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NO. 35489

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

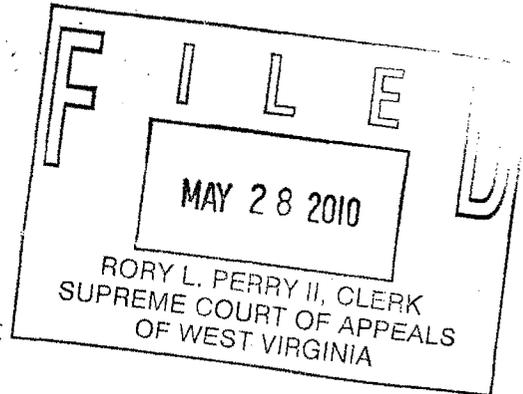
STATE OF WEST VIRGINIA,

*Appellee,*

v.

GREGG DELANEY SMITH,

*Appellant.*



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BRIEF OF APPELLEE, STATE OF WEST VIRGINIA

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**TABLE OF CONTENTS**

	<b>Page</b>
I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW .....	1
II. STATEMENT OF FACTS .....	2
III. RESPONSE TO ASSIGNMENTS OF ERROR .....	6
IV. ARGUMENT .....	7
A. THERE WAS NO ABUSE OF DISCRETION REGARDING THE CIRCUIT COURT’S DECISION NOT TO DENY THE PROSECUTOR THE ABILITY TO TRY THE CASE, AND APPELLANT WAS NOT DENIED A FAIR TRIAL. THE PRIOR INCIDENT CONCERNING A DISPUTE WHERE THE PROSECUTOR DECIDED THERE WAS INSUFFICIENT EVIDENCE TO CONVICT TOM SMITH WAS IMMATERIAL TO THE PRESENT CASE, AND NOT A GROUND FOR DISQUALIFICATION .....	7
1. The Standard of Review .....	8
2. Appellant Was Not Denied a Fair Trial by the Circuit Court Decision Regarding the Prosecutor Not Being Removed, and There Was No Error. This is Primarily Because Any Prosecutorial Testimony Would Have Been Immaterial and the Evidence Was Available Through Other Sources .....	8
B. APPELLANT’S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY HIS SENTENCE, AND IT WAS NOT DISPROPORTIONATE TO THE OFFENSES FOR WHICH HE WAS CONVICTED. THERE WAS NO ABUSE OF DISCRETION ON THE PART OF THE CIRCUIT COURT .....	11
1. The Standard of Review .....	12
2. There Was No Abuse of Discretion by the Circuit Court in Appellant’s Sentence, and It Was Not Disproportionate to the Crimes He Committed .....	12
C. APPELLANT FAILED TO TIMELY FILE HIS MOTION FOR A NEW TRIAL, AND HIS CLAIM IS NOT PROPERLY BRIEFED .....	15

1.	The Standard of Review .....	15
2.	This Ground of Error on the Part of Appellant Is Not Properly Briefed. Additionally, His Motion for New Trial Was Not Timely Filed According to West Virginia Rule of Criminal Procedure 33. ....	15
D.	THERE WAS SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF ATTEMPTED FIRST DEGREE MURDER, AND HE FAILS TO MEET THE HEAVY BURDEN TO HAVE THIS CONVICTION OVERTURNED .....	16
1.	The Standard of Review .....	17
2.	There Was Sufficient Evidence for a Jury to Convict Appellant of Attempted First Degree Murder Beyond a Reasonable Doubts, and He Fails to Meet This Heavy Burden to Have This Conviction Overturned .....	17
E.	THERE WAS NO ERROR AND THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN THE ADMITTANCE OF THE VIDEO SURVEILLANCE. THE CONSTITUTIONAL AND STATUTORY PROVISIONS AS WELL AS CASE LAW CITED BY APPELLANT ARE INAPPLICABLE HERE .....	19
1.	The Standard of Review .....	20
2.	There Was Nothing Improper Regarding the Admission of the Surveillance Video, and the Circuit Court Did Not Abuse Its Discretion .....	20
V.	CONCLUSION .....	24

## TABLE OF AUTHORITIES

	Page
<b>CASES:</b>	
<i>Simthson v. United States Fiselity Co.</i> , 186 W. Va. 195, 411 S.E.2d 850 (1991) .....	8, 10
<i>State ex. rel. Hatcher v. McBride</i> , 221 W. Va. 760, 656 S.E.2d 789 (2007) .....	12, 13
<i>State ex rel. Karr, Jr. v. McCarty</i> , 187 W. Va. 201, 417 S.E.2d 120 (1992) .....	7, 9
<i>State v. Guthrie</i> , 194 W. Va. 657, 461 S.E.2d 163 (1995) .....	17
<i>State v. Guthrie</i> , 205 W. Va. 326, 518 S.E.2d 83 (1999) .....	20, 23
<i>State v. Head</i> , 198 W. Va. 298, 480 S.E.2d 507 (1996) .....	13
<i>State v. Hinchman</i> , 214 W. Va. 624, 591 S.E.2d 182 (2003) .....	20, 23
<i>State v. Keesecker</i> , 222 W. Va. 138, 663 S.E.2d 593 (2008) .....	8
<i>State v. LaRock</i> , 196 W. Va. 294, 470 S.E.2d 613 (1996) .....	15
<i>State v. Louk</i> , 171 W. Va. 639, 301 S.E.2d 596 (1983) .....	20
<i>State v. Lucas</i> , 201 W. Va. 271, 496 S.E.2d 221 (1997) .....	12, 13
<i>State v. Mullens</i> , 221 W. Va. 70, 650 S.E.2d 169 (2007) .....	19, 22, 23
<i>State v. Neal</i> , 179 W. Va. 705, 371 S.E.2d 633 (1988) .....	12, 13
<i>State v. Peyatt</i> , 173 W. Va. 317, 315 S.E.2d 574 (1983) .....	20
<i>State v. Redman</i> , 213 W. Va. 175, 578 S.E.2d 369 (2003) .....	13
<i>State v. Watkins</i> , 214 W. Va. 477, 590 S.E.2d 670 (2003) .....	12, 13
<b>CONSTITUTIONAL PROVISIONS:</b>	
W. Va. Const. art. III, § 5 .....	12, 14

