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NO. 35226

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

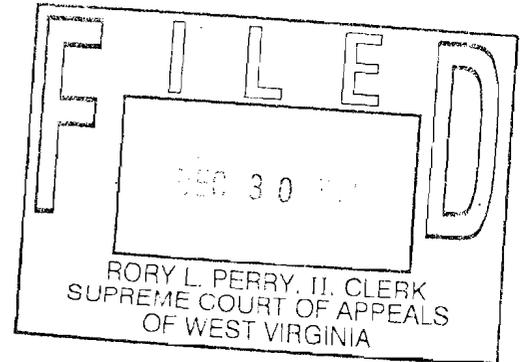
STATE OF WEST VIRGINIA,

*Appellee,*

v.

ROSHAWN PANNELL,

*Appellant.*



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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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I.

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

This is an appeal by Roshawn Pannell (hereinafter “Appellant”) from the February 20, 2009, order of the Circuit Court of Cabell County (Ferguson, J.), which sentenced him to three terms of sixty years to run concurrently in the State penitentiary upon his conviction by a jury of three counts of first degree robbery in violation of West Virginia Code § 61-2-12(a)(1), and a term of six months in the State regional jail upon his conviction by a jury of one count of fleeing in violation of West Virginia Code § 61-5-17(d); the sentences for first degree robbery to be served consecutively with that for the fleeing conviction. On appeal, Appellant claims that the circuit court committed various errors, denying him a fair trial.

## II.

### STATEMENT OF FACTS

The events of this case surround an armed robbery committed against Christopher Chiles, Andrew Chiles, and Marco Polo Cipriani in Huntington in the early morning of July 12, 2006. The three of them were held up at gunpoint on the intersection of Fifth Avenue and Fourteenth Street while returning back to their fraternity house from a bar at approximately 3:30 a.m. (Tr., 110, Aug. 1, 2007.) These victims were returning from a bar where they were celebrating Andrew Chiles' twenty-first birthday. (*Id.*) When they were walking toward the fraternity house, they saw a black man approximately five feet eleven inches tall jumping up and down acting in a manner as he was "pumping himself up." (*Id.* at 111.) The manner in which this person was acting was described as a person "psyching himself up before a basketball game." (Tr., 459, Aug. 2, 2007.) The person jumping up and down was wearing a green "du-rag" on his head. (Tr., 111, Aug. 1, 2007; Tr. 460, Aug. 2, 2007.)

When the three victims were looking at the man jumping up and down, another man came around the corner with a handgun pointed at them and told them to give him everything they had. (Tr., 111, Aug. 1, 2007; Tr., 461-62, 498, Aug. 2, 2007.) This person was wearing a dark mask with eye slits that resembled a loose-fitting sleeve that covered his face. (Tr., 116, Aug. 1, 2007; Tr., 461, 507, Aug. 2, 2007.) The person with the gun was also African-American. (Tr., 115, Aug. 1, 2007.) Regarding the man with the gun, the mask did not fully cover his head, and it was observed that he had cornrows in his hair. (Tr., 116, Aug. 1, 2007; Tr., 503, Aug. 2, 2007.) He was shorter but stockier and bigger built. (Tr., 463, 505, Aug. 2, 2007.) Conversely, the first person who was

jumping up and down was described as being taller and skinnier. (Tr., 462-63, 505, Aug. 2, 2007.)

Both assailants were described as wearing dark T-shirts and dark shorts or jeans. (*Id.* at 492, 5 502.)

At this point Christopher Chiles took the cash that was in his wallet out and deposited it on the ground. To this, the man with the handgun said, "No, I said everything you have got." So Christopher Chiles threw his wallet down. (Tr., 112, Aug. 1, 2007.) Andrew Chiles then dropped his wallet on the ground. (Tr., 464, Aug. 2, 2007.) Mr. Cipriani threw down a twenty-dollar bill. (*Id.* at 499.)

The victims were then told to run away, so the three of them ran to their fraternity house where they called the police. (Tr., 115, Aug. 1, 2007; Tr., 464, 499-500, Aug. 2, 2009.)

