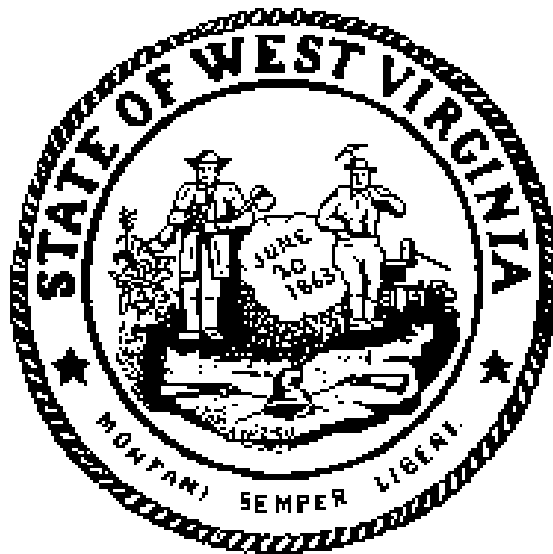


WEST VIRGINIA CRIMINAL JURY INSTRUCTIONS SIXTH EDITION



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INTRODUCTION TO SIXTH EDITION

The Sixth Edition of the West Virginia Criminal Jury Instructions contains much of the basic material of the previous five editions, and has been supplemented to include decisions of various appellate courts through December 2003 and statutory changes through the 2003 Regular and Extraordinary Session(s) of the West Virginia Legislature.

As with previous Editions, these instructions cover substantive law and include comments and footnotes. The Sixth Edition has been reorganized and includes all of the substantive offenses included in the previous Editions, with the inclusion of a number of instructions and offenses not previously included in those Editions.

This manual should not be used as a substitute for your own research. Instructions and related comments and notes should be carefully scrutinized. This manual is intended to function as a guide to supplement your research and to assist you in drafting jury instruction which are particularly tailored to the facts of your case.

West Virginia Public Defender Services welcomes any and all corrections and suggestions regarding this Manual.

Special thanks to Erin Akers for assisting me in creating this Sixth Edition; Elizabeth Murphy, whose excellent work on the Fifth Edition served as the foundation for this Edition; Robert Wilkinson, Chief Public Defender of Cabell and Wayne Counties; Tom Smith, Esq.; and numerous other public defenders and private attorneys whose contributions to this Edition were greatly appreciated.

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I. INTRODUCTION AND GENERAL INFORMATION

1.01 DEFINITION OF INSTRUCTIONS

“An instruction, simply stated, is a statement of law. It may concern a procedural rule, an evidentiary rule, or a substantive rule. For example, there are instructions on voting, on evidence that may be considered and for what purposes, and on the elements of the crime itself. Jury instructions are the last word to the jurors before they decide the defendant’s fate. Jury instructions also encapsulate the entire trial process and tell the jurors what to do with the evidence presented at trial. Thorough preparation of jury instructions at the outset forces counsel to focus on the government’s evidence as it relates to the elements of the charged crime, allows counsel to formulate a cogent theory of defense based upon the available evidence, and provides counsel with a clearly focused objective toward which to tailor presentation of the evidence. Pattern instruction references such as Devitt and Blackmar often cite legal authority in support of the proposed instruction and provide good secondary research tools to develop a defense theory. After thorough research and development of the theory of defense, counsel should be ready to prepare jury instructions.”

Franklin D. Cleckley, Handbook on W.Va. Criminal Procedure, II-209 (2nd Ed. 1993).

1.02 RULES AND STATUTORY PROVISIONS

1. **Rule 30 of the West Virginia Rules of Criminal Procedure (1995) (Instructions to Jury; Objections) provides as follows:**

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time, copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests and disclose to counsel all other instructions it intends to give before the arguments to the jury are begun and the instructions given by the court. The court may instruct the jury before or after the arguments are completed or at both times. The instructions given by the court, whether in the form of a connected charge or otherwise, shall be in writing and shall not comment upon the evidence, except that supplemental written instructions may be given later, after opportunity to object thereto has been accorded to the parties. The court may show the written instructions to the jury and permit the jury to take the written instructions to the jury room. No party may assign as error the giving or the refusal to give an instruction or the giving of any portion of the charge unless that party objects thereto before the arguments to the jury are begun, stating distinctly the matter to which that party objects and the grounds of the objection; but the court or any appellate court may, in the interest of justice, notice plain error in the giving or refusal to give an instruction, whether or not it has been made the subject of objection. Opportunity shall be given to make objection to the giving or refusal to give an instruction out of the presence of the jury.

2. **Rule 42.02 of the West Virginia Trial Court Rules (T.C.R.) (1999) (Presentation of Jury Instructions) states:**

Each counsel shall prepare jury instructions, indicating citations and authorities, and if the court directs, verdict forms and special interrogatories, and present them to the presiding judicial officer and serve them on opposing counsel not less than three (3) business days before the day set for trial or at such other times as the presiding judicial officer may order.

See also *W.Va. Code*, 56-6-19 (1923) (Instructions to jury generally; form and manner of giving); *W.Va. Code*, 56-6-20 (1923) (Reading instructions to jury; instructions part of record); *W.Va. Code*, 56-6-21 (1923) (Time for examining instructions; objecting thereto and settlement there of; and *W.Va. Code*, 56-6-22 (1923) (Oral instructions by court; written instructions during trial).

1.03 GENERAL DISCUSSION OF JURY INSTRUCTIONS

See F. Cleckley, Handbook on West Virginia Criminal Procedure, Vol. 2, Chapter XVIII, Instructions to the Jury (2d Ed. 1993) in which the following topics are discussed:

- A. Definition of "Instructions"
- B. Requirement for Instructions
- C. Responsibility to Instruct
- D. Purpose of Instructions
- E. Standard of Review of Instructions on Appeal
- F. Tailoring Instructions
- G. Defendant's Theory of the Case and Other Problem-Causing Instructions
- H. Judge's Comment on Evidence
- I. When Instructions Given

1.04 SUGGESTIONS ON PREPARING AND REQUESTING INSTRUCTIONS *:

1. You may want to prepare preliminary instructions and request that they be given. Instructions given before any evidence is taken help the jury understand their role in the trial and focus on what issues must be decided.
2. Research and draft proposed instructions early in the trial preparation. Early drafting helps defense counsel understand the elements of the charged offense, assists counsel with evaluating the evidence the State plans to introduce, and helps defense counsel prepare a theory of defense which can be developed from the filing of motions through closing argument.
3. Be critical of pattern or sample instructions. They provide only a starting point for your analysis. Do your own research, carefully analyze statutory and case law and draft instructions which are tailored to the facts of your case.
4. Cite authority for the instructions you propose.
5. Relate the applicable law to the facts of your case.
6. When the jury is given alternatives such as lesser included offenses, propose instructions which compare the alternatives and explain differences.
7. Keep the instructions as concise as possible.
8. Be creative.
9. Place all objections to instructions on the record.

* Many of these suggestions were taken from “Jury Instructions: A Judicial Perspective”, Criminal Defense Newsletter, Volume 20, Number 2, November, 1996.

1.05 JURY SEQUESTRATION

1. “Either party may move for sequestration of the jury prior to trial or at any time during the course of trial. Further, in appropriate circumstances, sequestration is a matter which should be raised *sua sponte* by the trial court. When sequestration is requested by motion, counsel should provide the trial court with an adequate basis to support a finding that there is a reasonable probability that, absent sequestration, the jury will be exposed to outside influences which could improperly taint their verdict. Once this initial showing is made, the burden falls upon the party opposing the motion to demonstrate that sequestration is not necessary to vindicate the due process guaranty of a fair trial by an impartial jury free from outside influences. The trial court’s findings of fact and conclusions of law on the issue of sequestration shall be made a matter of record. Whenever sequestration is ordered pursuant to motion, the court, in advising the jury of the decision, shall not disclose which party requested sequestration.” Syl. pt. 5, State v. Young, 173 W.Va. 1, 311 S.E.2d 118 (1983).
2. See also *W.Va. Code*, 62-3-6 (1965) (Custody of Jury; Board and Lodging of Jurors; Conversation with Jurors)

1.06 JUROR NOTE TAKING

1. In State v. Triplett, 187 W.Va. 760, 421 S.E.2d 511 (1992), the Court noted that a majority of both state and federal jurisdictions have found that it is proper to permit jurors to take notes during trial.

“It is a permissible practice to allow jurors to take notes on the evidence during trial as long as proper *voir dire* is permitted concerning the jurors’ capacity to take notes, and a cautionary instruction is given concerning the proper and improper uses of note-taking. The ultimate decision on whether to allow note-taking by the jury lies within the sound discretion of the trial court.” Syl. pt. 5, State v. Triplett, *supra*.

In Triplett, the appellant contended that the lower court erred in permitting the jurors to take notes during the trial, claiming that note-taking has a tendency to

distort the evidence and might have a tendency to allow one juror to overpower other jurors, particularly in view of the high rate of illiteracy in West Virginia. The Court noted the record revealed that defense counsel was permitted to ask the jury panel whether anyone would have problems in taking notes because of ability to read and write and that the Court offered to allow defense counsel to conduct an individual *voir dire* on the issue which was not pursued. Furthermore, the following cautionary instruction was given:

. . . You are permitted to take notes during the trial. You are not required to take notes but you are permitted to take notes if you choose to do so. Please remember that the notes that you take are to be an aid in your memory but not a substitute for it. Therefore, do not try to write down every word that is said. Listen to the witnesses and watch them and remember their testimony. You may take notes if you choose to in order to help your memory but it is your memory upon which you should rely in recalling the testimony. If you choose to take notes your notes must be your own. Do not look at another juror's notes and do not share [with or] show your notes to another juror . . . [Y]ou must not look at each other's notes or compare notes during the trial . . .

For this purpose each of you will be given a clipboard and notepad and pencil after opening statements. When you get the pad write only your name on the front sheet, just your name, so that we will know whose, who it belongs to and then begin your notes on the second sheet; that way there is always a cover sheet and no one can inadvertently see your notes.

The bailiff will collect your notepads at the lunch break and at evening breaks and redistribute them to you as we reassemble; and during the recesses no one will look at your notes, and that includes me. I won't look at them either. They are your private notes for your use only.

Take notes only of the evidence. You will not be permitted to take notes of opening statements or closing summation or Court's instructions. And remember this is optional for you; you can just choose not to altogether if you don't want to.

The Court further noted that United States v. MacLean, 578 F.2d 64 (3d Cir.1978), found the rationale for allowing jurors to take notes was explained:

The obvious and strongest argument in favor of allowing note-taking is that, when done properly, it is a valuable method of refreshing memory. In addition, note-taking may help focus jurors' concentration on the proceedings and help prevent their attention from wandering. 578 F.2d at 66.

The MacLean court noted that the “dangers of note-taking [by jurors such as the best or only note-taker dominating the jury deliberations] can be substantially avoided by proper instruction to the jury.”

MacLean indicated that the jury should be instructed to give precedence to each of their independent recollections rather than the notes; that a juror should not allow himself to be influenced by another juror who had taken notes; that the jury should not allow themselves to be distracted from the proceedings by note-taking; and that the jurors should only disclose the contents of their notes to another juror. 578 F.2d at 66.

The MacLean court held the instruction given in that case fully informed the jurors of the proper use of notes and the pitfalls to be avoided. The court noted that although it is perhaps advisable to repeat instructions on note-taking immediately prior to the jury’s deliberation, the failure to do so is not reversible error particularly where, as in this case, no such instruction was requested. 578 F.2d at 67.

2. In United States v. Polowichak, 783 F.2d 410 (4th Cir. 1986), the Fourth Circuit found that note taking by jurors is a matter of discretion with the district court. The Court noted that if jurors are permitted to take notes, they should be instructed that their notes are not evidence and should not take precedence over the jurors’ independent recollections of the proceedings. No such instruction was given but the Court did not find the failure to be plain error warranting reversal and a new trial.

II. GENERAL PRELIMINARY INSTRUCTIONS

2.01 IN GENERAL

You may want to prepare preliminary instructions and request that they be given. Instructions given before any evidence is taken help the jury understand their role in the trial and focus on what issues must be decided.

Preliminary charges given to a jury **before a trial begins** assist the jury with understanding their responsibilities and with evaluating the evidence that will be introduced at trial.

The following instructions were taken from the preliminary or final charge given to the jury in actual trials in state court. Although the instructions appear to reflect generally recognized principles upon which trial judges routinely instruct, they have not been specifically approved, adopted or endorsed by the West Virginia Supreme Court of Appeals. Many of the charges do not have accompanying supporting authority. They should be carefully and critically reviewed.

