NO. 35448

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

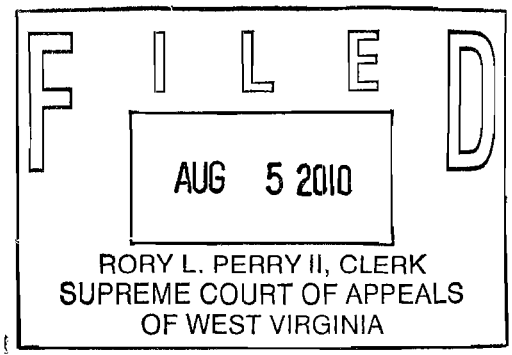
STATE OF WEST VIRGINIA,

Appellee,

v.

HOWARD KENNETH MURRAY,

Appellant.



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

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I.

KIND OF PROCEEDING AND RULINGS OF LOWER TRIBUNAL

This matter is before the Court pursuant to Howard Kenneth Murray's ("Appellant") appeal from his conviction in the Circuit Court ("court") of Wirt County of felony murder. On appeal, Appellant asserts that the court erred by improperly instructing the jury and failing to give his proposed jury instruction. Appellant further asserts that the evidence in this case does not justify the jury's verdict. The State disagrees.

II.

STATEMENT OF FACTS

At the time of his death, the victim in this case, Brent Butler, was living in a trailer in Elizabeth, West Virginia[1] with his pregnant wife, Devon Butler, and their two-year-old daughter

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[1] The Butler's trailer was actually located in Shears Trailer Court in Elizabeth. Vol. I Tr. 203, 266; Vol. II Tr. 55, 147.

Brooklyn. Vol. I Tr. 202; Vol. II Tr. 54, 55.

During the evening hours of February 6, 2008, Ms. Butler drove to Newark, West Virginia and picked up a friend of her husband's, Jamie Wine, and returned to the their trailer in Elizabeth.[2] Vol. II Tr. 56, 145, 146-147. Mr. Butler, his daughter Brooklyn, and an acquaintance of the Butlers, Ashlea Angely, were present[3] when Ms. Butler and Mr. Wine got back to the trailer. *Id.* at 147, 287, 288.

Later that same evening, Mr. Wine contacted a friend of his, Corey Robertson ("Robertson"), and made arrangements to meet him in Mineral Wells, West Virginia to buy some marijuana. Vol. II Tr. 147, 149, 200, 201. Ms. Butler then drove Mr. Wine to Mineral Wells and met with Robinson; Mr. Butler, his daughter Brooklyn, as well as Ms. Angely remained at the trailer. *Id.* at 57, 58, 59, 149, 201. While at Mineral Wells, Mr. Wine and Robertson got into a physical altercation when Mr. Wine took the marijuana from Robertson without paying for the same. *Id.* at 60, 62, 150, 204. Thereafter, Ms. Butler and Mr. Wine left and began driving back to the Butler's trailer in Elizabeth. *See generally Id.* at 62-64, 151, 203. Robertson likewise left and contacted his marijuana supplier, Oscar Gibson ("Gibson"), and informed him what had occurred. *Id.* at 203, 256, 257. At the request of Gibson, Robertson then drove to Gibson's home in Parkersburg where he picked up Gibson and Appellant. *Id.* at 204, 205, 257. Appellant, Gibson and Robertson then drove to the Butler's trailer in Elizabeth.[4] *Id.* at 206, 258.

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[2] This trip was prompted by Mr. Wine calling Mr. Butler and asking to be picked up and brought back to their trailer. Vol. II Tr. 56.

[3] Brooklyn was in bed at the time. *Id.* at 288.

[4] Robertson drove the car; Gibson was seated in the front passenger seat; and Appellant sat in the back seat behind Gibson. *Id.* at 205, 206, 259.