Corporal Jason Young of the Huntington Police Department responded to the call from the fraternity house and began questioning the three victims about the robbery. (Tr., 178, Aug. 1, 2007.) The corporal got a description of the assailants. (*Id.* at 179.) At this point Corporal Young received a dispatch that two African-American males fitting the description given were running on railroad tracks in the area, and he left the fraternity house to help pursue the suspects. (*Id.* at 181-82.)

Patrolman Sid Hinchman of the Huntington Police Department was patrolling the area and received the dispatch. He traveled around the area of Twelfth and Thirteenth Streets and drove slowly at approximately eight m.p.h. As he did this, he noticed two males coming toward him at about the same slow speed in a red car wearing objects on their heads which did not appear to be hats. (Tr., 288-91, Aug. 2, 2007.) The patrolman stated that the two people turned their heads in an exaggerated fashion as they passed him. (*Id.* at 289.) At this time, the two men in the red car immediately turned onto Thirteenth Street, and Patrolman Hinchman did a U-turn to follow them due to the suspicious behavior. (*Id.* at 290.) When the patrolman caught up with the vehicle, both

driver and passenger doors were open, and it was abandoned. (*Id.*) He discovered that the car was a red Ford Escort. (*Id.* at 201.) When he got to the vehicle, it was still running. When Patrolman Hinchman searched the vehicle, he initially found a black semi-automatic handgun. (*Id.* at 292.) There was a fully-loaded clip in the handgun. (*Id.* at 294.) Upon later inspection of the vehicle, Patrolman Hinchman found a dark piece of cloth with slits in it on the driver's side floorboard by the door and a green cloth described as a "du-rag" located on the passenger's side floorboard. (*Id.* at 297-300.)

Officer Scott Ballou of the Marshall University Police Department received the dispatch concerning the suspects and observed an African-American in dark shirt and jeans coming up from the railroad tracks on Nineteenth Street and Buffington Avenue that matched the description. (Tr., 237-39, Aug. 1, 2007.) The officer stopped this individual for safety reasons and secured him with handcuffs. (*Id.* at 238.)

Patrolman Eddie Prichard, Jr., of the Huntington Police Department was in the area and heard Sergeant John Ellis say on his radio that there were two African-American males running east on the railroad tracks. (Tr., 404, Aug. 2, 2007.) He traveled on foot to Eighth Avenue and saw a black male in a white T-shirt and dark jeans jump from an underpass to a sidewalk heading south towards him. (*Id.* at 405-06.) The patrolman told the person to stop, ordered him to get on the ground and took custody of him. (*Id.* at 406.)

It was discovered that the person that Officer Ballou apprehended was James Turner. (*Id.* at 408.) Patrolman Prichard discovered that the person of whom he took custody was Rashawn Pannell. (*Id.* at 407.) While John Ellis was pursuing the suspects on the railroad tracks, he found a black T-shirt thrown up underneath a train car. (*Id.* at 446.) This could explain why the victims

described both persons who robbed them as wearing dark T-shirts, and when Patrolman Prichard apprehended Mr. Pannell, he was wearing a white T-shirt. When the two suspects were taken to police headquarters, Patrolman Prichard retrieved money from one of Mr. Turner's pockets that was in three separate wads. (*Id.* at 409.)

A show-up with the suspects occurred later that morning. Andrew Chiles testified that he was able to identify Mr. Pannell and Mr. Turner by their build and body type; despite their wearing masks when the robbery took place, and one of them wearing a white shirt rather than a dark one. (*Id.* at 470.) Marco Polo Cipriani also testified that he was able to identify the suspects based on body style and height, in spite of one wearing a different color T-shirt during the show-up. (*Id.* at 504-05.) At the trial, Chris Chiles was able to identify the dark mask and green "du-rag" used in the robbery. (Tr., 121-22, Aug. 1, 2007.)