W. Va. Const. art. III, § 6 ..... 19, 23

**STATUTES:**

W. Va. Code § 61-2-1 ..... 1, 17, 18, 22

W. Va. Code § 61-2-9(a) ..... 1, 14

W. Va. Code § 61-3C-1 ..... 20

W. Va. Code § 61-7-12 ..... 1, 14

W. Va. Code § 61-8-28 ..... 20

W. Va. Code § 61-11-8 ..... 1, 14, 18

W. Va. Code § 61-11-21 ..... 14

W. Va. Code § 62-1D-1 *et seq.* ..... 20

W. Va. Code § 62-1D-3 ..... 19, 21, 22

W. Va. Code § 62-1D-3(a) ..... 21, 22

W. Va. Code § 62-1D-3(e) ..... 22

**OTHER:**

W. Va. R. Crim. P. 33 ..... 6, 15, 16

W. Va. R. Prof. Conduct 3.7 ..... 9

W. Va. R. Prof. Conduct 3.7(a) ..... 9

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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 Gregg Delaney Smith (hereinafter “Appellant”) from the April 23, 2009, order of the Circuit Court of Ritchie County (Holland, J.), which sentenced him to two terms of not less than two years nor more than ten years in the State penitentiary upon his conviction by a jury of two counts of malicious assault in violation of West Virginia Code § 61-2-9(a); a term of five years in the State penitentiary upon his conviction by a jury of one count of wanton endangerment involving a firearm in violation of West Virginia Code § 61-7-12; and a term of not less than three nor more than fifteen years in the State penitentiary upon his conviction by a jury of one count of attempted first degree murder in violation of West Virginia Code §§ 61-11-8 and 61-2-1; all terms to be served consecutively. On appeal, Appellant claims that the circuit court committed various errors, denying him a fair trial.

## II.

### STATEMENT OF FACTS

This case involves a shooting by Appellant of his neighbor, Tom Smith. The background of this event seems to be an ongoing dispute and enmity between two neighbors. On September 7, 2007, Ritchie County Deputy Sheriff Michael Kelly responded to a 911 dispatch call regarding an incident reported to be a neighbor dispute that resulted in a shooting. (Tr., 26, Sept. 2, 2008.) Upon receiving this call, Deputy Kelly traveled to Pensboro between 205 and 207 First Street where the incident was reported to have occurred. (*Id.*) When Deputy Kelly arrived, he found the victim, Tom Smith, laying on the ground behind Appellant's car. (*Id.* at 28.) Eventually, a lot more police officers and Emergency Medical Service (EMS) personnel arrived at the scene. (*Id.* at 29.)

When the deputy sheriff went over to where the victim was lying, the latter kept telling him that the incident was recorded and not to leave the recording there. (*Id.* at 41.) Tom Smith was then transported by EMS away from the scene and eventually flown via Health Net to Ruby Memorial Hospital at West Virginia University Medical Center. (*Id.* at 42.)

A video surveillance recording was found on the victim's computer which recorded the entire day, including the physical confrontation that led to the eventual shooting. (*Id.* at 38.) Chief Deputy Sheriff Brian Backus copied the incident onto a CD from the victim's computer. (*Id.* at 42.) On the basis of this video surveillance, Deputy Kelly testified that Appellant came out of his house with a shotgun, went over to where the victim was working on his vehicle, picked up a hammer and hit the victim with it and picked up the shotgun and pointed it at the victim's mid-section. (*Id.* at 38-39.) At that point, the deputy testified that he saw Tom Smith push the barrel of the gun down, and the rest of the incident went out of the video surveillance view. (*Id.* at 39.) Deputy Kelly testified that

the police discovered a spent shotgun shell in Appellant's living room and found a shotgun on his porch. (*Id.* at 34-36.) During the investigation, Deputy Michael Kelly determined that Appellant should be charged with the offenses listed in the indictment. (*Id.* at 42-43.)

West Virginia State Troopers Brewer and Richardson arrived on the scene, secured the area and handcuffed Appellant, putting him in Trooper Brewer's cruiser. (Tr., 64-65, Sept. 3, 2008.) Ritchie County Deputy Sheriff Brian Backus testified to taking a CD from the victim's computer and copying the video surveillance from that day. (*Id.* at 70-71.) From the video, he testified that Appellant came toward Tom Smith with a shotgun, and the latter had a hold of the barrel during a struggle. (*Id.* at 81-82.) He also testified from the video surveillance recording that Appellant had a hammer in his hand and Tom Smith was blocking a blow from the object with his arm. (*Id.* at 81.) When he had arrived, the victim was being loaded into the ambulance. (*Id.* at 79.) A search warrant was obtained, and Deputy Backus took custody of the actual recording device from the computer in Appellant's residence. This device went through the proper chain of custody evidentiary process. (*Id.* at 80.)

