No. 35226

IN THE

Supreme Court of Appeals of West Virginia

ROSHAWN PANNELL,

Appellant,

v.

STATE OF WEST VIRGINIA,

Appellee,

On Appeal From
The Circuit Court For Cabell County, West Virginia
Hon. Alfred E. Ferguson, Judge

BRIEF ON APPEAL FOR THE APPELLANT

RICHARD W. WESTON
WEST VIRGINIA STATE BAR ID NO. 9374
WESTON LAW OFFICE
635 Seventh Street
Huntington, WV 25701
(304) 522-4100
Counsel for Appellant Pannell

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I. KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

The Petitioner herein and defendant below, Roshawn Pannell, ("Pannell", hereafter) was indicted on three (3) counts of First Degree Robbery and one count of Fleeing as contained in Indictment No. 06-F-292.

Following a trial by jury before the Honorable Alfred Ferguson in the Circuit Court of Cabell County, West Virginia, commencing August 1, 2007 and continuing through August 3, 2007, Pannell was convicted of three (3) counts of First Degree Robbery and one count of Fleeing.

On August 9, 2007, trial counsel filed a motion for new trial. This motion was denied on October 9, 2007 and Petitioner was also sentenced on this date. Mr. Pannell was sentenced to the custody of the Warden of the West Virginia Penitentiary for assignment to a penitentiary of this State for a period Sixty (60) years on each of the three 1st Robbery convictions to run concurrently. He was sentenced to six months of confinement by the West Virginia Regional Jail Authority on the misdemeanor offense of Fleeing to be run consecutive to the Robbery sentences.

A pro se Notice of Appeal was filed by the Petitioner on November 8, 2007. Subsequently, present counsel was appointed to the Petitioner and directed to aid the Petitioner in filing this Petition.

Present counsel filed a motion for reconsideration of sentence which was denied on March 17, 2008. Subsequently, Petitioner's counsel requested that Mr. Pannell be resentenced to permit additional time to perfect this appeal. The circuit court resentenced Mr. Pannell on February 10, 2009.

Introduction

In the early morning hours of July, 12, 2006, three individuals were robbed of money at gunpoint while walking home after a night of drinking at the bars in Huntington, West Virginia. Alleged victims Chris Chiles, Andrew Chiles and Marco Cipriani called 911 soon afterward. Supposedly, at approximately 3 a.m., as the victims walked down Fifth Avenue, Mr. Pannell was jumping up and down. As the victims approached Mr. Pannell, Jamie Turner approached from around a corner holding a pistol. Mr. Turner told the victims to give him everything they had at which point they dropped their wallets. Mr. Turner retrieved two of the victims wallets and fled. The victims then called 911.

The victims' initial description of the two men that robbed them was black males dressed in all black with pantyhose over their faces. Shortly after the robbery report, a patrolling officer passed two black males in his cruiser travelling the opposite direction in a red sedan. After turning his cruiser around and losing visual contact of the red sedan, the officer found the car empty with the doors open by the railroad tracks. Inside the car the officer found a green "du-rag," a black semi-automatic pistol, and various items of trash. Mr. Pannell's fingerprints were later verified as found on a bottle and the rearview mirror in the red sedan. Approximately seven minutes after the robbery report, Mr. Pannell was apprehended. The police then conducted a "show up" and the victims were unable to identify either defendant. No money was found on Mr. Pannell.

At a joint trial, evidence displayed that appellant's codefendant, Jamie Turner, probably robbed the men at gunpoint. Mr. Pannell, at most, was present and served as a distraction with a green du-rag, not pantyhose, on his head but not covering his face.

The jury began deliberating on Friday afternoon. At 4:49 Friday afternoon, the jury reported it was deadlocked and asked to retire and return on Monday. Because the judge and a juror were to leave for vacation on Saturday morning, the judge denied this request, gave an *Allen* charge after only three hours, and implicitly set a time limit on the jury's deliberations. Due to this time limit, and without a sufficient amount of evidence, the jury was coerced into returning a verdict of guilty late Friday evening convicting Mr. Pannell of three counts of first degree robbery and one count of fleeing.

The Petitioner requests that this Court reverse his convictions and sentence in this matter, remand this case to the Circuit Court either with directions to enter an Order granting Petitioner's Motion for Judgment of Acquittal or his Motion for a New Trial. This Petition for Appeal is being presented pursuant to Rule 3 of the *West Virginia Rules of Appellate Procedure*. The petitioner has caused a transcript of the trial to be prepared.

II. STATEMENT OF FACTS

The Trial

In the early morning hours of the 12th day of July, 2006, three individuals were robbed at gunpoint while walking home after a night of drinking at the bars in Huntington, West Virginia. Allegedly, Roshawn Pannell created a distraction while Jamie Turner brandished a handgun and robbed the three men.

Alleged victim Christopher Chiles testified he was walking home from the bar with Andrew Chiles and Marco Cipriani after consuming approximately five shots of liquor and five beers. As the group was walking eastbound on Fifth Avenue, his attention was drawn to a 5'11 African American man, on the perpendicular 14th Street. This black male allegedly had an aqua du-rag on his head, but Mr. Chiles testified on direct

examination that he was unable to determine if it was obscuring his face. However, on cross-examination, Chris Chiles testified that he could not identify either victim at the "show-up" because "they had masks on." (Tr. Transcript, pp. 146). He further testified that this man, supposedly Mr. Pannell, was jumping as if to pump himself up. At this point, another black male emerged from another direction with a gun and robbed him. (Tr. Transcript, pp. 111-115). This was the extent of Christopher Chiles testimony regarding Mr. Pannell's involvement.