Appellant, Gibson and Robertson arrived at the Butler's trailer before Ms. Butler and Jamie Wine. *See generally* Vol. II Tr. 65, 206. Once there, Robertson kicked in the trailer door and he, Gibson and Appellant entered the trailer.[5] *Id.* at 207, 208, 291, 292. Once inside, Robertson and Gibson began questioning Mr. Butler about where his wife and Mr. Wine were, and told him that Mr. Wine had stolen their marijuana. *Id.* at 207, 260, 293. At this point, an argument ensued and Gibson, who was holding a gun out in the open, slapped Mr. Butler.[6] *Id.* at 207, 208, 209, 260, 261, 293, 294, 295. Appellant thereafter slapped and kicked Mr. Butler.[7] Vol. II Tr. 261, 295, 296; Vol. III Tr. 47, 72. Appellant then shoved Ashlea Angely as she was trying to escape the trailer causing her to fall and injure one of her knees. Vol. II Tr. 210, 297, 298. Following this incident, Appellant, Gibson and Robertson left the Butler's trailer. *Id.* at 210, 261, 299.

As Appellant, Gibson and Robertson were driving out of the Butler's trailer court, Ms. Butler and Jamie Wine were pulling into the trailer court.[8] Vol. II Tr. 65, 210-211, 262; Vol. III Tr. 73-74. Once they "spotted" each other, Ms. Butler and Mr. Wine turned their truck around and began driving through Elizabeth looking for the police. Vol. II Tr. 66, 210-211. While driving through Elizabeth, Appellant, Gibson and Robertson closely followed Ms. Butler and Mr. Wine. Vol. II Tr. 65, 67, 152, 154, 211, 212, 262, 263; Vol. III Tr. 74. During this pursuit, Gibson began waving a

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[5] Robertson entered the trailer first followed by Gibson; Appellant stayed just outside the door on the porch and eventually entered the trailer. *Id.* at 207, 291, 295, 296.

[6] The gun came in to Gibson's possession when he requested Appellant to retrieve the gun from their car and bring it back to him. Vol. III Tr. 44, 45, 70.

[7] Appellant also made threatening comments to Mr. Butler about his wife. *Id.* at 295.

[8] Again, Robertson was driving the car; Gibson was seated in the front passenger seat; and Appellant sat in the back seat behind Gibson. Vol. II Tr. 153, 262.

gun at Ms. Butler and Mr. Wine. Vol. II Tr. 154, 212. Ms. Butler and Mr. Wine eventually returned to the Butler's trailer court with Appellant, Gibson and Robertson following them yelling and screaming and throwing things at her truck. *Id.* at 66, 67-68, 155, 211, 212, 213, 262, 263.

Once inside the trailer court, Mr. Wine jumped out of the truck and ran into the Butler's trailer. Vol. II Tr. 68, 70, 155, 213, 214, 264. At this same moment, Appellant and Gibson jumped out of their car[9] and ran over to Ms. Butler's truck. Vol. II Tr. 68, 214, 263; Vol. III Tr. 74, 75. Once there, Appellant opened Ms. Butler's door and began yelling and screaming at her[10] while Gibson questioned Ms. Butler about the marijuana's location; Appellant also questioned Ms. Butler about the location of the marijuana. Vol. II Tr. 69, 70, 214, 263, 264; Vol. III Tr. 76.

Thereafter, Gibson proceeded towards the Butler's trailer in pursuit of Jamie Wine; Appellant remained with Ms. Butler, blocking her path from exiting the truck, and questioning her about the location of the marijuana. Vol. II Tr. 71, 215, 216, 264. At this point, Mr. Wine came out of the Butler's trailer with a pair of "numchucks" and a "mace" belonging to Mr. Butler.[11] *Id.* at 155, 215, 216, 264. Once outside, Mr. Wine observed Gibson coming towards him with a pointed gun. *Id.* at 156, 215. Seeing this, Mr. Wine dropped the "numchucks" and "mace" retreated back into trailer

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[9] Robertson remained in the car. *Id.* at 214.

[10] Ms. Butler also testified that Appellant was waving a gun in her face at this moment. Vol. II Tr. 69.

[11] "Numchucks" are a martial arts weapon that usually consist of two handles, wood in this case, with a chain linking them together. *See generally* Vol. I Tr. 238; Vol. II Tr. 155, 215, 264. A "mace" is a weapon of ancient origin usually consisting of a handle and a chain(s) with a metal spiked ball(s) attached to the chain. *See generally* Vol. I Tr. 238. The Court may be wondering why Mr. Butler had these types of weapons in his trailer. Apparently, Mr. Butler, along with a friend of his, Scott Lockhart, collected these types of weapons as a hobby. *See generally* Vol. II Tr. 280-281.

and attempted to lock the door; however, he was unable to lock the trailer door, as the locking mechanism was broken due to being previously kicked in by Robertson. *Id.* at 156, 157. Unable to lock the door, Mr. Wine held the door shut while Gibson began kicking and beating the door with his gun in order to gain entry to confront Mr. Wine, who had taken his marijuana.[12] *Id.* at 70, 71, 157, 215, 216, 264, 265.