When Craig Mullins, operation manager for Central Communications, Inc., who took the 911 call, testified at trial, the 911 call was played for the jury. In this recording, Appellant admitted to firing the shotgun at Tom Smith. (*Id.* at 102-03.)

Tom Smith testified that on the day in question, he was working on his car, and Appellant came toward him, rattling keys as to get his attention, with a shotgun in his hand. (*Id.* at 114.) Appellant grabbed a hammer laying beside Tom Smith and swung at him. Tom Smith attempted to block the swing, but the claw of the hammer hit him in the head. Then Appellant hit him with the claw a second time. (*Id.* at 117.) The victim testified that his right arm blocked the hammer enough

so that the claw did not go into his skull, but the blow broke his arm and hand. (*Id.*) Tom Smith testified that at this point he had blood running down his face. (*Id.* at 118.) In self-defense, the victim hit Appellant in the mouth. Appellant hit Tom Smith a third time in the arm. Luckily, through the struggle, the victim was able to maneuver so as to take the blow to his arm with the head of the hammer this time. (*Id.* at 120.) When they were struggling at the rear of the vehicle, Appellant reached around it and pulled up the shotgun from the ground. At this point, Tom Smith grabbed the barrel and shoved it away. (*Id.* at 121.) Appellant then dropped the hammer, grabbed the shotgun with both hands and shot the victim. (*Id.* at 123.) The victim had his hands on the barrel at the time the blast occurred, and it took off a majority of a leg and part of an ankle. (*Id.* at 123-24.) After this, Appellant dragged Tom Smith a bit and started beating him with a large object. (*Id.* at 125-26.) The next thing the victim remembered was his wife coming to his aid and holding him. (*Id.* at 127.)

Even Appellant's daughter, Edith Smith, testified that her father picked up a hammer and swung it at the victim. (*Id.* at 209-11.) During Appellant's testimony, he even admitted to swinging the hammer at Tom Smith. (Tr., 287, 300, Sept. 4, 2008.)

Melissa Smith, the victim's wife, was at work at the time of the shooting. She received a telephone call around 5:30 p.m. that day from their son, Tristan, screaming that his dad was dead. (*Id.* at 166.) She left her two youngest children with her oldest daughter and had her aunt drive her to the house because she was shaking so badly. (*Id.*) When she got to where her husband was laying on the ground, she noted a pool of blood and that a foot of his was missing and nowhere in sight. (*Id.* at 169.) She got towels and put them around her husband. (*Id.*) When she was assisting him, Tom Smith kept yelling that Appellant shot him. (*Id.* at 174.)

Tom Smith's initial hospitalization lasted more than a month. (*Id.* at 129.) From the shooting until the trial, he had nine surgeries performed on his leg, including skin grafting procedures. (*Id.* at 130.) During some procedures, Tom Smith had muscle in his back removed and re-attached to his injured leg. (*Id.* at 144.) The victim suffered extensive infections in his leg due to significant bacteria. People around him such as doctors, nurses and his wife had to wear masks to protect themselves from infection as well as for him due to his immune system being virtually destroyed. (*Id.* at 144-45.) He also suffered from staff infection. (*Id.* at 144.) Despite attempts to save it, Tom Smith eventually had to have half of his leg amputated. (*Id.* at 143-44.)

Melissa Smith testified that she had to clean the victim's injured leg two to three times a day due to the bacterial infection. (*Id.* at 174.) She said that the smell of it was so bad that she could barely stand to be in the same room. She testified that Tom Smith had surgeries every two and a half months to clean the leg. (*Id.* at 177.) She stayed with the victim during these hospitalizations, coming home on weekends to do laundry and having to pay for a babysitter during these visits. (*Id.* at 175.) She stated that he began to have heart attacks due to the pain of the injury. (*Id.*) She said that he had to see doctors every month since the incident. (*Id.* at 176.) She testified that he eventually started having chest pains, swelling of the leg and bacterial discharge, which led to the decision to undergo the leg amputation. (*Id.* at 177.)

On September 5, 2008, the jury convicted Appellant of two counts of felonious or malicious assault, one count of wanton endangerment, and one count of attempted first degree murder. (Tr., 377-78, Sept. 5, 2008.)

### III.

#### RESPONSE TO ASSIGNMENTS OF ERROR

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

- A. THE COURT ERRED IN FAILING TO DISQUALIFY THE PROSECUTING ATTORNEY AND THEREBY DENIED THE APPELLANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The State's Response:

The circuit court did not abuse its discretion when it refused to disqualify the prosecutor.

The prior dispute where the prosecutor determined there was insufficient evidence to convict Tom Smith and the accompanying videotape was immaterial to the instant case.

- B. APPELLANT'S SENTENCE HEREIN VIOLATES WEST VIRGINIA CONSTITUTION, ARTICLE III, SECTION 5, THAT PROHIBITS A PENALTY THAT IS NOT PROPORTIONATE TO THE CHARACTER AND DEGREE OF THE OFFENSES HEREIN.

The State's Response:

Appellant's sentences were within the statutory limitations of the offenses for which he was convicted, and they were not based on impermissible factors. Thus, there was no abuse of discretion.

- C. THE TRIAL COURT ERRED IN NEVER CONSIDERING A MOTION FOR A NEW TRIAL, BASED UPON THE FAILURE OF THE JURY TO CONSIDER ALL OF THE EVIDENCE AND THAT THE EVIDENCE DID NOT SUPPORT A CONVICTION FOR ATTEMPTED FIRST DEGREE MURDER.

The State's Response:

Appellant violated West Virginia Rule of Criminal Procedure 33 by failing to timely file his motion and is not entitled to relief. Additionally, this argument is not properly briefed.