2.02 INTRODUCTION

Ladies and gentlemen, at this point I will give some preliminary instructions governing this case and your conduct as jurors. You need to follow these instructions throughout the course of this trial.

2.03 PRESUMPTION OF INNOCENCE

The Court instructs the jury that the law presumes a defendant in a criminal case to be innocent of crime. Thus, a defendant, although accused, begins the trial with a “clean slate” - with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So this presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant’s guilt after careful and impartial consideration of all the evidence in this case.

(Note that this **GENERAL PRELIMINARY INSTRUCTION** on Presumption of Innocence is not as complete as the instruction set forth in State v. Goff, 166 W.Va. 47, 272 S.E.2d 457 (1980). See **FINAL CHARGE** Presumption of Innocence, Reasonable Doubt, Burden of Proof for complete Goff charge.)

2.04 BURDEN OF PROOF

The Court instructs the jury that the burden of proof is upon the State of West Virginia to establish the guilt of the defendant beyond a reasonable doubt. All presumptions of law are in favor of the innocence of the defendant, and every defendant is presumed to be innocent until he is proven guilty beyond a reasonable doubt. This presumption of innocence is not a mere matter of form, but is a substantive part of law that goes with the defendant throughout every stage of the trial. If, after hearing all the evidence in this case, there remains in the minds of the jury a reasonable doubt as to the guilt of the accused, the accused is entitled to the benefit of that doubt and the jury must acquit him.

2.05 INDICTMENT NOT EVIDENCE

The State of West Virginia has the entire burden of proof in criminal cases. Furthermore, the Court instructs you that this criminal case was brought to the Court by way of an indictment. The indictment or formal charge against a defendant is not evidence of guilt. The defendant is presumed by law to be innocent. The indictment in this case is not to be considered by the jury in the slightest degree as indicative of the guilt of the defendant. An indictment is a mere formality required by law to inform the defendant of the charge against him. The indictment raises no presumption of guilt on the part of the defendant.

For these reasons, you are further instructed that the indictment is not to be considered by you as having any weight whatsoever as evidence against the defendant in this case, and no juror should allow himself or herself to be influenced against the defendant because of or on account of the indictment in this case.

2.06 ROLE OF JURY

It is the duty of the judge to preside over the trial and to determine what testimony and evidence is relevant and admissible under the law for your consideration. It is also the judge's duty at the conclusion of the trial to instruct you upon the law applicable to the case.

You, as jurors, are the judges of the facts.

It is the duty of the jury to apply the law as given to you by the court to the facts determined by you from the evidence.

2.07 CONSIDERATION OF THE EVIDENCE

While you should consider only the evidence in this case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in this case.

You must consider all of the evidence. This does not mean, however, that you must accept all the evidence as true or accurate. You are the sole judges of the "credibility" or "believability" of each witness and the weight to be given to his or her testimony. As used in this charge, "credibility of a witness" means the truthfulness or lack of truthfulness of a witness. The "weight of the evidence" means the extent to which you are, or are not, convinced by the evidence.

The number of exhibits and the number of witnesses testifying on one side or the other of any issue are not alone the test of credibility of the witnesses and the weight of the evidence. If warranted by the evidence, you may believe one witness against a number of witnesses testifying differently. The tests are: how truthful is the witness and how convincing is his or her evidence in light of all the evidence and circumstances shown?

2.08 ROLE OF ATTORNEYS

Nothing said or done by the lawyers trying this case is to be considered by you as evidence of any fact. It is your recollection and interpretation of the evidence that controls in this case. What the lawyers say is not binding upon you. Your verdict shall be based upon the evidence as you hear it from the witness stand and as you recollect it, not as the lawyers or this Court may recollect it.

2.09 ROLE OF JUDGE

Likewise, nothing that the judge has said or done at any time during the trial is to be considered by you as evidence of any fact or as indicating any opinion concerning any fact, the credibility of any witness, or the weight of any evidence.

2.10 OBJECTIONS

You are instructed that you should disregard entirely questions to which an objection is sustained or answers ordered stricken out of the evidence. It is not the province of the jury to determine the admissibility or validity of any exhibit or other testimony. Do not draw any conclusion or speculate as to why or why not certain testimony or other evidence may be excluded or admitted.

2.11 NO DISCUSSION

You must not discuss this case among yourselves at any time either here in the courtroom or beyond the courthouse. You must wait until the trial is concluded and you have been asked to retire to your jury room to consider your verdict.

2.12 FORM NO OPINION

Do not make up your mind or form any opinion as to the guilt or innocence of the defendant until the trial is concluded and you have heard all of the evidence, the instructions of law and the argument of counsel. This defendant comes before you presumed to be innocent, with a clean slate, and you must keep that presumption throughout this trial.

2.13 AVOID OUTSIDE DISCUSSION

You are not to discuss this case with anyone other than the other members of this jury during deliberations. Do not even discuss this case with members of your own family or your friends.

2.14 NO INVESTIGATION

Do not make any kind of a private investigation, do not conduct any experiments and do not do any research. You may only consider the evidence that is introduced in this case.

2.15 NO MEDIA

Do not read any newspaper article or story or listen to any news coverage or watch any TV coverage that deals with this trial.

Sample Pre-Evidence Jury Instructions

Members of the Jury

Now that you have been sworn, I will give you some preliminary instructions to guide you in your participation in the trial.

Duty of the Jury

It will be your duty to find from the evidence what the facts are. You and you alone are the judges of the facts. You will then have to apply to those facts the law as the court will give it to you. You must follow that law whether you agree with it or not.

Nothing that the Court may say or do during the course of the trial is intended to indicate nor should it be taken by you as indicating what your verdict should be.

Evidence

The evidence from which you will find the facts will consist of the testimony of witnesses, documents and other things received into the record as exhibits, and any facts the lawyers agree or stipulate to, or that the Court may instruct you to find.

Certain things are not evidence and must not be considered as evidence by you. I will list them for you now.

1. The indictment, statements, arguments, and questions by the lawyers are not evidence.
2. Objections to questions are not evidence. Lawyers have an obligation to their client to make an objection when they believe evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it. If the objection is sustained, you must ignore the question. If it is overruled, treat the answer like any other answer. If you are instructed that some item of evidence or testimony is received for a limited purpose only, you must follow that instruction and consider the evidence only for that limited purpose.

3. Testimony that the Court has excluded or told you to disregard is not evidence and must not be considered by you.
4. Anything you have seen or heard, or may see or hear, outside the courtroom is not evidence and must be disregarded. You are to decide the case solely on the evidence presented here in the courtroom.

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. I will give you further instructions on these as well as other matters at the end of the case, but keep in mind that you may consider both kinds of evidence.

It will be up to you to decide which witnesses to believe, and how much of any witnesses testimony to accept or reject. I will give you some guideline for determining the credibility of witnesses at the end of the case.

Rules for Criminal Cases

As you know, this is a criminal case. There are three basic rules about a criminal case which you must always keep in mind.

First, a defendant is presumed innocent until proven guilty beyond a reasonable doubt. The indictment charging the defendant is only an accusation, and nothing more. It's sole purpose is to formalize the charges and give notice to the defendant of the exact nature of the charge or charges. The Grand Jury which returned this indictment was charged only with making a determination of probable cause based upon the evidence presented to it. Defendants are generally not afforded an opportunity to present evidence to the Grand Jury. You will see and hear evidence to which the Grand Jury was not privy. The fact that someone has been indicted is not proof of guilt or anything else. For these reason, a defendant therefore starts out with a clean slate, presumed as a matter of law to be innocent.

Second, the burden of proof is on the State of West Virginia throughout the trial. A defendant has no burden or obligation in any manner to prove his or her innocence, or to

present any evidence, or to testify. Since every defendant has the constitutional right to remain silent, the law prohibits you from considering that a defendant may not have testified in arriving at your verdict.

Third, the State of West Virginia must prove a defendant's guilt beyond a reasonable doubt as to each charge in the indictment. I will give you further instructions on this point later, but bear in mind that in this respect a criminal case is different from a civil case.

Summary of Applicable Law

In this case the defendant is charged with [state particular charge(s)]. I will give you detailed instructions on the law at the end of the case, and those instructions must control your deliberations and decision. However, in order to help you follow the evidence, I will now give you a brief summary of the elements of the offense(s) which the State of West Virginia must prove to make its case: [list elements of offense(s)].

Conduct of the Jury

Now, a few words about your conduct as jurors.

First, I instruct you that during the trial you are not to discuss this case with anyone or permit anyone to discuss the case with you. Until you retire to the jury room at the end of the case to deliberate your verdict, you simply are not to talk about this case.

Second, do not read or listen to anything relating to this case in any way. If anyone should try to talk to you about it, bring it to the court's attention immediately.

Third, do not try to do any research or make any investigation about the case on your own.

Finally, do not form any opinion until all evidence is in. Do not discuss the case with anyone and keep an open mind until you start your deliberations at the end of the case.

Course of the Trial

The trial will now begin. The State of West Virginia will first make an opening statement, which is simply an outline to help you understand the evidence as it comes in. Next, the defendant's attorney may, but does not have to, make an opening statement. Opening statements are neither evidence or arguments.

The State will then present its witnesses and counsel for the defendants may then cross-examine them. Following the State's case, the defendant may, if he wishes, present witnesses whom the State may cross-examine. After all the evidence is in, this Court will instruct you on the law and the attorneys will present their closing arguments to summarize and interpret the evidence for you. After that, you will retire to deliberate on your verdict.

III. INSTRUCTIONS GIVEN DURING TRIAL CAUTIONARY OR LIMITING INSTRUCTIONS

3.01 FLIGHT ¹

The Court instructs the jury that the evidence of flight by the defendant is competent along with other facts and circumstances, on the defendant's guilt, but the jury should consider any evidence of flight with caution since such evidence has only a slight tendency to prove guilt.

The jury is further instructed that the farther away the flight is from the time of the commission of the offense the less weight it will be entitled to, and the circumstances should be cautiously considered since flight may be attributed to a number of reasons other than consciousness of guilt.

FOOTNOTE

- ¹ This instruction was found to be a proper cautionary instruction in State v. Payne, 167 W.Va. 252 at 267, 280 S.E.2d 72 at 81 (1981).

COMMENTS

1. "In certain circumstances evidence of the flight of the defendant will be admissible in a criminal trial as evidence of the defendant's guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge, upon request by either the State or the defendant, should hold an *in camera* hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect. The trial judge should measure the probative value of the evidence by considering whether the facts and circumstances under which the defendant fled indicate a guilty conscience or knowledge. The burden at such hearing is upon the state. In considering whether the facts and circumstances of the case indicate a guilty conscience or knowledge, the trial judge should consider whether the defendant was aware of the charges pending against him at the time he fled; was aware that he was a suspect at the time he fled; or fled the scene of a crime under circumstances that would indicate a guilty conscience or knowledge; or otherwise fled under circumstances such that would indicate a desire to escape or avoid prosecution due to a guilty

conscience or knowledge. At such hearing the defendant should be allowed to introduce evidence that he was not aware of the charges pending against him at the time he fled; or that he was not aware he was a suspect at the time he fled; or that he did not flee from the scene of a crime under circumstances that would indicate a guilty conscience or knowledge; or that he did not otherwise flee under circumstances that would indicate a guilty conscience or knowledge. At such hearing the defendant should be afforded an opportunity to explain his flight or absence from the jurisdiction. If the trial judge finds the defendant's explanation of his conduct to be reasonable, or that the state has not shown that, under the facts and circumstances of the case, the defendant's conduct reflects a guilty conscience or knowledge, then the evidence of flight should not be admitted as evidence of the defendant's conscience or knowledge." State v. Payne, 167 W.Va. 252 at 266, 280 S.E.2d 72 at 81 (1981).

2. In State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982), the State's flight instruction was given. The instruction was based on evidence that the defendant after learning of the indictment, consulting with a lawyer, and being advised of the date set for his arraignment, left the State. He did not return until three weeks after the arraignment date. The Court found facts of flight existed since the defendant was personally aware of the indictment and the arraignment date, and did not appear at the prescribed date. The flight issue was initially raised by the defense and the trial court permitted the defense to introduce evidence to show the defendant's reasons for leaving and his voluntary return. The Court did not find the giving of the instruction to be reversible error.
3. In State v. Meade, 196 W.Va. 551, 474 S.E.2d 481 (1996), the defendant objected to the giving of the following state's instruction on flight:

The Court instructs the jury that the evidence of flight by the Defendant is competent along with other facts and circumstances, on the Defendant's guilt, but the jury should consider any evidence of flight or concealment with caution since such evidence has only a slight tendency to prove guilt.