Andrew Chiles, whose 21st birthday the group was celebrating, was walking home when he saw the first man hopping with his back to the group. At the time of the robbery, Andrew had consumed eight beers and "a few" shots. (Tr. Transcript, pp. 458). When asked on cross-examination if the man without the gun had his back to him the whole time, Andrew stated that he wasn't sure. (Tr. Transcript, pp. 490). He further stated at trial that the first man, believed to be Mr. Pannell, had on a green du-rag with strings running down the back although he admitted on cross-examination that this was not reported in his initial statement to police. (Tr. Transcript, pp. 486). Andrew was unsure if the first man was even black. This was the extent of his testimony regarding Mr. Pannell's involvement in the crime.

The third victim, Marco Cipriani, testified only that two men came around the corner and demanded money. (Tr. Transcript, pp. 508). He further testified that both men's faces were covered with masks. Mr. Cipriani stated he had consumed five beers and one shot of liquor. (Tr. Transcript, pp. 496).

Huntington Police Department officer Jason Young participated in the defendants "show-up" after their arrest. Initially, he testified that the victims positively identified the

defendants based upon their clothing descriptions. Not satisfied with this answer, the prosecutor led Officer Young to state that a positive identification was not made. (Tr. Transcript, pp. 191-2).

Scott Ballou, of the Marshall University Police Department, apprehended Mr. Turner at Buffington Avenue and Nineteenth Street approximately thirty to forty minutes after the crime was reported. (Tr. Transcript, pp. 238).

Sid Hinchman, a fourteen-year veteran of the Huntington Police Department, spotted two black males in a car traveling on Seventh Avenue shortly after the robbery report as they drove in opposite directions. Officer Hinchman testified that he turned around to follow the black males because they looked away from him as he passed and made a left turn onto Thirteenth Street where cars do not normally turn at night. (Tr. Transcript, pp. 289). Upon turning around, Officer Hinchman saw the red Ford Escort parked with both doors open and no passengers in sight. (Tr. Transcript, pp. 290). He never turned his siren on or made any actions that would put the car passengers on notice that they were being arrested. (Tr. Transcript, pp. 355). Inside the car was a black semi-automatic handgun, which he secured in the trunk of his patrol car, a dark piece of cloth on the floor, miscellaneous trash, and a green du-rag with strings. During Officer Hinchman's testimony, the radio dispatch traffic was played which listed the description of the two suspects as "two black males with a black shirt and jeans, pantyhose over their face." (Tr. Transcript, pp. 325). According to Officer Hinchman, the call came out at 3:14 a.m. and Mr. Pannell was apprehended six or seven minutes later in the viaduct of the Hal Greer Boulevard underpass. (Tr. Transcript, pp. 339).

On cross-examination, Officer Hinchman reviewed the three victims' statements and agreed that there was no mention of "green" or "du-rag" in any of the victims' descriptions.

Officer Eddie Prichard, Jr. testified that after receiving the robbery call and taking up position, he saw a black male wearing a white t-shirt and black jeans jump from the top of the Hal Greer Boulevard underpass. He then apprehended Mr. Pannell and later assisted in the capture of Mr. Turner. Officer Prichard eventually took the men to headquarters for processing where he found three wads of money in Mr. Turner's pockets, one wad amounting to forty-eight dollars, another of six dollars, and one of seven dollars. (Tr. Transcript, pp. 409-12). No money was found on Mr. Pannell. Upon cross examination and counsel's presentation of the victims' statements, the officer testified that Andrew Chiles had not listed an amount of money taken, Marco Cipriani had twenty dollars cash taken and Chris Chiles had twenty-nine dollars cash taken. (Tr. Transcript, pp. 430-1). Officer Prichard stated that Mr. Pannell obeyed his command to stop and did not resist arrest.

John Ellis, a detective in the HPD investigative unit, responded to the robbery call in the early morning hours of July 12, 2006. Detective Ellis testified that he spotted both suspects on the railroad tracks but never announced himself to either. (Tr. Transcript, pp. 445). His testimony was propounded by the state because he found a black t-shirt on the railroad tracks thus explaining why Mr. Pannell was found in a white t-shirt, contrary to the initial report of both suspects wearing black t-shirts.

HPD crime scene investigator David Castle testified regarding forensic evidence found in the red Ford Escort. The .45 caliber High Point gun found in the car did not

reveal any identifiable fingerprints. (Tr. Transcript, pp. 537). Detective Castle first processed the Escort on August 23, 2006 at which time Mr. Pannell's fingerprints were found on a Lipton Tea bottle and Mr. Turner's fingerprint was found on a 7-11 plastic bag. Investigator Castle later reexamined the evidence and found Mr. Pannell's print on a rearview mirror.

Defense Case

Mr. Pannell did not testify and the only defense witness was his codefendant Jamie Turner. Mr. Turner testified that at 1 p.m., on July 12, 2006, he and his friend Chris Jackson went to the nightclub Chickadees on Fourth Avenue in Huntington. (Tr. Transcript, pp. 647). After Mr. Jackson met a female, Mr. Turner left the nightclub on foot. He testified that Mr. Pannell picked him up in the red Ford Escort. As they were traveling on Seventh Avenue, a patrol car passed. Mr. Turner testified consistent with Officer Hinchman's testimony that he did turn his head as the patrol car passed because he had an active warrant for drug charges out of Logan County, West Virginia. (Tr. Transcript, pp. 658, 675). He admitted that they pulled over after the patrol car passed and traveled on foot through the railroad tracks until capture. (Tr. Transcript, pp. 662). He stated that he had known Mr. Pannell for about one year and that Mr. Pannell was aware of his drug charges on Logan County. (Tr. Transcript, pp. 685-6). When asked if he had informed Mr. Pannell of his drug charges on July 11, 2006, he testified he could not have because Mr. Pannell had just been released from jail on that date. *Id.* Unsurprisingly, Mr. Turner testified that he did not have any involvement in a robbery on July 12, 2006. (Tr. Transcript, pp. 676). He did not implicate Mr. Pannell in the robbery.

