage done to Mr. Barker's face was magnified by the Appellant's deliberate use of his work boots. Dr. O'Hara testified that only a kick or punch of considerable force could account for Mr. Barkey's injury. (Tr. 81.)

Although an intent to permanently maim, disable, disfigure or kill cannot be presumed by a blow from a fist, if the assault is attended with circumstances of violence and brutality, an intent to kill may be presumed. *Fletcher*, 166 S.E.2d at 273. In the case at bar Appellant's did not intend to merely injure Mr. Barkey, his punches were designed to render Mr. Barkey helpless, unable to protect his property. The force of his punches was so great that he knocked the victim to the ground.

Malice is a term of art which may either be express or implied. It does not only include anger, hatred or revenge, but also encompasses other unjustifiable motives. Malice may be inferred from any deliberate and cruel act done by the defendant without any reasonable provocation or excuse. *State v. Mullins*, 193 W. Va. 315, 322, 456 S.E.2d 42, 49 (1995).

The Appellant's conduct was inherently malicious. The record contains no evidence of mitigation. The victim did not provoke, or goad the Appellant into kicking him until his nose was broken. The Appellant acted with felonious intent, willing to employ whatever force necessary to separate the victim from his property. His conduct was clearly malicious.

⁸Virginia's malicious wounding statute is identical to West Virginia's. *See Fletcher*, 166 S.E.2d at 271 n.1.

E. THE APPELLANT HAS NOT PROVEN THAT THE POTENTIAL EVIDENCE WAS EXCULPATORY, THUS THERE IS NO BRADY VIOLATION.

1. The Standard of Review.

The Court reviews the circuit court's final order and ultimate disposition under and abuse of discretion standard. We review findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.

Syl. pt. 1, *State v. Farris*, No. 33314, 2007 WL 4150349, at * 1 (W. Va. 2007) quoting Syl. pt. 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996).

2. Discussion.

Appellant next claims that the State failed to disclose the name of a potentially exculpatory witness thus violating his due process rights under the Fourteenth Amendment to the Federal Constitution, and Article III, § 14 of the State Constitution. The victim mentioned the witness in passing during direct examination:

Q: What happened after that?

A: Then, by the time I gave up on my fight, you know, I pretty much gave up on my fight because it was two against one, and Mr. Brown reached in my pocket and took whatever money I had, and then they said – and I heard a lady from a nearby apartment say, “Leave him alone.” And I yelled out, “Call 911,” and when I yelled out Call 911, they started kicking me harder and more frequently.

(Tr. 92.)

Counsel for the State did not follow up on this issue. (Tr. 92-93.) This witness is never mentioned again in the trial transcript. Her name is not included in the report prepared by the investigating officer, the victim's statement, or the discovery provided to the defense by the State.

The Appellant claims this witness was potentially exculpatory. This Court subjects potentially exculpatory evidence to a different test under the State Constitution:⁹

When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant's request for it would have been subject to disclosure under either West Virginia Rule of Criminal Procedure 16 or case law; (2) whether the State had a duty to preserve the material; (3) if the duty was breached what consequences should flow from the breach.

Syl. pt. 2, *State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995).

The Appellant has failed to offer this Court any concrete evidence suggesting that this witnesses' testimony was "potentially" exculpatory. In fact, defense counsel effectively pointed out that this witness to the crime was never called by the State.¹⁰ (Tr. 216.) Nor is there evidence suggesting that the State had or should have had information about her. The victim testified that he was on the ground when he *heard* a lady tell the Appellant and Brown to leave him alone. The victim did not see her; thus, he couldn't describe her. (Tr. 227.) The Appellant admits as much, "Thus, *if* the State was aware of the potential eyewitness, such witness could have provided exculpatory information to the defense but was not disclosed prior to trial." (Appellant's Brief at 31; emphasis added.)

Nor were the witness's statements material. The jury heard about this witness once, in passing. The victim was able to identify his attackers, and describe their actions.

⁹Under the Federal Constitution the defendant must prove bad faith on the part of the State when the evidence is potentially exculpatory. *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988).

¹⁰Defense counsel's tactical decision to use this witnesses' absence as evidence undermining the victim's credibility, as opposed to arguing a *Brady* motion, was well within the bounds of reasonable representation.