The defendant did not appear for the second day of trial. Upon his voluntary return four days later an *in camera* hearing was conducted to review the State's motion to admit evidence of the appellant's flight. The Court found the holding and reasoning of Payne, *supra*, were followed and there was no error.

4. In State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982), the Court found the instruction that the jury, in determining the question of the guilt or innocence of the appellant, could take into consideration the flight of the appellant after the commission of the crime was proper and not misleading.
5. In State v. Beegle, 188 W.Va. 681, 425 S.E.2d 823 (1992), the Court held the introduction of evidence on the issue of flight and instruction thereon was not reversible error.
6. In State v. Spence, 182 W.Va. 472, 388 S.E.2d 498 (1989), the appellant contended the trial court erred in admitting evidence of flight without a bench conference or an *in camera* hearing and without issuing a curative or limiting instruction. The Court found no error since the appellant had not requested an *in camera* hearing or a limiting instruction and did not object to the evidence of flight presented in the state's case-in-chief.

3.02 COLLATERAL CONDUCT EVIDENCE

You have heard evidence concerning alleged conduct or other acts of the defendant which are not charged in this indictment. You are instructed that such evidence is not admitted as proof of the defendant's guilt on the present charge. This evidence is admitted for a limited purpose only, and it may be considered by you only in deciding whether a given issue or element relevant to the present charge has been proven. In this instance, the evidence of _____ may be considered only for the purpose of determining whether the state has established _____.

You may not use this evidence in consideration of whether the State has established the crime charged in the indictment. In addition, such evidence is not relevant to any other matters, such as the character of the defendant, whether the defendant is a bad

person, or whether the defendant had the propensity or the disposition to commit the crime charged. This evidence may not be considered in that regard, since the defendant's character is not an issue. In addition, it is not proper for the State to prove a criminal case by evidence that a defendant may have committed other criminal acts or may be a bad person.

Accordingly, this evidence may be considered by you only for the limited purpose for which it has been admitted. ¹

FOOTNOTE

¹ This instruction is drafted from the instruction set forth in footnote 17, State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994).

The Court noted that a limiting instruction on the introduction of 404(b) evidence should not list the litany of purposes appearing in the rule, but should instead be tailored to the specific purpose identified by the prosecution. The Court also noted that the instruction should not include such terms as “criminal”, “crime”, or “offense” to define the conduct, act or transactions of the defendant.

“When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial Court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court’s instruction.” Syl. pt. 1, State v. McGinnis, *supra*.

Instead of listing the litany of purposes appearing in Rule 404(b) the instruction should be tailored to the specific purpose identified by the prosecution. The instruction should not use terms such as “criminal”, “crime”, or “offense”. Terms such as “conduct”, “act”, or “transaction” should be adequate to convey the point to the jury. Footnote 17, McGinnis, *supra*.

“Where an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has

been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence. Syl. pt. 2, McGinnis, [*supra*]." Syl. pt. 3, State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996).

The evidence of a collateral crime is not to be considered as proof of the defendant's guilt on the present charge, but may be considered in deciding whether a given issue or element relevant to the present charge has been proven. When a defendant requests a limiting instruction on collateral crime evidence introduced at trial, it must be given. Although a trial court is not obligated to give a limiting instruction unless requested, the Court strongly recommended that the instruction be given unless it is objected to by the defendant. The Court deemed the giving of a limiting instruction and its effectiveness significant not only in deciding whether to admit evidence under Rule 404(b) but the absence of an effective limiting instruction will be considered by the Court on appeal in weighing the prejudice ensuing from the erroneous admission of 404(b) evidence. McGinnis, *supra*, at 525-26.

A limiting instruction is usually designed for the protection of the defendant. His request to not give the instruction should normally be honored. A defendant who objects to the giving of a limiting instruction at trial may not later complain that the instruction was not given or that the failure to give the instruction increased the likelihood of the jury misusing evidence of other crimes, wrongs or acts. McGinnis, *supra*, footnote 12.

A limiting instruction should be given at the time the evidence is offered and it is recommended that the instruction be repeated in the trial court's general charge at the conclusion of the evidence. McGinnis, *supra*, at 528.

COMMENTS

1. It appears that in State v. Phelps, 197 W.Va. 713, 478 S.E.2d 563 (1996), the defendant did not request a limiting instruction be given during the trial and none was *sua sponte* given by the trial court. The trial court included in its jury instructions that the defendant was not on trial for any acts or conduct not charged in the indictment. In footnote 3, the Court noted that they preferred that trial courts give limiting instructions on Rule 404(b) evidence contemporaneously with the admission of such evidence at the trial, but in the absence of a request by the defendant, they did not disapprove of such an instruction being given in the first instance during the trial court's general charge.

2. A limiting instruction was not given in State v. McGhee, 193 W.Va. 164, 455 S.E.2d 533 (1995), TXO Production Corp. v. Alliance Resources Corp., 187 W.Va. 457, 419 S.E.2d 870 (1992), aff'd, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) or State v. Pancake, 170 W.Va. 690, 296 S.E.2d 37 (1982). No error was found since a limiting instruction was not requested.

IV. FINAL CHARGE

In December 2000, the West Virginia Supreme Court of Appeals approved the adoption of drafts of model jury instructions to be used in civil and criminal trials. The following Sample Charge was adopted by the Court for use in criminal cases. Included with this Sample Charge, as included in previous editions of this publication, is a detailed summary of many of the key provisions of this Charge.

4.01 SAMPLE CHARGE

JUDGE'S CHARGE TO JURY

Ladies and Gentlemen of the jury: At this point in the trial, I am required to inform you as to the law governing this case to guide you in your deliberations. This statement by the judge as to the law of the case is known as a charge; it is also called instructions.

It is my duty to preside over the trial and to determine what testimony and evidence is relevant under the law for your consideration. It is also my duty at the end of the trial to instruct you on the law applicable to the case.

You, as jurors, are to decide the facts. But in determining what actually happened in this case -- that is, in reaching your decision as to the facts -- it is your sworn duty to follow the law that I am now in the process of defining for you.

You must not change the law or apply your own idea of what you think the law should be. Both you and I are bound by the law as stated in this charge.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would be a violation of your sworn duty, as finders of the facts, to base a verdict upon anything other than the evidence in the case.

(THE FIRST AND LAST SENTENCE OF THE FOLLOWING PARAGRAPH MAY BE AMENDED WHEN ANY ATTORNEY STATEMENT HAS BEEN DEEMED A PARTY ADMISSION UNDER RULE 801(D)(2)(C).)

Nothing said or done by the lawyers who have tried this case is to be considered by you as evidence of any fact. Opening statements of the lawyers are intended to give you a brief outline of what each side expects to prove so that you may better understand the testimony of the witnesses. The closing arguments are often very helpful in refreshing your recollection as to the testimony of the witnesses and such facts as may be developed thereby, but it is my duty to caution you that your verdict shall not be based upon the statements made to you by the lawyers at the opening of the trial or upon their closing arguments.

The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in doing so, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you. Your verdict shall be based upon the evidence as you heard it from the witness stand and as you recollect it, not as the lawyers or this court may recollect it.

(THE FOLLOWING PARAGRAPH MAY BE EXPANDED IN CASES INVOLVING FACTS WHICH ARE JUDICIALLY NOTICED [SEE, RULE 201(G)], FACTS WHICH ARE STIPULATED, OR INFORMATION WHICH IS OTHERWISE PROVIDED TO THE JURY [SUCH AS A JURY VIEW].)

The evidence in this case consists of the testimony of witnesses who have appeared before you and testified and the exhibits which have been introduced in evidence and which have been shown to you.

You should entirely disregard questions and exhibits to which an objection was sustained or answers and exhibits ordered stricken out of evidence. It is not the province of the jury to determine the admissibility or validity of any exhibit or other testimony. Do not draw any conclusions or speculations as to why or why not certain testimony or other evidence was excluded or admitted.

You are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It requires only that you weigh all of the evidence and be convinced of the defendant's guilt beyond a reasonable doubt before he/she can be convicted.

You should carefully consider the testimony of each and every witness and not overlook any testimony or any evidence. This does not mean, however, that you must accept all the testimony as true or accurate.

You are the sole judges of the "credibility" or "believability" of each witness and the weight to be given to his/her testimony.

As used in this charge, "credibility of a witness" means the truthfulness or lack of truthfulness of a witness. "The weight of the evidence" means the extent to which you are, or are not, convinced by the evidence.

The number of witnesses testifying on one side or the other of any issue is not alone the test of the credibility of the witnesses and the weight of the evidence. If warranted by the evidence, you may believe one witness against a number of witnesses testifying differently. The tests are: How truthful is the witness and how convincing is his or her evidence in the light of all the evidence and circumstances shown?

In determining the credit and weight you will give to the testimony when a witness has testified before you, you may consider if found by you from the evidence:

His or her good memory or lack of memory;

The interest or lack of interest of the witness in the outcome of the trial;

The relationship of the witness to any of the parties or to other witnesses;

His or her demeanor and manner of testifying;

His or her opportunity and means, or lack of opportunity and means, of having knowledge of the matters concerning which he or she testified;

The reasonableness or unreasonableness of his or her testimony;

His or her apparent fairness or lack of fairness;

The intelligence or lack of intelligence of the witness;

The bias, prejudice, hostility, friendliness or unfriendliness of the witness for or against the State of West Virginia or for or against the defendant;

(IF APPLICABLE) The intoxication of any witness, at the time of the events, concerning which he or she testified.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he/she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached or has testified falsely, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves. You may believe such parts of their testimony as you believe to be true and reject such parts as you believe to be false, or you may refuse to believe any part of such testimony, for it is a matter for you to determine, from all the testimony taken and all the circumstances surrounding the case, what witnesses have testified truthfully and what ones, if any, have testified falsely.

(OMIT THE FOLLOWING PARAGRAPH IF NO STATEMENT IS INTRODUCED)

The Court has admitted into evidence for your consideration a statement made by the defendant to police officers. If you believe that this statement was made by the defendant freely and voluntarily as assessed under the totality of the surrounding circumstances, both the characteristics of the defendant and the details of the interrogation, then you may consider such statement as a part of the evidence in these cases, and you may give to such statement and to each part of such statement such weight and credit as you may believe it is entitled. You may believe or disbelieve all or any parts of such statement. However, if you do not believe that the statement was freely and voluntarily made to the police officers, then you have the right to reject the statement from any consideration by you.

(INSERT HERE THE CONSIDERATIONS FOR DETERMINING VOLUNTARINESS AS ENUMERATED IN STATE V. FARLEY, 192 W.Va. 247, 452 S.E.2d 50 (1994) AND STATE V. BRADSHAW, 193 W.Va. 519, 457 S.E.2d 456 (1995) IF REQUESTED)

A person who by education, study and experience has become an expert in any art, science or profession, and who is called as a witness, may give his/her opinion as to any such matter in which he/she is versed and which is material to the case.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. You should weigh the reasons, if any, given for it. You are not bound, however, by such opinion. Give it the weight to which you deem it entitled, whether that be great or slight, and you may reject it entirely if in your judgment the reasons given for it are not sound.

The indictment in this case is in itself a mere accusation or charge against the defendant and is not itself any evidence of guilt. No juror in this case should permit himself or herself to be influenced against the defendant because of or on account of the fact that an indictment has been returned against him/her.

This is a criminal prosecution, and the rule as to the amount of proof in this case is different from that in civil cases. A mere preponderance of the evidence does not warrant the jury in finding the defendant guilty. Before the defendant can be convicted, you must be satisfied of his or her guilt beyond a reasonable doubt.

The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a "clean slate" - with no evidence against him/her. This presumption of innocence stays with the defendant through every stage of the trial, unless and until the State proves his/her guilt beyond a reasonable doubt. The defendant is never required to prove that he/she is not guilty. The law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all of the evidence in the case.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

It is not required that the State prove guilt beyond any possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense - the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture. You do not have to believe that the defendant is innocent of the charge against him/her in order to find a verdict of not guilty. Your verdict of not guilty only means that the prosecution has failed to prove to you the guilt of the defendant beyond a reasonable doubt.

So if the jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that the defendant is guilty of the charge, it must acquit. If the jury views the evidence in the case as reasonably permitting either of two conclusions - one of innocence, the other of guilt - the jury should adopt the conclusion of innocence.