Meanwhile, as Appellant has Ms. Butler "boxed" in her truck, Mr. Butler, in an effort to protect his pregnant wife, approached Appellant from behind and cut his neck with a spear.[13] Vol. II Tr. 71, 216, 266; Vol. III Tr. 53, 77. Appellant and Mr. Butler then began struggling for the spear, during which time Appellant called for Gibson. Vol. III Tr. 54, 78. Thereafter, Gibson ran over and struck Mr. Butler on the head and Mr. Butler dropped the spear. *Id.* at 54, 56, 78. At this point, Appellant gained control of the spear and Mr. Butler began running away. *Id.* at 57, 78, 79. In response, Appellant began chasing Mr. Butler, during which time he stabbed Mr. Butler in the left leg cutting his femoral artery, which caused him to bleed to death. Vol. III Tr. 57, 79, 80, 81; Vol. II Tr. 12, 13, 16, 17, 18. Following this incident, Appellant punctured a tire on Ms. Butler's truck and he, Gibson and Robertson then left the scene. Vol. III Tr. 62.

On or about March 31, 2008, the Grand Jury for Wirt County indicted Appellant for burglary, two counts of battery,[14] attempted burglary, felony murder, and destruction of property. R. at 4-6. Appellant's trial began on March 2, 2009, and ended on March 6, 2009, with the jury convicting him

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[12] Gibson was unable to actually kick the door open. *Id.* at 266.

[13] This spear is approximately 3 feet in total length with a wooden handle and a 1 foot steel double-edged blade. Vol. II Tr. 282.

[14] The two battery counts included batteries on Brent Butler and Ashlea Angely. R. at 4-5.

of burglary, two counts of battery, felony murder, and destruction of property. Vol. III Tr. 176; R. at 416-418.

On March 6, 2009, the court sentenced Appellant to 1 to 15 years for burglary, 1 year for the first battery, 1 year for the second battery, life with mercy for felony murder, and 1 year for destruction of property. Vol. III Tr. 213-214; R. at 11.[15]

III.

ARGUMENT

A. THE CIRCUIT COURT DID NOT ERR BY INSTRUCTING THE JURY AS TO THE CONCERTED ACTION THEORY. NOR DID THE CIRCUIT COURT ERR IN REFUSING TO GIVE APPELLANT'S PROPOSED JURY INSTRUCTION PROVIDING THAT SPECIFIC INTENT MUST BE PROVEN IN ORDER TO CONVICT HIM OF FELONY MURDER BY ATTEMPTED BURGLARY.

1. Standard Of Review

> "*A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence.* Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not mislead by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. *A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law.* Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion."

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[15] The court ordered that the two batteries and destruction of property sentences would run concurrently. The court further ordered that the burglary sentence would run consecutively with the sentences for the batteries and destruction of property. Finally, the court ordered that the felony murder sentence would run consecutively with the sentences for burglary, the batteries, and destruction of property. Vol. III Tr. 213-214; R. at 11.

Syl. pt. 8, *State v. Foster*, 221 W. Va. 629, 656 S.E.2d 74 (2007) (per curiam) (emphasis added) (*quoting* Syl. pt. 4, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995)).

"[I]f an objection to a jury instruction is a challenge to a trial court's statement of the legal standard, this Court will exercise *de novo* review." *Guthrie*, 194 W. Va. at 671, 461 S.E.2d at 177. "[W]hen an objection to a jury instruction involves the trial court's expression and formulation of the jury charge, this Court will review under an abuse of discretion standard." *Id.*

"'An instruction to the jury is proper if it is a *correct statement of the law and if sufficient evidence has been offered at trial to support it.*' Syllabus Point 8, *State v. Hall*, 171 W. Va. 212, 298 S.E.2d 246 (1982)." Syl. pt. 5, *State v. Satterfield*, 193 W. Va. 503, 457 S.E.2d 440 (1995) (emphasis added) (*quoting* Syl. pt. 1, *State v. White*, 171 W. Va. 658, 301 S.E.2d 615 (1983)). "'Whether facts are sufficient to justify the delivery of a particular instruction is reviewed by this Court under an abuse of discretion standard. In criminal cases where a conviction results, the evidence and any reasonable inferences are considered in the light most favorable to the prosecution.'" Syl. pt. 3, *State v. Bradford*, 199 W. Va. 338, 484 S.E.2d 221 (1997)(*quoting* Syl. pt. 12, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994)).