F. APPELLANT'S SENTENCE WAS NOT DISPROPORTIONATE.

1. The Standard of Review.

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

Syl. pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982).

Circuit 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 determined on finding that which is not there.

State v. Head, 198 W. Va. 298, 306, 480 S.E.2d 507, 515 (1996) (Cleckley, J. concurring).

2. Discussion.

Appellant next claims that his sentences were excessive. Article III, § 5 of the State Constitution mandates that sentences be proportional to the character and degree of the offense. Syl. pt. 8, *State v. Vance*, 164 W. Va. 216, 262 S.E.2d 423 (1980). In the past this Court has reserved the application of the proportionality principle to offenses punishable by an unlimited determinate sentence or a sentence of life without mercy. *Wanstreet v. Bordenkircher*, 166 W. Va. 523, 531-32, 276 S.E.2d 205, 211 (1981).

In the case at bar the Appellant received thirty-five years on the robbery and a consecutive term of two to ten years on the malicious wounding. There is no reason for this Court to re-examine the malicious wounding sentence. It was well within the statutory limits. Syl. pt. 4, *State v. Goodnight*.

Appellant claims that the court's decision to run the malicious wounding sentence consecutively to the robbery sentence constituted cruel and unusual punishment. See *State v. David D.W.*, 214 W. Va. 167, 588 S.E.2d 156 (2003) (consecutive sentences equaling 1,140 to 2,660 years

in prison shocked the conscience of the Court). The trial court's decision is supported by state statute. West Virginia Code § 61-11-21 (sentences are presumed consecutive unless court, in its discretion, chooses to run them concurrently).

There is no evidence that the court abused its discretion. Its decision to run the malicious wounding sentence consecutively to the robbery sentence should not shock this Court's conscience. The Appellant and his co-defendant kicked and punched a weaker, disabled man, until he was unable to protect himself. Once they had rendered him helpless that took all the money he had in his pocket. Appellant's conduct was malicious and cruel. The court's decision to run the malicious wounding sentence consecutive to the robbery sentence fell well within the bounds of its discretion.

Contrary to his claims, the Appellant was not merely an accomplice to the robbery, his willing participation rendered him a principal. The victim suffered severe facial trauma, including a broken nose. He could recall the Appellant's work boot repeatedly kicking him in the face. Every time he tried to get up, the beating got worse, until he could not get up again. The Appellant later admitted, despite his denial at trial, that he had kicked the victim.

Appellant claims that, given Brown's sentence of five to eighteen years, his sentence of thirty-five years should shock this Court's conscience. Disparity of sentences, standing alone, does not violate the proportionality clauses of the state and federal constitutions. The Appellant forgets that Brown pleaded guilty to a reduced charge of second degree robbery, for which he received the statutorily mandated sentence. *See* W. Va. Code § 61-2-12(b) (five to eighteen years for robbery by placing victim in fear of physical harm). The Appellant chose to go to trial. He was not punished for making this decision, he was denied the benefit of his co-defendant's bargain. "A sentence imposed on a co-defendant who pleaded guilty as part of a plea agreement does not provide a valid basis of

comparison to a sentence entered after trial.” *People v. Cabalero*, 688 N.E.2d 658, 664 (Il. 1997). Had he been acquitted, his decision would now look far more reasonable. The Appellant has no right to, in hindsight, complain about the consequences of his own choice.¹¹ *State v. Cooper*, 172 W. Va. 266, 271, 304 S.E.2d 851, 856 (1983) (disparate sentences between *similarly situated* defendants may be a factor in proportionality analysis) (emphasis added).

As for the Appellant’s extensive substance abuse and medical problems, they are of no moment. The Appellant’s medical problems did not stop him from standing up and punching the victim. Nor did they prevent him from repeatedly kicking the victim until his nose was broken. The Appellant was receiving counseling from Covenant House, and had moved into his own apartment two months before the robbery. (Tr. 151-52.) At sentencing defense counsel conceded that his client had a lengthy criminal record, including a prior conviction for First Degree Sexual Assault. (Sent. Hr’g at 4-5.)