(USE THE FOLLOWING PARAGRAPH IF DEFENDANT TESTIFIES - DEFENDANT'S OPTION)

The defendant, _____, is a competent witness in his or her own behalf, and you should not disregard or disbelieve his or her evidence in whole or in part solely because he or she is on trial charged with a crime. It is the duty of the jury to give his or her evidence the same careful and thorough consideration as the evidence of other witnesses and to weigh his or her evidence by the same rules as you weigh the evidence of other witnesses and give to his or her evidence such weight and credit as you believe it is entitled to receive.

(USE THE FOLLOWING TWO PARAGRAPHS IF DEFENDANT DOES NOT TESTIFY - DEFENDANT'S OPTION)

The Constitution of the United States and the Constitution of the State of West Virginia give to all persons the right to remain silent during the trial of a criminal case, and to require the State to prove guilt beyond a reasonable doubt.

The defendant, _____, has no duty to take the stand as a witness in his or her own behalf, and if he or she does not do so, this is not evidence, and you should draw no inference therefrom as to his or her guilt or innocence. You should entirely disregard this fact and not discuss it.

(USE THE FOLLOWING PARAGRAPH ONLY IF DEFENDANT INTRODUCES CHARACTER EVIDENCE)

The defendant has introduced evidence of his or her good character. Good character is a circumstance to be considered by the jury with all other facts and circumstances in the case on the question of the guilt or innocence of the defendant, and can, alone, give rise to a reasonable doubt of his or her guilt on your part; but if you believe the

defendant is guilty beyond a reasonable doubt, his or her good character cannot be taken into consideration to mitigate, justify or excuse the commission of the crime.

Up to this point, the court has been instructing you as to your duties as jurors and the rules which apply during the trial of every criminal case in the State of West Virginia. Now I would like to instruct you as to the crime charged in the indictment in this case, and the facts that the State of West Virginia must prove in order to convict the defendant, _____, of the charges upon which he/she is being tried.

INSERT HERE:
INSTRUCTIONS CONCERNING THE OFFENSE OR
OFFENSES CHARGED, DEFENSES, AND SPECIAL ISSUES

1. Description of the offense or offenses charged.
2. Enumeration of possible verdicts that may be returned.
3. Enumeration of the essential elements of the offense or offenses.
4. Definition of key terms used in enumerating the elements of the offense or offenses; and other special instructions necessary to further explain or qualify the offense or offenses.
5. Description of the defendant's defense(s), if any.
6. Enumeration of the essential elements of the defense(s).
7. Definition of key terms used in enumerating the essential element of the defense(s); and other special instructions necessary to further explain or qualify the defense(s).

Every material fact necessary to constitute the offense charged must be proved beyond a reasonable doubt, and if there is a reasonable doubt as to any such fact, you must find the defendant "Not Guilty."

(USE THE FOLLOWING PARAGRAPH ONLY IF INTENT IS AN ELEMENT OF CRIME)

It is the duty of the State to allege and prove criminal intent in this case. If, from the whole evidence, the jury has a reasonable doubt as to whether such intent existed, you should acquit the defendant. You may but are not required to infer that a person intends to do that which he/she does, or which is the natural and necessary consequences of his/her own act. Intent may be found by inferences from all the facts and circumstances in the case, provided you are convinced from all such facts and circumstances, beyond a reasonable doubt, that the defendant had the required intent.

(DELETE THE FOLLOWING PARAGRAPH IF TIME IS OF THE ESSENCE OF THE OFFENSE CHARGE)

You will note that the indictment charges that the offense was committed "on or about" a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

I caution you, members of the jury, that you are here to determine the guilt or innocence of the accused from the evidence in this case. The defendant is not on trial for any act or conduct or offense not alleged in the indictment. Neither are you called upon to return a verdict as to the guilt or innocence of any person or persons not on trial as a defendant in this case.

Also, the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the judge, and should never be considered by the jury or be discussed in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

The evidence should be considered and viewed by the jurors in light of their own observations and experiences in the ordinary affairs of life. During the trial of this case, I have conscientiously tried to keep from expressing in any manner to you

whether I believe the defendant to be guilty or not guilty. Do not try to figure out what I believe. This is your decision and your decision alone. The jury is the sole and exclusive judge of the facts.

It is your duty as jurors to protect and uphold the laws of the State of West Virginia. Pursuant to that duty, you should direct your consideration and deliberation toward ascertaining whether or not you believe beyond a reasonable doubt that the defendant violated these laws which it is your duty to protect and uphold, and any sympathy, or reluctance or dislike to convict on your part should not enter into your deliberations; but, by the same token, it is not the policy of the law to convict people when the evidence is insufficient merely for the purpose of upholding the law or to make examples of persons to deter crime, nor is it the policy of the law to convict merely because an indictment has been returned, or to satisfy a public demand that crime be prevented. On the contrary, it is as much the duty of the jury to protect an innocent person, as it is to convict the guilty person. You must not permit yourself to be influenced by sympathy, passion, prejudice or public sentiment for or against the defendant or the State. All your deliberations should be based solely upon the evidence presented to you in the trial and the law as given to you by the Court.

Upon the trial of any criminal case by a jury, the law requires that all twelve jurors must agree before a verdict of either "guilty" or "not guilty" can be reached.

Each individual juror must be satisfied as to the verdict before consenting thereto. Each individual juror must be satisfied beyond a reasonable doubt of the defendant's guilt before he or she can rightly, under his or her oath, consent to a verdict of guilty. Each juror should feel individual responsibility as a member of the jury and should realize that his or her own mind must be convinced beyond a reasonable doubt before consenting to a verdict. Therefore, if any individual juror after having duly considered the evidence, the instructions of the Court, and argument of counsel, and after consulting with his or her fellow jurors, should entertain a reasonable doubt as to the defendant's guilt, then it is the duty of that juror not to surrender his or her own convictions simply because the balance of the jury entertains a different conviction.

On the other hand, if any individual juror is satisfied beyond a reasonable doubt of the defendant's guilt, he or she cannot rightly, under his or her oath, consent to a verdict of not guilty.

The jury room is not a place for pride of opinion, and it is the duty of each juror to discuss the evidence in the spirit of fairness and candor with the other jurors, and with open minds, to give careful consideration to the views of the other jurors, and, if it can be done without a sacrifice of conscientious convictions, agree upon a verdict. Remember at all times, you are not partisans. Your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room you should first select one of your number to act as your foreperson who will preside over your deliberations and will be your spokesperson here in court. A form of verdict has been prepared for your convenience. You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreperson fill it in and sign it. Then notify the bailiff so that you can return to the courtroom to deliver your verdict in open court.

If, during your deliberations, you should desire to communicate with the Court, please write out your question, have signed by the foreperson, and pass the note to the bailiff who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

Ladies and Gentlemen of the jury, you will now hear argument of the attorneys.

J U D G E

DATE

4.02 IN GENERAL

At this point in the trial, I as the trial judge, am required to inform you as to the law applicable to this case which shall guide you in your deliberations.

4.03 DUTY OF THE JUDGE

It is the duty of the Judge to preside over the trial and to determine what testimony and evidence is relevant and admissible under the law for your consideration. It is also the Judge's duty at the conclusion of the trial to instruct you upon the law applicable to the case.

4.04 DUTY OF JURORS

You, as jurors, are the judges of the facts. It is the duty of the jury to apply the law as given to you by the Court to the facts determined by you from the evidence.

You must not change the law or apply your own ideas of what you think the law should be. Both this Court and you the jury are bound by the law as stated in this charge.

You are not to single out one portion of this charge alone as stating the law, but you must consider the charge as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in this charge, just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in this case, unswayed by pity or sympathy for either side.

4.05 ROLE OF ATTORNEYS

Nothing said or done by the lawyers who have tried this case is to be considered by you as evidence of any fact. It is your recollection and interpretation of the evidence that controls in this case. What the lawyers say is not binding upon you. Your verdict shall be based upon the evidence as you heard it from the witness stand and as you recollect it, not as the lawyers or this Court may recollect it.

Likewise, nothing that I have said or done at any time during the trial is to be considered by you as evidence of any fact or as indicating any opinion concerning any fact, the credibility of any witness, or the weight of any evidence.

4.06 OBJECTIONS

You are instructed that you should disregard entirely questions to which an objection was sustained or answers ordered stricken out of the evidence. It is not the province of the jury to determine the admissibility or validity of any exhibit or other testimony. Do not draw any conclusion or speculate as to why or why not certain testimony or other evidence was excluded or admitted.

4.07 DRAWING REASONABLE INFERENCES

While you should consider only the evidence in this case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in this case.

4.08 CREDIBILITY OF WITNESSES

Now, I have said that you must consider the evidence. This does not mean, however, that you must accept all the evidence as true or accurate. You are the sole judges of the “credibility” or “believability” of each witness and the weight to be given to his or her testimony. As used in this charge, “credibility of a witness” means the truthfulness or lack of truthfulness of a witness. The “weight of the evidence” means the extent to which you are, or are not, convinced by the evidence.

The number of exhibits and the number of witnesses testifying on one side or the other of any issue are not alone the test of credibility of the witnesses and the weight of the evidence. If warranted by the evidence, you may believe one witness against a number of witnesses testifying differently. The tests are: how truthful is the witness and how convincing is his or her evidence in light of all the evidence and circumstances shown?

In determining the credit and weight you will give to the testimony when any witness has testified before you, you may consider if found by you from the evidence:

1. his or her good memory, or lack of memory;
2. his or her interest, or lack of interest in the outcome of the trial;
3. his or her demeanor and manner of testifying;
4. his or her opportunity in means, or lack of opportunity in means, of having knowledge of the matters concerning which he or she testified;
5. the reasonableness or unreasonableness of his or her testimony; and
6. his or her apparent fairness or lack of fairness.

From these and all other conditions and circumstances appearing from the evidence, you may give the testimony of the witness such credit and weight as you believe it is entitled to receive. ¹

FOOTNOTE

- ¹ “The Court instructs the jury that in arriving at a verdict in this case you are the sole and exclusive judges of the evidence and the credibility of each and every witness introduced in this case; that the jury has the right to disregard the testimony of any witness, or witnesses, who in the opinion of the jury have testified falsely in this case, or to give to the testimony of any witness, such weight as in the opinion of the jury the same may be entitled to under all the circumstances of this case, and in ascertaining such weight the jury may take into consideration the character, motive, or anything else surrounding the witness, or his testimony, as disclosed by the evidence and circumstances in the case; that in passing upon the credibility of witnesses you may take into consideration the reasonableness or unreasonableness of their statements, their apparent bias or prejudice, as well as their interest in the outcome of the case, if any, as well also as their intelligence or lack of intelligence and their demeanor while upon the witness stand and from these and other facts and circumstances appearing in the case, the jury may give the evidence of any witness or witnesses only such credit as the jury may think such testimony is entitled to, because the jury is the sole judge of the evidence, as well as the credibility of the witnesses who testify in the case”.

State v. Stevenson, 147 W.Va. 211, 235, 127 S.E.2d 638,653 (1962).

4.09 DEFENDANT’S CHOICE NOT TO TESTIFY

The defendant is presumed innocent and the burden is on the prosecution to prove the defendant guilty beyond a reasonable doubt. This burden never shifts to a defendant, for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

The defendant has no duty to take the stand as a witness in his own behalf. The fact that the defendant did not testify as a witness in his own behalf cannot be taken or considered by the jury as any evidence or even a circumstance showing or tending to show in the slightest degree the guilt of the accused and you should draw no inference therefrom as to his guilt or innocence. You should entirely disregard it and not discuss it. ¹

FOOTNOTE

- ¹ "In any trial or examination in or before any court or officer for a felony or misdemeanor, the accused shall, with his consent (but not otherwise), be a competent witness on such trial or examination; and if he so voluntarily becomes a witness he shall, as to all matters relevant to the issue, be deemed to have waived his privilege of not giving evidence against himself and shall be subject to cross-examination as any other witness; but his failure to testify shall create no presumption against him, nor be the subject of any comment before the Court or jury by anyone." *W.Va. Code*, 57-3-6 [1923].

State v. Walker, 94 W.Va. 691, 698, 120 S.E. 171, 173 (1923); State v. McClung, 104 W.Va. 330, 334, 140 S.E. 55, 56 (1927); State v. McClure, 163 W.Va. 33, 253 S.E.2d 555, 557 (1979).