As the prosecutor stated in his closing, the whole case against Mr. Pannell was about time and proximity. (Tr. Transcript, pp. 809). Although a "show-up" was done within hours after the crime, the victims were unable to identify Mr. Pannell.

Jury Deliberation

On Wednesday morning of August 1, 2007, as the Court Clerk prepared the numbers in the lottery bin to pick those individuals who would comprise the jury pool, prospective juror James Blankenship sat in a wooden pew and hoped that his name would not be called. Mr. Blankenship did not want jury duty to interfere with his vacation that he was set to leave for on Saturday morning. Mr. Blankenship was likely happy when Judge Ferguson addressed the jury pool for the first time and stated "we should be able to finish this case tomorrow, but it will definitely be today and part of tomorrow." (Tr. Transcript, pp. 809). Had potential juror Blankenship known that Judge Ferguson was also leaving for vacation on Saturday morning, he probably would not have worried at all about missing his vacation.

During voir dire, another fateful decision was made by the Court when it ignored Mr. Pannell's attorney's suggestion that an alternate be impaneled:

Mr. Laishley: Are you going to pick an alternate today?
Court: Can – we will finish tomorrow: won't we?
Mr. Laishley: Yes, I would assume it will go past today.
.....
Court: We will finish tomorrow, and I will tell the jury it will go into tomorrow.
(Tr. Transcript, pp. 7).

Only twelve jurors were impaneled.

Immediately after Mr. Blankenship was impaneled as a member of the jury, he was again reassured that he would not miss his vacation when the Court stated "you will

probably be coming back tomorrow." (Tr. Transcript, pp. 81). On Thursday morning before trial resumed, out of the presence of the jury, the Court inquired as to the witnesses for the day. After being informed by the prosecution that its two witnesses would "definitely take a while," the Court stated that it "would really like to finish today if we possibly can. What I do, if it gets to the jury, I normally just tell the jury, 'We will stay here until you want to go home. Any time you want to go home, let us know and we will let you go home.'" (Tr. Transcript, pp. 280). Although the previous comment was out of the jury's presence, the court expressed its concern with time to the jury on Thursday before lunch by stating:

> We are going to recess until 1 o'clock...Come right back at 1 o'clock. A couple of you have been just a few minutes late and it has delayed us a little bit. So, try to be back here just a few minutes before 1.
>
> Its going slower than what I anticipated, and I am still trying to get through today but we are going slower than what I thought.

(Tr. Transcript, pp. 399).

The trial thereafter continued throughout Thursday and Friday. On Friday, the defense rested and the jury began deliberating at 1:05 p.m., immediately requested a lunch break at 1:11 p.m., and resumed deliberations at 2 p.m. (Tr. Transcript, pp. 861, 866). At 3:23 p.m., the jury sent a note requesting a CD player, the 911 call recording, the trial transcript, and the victim's witness statements. (Tr. Transcript, pp. 867, 868). The jury was provided a CD player and told they should have the witness statements. The Court was unable to provide the trial transcript or original call to 911 as it was not on the previously introduced police radio traffic. Deliberation resumed at 3:27 p.m. (Tr. Transcript, pp. 870).

At 4:49 on Friday afternoon, the jury sent out another note asking "How long can we deliberate today?" and also "We are not making any ground in either direction. Can we continue Monday?" (Tr. Transcript, pp. 870-1). Outside of the jury's presence, the judge stated that continuing Monday created a problem because him and a juror were leaving for the beach the next day. (Tr. Transcript, pp. 871). After bringing the jury in, the Court answered the first question by stating they could deliberate for as long as they wanted to stay. Answering the second question, the judge informed the jurors he was leaving for vacation the next day and could have another judge take over but "worse than that...one of the jurors was supposed to go on vacation next week." (Tr. Transcript, pp. 872). The Court then asked the juror about his vacation plans who responded that he was leaving at 6 o'clock the next morning. Referring to stopping deliberations and returning on Monday, the Court stated it was not a good solution and informed the jury it could take a dinner break and stay as long as it wanted. (Tr. Transcript, pp. 872). The jurors were then excused for a ten minute break. After the jurors were excused, the Court suggested that the trial could continue with less than twelve jurors to which defense counsel simply responded "no." (Tr. Transcript, pp. 874). The Court responded to defense counsel that if it would not agree to less than twelve jurors then it was impossible to allow them to go home and resume on Monday. Upon Mr. Pannell's counsel informing the Court that the jury said it wasn't making headway in either direction, the Court suggested a modified *Allen* Charge to which defense counsel promptly objected. (Tr. Transcript, pp. 875). Defense counsel then suggested the Court to ask the juror if he could postpone his vacation which the Court denied. (Tr. Transcript, pp. 877). At 5:07 p.m. the jury returned and the Court stated that they could use the phone and they would

get something to eat. "I am trying to help here, but he has got to go and -- You and I might be riding together in the morning down – I am going down to the beach. (Tr. Transcript, pp. 882). The Court further stated that the parties could not agree on his first solution, resuming deliberations with less than 12 jurors, and then stated the following:

> The *only* – the next best solution I would suggest is to keep you all here, let you all – if anybody wants anything to eat decide in there what you want and leave the money and we will get your food for you and bring it back to you if you want to do that.
>
> And I would like to keep you for a while to let you continue deliberating because I don't want – if he is going to be gone for a week I don't want to let you all just wander out there for a week and then come back. That's just not a healthy situation. I have never done that in thirty years that I have been here.
>
> (Tr. Transcript, pp. 880-1)(italics added).