- D. THE EVIDENCE ADDUCED AT TRIAL DOES NOT SUPPORT A CONVICTION FOR ATTEMPTED FIRST DEGREE MURDER.

The State's Response:

There was sufficient evidence for a jury to convict Appellant of attempted first degree murder beyond a reasonable doubt, and he fails to meet the heavy burden to warrant his conviction to be overturned.

- E. THE COURT ERRED IN ADMITTING THE VIDEO OBTAINED BY TOM SMITH AND THE POLICE IN VIOLATION OF WEST VIRGINIA LAW, APPELLANT'S EXPECTATION OF PRIVACY THEREIN AND HIS RIGHTS UNDER ARTICLE III, SECTION 6 OF THE WEST VIRGINIA CONSTITUTION THERETO.

The State's Response:

Appellant's rights were not violated by the admission of the video surveillance, and the authorities he cites are inapplicable.

IV.

ARGUMENT

- A. **THERE WAS NO ABUSE OF DISCRETION REGARDING THE CIRCUIT COURT'S DECISION NOT TO DENY THE PROSECUTOR THE ABILITY TO TRY THE CASE, AND APPELLANT WAS NOT DENIED A FAIR TRIAL. THE PRIOR INCIDENT CONCERNING A DISPUTE WHERE THE PROSECUTOR DECIDED THERE WAS INSUFFICIENT EVIDENCE TO CONVICT TOM SMITH WAS IMMATERIAL TO THE PRESENT CASE, AND NOT A GROUND FOR DISQUALIFICATION.**

Appellant wrongly contends that the circuit court erred in denying a motion to have the prosecutor in the case recused. He asserts that his right to a fair trial was violated due to this. This is based on a prior complaint against Tom Smith where the prosecutor eventually dropped the charges based upon insufficient evidence to prosecute. Appellant cites the precedent established in *State ex rel. Karr, Jr. v. McCarty*, 187 W. Va. 201, 417 S.E.2d 120 (1992); yet, this case is really

inapplicable here. In particular, the evidence Appellant was seeking through the testimony of the prosecutor was immaterial to the facts of the instant case, and it was obtained through other witnesses. There was no abuse of discretion on the part of the circuit judge.

1. **The Standard of Review.**

“In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.” Syl. Pt. 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).

Syl. Pt. 2. *State v. Keesecker*, 222 W. Va. 138, 663 S.E.2d 593 (2008).

When an attorney is sought to be disqualified from representing his client because an opposing party desires to call the attorney as a witness, the motion for disqualification should not be granted unless the following factors can be met: *First, it must be shown that the attorney will give evidence material to the determination of the issues being litigated; second, the evidence cannot be obtained elsewhere; and, third, the testimony is prejudicial or may be potentially prejudicial to the testifying attorney's client.*

Syl. Pt. 3, *Simthson v. United States Fidelity Co.*, 186 W. Va. 195, 411 S.E.2d 850 (1991) (emphasis added).

2. **Appellant Was Not Denied a Fair Trial by the Circuit Court Decision Regarding the Prosecutor Not Being Removed, and There Was No Error. This is Primarily Because Any Prosecutorial Testimony Would Have Been Immaterial and the Evidence Was Available Through Other Sources.**

Appellant asserts that his right to a fair trial was violated because the circuit judge did not rule that the prosecutor in the case should recuse himself. He makes this assertion primarily on the basis that a complaint was filed against the victim due to a past encounter, and the prosecutor dismissed it for lack of evidence.

On September 25, 2007, a hearing was held on the issue of Appellant's motion to have the prosecutor disqualified from the case. The criminal complaint against Tom Smith that surrounded the issue of this hearing was based on a past encounter between he and Appellant where the latter was recording the incident. From the testimony of Ritchie County Deputy Sheriff Mike Kelly, when he reviewed the video recording in question, it looked as if Appellant was intentionally provoking Tom Smith by recording him, and then it appeared as if Tom Smith struck Appellant by the jerking motion of the recording. (Motion H'rg, 10-11, Sept. 25, 2007.) During this hearing, the prosecutor, Steven Jones, stated that, after reviewing the video recording, there was not enough evidence to convict Tom Smith of a crime, so he dismissed the case. (*Id.* at 14.) It appears that Appellant pursued a conflict of interest argument regarding this prior case that was dismissed through a chain of custody determination and the involvement the prosecutor had in the recording. (*Id.* at 13.) In this hearing and this appeal, Appellant relies on the holding of *McCarty, supra*. However, that case is inapplicable here. In *McCarty*, this Court upheld the disqualification of a prosecutor on the basis of West Virginia Rule of Professional Conduct 3.7(a) where the integrity of taped telephone conversations in evidence in a criminal prosecution where he was directly involved with them and chain of custody was at issue; and thus, his testimony regarding the same was necessary. *McCarty*, 187 W. Va. at 205, 417 S.E.2d at 124. Rule 3.7 states the following:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

The prosecutor argued and the circuit court ruled accordingly that *McCarty* was distinguishable from the instant case in that there were no chain of custody issues and the recording was prepared by Appellant. (Motion H'rg, 16, 18, Sept. 25, 2007.) The prosecutor argued that there was no conflict of interest, and the circuit judge also ruled that prosecuting attorneys have wide latitude in reviewing cases to determine if prosecution should be pursued or a case should be dismissed. (*Id.* at 17, 19.) In light of this, the circuit court denied the motion. (*Id.* at 20.)