The jurors are instructed that the fact that the defendant did not go upon the witness stand to testify in his own behalf in this case, is not to be looked upon or considered by the jury as any evidence or even a circumstance showing or tending to show his guilt. State v. McClure, 163 W.Va. 33, 253 S.E.2d 555 (1979).

In State v. McClure, 163 W.Va. 33, 253 S.E.2d 555, 557 (1979), the Court noted that a state trial court's refusal to give a defendant's requested jury instruction on the presumption of innocence violates his right to a fair trial guaranteed by the Fourteenth Amendment to the United States Constitution. Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978).

. . . Where an accused in a criminal case did not testify in his own behalf, it is reversible error for the trial court to refuse to give an instruction offered by the defendant stating that the defendant's failure to testify was not to be considered by the jury as a circumstance showing or tending to show his guilt. State v. Walker, 94 W.Va. 691, 120 S.E. 171 (1923); State v. McClung, 104 W.Va. 330, 140 S.E. 55 (1927). The requirement with regard to this instruction develops out of the defendant's constitutionally protected right against self-incrimination and his entitlement to the presumption of innocence.

4.10 DEFENDANT'S TESTIMONY

The Court instructs the jury that the defendant has the right to testify in his own behalf, and the jury has no right to arbitrarily disregard or disbelieve his evidence in whole or in part merely because he is on trial charged with a crime, but it is the duty of the jury to weigh and consider his evidence the same as that of any other witness, and give to his evidence such weight and credit as they think the same is entitled to, and to weigh his evidence under the same rules as they weigh the evidence of other witnesses testifying in this case. ¹

FOOTNOTE

¹ State v. Taylor, 105 W.Va. 298, 142 S.E. 254, 257 (1928); State v. Stevenson, 147 W.Va. 211, 236, 127 S.E.2d 638, 653 (1962).

A criminal defendant's right to give testimony on his own behalf is protected under article three, section ten of our Constitution, as well as the due process provisions of the federal constitution. Syl. pt. 4, State v. Neuman, 179 W.Va. 580, 371 S.E.2d 77 (1988).

4.11 TESTIMONY OF LAW ENFORCEMENT OFFICER

The fact that a witness may be a law enforcement official does not mean that his testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of any ordinary witness. It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witnesses and to give to that testimony whatever weight, if any, and find it deserves.

So if the jury, after careful and impartial consideration of all the evidence in this case, has a reasonable doubt that a defendant is guilty of the charge you must acquit. If the jury views the evidence as a reasonably permitting either of two conclusions - one of innocence, the other of guilt - the jury should of course adopt the conclusion of innocence. ¹

FOOTNOTE

¹ An instruction which affords greater weight to the testimony of a police officer than to that of other witnesses is improper and is reversible error. Syl. pt. 2, State v. Hamrick, 160 W.Va. 673, 236 S.E.2d 247 (1977).

In State v. Hamrick, *supra*, the Court found the following instruction to be objectionable:

. . . State police are specifically authorized and empowered by statute in this State, and the duties of their office require them to arrest persons charged with the violation of any law of this State and to investigate such charges by interviewing witnesses as well as the persons charged with the commission of said crime and that such acts on their part should not be attacked in Court unless it appears by the evidence that they have improperly performed said duties.

The Court found this instruction to be erroneous because it directed the jury to give extra weight to an officer's testimony. The Court noted that the Court in United States v. Bush, 375 F.2d 602 (1967), held it was not error for the trial court to refuse an instruction that the uncorroborated testimony of a police officer must be viewed with suspicion and acted upon with caution. The Supreme Court found the reverse of the Bush proposition is also true: police officers' testimony is not accorded greater weight than other witnesses' evidence.

In State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996), the appellant argued the trial court improperly denied the following defense instruction:

The Court instructs the jury that the testimony you have heard from law enforcement officials, including the testimony of any state troopers, sheriffs, deputy sheriffs, or policemen is not entitled to any greater weight and is not more credible than the testimony of any other witnesses simply because it is the testimony of such a law enforcement officer. State v. Hamrick, 160 W.Va. 673, 236 S.E.2d 247 (1977).

In lieu of the above instruction, the trial court gave a lengthy instruction on credibility of witnesses. The Supreme Court found no error in the trial court's refusal to give the above instruction. The Court found that the instruction would have unduly highlighted the testimony of the police officers, and that the jury was properly instructed on credibility of witnesses.

4.12 PRESUMPTION OF INNOCENCE, REASONABLE DOUBT, BURDEN OF PROOF

The Court instructs the jury that the law presumes a defendant to be innocent of crime. Thus, a defendant, although accused, begins the trial with a "clean slate" -- with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the [State] prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is doubt based upon reason and common sense -- the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture. The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

So if the jury, after careful and impartial consideration of all the evidence in this case has a reasonable doubt that a defendant is guilty of the charge, it must acquit. If the jury views the evidence in the case as a reasonably permitting either of two conclusions- one of innocence, the other of guilt- the jury should of course adopt the conclusion of innocence.¹

FOOTNOTE

- ¹ Footnote 9, State v. Goff, 166 W.Va. 47, 272 S.E.2d 457 (1980). "This instruction is almost identical to the widely used federal instruction, E. Devitt and C. Blackmar, Federal Jury Practice and Instructions § 11.14"; See State v. Berry, 176 W.Va. 291, 342 S.E.2d 259, 264 (1986); See footnote 7, State v. Fisher, 179 W.Va. 516, 370 S.E.2d 480 (1988).

COMMENTS

1. "We, as well as the United States Supreme Court, have recognized the fundamental right to have a presumption of innocence and burden of proof instruction in a criminal case. Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978)"; cf. Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895); State v. Cokeley, 159 W.Va. 664, 226 S.E.2d 40 (1976). Because of the crucial significance of such instructions, most appellate courts have cautioned against altering the form of such instruction. United States v. Bridges, 499 F.2d 179 (7th Cir. 1974), *cert. denied*, 419 U.S. 1010, 95 S.Ct. 330, 42 L.Ed.2d 284; Scurry v. United States, 347 F.2d 468 (D.C. Cir. 1965); State

v. Boyken, 217 N.W.2d 218 (Iowa 1974); Commonwealth v. Ferreira, 373 Mass. 116, 364 N.E.2d 1264 (1977); State v. Flippin, 280 N.C. 682, 186 S.E.2d 917 (1972); Commonwealth v. Young, 456 Pa. 102, 317 A.2d 258 (1974). Since this case must be retried, we offer a standard instruction on the presumption of innocence and burden of proof.” (Instruction set out above).

“In the present case, we hold that the quoted language (under review) standing alone will not constitute reversible error but when coupled with other language which is at substantial variance with the standard instruction on the presumption of innocence and burden of proof, such deviant instruction may constitute reversible error”.

Goff, *supra*, at 462, 463.

2. “The appellant also challenges the trial court’s refusal of Defendant’s Instructions Nos. 5, 6, 8, and 15 which instructed the jury as to the presumption of innocence, the burden of proof and reasonable doubt. The trial court refused these instructions on the ground that the legal principles they contained were adequately covered by instructions proffered by the State. The appellant asserts, however, that he was entitled to have them read to the jury in his own language.”

“A defendant may have the right to have an instruction given in his own language provided that there are facts in evidence to support the instruction, that the instruction contains a correct statement of the law and that the instruction is not vague, ambiguous, obscure, irrelevant or calculated to mislead the jury. State v. Evans, 33 W.Va. 417, 10 S.E. 792 (1890). Where, however, both the State and the defendant have offered instructions which in form and effect embody the same legal principle and amount to the same thing, it is not reversible error for the trial court to give one instruction and to refuse the other. State v. Hamric, 151 W.Va. 1, 151 S.E.2d 252 (1966); State v. Rice, 83 W.Va. 409, 98 S.E. 432 (1919). After reviewing the instructions proffered by the

appellant and those given by the trial court at the request of the State, we find no reversible error in the trial court's refusal of Defendant's Instructions 5, 6, 8 and 15." State v. Williams, 172 W.Va. 295, 305 S.E.2d 251, at 266 (1983).

3. "In the trial of a criminal case, the refusal of a trial court to give to the jury, when requested to do so, an instruction or charge that the defendant is presumed to be innocent of the charge laid against him in the indictment on which he is being tried, is prejudicial to the defendant, and constitutes reversible error.' Point 8, Syl., State v. Foley, 131 W.Va. 326, 47 S.E.2d 40 (1948)." Syl. pt. 3, State v. Cokeley, 159 W.Va. 664, 226 S.E.2d 40 (1976).
4. A criminal defendant is entitled, as a matter of right, to an instruction to the jury that he is presumed to be innocent of the crime for which he is charged and it is reversible error to refuse to give such an instruction unless the statement is contained in other instructions. Syl. pt. 7, State v. Milam, 159 W.Va. 691, 226 S.E.2d 433 (1976).
5. Footnote 4, State v. Evans, 172 W.Va. 810, 310 S.E.2d 877 (1983) - "We discourage the use of instructions which attempt to define reasonable doubt beyond the standard charge." (cites omitted).
6. A criminal defendant is entitled, as a matter of right, to an instruction to the jury that he is presumed to be innocent of the crime for which he is charged and it is reversible error to refuse to give such an instruction unless the statement is contained in other instructions. Syl. pt. 7, State v. Milam, 159 W.Va. 691, 226 S.E.2d 433 (1976).

4.13 INDICTMENT NOT EVIDENCE

The case you have been sworn to try is, of course, a criminal case. The State of West Virginia has the entire burden of proof in criminal cases. Furthermore, the Court instructs you that this criminal case was brought to the Court by way of what we call an indictment. The indictment or formal charge against a defendant is not evidence of guilt. Indeed, the defendant is presumed by law to be innocent. The indictment in this case or any other case is not to be considered by the jury in the slightest

degree as indicative of the guilt of the defendant. An indictment is a mere formality required by law to inform the defendant of the charge against him. The indictment raises no presumption of guilt on the part of the defendant.

For these reasons, you are further instructed that the indictment is not to be considered by you as having any weight whatsoever as evidence against the defendant in this case, and no juror should allow himself or herself to be influenced against the defendant because of or on account of the indictment in this case. ¹

FOOTNOTE

- ¹ You are instructed that the indictment in this case is of itself a mere accusation or charge against the defendant and is not any evidence of guilt. An indictment is simply a formal charge for the purpose of bringing the defendant to trial. No juror should permit himself to be influenced against the defendant because an indictment has been returned against him. State v. Willey, 97 W.Va. 253, 260, 125 S.E. 83, 86 (1924); State v. Banks, 99 W.Va. 711, 714, 129 S.E. 715, 716 (1925); State v. Fugate, 103 W.Va. 653, 657, 138 S.E. 318, 320 (1927).

You are instructed that the indictment against the defendant is no evidence of his guilt, but is merely a formal charge for the purpose of putting him upon his trial. The jury must commence the investigation of this case with the presumption that the defendant is innocent of the crime of which he is accused and you should act upon the presumption throughout your consideration of the evidence, and unless this presumption of innocence shall have been overcome by proof of guilt so strong, credible and conclusive as to convince your minds beyond all reasonable doubt that the defendant is guilty, and unless the evidence is of such a nature as to exclude all reasonable doubt of guilt, then you should find the defendant not guilty. State v. Banks, 99 W.Va. 711, 714, 129 S.E. 715, 716 (1925).

The Court instructs the jury that the finding of the indictment by the grand jury against the prisoner in the case was no evidence against him and must not be permitted to influence them in any manner in arriving at a verdict. State v. Fugate, 103 W.Va. 653, 657, 138 S.E. 318, 320 (1927).

The Court instructs the jury that the indictment in this case is not to be considered by the jury in the slightest degree indicative of the guilt of the accused and while the jury has the right to take the indictment to your room, yet you shall not consider the indictment as being any evidence whatsoever of the guilt of the accused and the indictment shall not be considered by you as having any weight whatever as evidence against the accused in this case. State v. Demastus, 270 S.E.2d 649, 658 (W.Va. 1980).

4.14 SAMPLE FORM FOR ELEMENTS

The Court instructs the jury that the defendant, _____, is charged with the offense of “_____.” You may return one of _____ verdicts in this case, namely: (1) _____; (2) _____; or (3) Not Guilty.

You are instructed that the crime of _____ is committed when _____. The burden is on the State of West Virginia to prove the guilt of the defendant beyond a reasonable doubt and the defendant is not required to prove himself innocent. He is presumed by the law to be innocent of this charge and this presumption remains with him throughout the entire trial.

Before the defendant, _____, can be convicted of _____, the State of West Virginia must overcome the presumption that he is innocent and prove to the satisfaction of the jury, beyond a reasonable doubt, that:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
- 4.
- 5.
- 6.