> A trial court's refusal to give a requested instruction is reversible error only if: (1) *the instruction is a correct statement of the law*; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense.

State v. Wade, 200 W. Va. 637, 646, 490 S.E.2d 724, 733 (1997) (emphasis added) (*quoting* Syl. pt. 11, *Derr*, *supra*.

2. Because Appellant Was An Aider And Abettor To The Underlying Felony, Attempted Burglary, The Court's Incorporation Of The Concerted Action Theory In Its Jury Instructions Was Proper. As An Aider And Abettor, It Was Likewise Proper For The Court To Deny Appellant's Proposed Jury Instruction That Specific Intent Must Be Proven In Order To Convict Him Of Felony Murder By Attempted Burglary.

On appeal, Appellant asserts that, because attempted burglary is a specific intent crime, the court erred by instructing the jury as to the concerted action theory and in not giving his proposed jury instruction # 5,[16] which provided that specific intent must be proven in order to convict him of felony murder by attempted burglary. *See generally* Appellant's Brief at 4-5. On the contrary, the evidence in this case shows that Appellant acted as a principal in the second degree or aider and abettor[17] to the burglary attempt by Gibson, the principal in the first degree. Thus, it was proper for

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[16] Appellant's proposed jury instruction #5 provides as follows:

> In regards to the charge of Murder in the First Degree committed in the course of an attempted Burglary as charged in Count 5 of the indictment, the court instructs the jury that the crime of attempted burglary requires two elements. First, the Defendant must have a specific intent to commit the underlying substantive crime, and second, he must commit some overt act toward the commission of that crime which falls short of completing the underlying crime. Before you can convict the Defendant of murder in the first degree as charged in Count 5, the State of West Virginia must prove beyond a reasonable doubt that the Defendant had a specific intent to commit burglary, and second, he committed some overt act toward the commission of Burglary which falls short of completing the Burglary. If the State of West Virginia fails to prove beyond a reasonable doubt that the Defendant had a specific intent to commit burglary, and second, that he committed some overt act toward the commission of Burglary which falls short of completing the underlying crime, then you must find the Defendant not guilty of First Degree Murder.

R. at 393.

[17] It should be noted that "[t]he terms 'principal in the second degree' and 'aider and abettor' are synonymous." *State v. Duncan*, 179 W. Va. 391, 397 n.6, 369 S.E.2d 464, 470 n.6 (1988) (*citing State ex rel. Brown v. Thompson*, 149 W. Va. 649, 142 S.E.2d 711 (1965), *overruled on other grounds*, *State v. Petry*, 166 W. Va. 153, 273 S.E.2d 346 (1980)).

the court to instruct the jury as to the concerted action theory and, further, to deny Appellant's proposed jury instruction #5 providing that specific intent must be proven in order to convict him of felony murder by attempted burglary.

The court's jury instructions, relative to the charge of felony murder, in its entirety, provides as follows:

> The offense charged in Count Five of the indictment is "first degree murder". One of two verdicts may be returned by you under this charge of the indictment. They are: (1) guilty of first degree murder; and (2) not guilty.
>
> "First degree murder" is committed when a homicide occurs during the attempted commission of a burglary. This type of murder is commonly known as a felony murder. [18]
>
> Before the Defendant, HOWARD KENNETH MURRAY, can be convicted of first degree murder, the State of West Virginia must overcome the presumption that the Defendant, HOWARD KENNETH MURRAY, is innocent and prove to the satisfaction of the jury beyond a reasonable doubt that:
>
> 1. *the Defendant*, HOWARD KENNETH MURRAY,
>
> 2. in Wirt County, West Virginia,
>
> 3. on or about the 6th day of February, 2008,
>
> 4. while actually or constructively present at the time and place of the commission of