The modified Allen charge was then given to the jury, against the objection of defense counsel, who resumed deliberations at 5:13 p.m.

At 5:54 p.m., the jury sent another note with three additional questions requesting the time the first 911 call was made reporting the robbery, what time the 911 dispatcher put the call "out over the air," and what time the vehicle was seen. (Tr. Transcript, pp. 887-8). The Court informed the jury there was no written evidence of these matters and they would have to use their memories. Deliberation continued at 5:58 p.m. At 7:14 p.m. the jury returned its verdict convicting both defendants of all charges. The court then sent the jury back for deliberation as to Mr. Turner, excluding Mr. Pannell, for an interrogatory regarding his use of a firearm in the commission of the crime which was quickly answered in the affirmative. (Tr. Transcript, pp. 900-4).

III. ASSIGNMENTS OF ERROR

A. The Court Violated Pannell's Right to a Fair Trial Pursuant to the Sixth Amendment as Made Applicable to the States Through the Fourteenth Amendment Of the *United States Constitution* And Article III, §'s 10 and 14 Of The *West Virginia Constitution* by Invading The Province of the Jury and Coercing a Guilty Verdict Through Time Constraint.

B. Appellant's Robbery Convictions Should be Overturned Because the Evidence Did Not Prove Beyond A Reasonable Doubt that Mr. Pannell Committed Any Elements of 1st Degree Robbery, Committed Any Act to Aid and Abet the Robbery or Shared the Criminal Intent of the Principal in the First Degree.

C. Appellant's Robbery Conviction on Count II Should Be Overturned Because the Alleged Victim Did Not Have Any Personal Property Stolen or Money and The Jury Was Not Instructed on Attempted Robbery.

D. Appellant's Fleeing Conviction Should be Overturned Because he Complied with the First Law Enforcement Officer that Attempted his Arrest.

IV. POINTS AND AUTHORITIES

1. Whether a trial court's instructions constitute improper coercion of a verdict necessarily depends upon the facts and circumstances of the particular case and cannot be determined by any general or definite rule. Syl. Pt. 2, *State v. Spence*, 173 W. Va. 184; 313 S.E.2d 461 (1984)(citing *Janssen v. Carolina Lumber Co.*, 137 W.Va. 561, 73 S.E.2d 12 (1952).

2. The verdict shall be unanimous. *West Virginia Rules of Criminal Procedure* 31(a).

3. Merely witnessing a crime, without intervention, does not make a person a party to its commission unless his interference was a duty, and his non-interference was one of the conditions of the commission of the crime; or unless his non-interference was designed by him and operated as an encouragement to or protection of the perpetrator." Syl. Pt. 1, *State v. Patterson,* 109 W.Va. 588, 155 S.E. 661 (1930).

4. While we clearly must, according to our precedent, construe the evidence in the light most favorable to the State where a defendant challenges the sufficiency of the evidence, this is not to say that we must abandon sound reasoning in so doing. Instead, we construe the evidence in the light most favorable to the State, and then apply it to the relevant legal standard. *State v. Harden*, 2009-WV-0605.493 (W.Va. 2009).

V. ARGUMENT

A. The Court Violated Pannell's Right to a Fair Trial Pursuant to the Sixth Amendment as Made Applicable to the States Through the Fourteenth Amendment Of the *United States Constitution* And Article III, §'s 10 and 14 Of The *West Virginia Constitution* by Invading The Province of the Jury and Coercing a Guilty Verdict Through Time Constraint.

West Virginia Law

Pursuant to the Sixth Amendment of the *United States Constitution* and Article III, §'s 10 and 14 of the *West Virginia Constitution*, criminal defendants are entitled to a jury by impartial peers. "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." Syl. pt. 20, *State v. Thomas,* 157 W. Va. 640, 203 S.E.2d 445 (1974).

Pursuant to *West Virginia Rule of Criminal Procedure* 31, the verdict in a criminal case "shall be unanimous." This unanimity requirement creates a problem for judges cognizant of the costs of mistrial and managing their busy dockets when deliberating jurors reach an impasse. Although the "*Allen* Charge" and its variants are approved by this Court, many factors are generally involved beyond just the written instruction when determining if a jury verdict has been coerced. The general rule in West Virginia is that "[w]hether a trial court's instructions constitute improper coercion of a verdict necessarily depends upon the facts and circumstances of the particular case and cannot be determined by any general or definite rule." Syl. Pt. 2, *State v. Spence*, 173 W. Va. 184; 313 S.E.2d 461 (1984)(per curiam)(citing *Janssen v. Carolina Lumber Co.*, 137 W.Va. 561, 73 S.E.2d 12 (1952); *State v. Hobbs*, 168 W.Va. 13, 282 S.E.2d 258, 272 (1981)). While this rule specifically mentions the "trial court's instructions," the case

law interpreting this rule also considers other relevant factors such as time and other remarks, aside from an *Allen* instruction, from the judge to the jury. *Id.* at 463-4. While the applicable syllabus point speaks directly to the instructions, in practice the test resembles the federal test of "totality of the circumstances."