If after impartially considering, weighing and comparing all the evidence, [both that offered by the State and that offered by 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 _____, then you may find the defendant, _____, guilty of _____.

If, on the other hand, the jury and each member of the jury is not convinced beyond a reasonable doubt as to the truth of any one or more of the elements of the charge contained in the indictment, then you must find the defendant, _____, not guilty.

4.15 SUFFICIENCY OF EVIDENCE

You are instructed that, upon the trial of this case, if a reasonable doubt of any fact necessary to establish the guilt of the accused as charged in the indictment be raised by the evidence, or lack of evidence, such doubt is decisive, and the jury must acquit the accused.

You do not have to believe that the defendant is innocent of the charges against him in order to find a verdict of not guilty; your verdict of not guilty only means that the State of West Virginia has failed to prove to you the guilt of the defendant beyond a reasonable doubt. ¹

FOOTNOTE

- ¹ In State v. Evans, 172 W.Va. 810, 310 S.E.2d 877 (1983), defendant's instruction no. 15, which was refused by the trial court, would have told the jury that:

[a] verdict of 'not guilty' in a criminal case such as the one on trial does not necessarily mean that the innocence of the defendant has been proved; such a verdict means only that guilt of the defendant has not been established beyond a reasonable doubt.

The appellant contended the instruction was an "essential component" to other instructions concerning the State's burden to prove every element of the offense beyond a reasonable doubt and that he was entitled to have the instruction given on the ground that it presented a theory of the case in the appellant's own language. The court held these arguments were without merit finding the instruction on its face is unrelated to any "theory" of the case but rather, was offered to elucidate the reasonable doubt standard. The court noted in footnote 4 that they discourage the use of instructions which attempt to define reasonable doubt beyond the standard charge. The court also found the jury was properly and adequately instructed on the application of the reasonable doubt standard in a criminal trial and that there was no error in refusal of the instruction.

4.16 REASONABLE DOUBT AS TO GRADE OF THE OFFENSE ¹

If you have a reasonable doubt as to the grade of the offense of which the defendant may be guilty, you shall resolve that doubt in his favor and find him guilty of the lower grade, and if you have a reasonable doubt as to whether the defendant is guilty of any offense, you must resolve that doubt in his favor and find him not guilty.

FOOTNOTE

- ¹ State v. Wayne, 162 W.Va. 41, 245 S.E.2d 838 (1978).

In State v. Wayne, 162 W.Va. 41, 245 S.E.2d 838 (1978), the appellant contended on appeal that the trial court erred in refusing to instruct the jury concerning second degree murder and in refusing to give the above proffered instruction. The Court held the trial court properly refused to give the above instruction finding that since the evidence only indicated first degree murder or complete innocence, the refusal of an instruction on lesser offenses was proper. The Court offered no comment on the substance of the above instruction.

4.17 CONFLICT IN THE EVIDENCE ¹

The Court instructs the jury that if you find there is a conflict in the evidence in this case on any fact or circumstance tending to establish the guilt or innocence of the defendant, a part of which is in favor of the theory of the State and a part is in favor of the theory of the defendant, and the jury should entertain a reasonable doubt as to which is true, then it is the duty of the jury in arriving at their verdict to adopt the evidence, theory and conclusion most favorable to the accused.

FOOTNOTE

- ¹ In State v. Maynard, 183 W.Va. 1, 393 S.E.2d 221 (1990), the appellant argued the trial court committed reversible error in refusing to give the following defense instruction:

You are instructed that when two (2) inferences, equally plausible, may be drawn from the evidence in the case, the law does not permit the jury to arbitrarily adopt the one more unfavorable to the accused, but rather requires you, as members of the jury, to adopt the inference [sic] most favorable to the accused, and if found by you proper, to then acquit the defendant and find him not guilty.

The Court found the trial court properly refused the instruction since it was repetitious of the following instruction which was given at trial:

If the jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that the defendant is guilty of the charge, it must acquit. If the jury views the evidence in the case as reasonably permitting either of two conclusions -- one of innocence, the other of guilt--the jury should of course adopt the conclusion of innocence.

4.18 UNANIMITY OF THE VERDICT

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

This means that each and every one of you must be convinced beyond a reasonable doubt that the accused is guilty as charged in the indictment before you can find him guilty. If each of you is not so convinced, you must find the defendant not guilty. Each juror must consider all the evidence in the case, the instructions of the Court, the arguments of counsel, and the arguments of his or her fellow jurors in arriving at his or her individual verdict. No juror, however, should surrender his or her opinion simply because other jurors are of a different opinion and no juror entertaining a reasonable doubt as to the guilt of the defendant should join in a verdict of guilty.¹

FOOTNOTE

¹ See, Rule 31(a), W.Va. R. Crim. P.; State v. Vandevender, 190 W.Va. 232, 438 S.E.2d 24 (1993), and State v. Tennant, 173 W.Va. 627, 319 S.E.2d 395 (1984), State v. Noble, 96 W.Va. 432, 123 S.E. 237 (1924); State v. Warrick, 96 W.Va. 722, 123 S.E. 799 (1924); State v. Edgell, 94 W.Va. 198, 118 S.E. 144 (1923); State v. McKinney, 88 W.Va. 400, 106 S.E. 894 (1921); State v. Joseph, 100 W.Va. 213, 221, 130 S.E. 451, 454 (1925); State v. Wisman, 94 W.Va. 224, 118 S.E. 139 (1923); State v. McCausland, 82 W.Va. 525, 96 S.E. 938 (1918).

In State v. Taft, 144 W.Va. 704, 708, 110 S.E.2d 727, 731 (1959), the following instruction offered by the State was given at trial:

The Court instructs the jury that upon the trial of a criminal case by a jury the law contemplates the concurrence of twelve minds in the conclusion of guilt before a conviction can be had. Each individual juror must be satisfied beyond a reasonable doubt of the defendant's guilt before he can rightly, under his oath, consent to a verdict of guilty. Each juror should feel the responsibility resting upon him as a member of the jury, and should realize that his own mind must be convinced beyond all reasonable doubt of the defendant's guilt before he can consent to a verdict of guilty. Therefore, if any individual juror, after having duly considered the evidence in the case, the instructions of the Court, the arguments of counsel, and consulting with his fellow jurors, should entertain a reasonable doubt of defendant's guilt, it is his duty not to surrender his own convictions simply because all, or some, of the other jurors entertain a different opinion.

And in this connection the jury is further instructed that the jury room is no place for pride of opinion or obstinacy, and it is the duty of the jurors to discuss the evidence in a spirit of fairness and candor with each other, and with open minds to give careful consideration to the views of their fellow jurors, and, if it can be done without a sacrifice of conscientious convictions, agree upon a verdict.

Defense counsel objected to the second paragraph of this instruction. The Court held the trial court did not err in giving the instruction.

“If an instruction on the subject of the unanimity of the jury is granted by the Court, it is proper in the same instruction to tell the jury that ‘the jury room is no place for pride of opinion or obstinacy, and it is the duty of the jurors to discuss the evidence in a spirit of fairness and candor with each other, and with open minds to give careful consideration to the views of their fellow jurors, and if it can be done without a sacrifice of conscientious convictions, agree upon a verdict.’” Syl. pt. 2, State v. Taft, *supra*.

A unanimous verdict instruction which is couched in such language as to invite the jury to disagree is properly refused. Syl. pt. 8, State v. Cokeley, 159 W.Va. 664, 226 S.E.2d 40 (1976).

“While the law contemplates the free and deliberate concurrence of all jurors as a prerequisite of a verdict, this Court has expressed its disapproval of instructions couched in language tending to foster disagreement among or obduracy on the part of jurors. The Court in its instructions must neither encourage disagreement nor coerce agreement. ‘It is proper for a trial court to tell the jurors that it is their duty to agree, if possible, and that in conferring they should respect each other’s opinion with a disposition to agree thereto, if based on sound reasoning.’ Emery v. Monongahela West Penn, 111 W.Va. 699, 709, 163 S.E. 620, 624, (1932) 88 C.J.S. Trial Sec. 297, page 810.” State v. Taft, 144 W.Va. 704, 709, 110 S.E.2d 727, 732 (1959).

“This Court has held in a number of cases that the accused in a criminal case is entitled to have the jury told that if any juror has a reasonable doubt as to the guilt of the accused, after hearing the evidence, receiving the instructions of the Court, listening to the arguments of counsel, and consulting with his fellow jurors, such juror should not agree to a conviction. State v. Noble, 96 W.Va. 432; State v. Warrick, 96 W.Va. 722; State v. Edgell, 94 W.Va. 198; State v. McKinney, 88 W.Va. 400. Such instruction should, however, not be couched in terms as would invite the jury to disagree. The instruction requested in the instant case does not seem to be open to that fault, therefore, it should have been given.” State v. Joseph, 100 W.Va. 213, 221 (1925).

State v. McKinney, 88 W.Va. 400 - The Court found that no good reason was perceived for the refusal of a defense instruction on the legal requirement of unanimity of the jury unless the instruction fell within the scope of some other instruction given. The instruction would have advised the jury that if any juror, after due consideration of the evidence and consultation with his fellow jurors, should entertain a reasonable doubt of the guilt of the accused, it was his duty not to surrender his own convictions simply because the others were of a

different opinion. The Court found no misleading element in it and it did not import justification or encouragement of obduracy or arbitrariness on the part of an individual juror. The majority of the Court were of the opinion that the subject was sufficiently covered by another instruction. The author of the opinion disagreed, noting that the primary subject of the other instruction was presumption of innocence and the requirement of unanimity in the verdict is a subordinate, if not an incidental, subject or element thereof.

State v. Wisman, 94 W.Va. 224 (1923) - Defendant's instruction no. 3 was refused. It read: "The Court instructs the jury that if the jury or any member of the jury entertains a reasonable doubt as to the defendant's guilt, then they cannot find him guilty." The Supreme Court found the instruction related not only to reasonable doubt, but also to unanimity in the verdict. The State argued the instruction was properly refused because it was incorporated in another defense instruction which read: "The Court instructs the jury that if they entertain any reasonable doubt as to the defendant's guilt, it is their duty to give the benefit thereof to the defendant, and find him not guilty." The Court found this latter instruction was entirely as to reasonable doubt in the minds of the jury as a whole, and that if they entertain a reasonable doubt as to his guilt they must find him not guilty. The Court found the instruction did not attempt to instruct the jury as to the legal requirement of unanimity in finding their verdict. They found Defendant's instruction 3 was not couched in such terms as would invite a disagreement. It simply informed the jury that if any member thereof entertained a reasonable doubt as to the defendant's guilt, they could not find him guilty. The Court found this instruction should not be confused with the one disapproved in State v. McCausland, 82 W.Va. 525, which told the jury that if any member had reasonable doubt as to the defendant's guilt they should find him not guilty. The Court noted that a reasonable doubt as to the guilt of an accused in the mind of one juror does not compel the jury to find the defendant not guilty. The other jurors may be satisfied of the accused's guilt beyond a reasonable doubt.

The Court found the minds of the jurors must meet in order to form a verdict, and in a criminal case it is proper that jurors should be so advised. The Court noted that an inexperienced juror not being advised of the tenderness with which the law regards human life and liberty and of the strict requirements necessary to deprive the accused of life or liberty may be under the erroneous impression that although he should have reasonable doubts of the guilt of the accused he should defer to the judgment of the majority of his more experienced fellow jurymen.

V. ADDITIONAL INSTRUCTIONS

5.01 VOLUNTARINESS OF DEFENDANT'S STATEMENT

The Court instructs the jury that if you do not believe that the statement or statements made by the defendant were freely and voluntarily made, then you have a right to reject the statement wholly from your consideration.

The Court instructs the jury that if you do not believe that the statement made by the defendant was freely made without influence of hope or fear held out by the officers then you are at liberty to disregard the statement.

COMMENTS

1. "There is a split of authority on the procedures to be followed in making voluntariness determinations; the disagreement concerns the allocation of responsibility as between the trial court and the jury for determining the voluntariness issue. A majority of the jurisdictions follow the 'Wigmore' or 'orthodox' rule. Under this rule, the trial judge makes the final and sole determination as a matter of law as to the voluntariness of the confession. If found to be voluntary, the confession is admitted into evidence and the jury is to consider the voluntariness of the confession only as affecting the weight or credibility to be given it.