Sergeant David Castle of the crime scene investigation division of the Huntington Police Department also testified. He found a thumb print of Appellant on a Lipton Tea bottle that was in the red Ford Escort. (Tr., 547, 551, Aug. 2, 2007.) Appellant's palm print was also found on the rear view mirror of the vehicle. (*Id.* at 562-65.) He also testified that Mr. Turner's left thumb print was found on a 7-11 bag in the Escort. (*Id.* at 565-66.) Sergeant Castle gave detailed scientific methodology background testimony on all of these prints as well as photographs for the jury to examine.

On August 3, 2007, the jury convicted both Appellant and Mr. Turner of three counts of first degree robbery and one count of fleeing. (Tr., 890-98, Aug. 3, 2007.)

### III.

#### RESPONSE TO ASSIGNMENTS OF ERROR

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

- A. THE COURT VIOLATED PANNELL'S RIGHT TO A FAIR TRIAL PURSUANT TO THE SIXTH AMENDMENT MADE APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT TO THE *UNITED STATES CONSTITUTION*. AND ARTICLE III, §§ 10 AND 14 OF THE *WEST VIRGINIA CONSTITUTION* BY INVADING THE PROVINCE OF THE JURY AND COERCING A GUILTY VERDICT THROUGH TIME CONSTRAINT.

#### The State's Response:

When all of the facts and circumstances of this particular case are examined, there was no coercion by th circuit judge placed on the jurors to reach a verdict, despite some unique time factors involved.

- B. APPELLANT'S ROBBERY CONVICTION 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 PRINCIPLE IN THE FIRST DEGREE.

#### The State's Response:

There was sufficient evidence presented at trial for a jury to convict Appellant of first degree robbery 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 STOLEN OR MONEY AND THE JURY WAS NOT INSTRUCTED ON ATTEMPTED ROBBERY.

**The State's Response:**

There was sufficient evidence to convict Appellant of first degree robbery of Andrew Chiles, regardless of the status or amount of any cash or property. Additionally, Appellant's argument is not properly briefed.

- D. APPELLANT'S FLEEING CONVICTION SHOULD BE OVERTURNED BECAUSE HE COMPLIED WITH THE FIRST LAW ENFORCEMENT OFFICER THAT ATTEMPTED HIS ARREST.

**The State's Response:**

There was enough evidence to convict Appellant beyond a reasonable doubt of fleeing, and he fails to meet the heavy burden to overturn the conviction.

IV.

**ARGUMENT**

- A. **ALTHOUGH THERE WERE SOME UNIQUE TIME CONSTRAINT ISSUES IN THIS CASE, THE CIRCUIT JUDGE DID NOT COERCE THE JURY INTO A DECISION TO CONVICT APPELLANT, AND THERE WAS NO FAIR TRIAL VIOLATION.**

Although some unique time-related circumstances took place in this case during jury deliberation, the circuit court did not coerce the jury into a decision to convict Appellant. The circuit judge attempted to come up with various solutions to the time issue and eventually read a proper instruction to the jury regarding their reaching a decision in the form of a unanimous verdict as well as the possibility of their inability to do so. When the totality of the circumstances is considered, the trial judge acted properly, there was no coercion and Appellant was provided a fair trial under the United States and West Virginia Constitutions.

1. **The Standard of Review.**

"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. *Janssen v. Carolina Lumber Co.*, 137 W.Va. 561, 73 S.E.2d 12 (1952)." *State v. Hobbs*, W.Va., 282 S.E.2d 258, 272 (1981).

Syl. Pt. 2, *State v. Spence*, 173 W.Va. 184, 313 S.E.2d 461 (1984).

An entire review of the trial record, in its context and under all circumstances, is to be conducted in order to determine if a trial judge's statements, questions and instructions amounted to coercion, and in turn, plain error.

*United States v. Jenkins*, 380 U.S. 445, 85 S. Ct. 1059, 13 L. Ed. 2d 957 (1965).