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[18] As a collateral matter, this provision of the court's instructions is appropriate under the felony murder statute, which provides the following: "Murder . . . 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 . . . is murder of the first degree. All other murder is murder of the second degree." W. Va. Code § 61-2-1.

attempted burglary, and *while sharing the criminal intent of Oscar Gibson,*

5. *did knowingly aid and abet*

6. *Oscar Gibson*

7. *to commit attempted burglary,*

8. in order that Oscar Gibson,

9. with the intent to commit burglary,

10. did attempt to break and enter in the nighttime

11. the dwelling house

12. belonging to Brent W. Butler

13. with the intent of Oscar Gibson to commit battery therein,

14. and, as a result of the attempted burglary, HOWARD KENNETH MURRAY caused the death of Brent Wilson Butler.

The felony murder statute applies where the initial felony and the homicide were parts of one continuous transaction and were closely related in point of time, place and causal connection. [19]

The crime of felony murder in this state does not require proof of the elements of malice, premeditation or specific intent to kill. It is deemed sufficient if the homicide occurs accidentally during the

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[19] This provision of the court's instructions is also consistent with the law. "'The felony-murder statute applies where the initial felony and the homicide are parts of one continuous transaction, and are closely related in point of time, place, and causal connection . . . .'" Syl. pt. 9, in part, *Wade*, *supra* (*quoting* Syl. pt. 2, *State v. Wayne*, 169 W. Va. 785, 289 S.E.2d 480 (1982)).

commission of, or the attempt to commit, burglary. [20]

If, after impartially considering, weighing and comparing all the evidence, both that of the State and that of the Defendant, the jury, and each member of the jury, is convinced beyond a reasonable doubt of the truth of the charge as to each of these elements of first degree murder you may find the Defendant, HOWARD KENNETH MURRAY, guilty of first degree murder.

If the jury, and each member of the jury, have a reasonable doubt of the truth of the charge as to any one or more of these elements of first degree murder, you shall find the Defendant, HOWARD KENNETH MURRAY, not guilty.

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 is an aider and abettor and a principal in the second degree, [21] and as such, may be criminally liable for the criminal act as if he were the absolute perpetrator of the crime. [22] Actual physical presence at the scene of the criminal act

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[20] The court's instructions, on this point, also comport with the law. *See* Syl. pt. 8, *State v. Grimmer*, 162 W. Va. 588, 251 S.E.2d 780 (1979) *overruled on other grounds*, *State v. Petry*, 166 W. Va. 153, 273 S.E.2d 346 (1980) (*quoting* Syl. pt. 7, *State v. Sims*, 162 W. Va. 212, 248 S.E.2d 834 (1978)) ("'The crime of felony-murder in this State does not require proof of the elements of malice, premeditation or specific intent to kill. It is deemed sufficient if the homicide occurs accidentally during the commission of, or the attempt to commit, one of the enumerated felonies.'").

[21] The court's instructions on the meaning of principles in the first degree and second degree are also correct. "'A person who is the absolute perpetrator of a crime is a principal in the first degree, and a person who is present, aiding and abetting the fact to be done, is a principal in the second degree.'" Syl. pt. 4, *Foster*, *supra* (*quoting* Syl. pt. 5, *State v. Fortner*, 182 W. Va. 345, 387 S.E.2d 812 1989)).

[22] This provision of the court's instructions is also supported by statute. In this regard, W. Va. Code § 61-11-6(a) provides, in relevant part, that "[i]n the case of every felony, every principal in the second degree . . . shall be punishable as if he or she were the principal in the first degree . . . ." The case law provides likewise:

> 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*. However, you are cautioned that merely witnessing a crime without intervention therein does not make a person a party to its commission unless his interference was a duty and his non-interference was designed by him and operated as an encouragement to or protection of the absolute perpetrator of a criminal act. [23]

> "A person who is present, aiding and abetting another in the commission of an offense, is a principal in the second degree within the meaning of Code, 61-11-1, which provides, in part: 'In the case of every felony, every principal in the second degree, and every accessory before the fact, shall be punishable as if he were the principal in the first degree.'"