"In other jurisdictions following the 'Massachusetts' or 'humane' rule, the trial court makes an initial determination as to voluntariness, and if the court finds the confession to be voluntary, the jury is instructed that it must find the confession to be voluntary before they can consider it as evidence in the case." State v. Vance, 162 W.Va. 467, 250 S.E.2d 146, 149 (1978).

"We adopt the 'Massachusetts' or 'humane' rule whereby the jury can consider the voluntariness of the confession, and we approve of an instruction telling the jury to disregard the confession unless it finds that the State has proved by a preponderance of the evidence that it was made voluntarily." Syl. pt. 4, State v. Vance, 162 W.Va. 467, 250 S.E.2d 146 (1978).

“ . . . there is no Sixth Amendment right to have a jury redetermine the voluntariness issue once the trial judge has decided the matter . . . and as a general rule trial courts have no duty to give instructions *sua sponte* on collateral issues not involving an element of the offense being tried. Given the state of law at trial on this issue, we cannot say that the trial court committed reversible error by not on its own motion submitting the voluntariness issue to the jury.” State v. Vance, 162 W.Va. 467, 250 S.E.2d 146, 250 (1978).

“In all trials conducted hereafter where a confession or admission is objected to by the defendant at trial or prior to trial on the grounds of voluntariness, the trial court must instruct the jury on this issue if requested by the defendant.” Syl. pt. 5, State v. Vance, 162 W.Va. 467, 250 S.E.2d 146 (1978).

2. In State v. Goodmon, 170 W.Va. 123, 290 S.E.2d 260 (1981), the Court found they had adopted the “Massachusetts” or “humane” rule in State v. Vance, *supra*, whereby the jury can consider the voluntariness of the confession and approved of an instruction telling the jury to disregard the confession unless it finds that the State has proved by a preponderance it was made voluntarily. The Court noted such an instruction was given in this case and set forth the instruction in footnote 4:

The Court instructs the jury that it is the law of the State of West Virginia that evidence in a criminal case which relates to any statement or act or omission claimed to have been made or done by a defendant outside of Court and after a crime has been committed, must be considered with great caution and weighed with great care. All such evidence should be disregarded in it’s entirety unless the evidence in the case showing how the statement or act was obtained convinces the jury beyond a reasonable doubt that the statement or act was knowingly made or done.

In this connection, a statement or act is knowingly made or done, only if it is made or done voluntarily and intentionally and not because of mistake, accident, innocent reason, pressure of hope or fear to confess as facts things which are not true in an effort to secure a promised reward or to avoid threatened punishment.

Therefore, the Court instructs the jury that in determining whether any statement or act claimed by the State to have been made or done by Roundtree Riley Goodman outside of Court after the commission of the crime of which he is accused was knowingly made or done the jury should consider the following:

Roundtree Riley Goodman's age, training, education and physical and mental condition; his treatment while in custody or under interrogation as shown by all the evidence in this case; all other circumstances in evidence surrounding the making of any statement or the doing of any act, including whether, before the statement or act was made or done, the defendant knew or had been told and understood that he was not obliged or required to make or do the statement or act claimed to have been made or done by him; that he could terminate the interrogation or statement at any time; that any statement or act which he might make or do could be used against him in Court; that he was entitled to the assistance of legal counsel before making any statement or before doing any act; and that if he was without money or means to retain legal counsel of his own choice, an attorney would be appointed to advise and represent him free of cost or obligation before any interrogation was conducted.

And the Court further instructs the jury that if the evidence of the taking of the statement in this case does not convince the jury beyond a reasonable doubt that any statement, act done by Roundtree Riley Goodman, was made or done voluntarily and intentionally, then and in that event, you should disregard it entirely.

3. In State v. Taylor, 174 W.Va. 225, 324 S.E.2d 367 (1984), the Court held that the defendant's statements were voluntarily given and noted that the voluntariness issue was also submitted to the jury with a proper instruction as requested by the defense. Defense instruction No. 7, set forth in footnote 2, provided:

The Court instructs the jury that in order to find that David Taylor voluntarily made any confession(s), you must first find that he was told that he had the right to remain silent, that anything he said would be used against him in a Court of law, that he had a right to have a lawyer present during any questioning and that if he could not afford an attorney that one would be appointed for him.

You must also find that David Taylor was told that he had the right to exercise these rights at any time and not answer any questions and that he knowingly and intelligently relinquished these rights.

4. In State v. Wilson, 190 W.Va. 583, 439 S.E.2d 448 (1993), the appellant contended that the lower court erred by refusing the offered instruction on the voluntariness of the alleged confession. The instruction would have informed the jury that before they were permitted to consider any incriminating statement of the accused, the State must prove by a preponderance of the evidence that the statement was voluntarily made. The Court held the trial court's failure to instruct the jury on the voluntariness issue in accordance with State v. Vance, 162 W.Va. 467, 250 S.E.2d 146 (1978), was reversible error.

5.02 MISSING WITNESS

The Court instructs the jury that the failure of the State to call [available material witness] gives rise to the inference that had [that witness] testified, his/her testimony would have been adverse to the State's case.

COMMENTS

1. Carefully review, McGlone v. Superior Trucking Co., Inc., 178 W.Va. 659, 363 S.E.2d 736 (1987); F. Cleckley, Handbook on Evidence for West Virginia Lawyers, Section 3-1 (c)(J) (3rd Ed. 1994) before offering an instruction on this issue.
2. See footnote 4, McGlone v. Superior Trucking Co., Inc., 178 W.Va. 659, 363 S.E.2d 736 (1987).

"The unjustified failure of a party in a civil case to call an available material witness may, if the trier of the facts so finds, give rise to an inference that the testimony of the "missing" witness would, if he or she had been called, have been adverse to the party failing to call such witness." Syl. pt. 3, McGlone v. Superior Trucking Co., Inc., 178 W.Va. 659, 363 S.E.2d 736 (1987).

"The propriety of a missing-witness instruction raising a presumption against a defendant in a criminal case is fraught with constitutional implications not present in a civil case." McGlone v. Superior Trucking Co., Inc., 178 W.Va. 659, 665, 363 S.E.2d 736, 742 (1987).

"It is clear . . . that the unfavorable inference which may arise from the withholding of particular evidence at trial is not conclusive against a party, but is merely a matter for the consideration of the

jury. . . Because this inference is not conclusive, an instruction directing the Jury's attention to the failure of a party to call a particular witness or to produce other particular evidence at trial must be carefully drafted so as not to be binding upon the jury.

"In fact, the risk of misleading the jury as to the effect of the nonproduction of particular evidence at trial is so significant that there is a split of authorities on the propriety of giving an instruction on the point. In West Virginia, there is a right to have the inference which may arise from the failure to call a particular witness explained in an instruction . . ." McGlone v. Superior Trucking Co., Inc., 178 W.Va. 659, 667, 363 S.E.2d 736, 744 (1987).

In McGlone, the Court found the instruction given was reversible error since the jury may have been misled by the phrase "gives rise to a presumption".

3. In Page v. Columbia Natural Resources, Inc., 198 W.Va. 378, 480 S.E.2d 817 (1996), the appellants argued the trial court erred by refusing the appellant's adverse inference instruction which read:

The unjustified failure of Mrs. Page to call her former lawyer to testify may, if you so find, give rise to an inference that the testimony of her former lawyer would have been adverse to Mrs. Page if he had been called.

The Court found that the instruction is required only where there is an unjustified failure to call a material witness and that denial of appellant's request for a missing witness instruction was not an abuse of discretion.

4. In State v. Hinkle, 169 W.Va. 271, 286 S.E.2d 699 (1982), the Court held that the State's failure to call an informer to rebut entrapment or explain his absence supported the inference that his testimony would not have rebutted the defendant's.
5. In Lawyer Disciplinary Board v. Allen, 198 W.Va. 18, 479 S.E.2d 317 (1996), a lawyer disciplinary action, the Court, citing McGlone, found that since the respondents failed to appear and testify before the Lawyer Disciplinary Board, the Board was entitled to the presumption that respondents' truthful testimony would have been adverse to them.

6. In United States. v. Milton, 52 F.3d 78, 81 (4th Cir. 1995), the Fourth Circuit held the defendant is not entitled to a “missing witness” instruction where the witness is equally available to both parties.
7. In State v. James, 211 W.Va. 132, 563 S.E.2d 797 (2002), the Court disapproved of the following instruction, which the Court characterized as not being a “pure” missing witness instruction:

The State and the Defendant both have the authority to subpoena witnesses to trial. If there is a witness the defendant believes would be helpful to her case, she may subpoena that witness if the state does not.

The Court found that the first sentence of the instruction “raise[d] constitutional concerns” and “served no useful purpose”, and that the second sentence was “wholly inappropriate” despite being legally and factually correct. The Court held that the instruction as a whole was inappropriate; however, since the remainder of the instructions fairly advised the jury on the law applicable to the case, the error was not prejudicial error.

5.03 LOST OR MISSING EVIDENCE

If you find that the State has lost, destroyed, or failed to preserve any evidence whose contents or quality are material to the issues in this case, then you may draw an inference unfavorable to the State which in itself may create a reasonable doubt as to the defendant’s guilt.¹

FOOTNOTE

- ¹ State v. Osakalumi, 194 W.Va. 758, 461 S.E.2d 504 (1995); Arizona v. Youngblood, 488 U.S.51, 102 L.Ed.2d 281, 109 S.Ct. 333 (1988).

5.04 DIRECT AND CIRCUMSTANTIAL EVIDENCE

The Court instructs the jury that direct evidence is evidence, usually in the form of testimony from a witness, who actually saw, heard, or touched the subject of questioning. In other words, direct evidence may be described as the testimony of a person who has perceived the existence of a fact, sought to be proved or disproved, by means of his or her senses.

By contrast, circumstantial evidence is evidence which is not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions may be made, showing indirectly the facts sought to be proved. In other words, circumstantial evidence is evidence that, while not directly proving the existence of a fact, gives rise to a logical inference that such fact does exist. ¹

FOOTNOTE

- ¹ Black's Law Dictionary, 243, 460 (6th Ed. 1990); F. Cleckley, HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS, § 1-3(F)(3) (3rd Ed. 1994).

5.05 EYEWITNESS INSTRUCTION

The Court instructs the jury that one of the disputed issues in this case is the identification of the defendant as the person who committed the offense(s) charged in the indictment. The State of West Virginia has the burden of proving this issue beyond a reasonable doubt

In considering whether the State of West Virginia has proven beyond a reasonable doubt that the defendant was the person who committed the offense(s) charged in the indictment, you may consider the following with regard to an identification witness's testimony:

1. the witness's opportunity to observe the person(s) committing the crime, which includes the amount of time of the observation and the physical conditions such as lighting, distance, or obstructions present at the time of the observation;

2. the witness's degree of attention at the time of the observation, whether the witness was under stress, and whether the witness had occasion to see or know the person in the past;
3. whether the witness gave a description of the person after the crime and if so, the accuracy of such description and the length of time after the offense that the description was given; and
4. whether the witness made any subsequent identification of the person after the offense, the circumstances surrounding such subsequent identification, the witness's level of certainty at such subsequent identification, and the time between the offense and the subsequent identification.¹

FOOTNOTE

- ¹ This instruction is adapted from footnote 16 of State v. Watson, 173 W.Va. 553, 318 S.E.2d 603 (1984).

5.06 ACCOMPLICE INSTRUCTION

The court instructs the jury that a criminal conviction can be obtained upon the uncorroborated testimony of an accomplice, accessory or co-conspirator in the act alleged in this matter. However, the court further instructs the jury that such testimony should be viewed with great care and caution, if the testimony tends to inculcate the Defendant and shift responsibility away from the witness.¹

FOOTNOTE

- ¹ State v. Humphreys, 128 W.Va. 370, 36 S.E.2d 469 (1945); State v. Spadafore, 159 W.Va. 236, 220 S.E.2d 655 (1975); State v. Vance, 164 W.Va. 216, 262 S.E.2d 423 (1980); State v. Hall, 172 W.Va. 138, 304 S.E.2d 43 (1983); State v. Satterfield, 193 W.Va. 503, 457 S.E.2d 440 (1990).

VI. INSTRUCTIONS DURING DELIBERATIONS

6.01 REREADING OF INSTRUCTIONS

In State v. Wyatt, 198 W.Va. 530, 482 S.E.2d 147 (1996), the Court found no error in the trial court's re-reading of only a portion of the instructions to the jury after a jury request. The issue was waived by the defendant's failure to object. The Court noted, however, that upon retrial, if there is a request for the re-reading of a part of the instructions, or it is deemed appropriate to re-read a part of the instructions to respond to a jury question, it may be appropriate to consider that re-reading of a portion of instructions "is usually no error", but error may arise where the portion read omits a related portion of the charge which explains or expands upon the re-read portion. State v. Pannell, 175 W.Va. 35, 39, 330 S.E.2d 844, 848 (1985) ("Certainly we can envision a situation where the trial court's selective rereading of instructions would unfairly prejudice the jury.")