2. **There Were Unique Time Issues Presented in this Case, Yet No Coercion Took Place on the Part of the Circuit Judge and Appellant Was Given a Fair Trial.**

Appellant erroneously asserts that the jury in his trial was coerced into making a decision to convict him by the circuit judge and that his constitutional right to a fair trial was violated. In this case, the jury retired to the jury room to deliberate at 1:05 p.m. on Friday, August 3, 2007. (Tr., 861, Aug. 3, 2007.) At 3:37 p.m., the jury took a recess and asked the circuit judge how long they could deliberate, informing the court that they were not currently making any headway in reaching a unanimous verdict. (*Id.* at 870-71.) The real problem arose because both a juror and the circuit judge were leaving town for vacation the following morning. (*Id.* at 871-72, 882.) It is true that the concern of the juror's vacation schedule was presented to the circuit court at the beginning of the trial. (*Id.* at 877.) However, based upon the nature of the case, it was believed that the trial would last two days and be completed by this point. (Tr., 21, Aug. 1, 2007; Tr., 877, Aug. 3, 2007.) Yet when the totality of the circumstances of this case are examined, the circuit judge's statements,

questions and instructions did not amount to coercion in accordance with *Jenkins, supra*, in the jury's eventually reaching a unanimous guilty verdict.

Various alternative solutions were discussed between the circuit judge and the parties. The potential solution of continuing the case until the following Monday with another judge was considered, but in light of a juror also going out of town the next day, the circuit judge decided against that alternative. (Tr., 872, Aug. 3, 2007.) The circuit judge also considered bringing the jury back in a week after he and the juror returned from vacation, but believed that to be a bad idea. (*Id.* at 877.) The circuit judge even raised the possibility of West Virginia Rule of Criminal Procedure 12(b) whereby the parties may stipulate in writing and the court may approve a jury of less than twelve panelists before the verdict is handed down, but Mr. Turner, through his counsel, objected to this potential solution. (*Id.* at 874.)

The circuit judge decided upon bringing the jury in and giving it a "modified Allen charge" or what he referred to as a "Ferguson Charge." (*Id.* at 875.) At 5:07 p.m., the circuit judge called the jury panel in and gave them the following instruction:

You have informed the Court of your inability to reach a verdict in this case. The Court does not wish to know, and you are not to indicate, how you stand or whether you entertain a predominant view.

At the outset, the Court wishes you to know that although you have a duty to reach a verdict, if that is possible, the Court has neither the power nor the desire to compel agreement on a verdict.

The purpose of these remarks is to point out to you the desirability of reaching a verdict in this case, provided, however, that you as individual jurors can do so without surrendering or sacrificing your conscientious scruples or personal convictions.

You will recall that upon assuming your duties in this case each of you took an oath. That oath places upon each of you as individuals the responsibility of

arriving at a true verdict upon the basis of your own opinion and not merely upon acquiescence in the conclusions of your fellow jurors.

However, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to reach a verdict by a comparison of views and by a consideration of the proofs with your fellow jurors.

During your deliberations you should be open-minded and consider the issues with proper deference to and respect for the opinions of each other, and you should not hesitate to re-examine your own views in the light of such discussions.

You should consider also that this case must at some time be terminated; that there is no reason to suppose that the case will ever be submitted to twelve persons more intelligent, more impartial or more competent to decide it, or clearer evidence will ever be produced on one side or the other.

With that being said, you may retire now taking as much time as is necessary for further deliberation upon the issues submitted to you for your determination.

So, again, go back in and if anybody— if you want us to get anything for you or whatever, you all just let us know.

You all may now again retire.

(*Id.* at 890, 892-93.) The circuit judge also told the jury that dinner accommodations would be made as the panelists desired while they were deliberating. (*Id.* at 882.)

After some additional questions concerning evidentiary matters, the jury continued deliberations at 5:43 p.m. and handed down a verdict at 7:14 p.m., convicting Appellant and Mr. Turner on all four counts. (*Id.* at 889-97.) The circuit judge inquired individually of each juror as to whether the verdict was their own on each charge for both Appellant and Mr. Turner, and each panelist answered affirmatively on every question. (*Id.* at 891-98.)