In *Spence*, this Court considered a situation similar to the case at bar holding that "the trial court's remarks amounted to improper coercion of the jury to reach a verdict within a time limit set by the court." *Spence*, 173 W.Va. at 186. The trial judge made comments such as "...you will be out of here by noon tomorrow," "I don't want to hold you unduly but I need your help," and "...you have to reach a verdict." *Id.* Reversing the jury's verdict, the Court held the trial judge's remarks "when considered in their entirety throughout the course of the trial, had the effect of improperly coercing the jury to reach a verdict, and to reach it quickly." *Id.*

Persuasive Authority; Federal law

"A fair trial in a fair tribunal is a basic requirement of due process." *In Re Murchison*, 349 U.S. 133, 136 (1955). The test for jury coercion is whether the Court's statements in context and under all circumstances of the case were coercive. *Jenkins v. U.S.*, 380 U.S. 445 (1965). Numerous circuits have held that the trial court may not put the jury under conscious time demands. See *United States v. Amaya*, 509 F.2d 8 (5th Cir. 1975); *United States v. Lansdown*, 460 F.2d 164, 169 n. 3 (4th Cir. 1972); *Goff v. United States*, 446 F.2d 623 (10th Cir. 1971); *Burroughs v. United States*, 365 F.2d 431 (10th Cir. 1966). *Burroughs'* facts are similar to those at bar; the jury began deliberation at 5 p.m., were asked by the judge to attempt a verdict within one hour, an hour and

twenty minutes later the jury informed the court it was deadlocked, the court gave the Allen charge and soon after the jury convicted. *Id.* Reversing the conviction, the appellate court held:

> But, in any event, it is one thing to recall the jury to beseech them to reason together, and it is quite another to entreat them to strive toward a verdict by a certain time. When these admonitions are considered in their context, they are subject to the clear inference that the judge was unduly anxious to conclude the lawsuit, and we think it entirely reasonable to infer that the jury was aware of his anxiety. This type of verdict-urging on the part of the court tends to undermine the proper function of the common law jury system as contemplated by the Seventh Amendment. We must guard against any such subtle inroads.

Burroughs, 365 F.2d at 434.

Federal law is in agreement with West Virginia that a supplemental jury charge, including the official Allen charge but also other statements by the court to the jury, is proper in certain circumstances. *Allen v. United States*, 164 U.S. 492 (1896). However, any charge which leaves the jury with the impression that they have to reach a verdict has a coercive effect. *Jenkins v. United States*, supra. When a jury reports a deadlock, the *Allen* charge approaches the limits to which the court should go in suggesting to jurors the desirability of agreement and avoidance of necessity of a retrial before another jury. *United States v. Rogers*, 289 F.2d 433, 435 (4th Cir. 1961). Further, after prior indications of deadlock, a verdict returned soon after a supplemental charge "at the very least, gives rise to serious questions" of jury coercion. *United States v. Gypsum Co.*, 438 U.S. 442, 462 (1978).

Application of Facts to Law

The court's remarks regarding time throughout the course of Mr. Pannell's trial demands reversal of his conviction. From the outset the court believed, and told the jurors, that the trial would last at most two days; Wednesday and Thursday. While neither counsel disagreed with the Court, the transcript reveals that counsel was trying to inform the Court it could go longer. Mr. Pannell's counsel asked if an alternate would be picked and the Court stated that we will finish tomorrow; won't we? Counsel's reply was it "will go past today." The prosecutor responded to the same inquiry by stating it depends how long it will take to pick the jury. The Court replied it won't take long. The prosecutor then reminded the Court that due to the joint trial of codefendants, there would be three openings instead of two and two cross examinations of every witness. Reading "between the lines," the Court is saying this case will be finished tomorrow while counsel for both sides is trying to inform the judge that it may take longer.

The aforementioned colloquy was outside of the presence of the jury but soon after empanelment on Wednesday, the jury was also instructed that the trial would last two days. The court then asked if the jurors had a problem with coming back tomorrow, on Thursday. None of them did, but one juror and the judge both had a problem if the trial went past Friday because they were both going to the beach on Saturday morning. Although it was not stated until later that the time limit set by the Court for the trial was Friday, it was already set when the juror and judge scheduled their vacations.

As often happens when co-defendants are tried together, the trial went longer than expected. On Thursday morning, the Court was informed the day's witnesses may take awhile. Outside the jury's presence, the Court stated it would like to finish that day. However, the time limit and subsequent coercion began on Thursday as the jury was

leaving for lunch and the Court informed them to return punctually because the day before some members had been late thus delaying the trial. While the trial court obviously has the authority to manage a trial efficiently, blaming the jurors for delaying the trial by being a few minutes late began the coercion and informed the jury that the court wanted to be done quickly.

The final time limit was set on Friday as the jurors sent out a note asking, "[w]e are not making any ground in either direction. Can we continue Monday?" (Tr. Transcript, pp. 870-1). Previously the court had informed the attorneys that any time the jury wanted to go home they could. However, the court did not allow the jury to go home.

In summation, at 4:40 p.m. on Friday afternoon, when the judge and a juror were scheduled to leave for vacation the next morning, the jury reported it was not making headway and asked to come back after the weekend. Discarding all other options, bringing the jurors back on Monday or continuing the trial for a week, the Court gave the jury the *Allen* charge and sent the jurors back to deliberate.

In *Waldron*, this Court noted the distinction between a trial court forcing a time limit and quick verdict on the jury from that of inquiring as to the jurors' schedules and availability. *State v. Waldron*, 218 W.Va. 450 (2005). Had the trial court simply inquired into the juror's vacation on Saturday and stopped, the court's remarks may not have arisen to coercion. But the Court stated that coming back on Monday was not a solution, that the Judge was going to the beach, and that he was not going to keep the juror from his vacation. By stating to the juror that they might ride to the beach together, clearly the court was telling the jury that this trial will end today.

At this point on Friday afternoon at 5 p.m., the jury had been in a three-day trial and was likely tired, had reported they were deadlocked and asked to leave, they were likely hungry, and they did not want to keep their fellow juror or the judge from missing their vacations. Mr. Turner had testified earlier in the day and informed the jury that both he and Mr. Pannell were not from Huntington, that he was wanted for drug charges in Logan County, and that Mr. Pannell was released from jail the day before the robbery occurred. The jurors that carefully considered the reasonable doubt standard earlier in deliberations and voted for acquittal, and the complete lack of evidence against Mr. Pannell, were not going to keep the judge and a fellow juror from their vacations because two black males from out of town with criminal records might be innocent.