However, Appellant fails to meet the standard established in *Simthson, supra*. Primarily, he fails to establish that any evidence regarding this past incident between the feuding neighbors was material to the instant case. The incident Appellant recorded took place a fair amount of time before the offenses in which he was charged, and bears no relevance as to his hitting the victim with a hammer, coming toward him with a shotgun, and shooting him on the day in question. Appellant uses the term "justification" regarding the past incident and in his defense of the offenses in this case, but surely he is not saying that a past conflict, regardless of how violent it may or may not have been, is justification or a defense as to why he came toward the victim on a separate day in question and hit him with a hammer and shot him.

Additionally, David Richards, who was a Pensboro police officer during the prior encounter in question, testified regarding the recording. (Tr., 227-41, Sept. 5, 2008.) So Appellant fails to meet the second *Simthson* factor that the evidence could not be found elsewhere. Finally, it is hard to argue that this prejudiced Appellant since this incident occurred in the past and was not relevant to the facts of the instant case.

It is worth noting that during the September 25, 2007, hearing, Appellant made a point of saying that he did not want to call Mr. Jones to the stand to testify during it, and he refrained from doing so. (Motion H'rg, 13, Sept. 25, 2007.) There is no record of Appellant attempting to call the prosecutor to the stand to testify during the trial, and Appellant cites nothing to this effect.

Appellant takes issue with the fact that there was no ruling on his second motion to disqualify the prosecutor by the circuit court. It is true that Appellant filed another motion regarding this issue on August 7, 2008. (R. at 261-62.) In the State's motion in response, it pointed out that the issue had already been resolved in the circuit court's previous denial. (*Id.* at 270.) It does appear that there was no ruling on this subsequent motion. However, Appellant never raised the issue again. Thus, it appears that Appellant has no recourse at this time regarding the absence of a ruling on this and should raise an ineffective assistance of counsel claim later in a habeas proceeding.

Regarding all of this, there was no abuse of discretion on the part of the circuit court. In light of this, Appellant's argument fails on this ground.

**B. APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY HIS SENTENCE, AND IT WAS NOT DISPROPORTIONATE TO THE OFFENSES FOR WHICH HE WAS CONVICTED. THERE WAS NO ABUSE OF DISCRETION ON THE PART OF THE CIRCUIT COURT.**

There was no abuse of discretion on the part of the circuit court in sentencing Appellant. Appellant fails to meet the heavy burden to establish error in his sentencing order. With the exception of briefly mentioning that he is age 50, he seems to just repeat the alleged facts he conveyed to the jury which it chose not to believe or have much merit; mainly restating his recounting of past disputes with Tom Smith which are not relevant. He cannot overcome the facts that he went over to the victim, swung a hammer at him, repeatedly struck him with the object and

shot him in the leg. All of the sentences were within the statutory limitations of the respective penalties for the offenses.

1. **The Standard of Review.**

“Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.” Syllabus Point 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982).

Syl. Pt. 4, *State ex. rel. Hatcher v. McBride*, 221 W. Va. 760, 656 S.E.2d 789 (2007); Syl. Pt. 5, *State v. Watkins*, 214 W. Va. 477, 590 S.E.2d 670 (2003); Syl. Pt. 4, *State v. Neal*, 179 W. Va. 705, 371 S.E.2d 633 (1988).

The Supreme Court of Appeals reviews sentencing orders, including orders of restitution made in connection with a defendant's sentencing, under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.

Syl. Pt. 1, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997); *see also Watkins, supra* at 480, 590 S.E.2d at 673.

2. **There Was No Abuse of Discretion by the Circuit Court in Appellant's Sentence, and It Was Not Disproportionate to the Crimes He Committed.**

Appellant makes the claim that the sentences imposed on him were disproportionate, and thus a violation of Article III, Section 5 of the West Virginia Constitution. As previously stated, Appellant was sentenced to two terms of not less than two years nor more than ten years for two counts of malicious assault, a term of five years for one count of wanton endangerment involving a firearm, and a term of not less than three nor more than fifteen years for one count of attempted first degree murder in the State penitentiary; all terms to run consecutively. Basically, Appellant makes this claim on the basis of his age as well as by restating his version of the facts which the jury obviously did not believe and his claims of past disputes with the victim which are not relevant to

the instant case. However, when examining precedent set by this Court along with the facts of this case, there was no disproportionate sentence imposed.

Subject to certain narrowly drawn exceptions, this Court has consistently held that sentencing decisions rest within the sound discretion of the trial court. “The Supreme Court of Appeals reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.” Syl. Pt. 1, in part, *State v. Lucas, supra*. The balance struck by the sentencing judge in weighing competing sentencing factors will not be disturbed by this Court unless it is manifestly unsupported by reason. *See State v. Redman*, 213 W. Va. 175, 181, 578 S.E.2d 369, 375 (2003) (“Our system of criminal jurisprudence views a trial court’s discretion during the sentencing phase of a criminal proceeding as a critical component of the process.”); *State v. Head*, 198 W. Va. 298, 306, 480 S.E.2d 507, 515 (1996) (Cleckley, J., concurring) (“Circuit court 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 of their decisions determined on finding that which is not there.”).

As this Court held in *Hatcher, Watkins, and Neal, supra*, so long as a sentence is within the statutory limits and is not based on impermissible factors, this Court will not subject it to appellate review. This is indeed a very deferential standard, and Appellant’s sentence does not violate it. All of the sentences imposed for each offense of which Appellant was convicted were within their respective statutory limits.