The State acknowledges that there could have been potential problems with the jury coming to agreement on a verdict in light of the one juror and the circuit judge having to go out of town the next day. However, the judge in no way coerced the jury with the instructions. The instructions

were completely fair, expressed the desire to reach a verdict, spoke to the possibility of concluding the trial without one if no agreement could be reached and stated the goal of its taking as much time as necessary. When looking at all of the circumstances involved as required by *Jenkins, supra*, no judicial coercion took place in the jury reaching a verdict. Although the trial judge and a juror having to go out of town for a week beginning the following day was a concern, the jury began deliberations at 1:05 p.m. and handed down a verdict at 7:14 p.m., a time period of more than six hours. Appellant takes note of the fact that a juror was going out of town the following day in an attempt to give evidence of jury coercion, yet there is absolutely no evidence whatsoever that this particular juror was wavering in his decision or that he was the cause, in particular, for any deadlock. When looking at the facts and circumstances of this particular case as opposed to a general rule, as required under *Spence, supra*, there was no coercion.

In *State v. Waldron*, 218 W. Va. 450, 459, 624 S.E.2d 887, 896 (2005), this Court was presented with a case where the trial court stated that the jury must reach a decision by a certain time, and there were certain days where the judge requested that the jury stay later than 5:00 p.m. This Court held that the judge was not forcing a quick time frame on the jury and a quick verdict, but rather an attempt by the trial court to seat a proper jury who could preside over the matter free from scheduling issues. It was further held that the judge's instructions amounted to asking the jurors if they could commit to such a time frame and requesting input on the availability of their schedules (*Id.*) Applying the *Waldron* holding, the circuit court having the jury stay later to attempt to reach a verdict, requesting input on their availability and stressing that it was not forcing a decision; no coercion occurred, and Appellant was not denied a fair trial.

In light of all of this, Appellant's argument fails on this ground.

**B. THERE WAS SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF ROBBERY IN THE FIRST DEGREE IN THIS CASE.**

When examining the facts of this case with the elements of the crime of first degree robbery, there was sufficient evidence to convict Appellant of these three counts. Appellant fails to meet the heavy burden that the jury could not find beyond a reasonable doubt that he was guilty of these charges.

**1. The Standard of Review.**

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

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

**2. The Evidence Was Sufficient to Convict Appellant of First Degree Robbery, and He Fails to Meet the Burden That the Verdict to Convict Him Was Not Based on One Beyond a Reasonable Doubt.**

Appellant incorrectly argues that he was wrongfully convicted of first degree robbery because the evidence was insufficient to establish beyond a reasonable doubt that he committed the elements of the same. According to West Virginia Code § 61-2-12(a)(1), the elements of first degree robbery are as follows:

(a) 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.

There was ample evidence to establish that Appellant and Mr. Turner committed robbery by the use of the threat of deadly force, in the form of a handgun, to obtain money from the three victims, both direct and circumstantial. With respect to robbery, this court has held the following:

“At common law, the definition of robbery was (1) the unlawful taking and carrying away, (2) of money or goods, (3) from the person of another or in his presence, (4) by force or putting him in fear, (5) with intent to steal the money or goods.” Syl. Pt. 1, *State v. Harless*, 168 W.Va. 707, 285 S.E.2d 461 (1981).

Syl. Pt. 1, *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988).

“We believe that the legislature has not by the enactment of W.Va.Code, 61-2-12, redefined the elements of robbery from those established by the common law.”

*State v. Collins*, 174 W. Va. 767, 770, 329 S.E.2d 839, 842 (1988).

In this case, the victims supplied testimony that they were robbed at gunpoint by two African-American males wearing masks. Patrolman Hinchman observed two black males in a red Ford Escort traveling slowly in the area of the crime who matched the description of the suspects who immediately fled the vehicle upon the policeman turning around to follow them. Patrolman Hinchman found a dark-colored, semi-automatic handgun, a dark mask and a green “du-rag” in this vehicle as was identified by the victims. After the suspects fled, Marshall University Police Officer Ballou apprehended Mr. Turner, and Patrolman Prichard took custody of Appellant. Both suspects were wearing the same clothing as described by the victims except for Appellant wearing a white shirt; however, Sergeant Ellis discovered a black shirt at the railroad tracks where both suspects had initially fled. Andrew Chiles and Marco Polo Cipriani both testified that they were able to identify Mr. Turner and Appellant in a show-up based on body type and height. Patrolman Prichard found

money in Mr. Turner's pocket in the form of three separate wads of bills. Sergeant Castle presented evidence of a thumb print on a Lipton Tea bottle and a palm print on a rear view mirror belonging to Appellant found in the vehicle where Patrolman Hinchman originally saw he and Mr. Turner. Thus, using the standard established in *Guthrie, supra*, there was indeed ample evidence for a jury to find Appellant guilty beyond a reasonable doubt.