The remarks by the trial court placing a time restraint and coercing the jury to reach a quick verdict were ongoing throughout the trial and contributed to the coerced verdict. However, one statement by the Court clearly demanded the jury to reach a verdict within a time limit set by the court. When the jury asked to come back on Monday, the Court responded at 5:58 p.m., "**if we could we would send you home and bring you back Monday, but that's just not possible**." (Tr. Transcript, pp. 889). The court had already informed the jury that it would not continue the trial until after the juror's vacation stating it's "not a healthy situation" and it had never "done that in the thirty years I have been here." (Tr. Transcript, pp. 881). No other conclusion can be made from this remark other than you must reach a verdict tonight.

B. Appellant's Robbery Convictions Should be Overturned Because the Evidence Did Not Prove Beyond A Reasonable Doubt that Mr. Pannell Committed Any Elements of 1st Degree Robbery, Committed Any Act to Aid and Abet the Robbery or Shared the Criminal Intent of the Principal in the First Degree.

Elements of First Degree Robbery

In West Virginia, the statute upon which appellant was convicted reads:

> Any person who commits or attempts to commit robbery by: (1) Committing violence to the person, including, but not limited to, partial strangulation or suffocation or by striking or beating; or (2) uses the threat of deadly force by the presenting of a firearm or other deadly weapon, is guilty of robbery in the first degree and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than ten years.

West Virginia Code § 61-2-12(a).

While the statute divides robbery into separate classes, it does not define "robbery" or list its elements. However, the West Virginia Supreme Court has stated that "one of the principal aspects of the common law crime of robbery is the taking of personal property of another against his will with the intent to permanently deprive him of the ownership thereof." *State v. Collins*, 174 W.Va. 767, 770 (1985). Additionally, "our robbery statute must be read in conjunction with the common law elements of larceny." *Id.* citing *State ex rel. Vandal v. Adams*, 145 W.Va. 566 (1960); *Franklin v. Brown*, 73 W.Va. 727 (1914). Robbery at common law is comprised of the same elements as larceny with two additional elements of in the victim's presence and the use of force. Id. at 770.

First Degree Robbery Jury Instruction

The Court's instruction to the jury for Count I, which was identical to the other two robbery counts, stated:

> Before Jamie Allen Turner or Roshawn Michael Pannell can be convicted of "robbery in the first degree" as charged in Count I of the indictment, the State of West Virginia must prove to the satisfaction of the jury beyond a reasonable doubt that: 1) the defendants, Jamie Allen Turner and/or Roshawn Michael Pannell, 2) in Cabell County, West Virginia, 3) on or about the 12th day of July, 2006, 4) did take, 5) from the person, or presence, of Christopher Michael Chiles, 6) against his will, 7) money, 8) belonging to Christopher Michael Chiles, 9) lawfully in his care, custody and control, 10) by

presentment and use of a firearm, 11) with intent to permanently deprive Christopher Michael Chiles of such money.

(Tr. Transcript, pp. 794-5).

Elements of Aiding and Abetting

To be convicted as an aider and abettor, the law requires that the accused in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. The State must demonstrate that the defendant shared the criminal intent of the principal in the first degree. In this regard, the accused is not required to have intended the particular crime committed by the perpetrator, but only to have knowingly intended to assist, encourage, or facilitate the design of the criminal actor.

State v. Foster, 656 S.E.2d 74, 80-1 (2007) (citing *Fortner,* 182 W.Va. at 356, 387 S.E.2d at 823(internal quotation marks and citations omitted)).

Aiding and Abetting Jury Instruction

The Court's instruction to the jury read:

This case has seen the trial of two separate defendants; Mr. Pannell and Mr. Turner.

I instruct you that you must consider the guilt or innocence of each defendant separately based solely upon the evidence presented against each. Evidence of guilt or innocence of one defendant does not necessarily prove guilt or innocence of the other defendant. You must weigh all the evidence against each defendant separately when deciding guilt or innocence beyond a reasonable doubt.

The court instructs the jury that a person who is the absolute perpetrator of a crime is a principal in the first degree. The court further instructs the jury that a person who is actually or constructively present at the scene of a crime at the same time as the criminal act of the absolute perpetrator, who acts with shared criminal intent, contributing to the criminal act of the absolute perpetrator, is an aider and abettor, and a principal in the second degree, and as such may be criminally liable for the criminal act the same as if he were the absolute perpetrator of the crime.

Actual physical presence at the scene of the criminal act is not necessary where the aider and abettor was constructively present at a convenient distance at the time and place of the criminal act, acting in concert with the absolute perpetrator.

> You are cautioned, however, that merely witnessing a crime without intervention therein does not make a person a party to its commission.
>
> (Tr. Transcript, pp. 805-6)

Application of Facts to Law

Although it is unclear from the verdict form, Mr. Pannell could only have been convicted under the aiding and abetting instruction given by the Court. There is no evidence that Mr. Pannell had a gun, said anything to the victims, or committed an element of 1st Degree Robbery. Mr. Pannell was never close enough to any victim to take money against their will, did not possess a firearm, and could not have permanently deprived either victim of money because the money was found on his codefendant. Indeed, the only act that can be attributed to Mr. Pannell is that he jumped up and down. The trial court implicitly acknowledged the theory of conviction when it refused the prosecution's request to submit the firearm interrogatory to the jury after conviction as was given for the codefendant. Therefore, the jury could only have convicted Mr. Pannell under aiding and abetting his co-defendant.