Syl., *State v. R. A. W.*, 165 W. Va. 264, 267 S.E.2d 553 (1980) (*quoting* Syl. pt. 3, *State v. Franklin*, 139 W. Va. 43, 79 S.E.2d 692 (1953)). *See State v. Legg*, 218 W. Va. 519, 523, 625 S.E.2d 281, 285 (2005) ("[T]here is no legal distinction between a conviction as a principal in the first degree and a conviction as an aider and abettor; the punishment is the same for each."). *See also* Syl. pt. 1, *State v. C. J. S.*, 164 W. Va. 473, 263 S.E.2d 899 (1980) *overruled on other grounds*, *State v. Petry*, 166 W. Va. 153, 273 S.E.2d 346 (1980) ("An aider and abettor is as criminally responsible for a crime as the principal actor.").

[23] This particular instruction is also well founded in the law:

> "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. 5, *Foster*, *supra* (*quoting* Syl., *State v. Patterson*, 109 W. Va. 588, 155 S.E. 661 (1930)). However, and although not instructed to the jury by the court,

> "Proof that the defendant was present at the time and place the crime was committed is a factor to be considered by the jury in determining guilt, along with other circumstances, such as the defendant's association with or relation to the perpetrator and his conduct before and after the commission of the crime."

> 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.*

Volume III Tr. 118-121 (emphasis added).

"'Under the *concerted action principle*, a defendant who is present at the scene of a crime and, by acting with another, *contributes to the criminal act*, is criminally liable for such offense as if he were the sole perpetrator.'" Syl. pt. 7, *Foster*, supra (emphasis added) (*quoting* Syl. pt. 11, *Fortner*, *supra*). The events of February 6, 2008, and Appellant's participation in them, show that the court was correct in instructing the jury on this theory.

After learning that his marijuana had been taken, Gibson, along with Appellant and Robertson, drove from Parkersburg to the Butler's trailer in Elizabeth to find Jamie Wine in order to recoup his marijuana. At no time during this trip did Appellant ask to be taken home or let out of the car. Volume III Tr. 69. After arriving at the Butler's trailer, Robertson kicked in the door and he, Gibson and Appellant entered the trailer. Robertson and Gibson then began questioning Mr. Butler about where his wife and Jamie Wine were, and told him that Mr. Wine had stolen their marijuana. An argument ensued and Gibson, while holding a gun in open view, slapped Mr. Butler. Appellant thereafter slapped and kicked Mr. Butler. Appellant then shoved Ashlea Angely as she was trying to escape the trailer. Appellant, Gibson and Robertson then left the trailer.

Returning to the Butler's trailer a few minutes later, Appellant and Gibson jumped out of

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Syl. pt. 6, *Foster*, *supra* (*quoting* Syl. pt. 10, *Fortner*, *supra*).

their car and ran over to Ms. Butler's truck.[24] Appellant opened Ms. Butler's door and began yelling and screaming at her while Gibson questioned her about the marijuana's location. Gibson then proceeded towards the Butler's trailer in pursuit of Jamie Wine while Appellant remained with Ms. Butler, blocking her from exiting her truck, and questioning her about the location of the marijuana. At this same moment, and with the door locked, Gibson began kicking the trailer door in order "get at" Mr. Wine for taking his marijuana. It was also during this same time period that Appellant stabbed Mr. Butler in the leg causing him to bleed to death.

It is obvious on these facts that Appellant was acting in concert with Gibson in his attempt to burglarize the Butler's trailer. Appellant was present at all times while Gibson was attempting to kick in the trailer door. Appellant contributed to this attempted burglary, at a minimum, by preventing Ms. Butler from leaving her truck while Gibson was trying to kick the trailer door open. It is also obvious on these facts that Appellant contributed to the overall criminal plan, which was to go to Elizabeth, find Jamie Wine, and get back the marijuana by any means necessary, including

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[24] Regarding getting out of the car on their second trip to the Butler's trailer, Appellant gave the following testimony:

> Q. When you returned back to the trailer, at this point, did you believe that things had completely gotten out of hand [from] the first time you were there?
>
> A. Yes.
>
> Q. But you didn't stay in the car, did you?
>
> A. No.
>
> Q. You got out of the car to help Oscar [Gibson] again, didn't you?
>
> A. I just– yeah. Yes. Yes.