The statutory sentence for malicious assault is to be imprisoned not less than one nor more than five years, or be confined in jail not exceeding twelve months and fined not exceeding five hundred dollars; wanton endangerment involving a firearm is to be imprisoned not less than one year

nor more than five years, or, in the discretion of the court, confined in the county jail for not more than one year, or fined not less than two hundred fifty dollars nor more than two thousand five hundred dollars, or both and attempted first degree murder is to be imprisoned by the discretion of the court, either in the penitentiary for not less than one nor more than three years, or to be confined in jail not less than six nor more than twelve months, and fined not exceeding five hundred dollars. See West Virginia Code §§ 61-2-9(a); 61-7-12 and 61-11-8. Additionally, there is a statutory presumption in this State that sentences for multiple offenses will be consecutive, unless the trial court in its discretion determines that they will be concurrent:

When any person is convicted of two or more offenses, before sentence is pronounced for either, the confinement to which he may be sentenced upon the second, or any subsequent conviction, shall commence at the termination of the previous term or terms of confinement, unless, in the discretion of the trial court, the second or any subsequent conviction is ordered by the court to run concurrently with the first term of imprisonment imposed.

W. Va. Code § 61-11-21. Under the circumstances of this case, the circuit court was within the statutory limits for each sentence and did not abuse its discretion in imposing consecutive sentences for Appellant's crimes.

During his sentencing, the circuit judge found that there was overwhelming evidence against Appellant, that he was a controlling dictatorial individual who will make every effort to have his way and that his crimes were extremely violent actions, involving the use of a firearm. (R. at 353.)

From reviewing this, it is clear that the sentence imposed was indeed within the statutory limits and was not based on an impermissible factor. There was no abuse or discretion by the circuit court and no violation of Article III, Section 5 of the West Virginia Constitution.

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

**C. APPELLANT FAILED TO TIMELY FILE HIS MOTION FOR A NEW TRIAL, AND HIS CLAIM IS NOT PROPERLY BRIEFED.**

Appellant's claim that he was denied a fair trial due to the fact that the videos were not sent into the jury room during deliberations is not properly briefed. He merely makes this claim in passing without citing any court rule, statute or holding of an analogous case where such issue would give rise to such a claim. Additionally, his filing of this motion for new trial was not timely filed and in violation of West Virginia Rule of Criminal Procedure 33.

**1. The Standard of Review.**

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).

**2. This Ground of Error on the Part of Appellant Is Not Properly Briefed. Additionally, His Motion for New Trial Was Not Timely Filed According to West Virginia Rule of Criminal Procedure 33.**

Appellant asserts that he was denied a fair trial due to the jury not having the videos admitted into evidence and shown during the trial during its deliberations. It appears this was because the jury had told the bailiff that it did not want them during this deliberation period. (*See* Appellant's Brief at 15.) However, Appellant cites absolutely nothing as to how this constitutes a violation of his right to a fair trial. There is no court rule, statutory provision or case law cited whatsoever as to how or why videos which the panel had seen during the trial not being brought back to the jury room for its deliberations constitutes this violation. This is merely an issue mentioned only in passing and not supported with pertinent authority as outlined in *LaRock*. Thus, this Court need not look into this matter any further.

However, even if this Court examines this issue further, Appellant is not entitled to any relief based on this argument. That is because Appellant filed his motion for a new trial too late and violated West Virginia Rule of Criminal Procedure 33. Rule 33 states, in pertinent part, the following:

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds *shall be made within ten days after verdict or finding of guilty* or within such further time as the court may fix during the ten-day period.

(Emphasis added.) Appellant filed his motion for a new trial on January 30, 2009, and as previously mentioned the jury verdict was entered on September 5, 2008, well beyond the ten-day time period mandated in Rule 33. (R. at 323; Tr., 377, Sept. 5, 2008.) There is no evidence that the circuit court established any further time for the motion to be filed within the prescribed time period. The State pointed this out in its response to Appellant's motion for new trial. (R. at 328.) So assuming, *arguendo*, that Appellant's assignment of error is properly briefed, he is still not entitled to relief based on his violation of Rule 33.

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

**D. THERE WAS SUFFICIENT EVIDENCE TO CONVICT APPELLANT OF ATTEMPTED FIRST DEGREE MURDER, AND HE FAILS TO MEET THE HEAVY BURDEN TO HAVE THIS CONVICTION OVERTURNED.**

Appellant contends that there was insufficient evidence to convict him of attempted first degree murder. However, he fails to meet the heavy burden to establish this. When examined in

the light most favorable to the State, there was sufficient evidence for a jury to convict him of the offense beyond a reasonable doubt.

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. **There Was Sufficient Evidence for a Jury to Convict Appellant of Attempted First Degree Murder Beyond a Reasonable Doubts, and He Fails to Meet This Heavy Burden to Have This Conviction Overturned.**

Appellant contends that there was insufficient evidence for a jury to convict him of attempted first degree murder of Tom Smith. This is not the case, however. As stated above, the *Guthrie* standard is that, when examining the evidence in the light most favorable to the prosecution, it is sufficient so long as a jury could find the defendant guilty beyond a reasonable doubt. This is a heavy burden, and a verdict is to be set aside only when there is no evidence, regardless of how it is weighed, where a jury could find guilt beyond a reasonable doubt. Appellant fails to meet this heavy burden.

According to West Virginia Code § 61-2-1, first degree murder is defined, in pertinent part, as follows:

Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit,

arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance as defined in article four, chapter sixty-a of this code, is murder of the first degree. All other murder is murder of the second degree.