Appellant goes to great lengths to point out that he could not have been charged with first degree robbery because he did not have a gun, say anything to the victims or physically take their money. He points out that all he did was jump up and down. (*See Appellant Brief at 23.*) However, this Court has held the following regarding this offense:

Two or more persons may be charged in an indictment with the commission of a crime, such as armed robbery, as principals in the first degree, when one of the two persons was present, aiding and abetting the other in the commission of the crime; principals in the second degree being indictable and punishable, under our Code and practice, as principals in the first degree.

Syl. Pt. 1, *State v. Haines*, 156 W. Va. 281, 192 S.E.2d 879 (1972). This ruling was reflected in the instructions given to the jury on this issue. The instructions on this issue were as follows:

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 abetter, 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.*

(Tr., 805-06, Aug. 3, 2007; emphasis added.) The State concedes that the trial testimony does not present a clear picture of what role each suspect played in the robbery. However, assuming Appellant was not the suspect who actually held up the victims at gunpoint, no one just engages in the activity of jumping up and down or "getting pumped up" on a sidewalk at approximately 3:00

a.m. Appellant could undoubtedly be found to have been an aider and abetter and a principal of the crime of first degree robbery in accordance with *Haines, supra*. This is exactly what the jury found beyond a reasonable doubt.

In light of this, Appellant's argument fails on this ground.

**C. THERE WAS SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF FIRST DEGREE ROBBERY OF ANDREW CHILES.**

Appellant contends that there was insufficient evidence to convict him of first degree robbery of Andrew Chiles. That is factually incorrect; however, even if Appellant and Mr. Turner did not take anything of value, the attempted first degree robbery was sufficient to convict them of the offense. There was enough evidence for a jury to convict beyond a reasonable doubt. Additionally, Appellant cites no authority as to the legal reasoning behind his assertion of the alleged missing instruction, and this argument is not properly briefed.

**1. The Standard of Review.**

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Syl. Pt. 3, *State v. Guthrie, supra*.

2. **There Was Sufficient Evidence to Convict Appellant of First Degree Robbery of Andrew Chiles Regardless of Any Amount Actually Taken, or That Was Not. The Circuit Court Did Not Err in this Matter. Additionally, Appellant's Argument Is Not Properly Briefed.**

Appellant wrongly contends that there was insufficient evidence to convict him of first degree robbery of Andrew Chiles because it seems unclear as to whether actual cash was taken from the latter's person. It is initially worth pointing out that Appellant fails to cite anything in the trial transcript or court record to validate this claim. All of the facts cited above support a jury being able to convict Appellant of first degree robbery of Andrew Chiles. Andrew Chiles testified that he was held up at gunpoint, was told to give Appellant and Mr. Turner all that he had and dropped his wallet on the sidewalk. (Tr., 462-64, Aug. 2, 2007.)

Again, West Virginia Code § 61-2-12(a)(1) defines first degree robbery as follows:

(a) 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.

Appellant and Mr. Turner took Andrew Chiles' wallet by the use of a firearm as prohibited by the statute. There was testimony that the wallets of the victims were retrieved at the sidewalk. However, even if Andrew Chiles had no money in the retrieved wallet, Appellant still committed first degree robbery with the attempt to rob him by the use of a firearm as is articulated in the statutory provision. Again, according to *Haines, supra*, despite the fact that Appellant did not use the firearm, his aiding and abetting in the offense made him as guilty as Mr. Turner who actually threatened Andrew Chiles with the handgun.