G. DEFENSE COUNSEL RENDERED EFFECTIVE ASSISTANCE.

1. The Standard of Review.

An ineffective assistance of counsel claim presents a mixed question of law and fact; we review the circuit court’s findings of historical fact for clear error and its legal conclusions *de novo*. This means that we review the ultimate legal claim. . . *de novo* and the circuit court’s findings of underlying predicate facts more deferentially.

Syl. pt. 1, *State ex. rel Vanatter v. Warden*, 207 W. Va. 11, 528 S.E.2d 207 (1999).

¹¹The record suggests that the State was willing to offer the same plea to the Appellant. At sentencing defense counsel said that his client had made the “bad gamble” to go to trial while Mr. Brown chose to cut his losses and accept the plea agreement. (Sent. Hr’g at 10-11.)

2. Discussion.

Appellant next claims that defense counsel rendered constitutionally ineffective assistance at trial. Ordinarily, these sort of claims are raised in a state of federal habeas as to allow the Petitioner the opportunity to develop the record. But in the case at bar defense counsel, Joseph C. Cometti, Esq., died on August 6, 2006. Any insight into Mr. Cometti trial strategies is irretrievably lost. This does not lighten the Appellant's burden of proof, but makes his claim more amenable to resolution on direct appeal.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court announced the following standard:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

"The burden that *Strickland* imposes on a defendant is severe." *Procter v. Butler*, 831 F.2d 1251, 1255 (5th Cir. 1987). In order to satisfy the deficient performance prong of the *Strickland* test for example, the defendant must demonstrate that counsel's representation fell below any objective standard of reasonableness by prevailing professional standards. *Martin v. McCotter*, 796 F.2d 813, 816 (5th Cir. 1986). Given the almost infinite variety of possible trial techniques and tactics available by counsel, we must be careful not to second guess legitimate strategic choices which may now seem

ill-advised and unreasonable. We have stressed that “great deference is given to counsel, ‘strongly presuming that counsel has exercised reasonable professional judgment.’” *Id.* at 816 (quoting *Lockhart v. McCotter*, 782 F.2d 1275, 1279 (5th Cir. 1986)). *See also Sawyer v. Butler*, 848 F.2d 582, 588 (5th Cir. 1988).

Appellant first claims that Mr. Cometti failed to conduct an adequate investigation. He claims,

Given the fact that the Appellant is partially confined to a wheelchair, . . . as well as the Defendant’s history of alcohol and substance abuse problems, a medical expert in the area of orthopedics and/or neurology, psychiatry, psychology, or even general medicine *would have proved extremely beneficial to the defense*, particularly with the alleged victim testifying the he felt the Defendant may have kicked him from the wheelchair up to fifty (50) times.

(Appellant’s Brief at 42; emphasis added.)

The Appellant has not offered this Court a single piece of concrete evidence to support his claim. It is, in fact, pure speculation. Although Mr. Cometti is deceased, such a claim should only be considered when the Appellant has the hard medical data to support his position. The same may be said of counsel’s decision not to hire a private investigator. The Appellant must point to specific facts which would have been discovered had counsel done so. *See Strickland v. Washington*, 466 U.S. at 694 (defendant must show that but for counsel’s failure there was a reasonable probability that the outcome would have been different). Speculation relating to evidence not explored does not present this Court with a reasonable probability.

Nor did counsel have any problem with the victim’s alleged memory lapses. His cross-examination of Mr. Barkey addressed this issue. (Tr. 101-02.) Of course, every medical

question only served as another opportunity for Mr. Barkey to describe his physical weaknesses, thus currying favor with the jury.

Appellant next claims that defense counsel elicited hearsay statements from Mr. Brown during his cross-examination of the victim. Once again, the Appellant fails to specify exactly what statements he is talking about.

Mr. Barkey testified that Brown stopped his bike as he passed across the East End Mart's parking lot. (Tr. 88.) Brown asked him if he had any change. (Tr. 89.) According to the victim, Brown then said, "Well, you're in the 'hood now. We're going to take your bike." (Tr. 89.) For the reasons stated above, this statement constitutes a statement of intent. (*See supra*, pp. 7-10 of Appellee's Brief; *see also* W. Va. R. Evid. 803(3).) To let this statement stand un rebutted would not have been the best trial strategy.