Additionally, the statutory provision of attempt is dealt with in West Virginia Code § 61-11-8 and states the following, in pertinent part:

Every person who attempts to commit an offense, but fails to commit or is prevented from committing it, shall, where it is not otherwise provided, be punished as follows:

(1) If the offense attempted be punishable with life imprisonment, the person making such attempt shall be guilty of a felony and, upon conviction, shall be imprisoned in the penitentiary not less than three nor more than fifteen years.

When examined in the light most favorable to the State, there was sufficient evidence for a jury to convict Appellant of attempted first degree murder. As was brought out through the victim's testimony, on the day in question, he was working on his car and Appellant came toward him, rattling keys as to get his attention, with a shotgun in his hand. (Tr., 114, Sept. 3, 2008.) Appellant grabbed a hammer laying beside Tom Smith and swung at him. Tom Smith attempted to block the swing, but the claw of the hammer hit him in the head. Then Appellant hit him with the claw a second time. (*Id.* at 117.) Appellant then hit Tom Smith a third time in the arm. (*Id.* at 120.) Appellant then dropped the hammer, grabbed the shotgun with both hands and shot the victim. (*Id.* at 123.) After this, Appellant dragged Tom Smith a bit and started beating him with a large object. (*Id.* at 125-26.) As detailed above, even Appellant's daughter, Edith Smith, testified that her father picked up a hammer and swung it at the victim. (*Id.* at 209-11.) During Appellant's testimony, he even admitted to swinging the hammer at the victim. (Tr., 287, 300, Sept. 4, 2008.) On the basis of this video surveillance, Deputy Kelly testified that Appellant came out of his house with a shotgun, went over to where the victim was working on his vehicle, picked up a hammer and hit the

victim with it and picked up the shotgun and pointed it at the victim's mid-section. (Tr., 38-39, Sept. 3, 2008.) From the same video, Deputy Backus testified that Appellant came toward Tom Smith with a shotgun, and the latter had a hold of the barrel during a struggle. (*Id.* at 81-82.) He also testified from the video surveillance recording that Appellant had a hammer in his hand and Tom Smith was blocking a blow from the object with his arm. (*Id.* at 81.)

By examining this testimony as well as the statutory language above, a jury could indeed find Appellant guilty of attempting to commit murder by a willful, deliberate and premeditated killing. According to the testimony, Appellant came toward the victim unprovoked, and swung a hammer at him repeatedly as well as shot him with a shotgun. Any contradictory testimony Appellant gave at trial and that he now presents in his appeal was not found credible by the jury, and any issues of credibility are not to be determined by this Court. Therefore, the evidence was sufficient for the jury to find Appellant guilty of this offense, and he has not met the heavy burden.

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

**E. THERE WAS NO ERROR AND THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN THE ADMITTANCE OF THE VIDEO SURVEILLANCE. THE CONSTITUTIONAL AND STATUTORY PROVISIONS AS WELL AS CASE LAW CITED BY APPELLANT ARE INAPPLICABLE HERE.**

The Appellant cites West Virginia Constitution, Article III, Section 6; West Virginia Code § 62-1D-3, as well as various other related statutory provisions, and *State v. Mullens*, 221 W. Va. 70, 650 S.E.2d 169 (2007), in an attempt to assert that the circuit court erred in the admittance of the video surveillance of his attack on Tom Smith and that his privacy rights were violated. However, none of these are applicable here. The circuit court did not abuse its discretion in this matter, and no error occurred.

1. **The Standard of Review.**

“Concerning our standard of review of the circuit court’s exclusion of the evidence at issue, we note that ‘[r]ulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.’”

*State v. Guthrie*, 205 W. Va. 326, 332, 518 S.E.2d 83, 89 (1999), quoting *State v. Louk*, 171 W. Va. 639, 643, 301 S.E.2d 596, 599 (1983), citing Syl. Pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983).

“In reviewing challenges to the findings and conclusions of the circuit court, we apply a two-prong deferential standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.” Syl. Pt. 2, *Walker v. West Virginia Ethics Comm’n*, 201 W.Va. 108, 492 S.E.2d 167 (1997).

Syl. Pt. 2, *State v. Hinchman*, 214 W. Va. 624, 591 S.E.2d 182 (2003).

2. **There Was Nothing Improper Regarding the Admission of the Surveillance Video, and the Circuit Court Did Not Abuse Its Discretion.**

Appellant contends that the circuit court violated his right to privacy and his constitutional rights by admitting the video surveillance from Tom Smith’s house. However, the circuit court did not abuse its discretion in admitting this evidence, and his arguments are without merit. The authority Appellant cites in his argumentation is inapplicable in the present case.

During the testimony of Deputy Kelly, Appellant objected to the admission of the video surveillance obtained from Tom Smith’s computer on the basis of West Virginia Code §§ 61-8-28, 62-1D-1 *et. seq.* and 61-3C-1, dealing with privacy, authorized and unauthorized wiretapping and computer services, respectively. (Tr., 51-53. Sept. 4, 2008.) The circuit court ruled that the case fell outside of the scope of these three statutes. (*Id.* at 53.) The circuit judge stated that it was not the intent of the victim to intercept any personal, private information, oral communications or

electronic communications from Appellant's computer system, but rather the images recorded from Tom Smith's computer were captured wireless images "out in space," able to be recorded by anyone. (*Id.* at 54.) In light of this, the circuit court denied the objection to its admission. (*Id.* at 54-55.)