In West Virginia, "[a] reviewing court should not reverse a criminal case on the facts which have been passed upon by the jury, unless the court can say that there is reasonable doubt of guilt and that the verdict must have been the result of misapprehension, or passion and prejudice." Syllabus Point 3, *State v. Sprigg,* 103 W.Va. 404, 137 S.E. 746 (1927). *Accord* Syllabus Point 1, *State v. Easton,* 203 W.Va. 631, 510 S.E.2d 465 (1998). Additionally:

> The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to

> determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.
>
> Syllabus Point 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

However, this Court recently noted that:

> While we clearly must, according to our precedent, construe the evidence in the light most favorable to the State where a defendant challenges the sufficiency of the evidence, this is not to say that we must abandon sound reasoning in so doing. Instead, we construe the evidence in the light most favorable to the State, and then apply it to the relevant legal standard.

State v. Harden, 2009-WV-0605.493 (W.Va. 2009).

It is well-settled law in West Virginia that merely witnessing a crime will not suffice for conviction under an aiding and abetting or concerted action theory. *See*, Syl. Pt. 5, *State v. Foster* (quoting *State v. Patterson*, 109 W.Va. 588 (1930). "Even approval of the act, not amounting to encouragement, will not suffice." *State v. Mayo*, 443 S.E.2d 236, 241 (W.Va. 1994)(quoting B*rown v. State*, 302 S.E.2d 347, 349 (Ga. 1983)).

In evaluating the sufficiency of evidence in relation to aiding and abetting, there are numerous instructive cases on both sides.[1] A review of the factual details of each case is important, but does not provide clear guidance on what actions, or inactions, amount to aiding and abetting. Additionally, one cannot discern a bright line standard for aiding and abetting. Underscoring the decisions is a subjective decision making process akin to Justice Potter's famous definition of pornography: "I shall not today attempt further to define the kinds of material I understand to be embraced . . . [b]ut I know it when I see

[1] See S*tate v. Foster*, 221 W. Va. 629 (2007); *State v. Mayo*, 191 W. Va. 79 (1994); *State v. Kirkland*, 191 W.Va. 586 (1994); *State v. Fortner*, 182 W.Va. 345, 358 (1989); *State v. Hoselton*, 179 W. Va. 645, 371 S.E.2d 366 (1988); *State v. Haines*, 156 W. Va. 281, 192 S.E.2d 879 (1972).

it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). Put differently, did the defendant just happen to be there or did he know what was going to happen. In *Fortner*, the defendant assisted in removing the victims clothing, taunted the victim, and ridiculed a codefendant for his failure to maintain an erection. *State v. Fortner*, 182 W.Va. 345, 358 (1989). While Mr. Fortner may not have had sexual contact with the victim, he did not just happen to be there and was properly convicted. Likewise, in *Foster*, the appellant and victim had a physical confrontation earlier in the day. *State v. Foster*, 221 W. Va. 629, 636 (2007). It does not require a logical reach to conclude that the appellant aided and abetted the shooter when the appellant was driving the car from which the shots were fired upon encountering the victims shortly after a prior physical encounter.

Contrary to the aforementioned cases, in *Hoselton* this Court reversed after the defendant trespassed on a barge and watched his friends steal tools from a storage unit. *State v. Hoselton*, 179 W. Va. 645, 371 S.E.2d 366 (1988). Certainly, this Court could have upheld the conviction based upon the appellant's response when asked if he was a lookout: "You could say that. I just didn't want to go down in there." *Id.* at 647. However, other evidence showed that defendant and his friends frequently trespassed on the barge with his friends to fish, he went to the car when he saw friends stealing the goods, and did not share in the spoils of the larceny. *Id.* By the appellants own admission, he was a lookout for at least some period of time. But the other evidence showed that Mr. Hoselton was in the wrong place at the wrong time. As in *Foster*, a reasonable inference can be made that a group friends that traveled to a destination together that they have been to before and possibly seen items to take, steal items, and then leave together was "planned in advance." However, the facts in *Hoselton*, even

taking into account the lookout admission, have the feel of an eighteen-year-old kid that was in the wrong place at the wrong time that went to the car when he saw what his friends were doing.

Likewise, assuming that Mr. Pannell was actually the person at the scene of the robbery, he was in the wrong place at the wrong time. From the victims' testimony, the robbery occurred quickly. There is no testimony that Mr. Pannell was even in the direct vicinity of the victims, or his codefendant, when the robbery occurred. He did not say anything to either the victims or his codefendant. There is no evidence of a plan or scheme to commit robbery. There was no prior relationship between Mr. Pannell and the victims. Mr. Pannell did not have any money on him when apprehended while his codefendant did. No evidence, certainly beyond a reasonable doubt, suggests that Mr. Pannell approved or assisted in the act of robbery.

Only three facts exist which, taken in light most favorable to the prosecution, possibly suggest Mr. Pannell aided and abetted his codefendant. 1) By jumping up and down he diverted the victims' attention; 2) he had a "du-rag" to conceal his identity; and 3) he was in the car with his codefendant after commission of the crime. Addressing the first issue, it is incontrovertible that jumping up and down is not an element of robbery. Therefore, the act must have done something in furtherance of the crime to support the aiding and abetting theory. The testimony of one victim was that Mr. Pannell was on a corner jumping up and down looking away from the victims. A victim testified that he appeared to be pumping himself up, not that he was acting as a diversion. The victim testified that he did not pay much attention to Mr. Pannell.

Jumping up and down would actually have the opposite effect of a diversion. At the sight of a young of black male with a mask on, jumping up and down on a street corner at 3 a.m. in the morning, most Huntingtonians would not be diverted, they would be on high alert. One victim did not even notice Mr. Pannell. Clearly, this act did not facilitate or assist the robbery. To the contrary, a reasonable conclusion is that Mr. Pannell had just realized that his acquaintance was about to commit robbery and was freaking out.