Additionally, this Court has held the following regarding a conviction of first degree robbery:

"Under . . . W. Va. Code, 61-2-12 [1961]], making robbery, and the attempt to commit robbery, a crime, and prescribing the penalties therefor, the attempt to commit robbery is a crime in itself...." Syl. Pt. 4, in part, *State ex rel. Vascovich v. Skeen*, 138 W.Va. 417, 76 S.E.2d 283 (1953).

Syl. Pt. 1, *State v. Coulter*, 169 W. Va. 526, 288 S.E.2d 819 (1982). So according to *Coulter* Appellant and Mr. Turner's attempt was enough to convict them of first degree robbery of Andrew Chiles, regardless of the amount of money or property that was or was not actually taken. There was sufficient evidence for a jury to convict Appellant of this offense based on this evidence beyond a reasonable doubt.

Appellant asserts that the issue of attempt should have been articulated in the jury instructions, and the circuit court erred in failing to do so. However, not only does Appellant fail to cite anything in the trial transcript or court record to support this argument, he cites no legal authority that mandates this is required. Regarding a party's failure to cite any legal authority when challenging a lower-court decision, this Court has held the following:

"Although we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal."

*State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996).

Since Appellant cites no legal authority but merely mentions this in passing; thus,, this Court need not examine the issue any further.

In light of all of this, Appellant's argument fails on this ground.

**D. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO CONVICT APPELLANT BEYOND A REASONABLE DOUBT OF FLEEING, AND HE FAILS TO MEET THE HEAVY BURDEN TO GET THIS CONVICTION OVERTURNED.**

Despite Appellant's compliance with Patrolman Prichard's orders, he still engaged in the offense of fleeing. There was sufficient evidence for the jury to convict him beyond a reasonable doubt of this crime. Just as with the previous two arguments, Appellant fails to meet the heavy burden imposed on him to have this conviction overturned.

**1. The Standard of Review.**

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

Syl. Pt. 3, *State v. Guthrie, supra*.

**2. As with Appellant's Previous Two Arguments, He Has Failed to Meet the Standard to Overturn the Conviction for this Offense. There was Sufficient Evidence for a Jury to Find Him Guilty Beyond a Reasonable Doubt.**

Yet, again, Appellant fails to meet the heavy burden established in *Guthrie, supra*, in order to have his conviction of fleeing overturned. There was indeed sufficient evidence presented for the jury to convict him beyond a reasonable doubt of this offense. West Virginia Code § 61-5-17(d) defines fleeing as follows:

(d) 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.

(Emphasis added.) Under this statutory provision, Appellant could indeed be convicted of fleeing when he and Mr. Turner got out of the red Escort, abandoned the vehicle and went off on foot toward the railroad tracks. The fact that Patrolman Prichard found Appellant running in that area begs the question as to his committing this offense. It is true that Appellant complied with the order to stop when apprehended by Patrolman Prichard, but the fact remains that from the time he and Mr. Turner left the Escort when Patrolman Hinchman turned around, they were engaged in the offense of fleeing. There was sufficient evidence for the jury to find him guilty of this crime beyond a reasonable doubt when the *Guthrie* standard is applied, and Appellant is unable to meet the heavy burden to have this conviction overruled.

In light of this, Appellant's argument fails on this ground.

V.

**CONCLUSION**

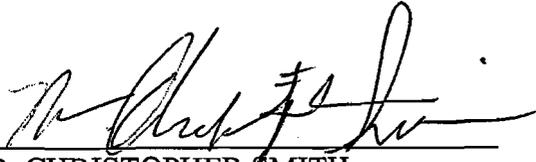
For the foregoing reasons, the judgment of the Circuit Court of Cabell County should be affirmed by this Honorable Court.

Respectfully submitted,

State of West Virginia,  
*Appellee,*

By counsel

DARRELL V. MCGRAW, JR.  
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "R. Christopher Smith", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

The undersigned counsel for Appellee hereby certified that a true and correct copy of the foregoing *Brief of Appellee, State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 30<sup>th</sup> day of December, 2009, addressed as follows:

Richard W. Weston, Esq.  
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A handwritten signature in black ink, appearing to read "R. Christopher Smith", written over a horizontal line.

R. CHRISTOPHER SMITH