In his brief, Appellant gives numerous statutory definitions of computers, computer data and access, and then he attacks the admission of this video surveillance material from the victim's computer, primarily on the basis of West Virginia Code § 62-1D-3. West Virginia Code § 62-1D-3 states, in pertinent part,

(a) Except as otherwise specifically provided in this article it is unlawful for any person to:

(1) Intentionally intercept, attempt to intercept or procure any other person to intercept or attempt to intercept, any wire, oral or electronic communication; or

(2) Intentionally disclose or intentionally attempt to disclose to any other person the contents of any wire, oral or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral or electronic communication in violation of this article; and

(3) Intentionally use or disclose or intentionally attempt to use or disclose the contents of any wire, oral or electronic communication or the identity of any party thereto, knowing or having reason to know that such information was obtained through the interception of a wire, oral or electronic communication in violation of this article.

The victim did tell Detective Michael Kelly about the video surveillance recording from his computer which was eventually copied onto a disc. (Tr., 41-42, Sept. 3, 2008.) However, there was no violation of the above statute. Both Appellant and Tom Smith had video surveillance cameras recording the area. Tom Smith had a Nortech Wireless Surveillance Camera, which was approved by the Federal Communications Commission (FCC). (Tr., 135, Sept. 4, 2008.) It ran off of a frequency the same way as an antennae. (*Id.* at 136.) Eventually, Tom Smith turned his camera off,

yet he was able to pick up camera images from Appellant's wireless camera because it ran on the same frequency. He testified that he was able to flip his box back on, and was able to see his vehicle through the wireless images of Appellant's camera. (*Id.* at 157.) This testimony goes to the ruling by the circuit judge that this recording was merely capturing wireless transmissions out in space rather than intentionally intercepting any wire, oral or electronic communication prohibited by West Virginia Code § 62-1D-3(a). Appellant mentions a "Gotcha" computer program used by the victim which is designed to illegally intercept another's computer recordings. However, there is absolutely no evidence that this is what Tom Smith utilized, nor does Appellant cite anything to this effect.

Additionally, § 62-1D-3 states the following:

(e) It is lawful under this article for a person to intercept a wire, oral or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortuous act in violation of the constitution or laws of the United States or the constitution or laws of this state[.]

If one were to accept the premise that the victim intercepted Appellant's video recordings and computer records—which the State does not concede occurred—it could be argued that West Virginia Code § 62-1D-3(e) permitted this action since he was a party to the communication. The point can be made that Tom Smith was a party to the communication in that he was being filmed with Appellant who was recording the encounter from his computer and wireless camera.

Appellant also cites the holding of *State v. Mullens*, 221 W. Va. 70, 650 S.E.2d 169 (2007), in an attempt to further his argument. However, this case is also inapplicable here. The holding Appellant refers to is the following:

It is a violation of West Virginia Constitution article III, § 6 for the police to invade the privacy and sanctity of a person's home by employing an informant to surreptitiously use an electronic surveillance device to record matters occurring in

that person's home without first obtaining a duly authorized court order pursuant to W. Va.Code § 62-1D-11 (1987) (Repl. Vol .2005). To the extent that *State v. Thompson*, 176 W.Va. 300, 342 S.E.2d 268 (1986), holds differently, it is overruled.

*Mullens, supra*, at Syl. Pt. 2. Yet, this holding speaks to the State utilizing an informant in a suspect's home without obtaining a duly authorized court order. In *Mullens*, this Court reversed the lower court conviction where the police sent an informant into the defendant's house to record a conversation without judicial authorization. *Id.*, 221 W. Va. at 92, 650 S.E.2d at 191. This is distinguishable from the present case involving a recording by the victim without any State action.

Appellant makes the claim that the State violated his rights according to Article III, Section 6 of the West Virginia Constitution. That section states the following

§ 6. Unreasonable Searches and Seizures Prohibited

The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.

However, there was testimony by both Deputies Michael Kelly and Brian Backus that search warrants were obtained to recover the computer evidence from both the victim's and Appellant's respective residence. (Tr., 39, Sept. 3, 2008; Tr., 79-80, Sept. 4, 2008.) So any claim that Appellant's constitutional rights were violated through obtaining this evidence and admitting it in court are without merit.

In light of all of this, the circuit court did not abuse its discretion in admitting this evidence in accordance with *Guthrie, supra*, and *Hinchman, supra*. This ruling was within the circuit court's sound discretion. Thus, Appellant's argument fails on this ground.

V.

**CONCLUSION**

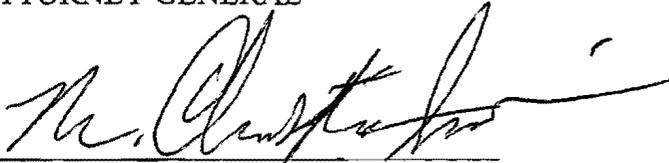
For the foregoing reasons, the judgment of the Circuit Court of Ritchie County should be affirmed by this Honorable Court.

*Respectfully submitted,*

State of West Virginia,  
*Appellee,*

By counsel

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL

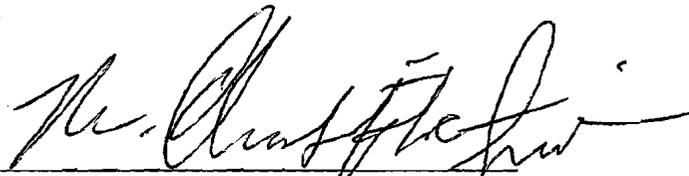
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**CERTIFICATE OF SERVICE**

The undersigned counsel for Appellee hereby certifies 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 day of 28th day of May, 2010, addressed as follows:

To: Rocco E. Mazzei, Esq.  
427 West Pike Street  
Clarksburg, WV 26301

  
R. CHRISTOPHER SMITH