The testimony regarding Mr. Pannell and the alleged green "du-rag" he wore during the commission of the robbery is also inconsistent and unreliable. First and foremost, none of the victims' statements mentioned a "du-rag" and the initial report was two men with pantyhose as masks. Christopher Chiles testified that he could not tell if the green "du-rag" obscured Mr. Pannell's face. Andrew Chiles testified he never saw Mr. Pannell turn around and only saw the green "du-rag" from behind. Marco Cipriani testified that it was a mask covering his face. At best, only one victim testified that Mr. Pannell had a mask to conceal his identity. The green "du-rag" was found in the Ford Escort found parked by officer Hinchman after the victims had given their initial description. Curiously, only one mask was found in the car and the reports of Mr. Pannell wearing a green "du-rag" did not surface until after it had been found.

Mr. Pannell's presence in the car after the commission of the robbery is also insufficient to support aiding and abetting. In *Mayo*, *Kirkland*, *Hoselton* and *Haines*, cases in which this Court overturned convictions based upon aiding and abetting, the defendants traveled in a car with codefendants that were principals in the first degree.

Aside from committing an act, the trial court's instruction also correctly stated that the State must prove a principal in the second degree acted "with shared criminal intent." There was absolutely no evidence presented at trial that Mr. Pannell acted with shared criminal intent of his codefendant. In West Virginia, "there is a permissible inference of fact that a person intends that which he or she does or which is the immediate and necessary consequence of his or her act." *State v. Evans*, 172 W.Va. 810, 813 (1983). Because the only act attributed to Mr. Pannell was that he jumped up and down and he did not commit any elements of robbery in the 1st degree, there cannot be an inference that he intended anything by his actions. Therefore, for evidence sufficient for conviction, the State would have to prove in some other way that Mr. Pannell shared criminal intent with his codefendant. There was no other evidence which displayed Mr. Pannell shared the criminal intent of his codefendant and therefore the State did not meet its burden beyond a reasonable doubt.

C. Appellant's Robbery Conviction on Count II Should Be Overturned Because the Alleged Victim Did Not Have Any Personal Property or Money Stolen and The Jury Was Not Instructed on Attempted Robbery.

Quite simply, Andrew Chiles did not have anything taken from him. While the applicable statute includes attempted robbery and is punishable the same as completed first degree Robbery, attempted robbery was excluded from the court's instructions to the jury. Andrew Chiles dropped his wallet which was subsequently recovered where it was dropped without anything missing. As the verdict form did not mention attempted robbery, nor did the instruction, there is absolutely no evidence to support the jury's

finding that Andrew Chiles had items taken from his person with the intent of permanent deprivation.

D. Appellant's Fleeing Conviction Should be Overturned Because he Complied with the First Law Enforcement Officer that Attempted his Arrest.

Per the Indictment, Mr. Pannell was charged with Fleeing from a Law Enforcement Officer pursuant to West Virginia Code § 61-5-17(d) which provides:

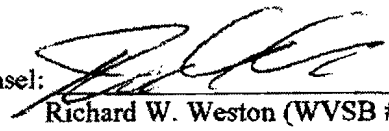
> Any person who intentionally flees or attempts to flee by any means other than the use of a vehicle from any law-enforcement officer, probation officer or parole officer acting in his or her official capacity who is attempting to make a lawful arrest of the person, and who knows or reasonably believes that the officer is attempting to arrest him or her, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than fifty nor more than five hundred dollars or confined in the county or regional jail not more than one year, or both.

Officer Hinchman, who passed Mr. Pannell in his patrol car, did not turn on his siren or take any other action to indicate he was attempting to arrest Mr. Pannell. Officer Hinchman never saw Mr. Pannell upon his arrival at the red Ford Escort. Detective Ellis next saw Mr. Pannell on the railroad tracks and testified that he did not announce himself or take any other action to arrest Mr. Pannell. Officer Prichard was the first officer to announce himself to Mr. Pannell and stated on direct examination: "when he got down into the bottom of the viaduct that's when I made my presence known to him and I told him to stop and he did." (Tr. Transcript, pp. 406). Quite simply, Officer Prichard was the only law enforcement officer to announce himself to Mr. Pannell and he complied with this request.

VI. PRAYER FOR RELIEF

Petitioner prays that this Court will accept his appeal, reverse his convictions and sentence in this matter, and remand this case to the Circuit Court either with directions to enter an Order granting Petitioner's Motion for Judgment of Acquittal or his Motion for a New Trial.

ROSHAWN PANNELL

By Counsel: 

Richard W. Weston (WVSB # 9734)
WESTON LAW OFFICE
635 Seventh Street
Huntington, WV 25701
(304) 522-4100
(304) 697-5022

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

STATE OF WEST VIRGINIA,

PLAINTIFF,

VS. **INDICTMENT NO. 06-F-292**
JUDGE FERGUSON

ROSHAWN PANNELL,

DEFENDANT.

CERTIFICATE OF SERVICE

I, Richard W. Weston, do hereby verify that I served the foregoing **"Brief on Appeal For Petitioner"** by U.S. Mail, postage prepaid, this 30th day of November, 2009, addressed to the following:

Darrell V. McGraw, Jr.
Attorney General
State of West Virginia
State Capitol Complex,
Bldg. 1, Room E-26
Charleston, WV 25305

Phillip W. Morrison, II
Special Prosecuting Attorney
WV Prosecuting Attorney's Institute
The Cambridge Building, Suite 202
90 MacCorkle Avenue, Southwest
South Charleston, WV 25303

Roshawn Pannell
Mount Olive Correctional Complex
1 Mountainside Way
Mt. Olive, West Virginia 25185

Richard W. Weston (WVSB 9734)
WESTON LAW OFFICE
635 Seventh Street
Huntington, WV 25701
Phone: 304.522.4100
Fax: 304.697.5022