Volume III Tr. 74.

using violence. Thus, and contrary to Appellant's assertion, the court properly used the concerted action theory in instructing the jury.

As an aider and abettor, it was also proper for the court to deny Appellant's proposed jury instruction, which stated that specific intent must be proven in order to convict him of felony murder by attempted burglary.

> 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.*

Foster, 221 W. Va. at 635- 636, 656 S.E.2d at 80-81 (emphasis added) (*quoting Fortner*, 182 W. Va. at 356, 387 S.E.2d at 823).

"A finding that two criminal actors possess a shared criminal intent *does not require that an accused aider and abettor intend to commit the crime committed by the principal in the first degree.* The intent element is relaxed where there is evidence of substantial physical participation in the crime by the accused." Syl. pt. 4, *State v. Mullins*, 193 W. Va. 315, 456 S.E.2d 42 (1995)(emphasis added). *See Fortner*, 182 W. Va. at 356, 387 S.E.2d at 823 (citations omitted) ("The intent requirement is relaxed somewhat where the defendant's physical participation in the criminal undertaking is substantial."). Furthermore, "[s]ubstantial physical participation by a person charged as an aider and abettor in a criminal undertaking constitutes evidence from which a jury may properly infer an intent to assist the principal criminal actor." Syl. pt. 5, *Mullins, supra. See also State v. Reedy*, 177 W. Va. 406, 415, 352 S.E.2d 158, 167-168 (1986) (*quoting State v. West*, 153

W. Va. 325, 335, 168 S.E.2d 716, 722 (1969)) ("'All that it is necessary for a principal in the second degree to be doing is to be present aiding and abetting in the commission of the crime. He does not have to commit the crime itself . . . .'").

Appellant, as an aider and abettor, shared the criminal intent of Gibson, the principal in the first degree, by knowingly helping and participating in the overall criminal plan of Gibson, which, again, was to travel to Elizabeth, find Jamie Wine, and retrieve the marijuana "at all cost," including the use of violence. As discussed above, Appellant's participation in this endeavor was substantial – he was involved "all the way, from beginning to end." Thus, the court correctly denied Appellant's proposed instruction requiring proof of specific intent and, instead, properly instructed the jury as follows:

> 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.*

Vol. III Tr. 121 (emphasis added).

B. THE JURY'S APPLICATION OF THE EVIDENCE TO THE LAW, AS INSTRUCTED TO THEM BY THE CIRCUIT COURT, JUSTIFIES THEIR VERDICT CONVICTING APPELLANT OF FELONY MURDER.

1. Standard Of Review

> "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."

Syl. pt. 2, *Foster*, *supra* (*quoting* Syl. pt. 1, *Guthrie*, *supra*).

> "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. 1, *Foster*, *supra* (*quoting* Syl. pt. 3, *Guthrie*, *supra*).

"The jury is the trier of the facts and in performing that duty it is the sole judge as to the weight of the evidence and the credibility of the witnesses. Syllabus point 2, *State v. Bailey*, 151 W. Va. 796, 155 S.E.2d 850." Syl. pt. 3, *West*, *supra* (internal quotations omitted). *See* Syl. pt. 4, *West*, *supra* (internal quotations omitted) ("If a new trial depends upon the weight of testimony or inferences from it, the jury are exclusively and almost uncontrollably the judges. Point 1, syllabus, *State v. Winans*, 100 W. Va. 418, 130 S.E. 607.").

2. Because Appellant Acted As An Aider And Abettor, The Jury Properly Returned A Verdict Convicting Him Of Felony Murder.

On appeal, Appellant argues that the evidence in this case does not justify the jury's verdict. *See generally* Appellants' Brief at 5. More precisely, Appellant asserts that

> [t]o affirm a charge of first degree murder as a result of an underlying allegation of attempted burglary, when the Appellant did not commit the attempted burglary, the attempted burglary was unplanned, was perhaps unforeseeable, and when the Defendant was provoked by first having his own neck sliced with a razor sharp spear, would be unjust.

Appellant's Brief at 6.