On cross-examination Mr. Barkey testified that Brown, upon stopping his bike, asked him if he "needed anything." (Tr. 112.) Although asked to describe exactly what happened to him by counsel for the State, Mr. Barkey left this piece of information out of his direct testimony. Defense counsel may well have thought that such a piece of impeachment evidence would be important during closing argument.

Counsel's cross-examination constituted a textbook example of bringing the witness further and further out on the limb and then tripping him up with alleged inconsistencies. Although the Appellant now claims that counsel's decision to point out the inconsistencies, or omissions, present in the victim's contemporaneous statements fell below a reasonable standard of performance. Such a claim lacks merit. Counsel's conduct was well within the bounds of reason.

Appellant next claims that trial counsel failed to strike two jurors. "Determining whether a prospective juror can render a fair verdict lies peculiarly within a trial judge's province . . . Therefore, the trial court's resolution of such questions is entitled to is entitled, even on direct appeal, to special deference." *United States v. Murray*, 103 F.3d 310, 323 (3d Cir. 1997). Trial counsel's decision to strike, or not to strike, a potential juror is a matter of trial strategy. *Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995). See also *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001); *United States v. Lawes*, 292 F.3d 123, 128 (2d Cir. 2002) ("[T]rial strategy and voir dire are inseparable."). Even if the Appellant told counsel to strike these two jurors, matters of trial strategy are left for counsel, not his client.

To prevail the Appellant must overcome the presumption that counsel's decision was a matter of sound trial strategy. *Strickland*, 466 U.S. at 689. Appellant has not come close to shouldering his burden of proof. The jury panel contained two African-American individuals. (Tr. 46.) One of them went to college with the investigating officer 20 years ago. (Tr. 21.) She knew him by a nickname and would say hello to him whenever she saw him, This juror was also a victim of domestic violence. The case never went to trial. (Tr. 45.) The second African-American juror was also a victim of domestic violence. (Tr. 45.)

"The object of jury selection is to secure jurors who are not only free from improper prejudice and bias, but who are also free from the suspicion of improper prejudice or bias." *O'Dell v. Miller*, 211 W. Va. 285, 288, 565 S.E.2d 407, 410 (2002). The Appellant has failed on both counts. Crime victims are no excluded from jury service simply because they are crime victims. The Appellant must prove that they were unable to set aside their prejudices or biases and render a fair verdict. There is no such proof.

Appellant also claims that defense counsel improperly injected the issue of race into the trial. For the reasons stated above, counsel never made an issue of race. The testimony objected to by the Appellant involved the location of the offense. Such evidence was necessary to place the event into its proper context.

Petitioner next argues cumulative error. *State ex. rel. Daniel v. Legursky*, 195 W. Va. 314, 322, 465 S.E.2d 416, 424 (1995). To prevail, the Appellant must demonstrate error. As argued above he has not done so. Therefore, his claim of cumulative error is without merit.

IV.

CONCLUSION

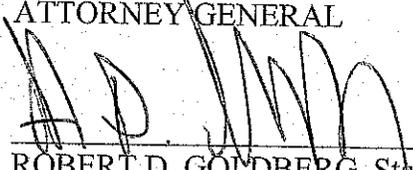
For the foregoing reasons, this Honorable Court should affirm the judgment of the Circuit Court of Kanawha County.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

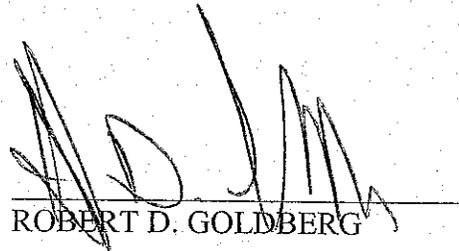


ROBERT D. GOLDBERG, State Bar No. 7370
ASSISTANT ATTORNEY GENERAL
State Capitol, Room 26-E
Charleston, West Virginia 25305
(304) 558-2021

CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Appellee, do hereby verify that I have served a true copy of the Brief of Appellee State of West Virginia, upon counsel for the Appellant by depositing said copy in the United States mail, with first-class postage prepaid, on this ^{13th} day of February, 2008, addressed as follows:

To: W. Jesse Forbes, Esq.
28 Ohio Avenue
Charleston, West Virginia 25302


ROBERT D. GOLDBERG