On the contrary, and as more fully discussed above, the evidence shows that Appellant acted as a principal in the second degree or an aider and abettor to Gibson in carrying out not only the underlying felony offense, attempted burglary, but also the overall criminal design or plan of Gibson of retrieving his marijuana by any means necessary. Based on this evidence, the court properly instructed the jury under the concerted action theory. Thereafter, the jury properly convicted Appellant of felony murder. The jury's verdict finding Appellant guilty of felony murder is just, regardless of whether the attempted burglary was planned or whether Appellant actually committed the attempted burglary.

> "Where a defendant is convicted of a particular substantive offense, the test of the sufficiency of the evidence to support the conviction necessarily involves consideration of the traditional distinctions between parties to offenses. Thus, *a person may be convicted of a crime so long as the evidence demonstrates that he acted* as an accessory before the fact, *as a principal in the second degree*, or as a principal in the first degree *in the commission of such offense*."

Syl. pt. 3, *Foster*, *supra* (emphasis added) (*quoting* Syl. pt. 8, *Fortner*, *supra*).

> "'[T]he elements which the State is required to prove to obtain a conviction of felony-murder are: (1) the commission of, or attempt to commit, one or more of the enumerated felonies; (2) *the defendant's participation in such* commission or *attempt*; and (3) the death of the victim as a result of injuries received during the course of such commission or attempt.' *State v. Williams*, 172 W. Va. 295, 311, 305 S.E.2d 251, 267 (1983)."

Syl. pt. 1, *Wade*, *supra* (emphasis added) (*quoting* Syl. pt. 5, *State v. Mayle*, 178 W. Va. 26, 357 S.E.2d 219 (1987).

Furthermore, under the facts of this case, Appellant's suggestion that Gibson's attempt to

burglarize the Butler's trailer was unforeseeable is disingenuous. Only minutes before this attempted burglary, Appellant, Gibson and Robertson broke into the trailer in order to retrieve the marijuana and "came up empty handed." Given this, it was very foreseeable, and perhaps a certainty, that when these men returned Gibson would again attempt to burglarize the trailer in order to retrieved his marijuana from Jamie Wine, after Mr. Wine ran into the trailer.

It was likewise foreseeable that someone may have been killed as a result of the second break-in attempt. Essentially, the Butlers, as well as Ashlea Angely, were terrorized by Appellant, Gibson and Robertson. First, these men kicked down the door to the Butler's trailer , entered, and proceeded to "bully," threaten and beat Mr. Butler and Ashlea Angely and, "all the while," Gibson had a gun in his hand. Thereafter, these men followed Ms. Butler and Jamie Wine through the town of Elizabeth screaming, yelling and throwing things at Ms. Butler's truck with, again, Gibson waving a gun at them. Appellant, Gibson and Robertson continued to follow Ms. Butler and Mr. Wine back to the Butler's trailer court. Appellant and Gibson then jumped out of their car, ran over to Ms. Butler's truck, and began yelling and screaming at her about the location of the marijuana. With Appellant blocking Ms. Butler from getting out of her truck, and continuing to yell and scream at her about the marijuana, Gibson, with a gun in his hand, walked up to the trailer and tried to kick open the door and confront Jamie Wine about his marijuana. This is just the type of situation where someone can be killed, which is exactly what happened in this case.

Finally, with no offense intended, Appellant's assertion that he was provoked into stabbing Mr. Butler is somewhat insulting. To begin with, Mr. Butler had his home broken into; he was slapped, kicked and had threatening comments made to him about his wife; and he had a gun pulled on him. Minutes later, these same men came back to his home, one of whom (Gibson) tried to kick

down his door with a gun in his hand. At this same moment, another one of these men (Appellant) had his pregnant wife blocked from exiting her vehicle and was yelling and screaming at her. If anyone was provoked under these circumstances, it was Mr. Butler – not Appellant. In cutting Appellant's neck, Mr. Butler was doing nothing more than trying to protect his wife, and he had full justification for doing so. If this were not enough, Mr. Butler lost control of the spear, took off running in the opposite direction, and was chased down by Appellant, who then stabbed him with the spear causing him to bleed to death. Thus, at the time that he stabbed him, Mr. Butler posed no threat to Appellant.

IV.

CONCLUSION

Appellant's conviction should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,

Appellee,

By counsel

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NO. 35448

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

HOWARD KENNETH MURRAY,

Appellant.

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 5th day of August, 2010, addressed as follows:

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