6.02 ALLEN CHARGE

You have informed the Court of your inability to reach a verdict in this case.

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 upon a verdict.

The purpose of these remarks is to point out to you the importance and 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 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 you are selected in the same manner and from the same source from which any future jury must be selected; 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 that more or clearer evidence will ever be produced on one side or the other.

You may retire now, taking as much time as is necessary for further deliberations upon the issues submitted to you for determination. ¹

FOOTNOTE

¹ The above supplemental instruction was given in State v. Blessing, 175 W.Va. 132, 331 S.E.2d 863, n.2 (1985).

The Court held the trial judge was within the bounds of his discretion in instructing the jury to deliberate further under the circumstances where the appellant was charged with first degree murder, trial had been held for two days, and the jury had deliberated only one and three quarter hours. The instruction was found to constitute a fair and reasonable effort to stimulate continued deliberation.

The Court found no language was used the effect of which would be to cause the minority to yield its views for the purpose of reaching a verdict. The Court could not conclude that the trial court's remarks and instruction were coercive when the trial court never mentioned majority and minority opinions nor urged the minority to reconsider. [**COMPARE** Blessing with the language of the Fourth Circuit in Burgos (see Comment 1 below): "regardless of what other specifics are included in an Allen charge given to a deadlocked jury, a district court must incorporate a specific reminder both to jurors in the minority and those in the majority that they reconsider their positions in light of the other side's views. Such an instruction applies equally to each juror, regardless of whether that person is alone in dissent or is part of a substantial majority. Failure to provide a sufficiently balanced charge will result in reversal." The Court in Burgos was

primarily concerned with the lack of a specific charge to the minority and majority factions of the jury to reconsider their positions in light of the other side's views and to the implication that the jurors should reconsider their firmly held beliefs.]

An instruction almost identical to that given in Blessing was given in State v. Sloan, 177 W.Va. 585, 355 S.E.2d 374 (1987). The defendant asked the Court to distinguish Blessing because of the trial judge's comments to the jury at the outset of the trial. The Court found that contrary to State v. Spence, 313 S.E.2d 461 (1984), where the trial court made repeated remarks designed to have the effect of expediting the trial, the Court made no such remarks in the Sloan case and was within its discretion in giving the additional instruction.

COMMENTS

1. In United States v. Burgos, 55 F.3d 933 (4th Cir. 1995), the Fourth Circuit noted that the component of the original Allen charge that jurors in the minority should consider whether the majority's position is correct had been the subject of criticism throughout the federal circuits. This phrasing engendered debate in the Fourth Circuit which led the Court to suggest in United States v. Sawyers, 423 F.2d 1335 (4th Cir. 1970), and United States v. Stollings, 501 F.2d 954 (4th Cir. 1974), modification of the charge to also admonish those in the majority to consider the minority viewpoint.

In Burgos, *supra*, the 4th Circuit held:

[w]hat began as a recommendation in Sawyers and evolved into an admonition in Stollings now becomes a mandate: regardless of what other specifics are included in an Allen charge given to a deadlocked jury, a district court must incorporate a specific reminder both to jurors in the minority and those in the majority that they reconsider their positions in light of the other side's views. Such an instruction applies equally to each juror, regardless of whether that person is alone in dissent or is part of a substantial majority. Failure to provide a sufficiently balanced charge will result in reversal.

Finding that the district court's charge lacked the necessary balance, the Court held that Burgos was entitled to a new trial.

The following instruction was found by the Fourth Circuit in Sawyers, *supra*, and Stollings, *supra*, to be an example of a balanced Allen charge. The instruction was created by the Judicial Conference of the United States Courts and is set out in footnote 7 of Sawyers, at 1342. See also United States v. Cropp, (No. 95-5908, 4th Cir. October 10, 1997).

Footnote 7 of Sawyers reads as follows:

The American Bar Association Project on Minimum Standards for Criminal Justice has expressly disapproved giving the Allen charge to a deadlocked jury, but has recommended a charge to be given before the jury retires to deliberate, to be repeated if necessary upon a deadlock. A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY §5.4 (Approved Draft, 1968). Furthermore, the Committee on the Operation of the Jury System of the Judicial Conference of the United States Courts has recommended that the Allen charge no longer be given as a matter of judicial policy. The Judicial Conference recommended that the charge approved by the A.B.A. Project be given, with one addition, instead of the Allen charge. SUPPLEMENT TO REPORT OF THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM, JUDICIAL CONFERENCE OF THE UNITED STATES ² (1969). It is interesting to note that the Committee did not base its recommendation on constitutional problems with the Allen charge, but considered use of the charge a matter of 'judicial policy'. *Id.* at 3. The version approved by the Judicial Conference reads: 5.4 Length of deliberations; deadlocked jury.

- (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
1. that in order to return a verdict, each juror must agree thereto;
 2. that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
 3. that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
 4. that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous;
 5. that each juror who finds himself in the minority shall reconsider his views in the light of the opinions of the majority, and each juror who finds himself in the majority shall give equal consideration to the views of the minority.
 6. that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

- (b) If it appears to the Court that the jury has been unable to agree, the Court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The Court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

SUPPLEMENT TO REPORT OF THE COMMITTEE ON THE OPERATION OF
THE JURY SYSTEM OF THE JUDICIAL CONFERENCE OF THE UNITED
STATES (1969).

2. In State v. Hobbs, 168 W.Va. 13, 282 S.E.2d 258, 272 (1981), the Court found that 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. The Court noted it is generally held that when a jury is unable to agree on a verdict, it is within the trial court's discretion to urge an earnest effort to agree, so long as the jurors are free to act without any form of coercion by the trial court. The trial court must carefully instruct the jurors not to give up their conscientious convictions merely for the sake of achieving a verdict, and must scrupulously avoid expressing any opinion as to how the case should be decided. The trial court decision to so instruct the jury must neither encourage disagreement nor coerce agreement, but should foster the jury's fair and open-minded debate.

The trial court instructed the jury:

It is the duty of the jury in this case to reach a verdict on the issues, if at all possible. In the event that this jury cannot reach a verdict, this court would have to declare a mistrial and the case would have to be tried again before another jury of twelve.

I see no reason why you jurors are not as competent, are not as able, nor as likely to decide the disputed issues of fact in this case and decide the right as the next jury that would be called to determine such issues. I do not want you to understand by what I say that you are going to be made to agree or that you are going to be kept out until you do agree. I do want you to understand that it is your duty to make an honest and sincere attempt to arrive at a verdict.

Jurors should not be obstinate. They should be open minded. They should listen to the arguments of others and talk matters over freely and fairly and make an honest effort, as fair minded men and women, to come to a conclusion without sacrificing his or her own convictions . . .

The trial court's instructions in Hobbs were found to be a fair and reasonable effort to stimulate continued deliberation. The jury had only deliberated one and one-half hours. The Court found no abuse of discretion in the trial court's decision that more deliberation was appropriate and to instruct the jury. The Court also found the instructions were not coercive in that the trial court did not threaten to keep the jury out until they reached a verdict, nor did the judge chastise them, but rather asked them not to be obstinate and pointed out the importance of the case and the problems resulting from a hung jury. The Court found the trial court did not go so far as to instruct the jury on the second or third elements of the much harsher "dynamite" or "Allen" charge, but that the trial court carefully urged the jurors to be open-minded, to conduct free and fair discussion of the issues, and to reach a decision only "so long as each juror can do so without sacrificing his or her own convictions." The Court found that the instructions in this case neither mentioned majority and minority positions nor urged the minority to reconsider. [**COMPARE** Hobbs with the language of the Fourth Circuit in Burgos: "regardless of what other specifics are included in an Allen charge given to a deadlocked jury, a district court must incorporate a specific reminder both to jurors in the minority and those in the majority that they reconsider their positions in light of the other side's views. Such an instruction applies equally to each juror, regardless of whether that person is alone in dissent or is part of a substantial majority. Failure to provide a sufficiently balanced charge will result in reversal." The Court in Burgos was primarily concerned with the lack of a specific charge to the minority and majority factions of the jury to reconsider their positions in light of the other side's views and to the implication that the jurors should reconsider their firmly held beliefs.]

3. “Where a jury has reported that it is unable to agree and the trial court addresses the jury urging a verdict, but does not use language the effect of which would be to cause the minority to yield its views for the purpose of reaching a verdict, the trial court’s remarks will not constitute reversible error.” Syl. pt. 2, State v. Johnson, 168 W.Va. 45, 282 S.E.2d 609 (1981).
4. In State v. McClanahan, 193 W.Va. 70, 454 S.E.2d 115 (1994), the Court had before it the issue of whether the giving of an “Allen” type instruction to the jury panel prior to trial constitutes reversible error. Prior to the jury being selected, while the trial court was indoctrinating the jury panel, the panel was instructed on the potential effect of its failure to reach a verdict. The Supreme Court found the giving of the challenged instruction should be a ground for reversing the jury’s verdict only if the defendant can show prejudice. In this case, the Court found it appeared that the trial court’s hung-jury instruction was given during pretrial indoctrination of the jury panel and was thus distant in time from the jury’s deliberations. There was also no evidence that the jury became deadlocked. After return of the verdict the jurors were polled, and nothing in their responses suggested any hesitation about the verdict or that coercion in any way affected it. The Court could not conclude that the defendant had shown the jury’s pretrial orientation was prejudicial to her.
5. In State v. Shabazz, 206 W.Va. 555, 526 S.E.2d 521 (1999), the Court determined that a magistrate’s communication to a jury, outside the presence of counsel for either party, that the jury could continue its deliberations or return the following day, might be considered similar to an “Allen charge.” The Court noted its general disapproval of such *sua sponte* communications, but found that the magistrate’s statements were essentially “administrative in nature”.

HOMICIDE
FIRST DEGREE MURDER
Murder by Any Willful, Deliberate and Premeditated Killing

“First Degree Murder” is committed when any person does willfully, intentionally, deliberately, premeditatedly, maliciously and unlawfully slay, kill and murder another person.¹

Therefore, in order to prove the commission of the offense of “First Degree Murder”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did willfully,
5. intentionally,²
6. deliberately,³
7. premeditatedly,⁴
8. maliciously⁵
9. and unlawfully
10. slay, kill and murder _____.

FOOTNOTES

¹ W.Va. Code, 61-2-1 (1991).

Carefully review State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995) before drafting instructions on first degree murder.

² See page 66 for definition of “intent”.

The distinctive element in willful, deliberate, and premeditated murder, not in murder of the second degree, is the specific intention to take life. State v. Hertzog, 55 W.Va. 74, 46 S.E. 792 (1904); State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982).

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

³ See page 69 for definition of “deliberation”.

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

⁴ See page 70 for definition of “premeditation”.

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

⁵ See page 73 for definition of “malice”.

State v. Saunders, 108 W.Va. 148, 150 S.E. 519 (1929); State v. Slonaker, 167 W.Va. 97, 280 S.E.2d 212 (1981); State v. Bongalis, 180 W.Va. 584, 378 S.E.2d 449 (1989).

HOMICIDE
FIRST DEGREE MURDER
Murder by Any Willful, Deliberate and Premeditated Killing
Intent

To constitute “First Degree Murder”, it is not necessary that an intention to kill exist for any particular length of time prior to the actual killing. It is only necessary that such intention come into existence for the first time at the time of the killing or at any previous time thereto. ¹

[This instruction is merely intended to convey the notion that it is possible for deliberation and premeditation to precede the formation of the actual intent to kill. It refers primarily to the intention to kill not existing for any particular time and arising at the moment of the killing. This means the specific intent to kill and is to be distinguished from the elements of deliberation and premeditation which are the state of mind conveying the characteristics of reflection.] ²

FOOTNOTES

¹ This instruction [the first paragraph] is adequate when supplemented with instructions which accurately define the other degrees of homicide. State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982).

² State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982).

Carefully review State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995) before offering this instruction on intent.

In Guthrie, *supra*, the Court found “[a]lthough we approved the jury instruction from State v. Clifford, 59 W.Va. 1, 52 S.E. 981 (1906), that ‘it is only necessary that the intention to kill should have come into existence for the first time at the time of the killing’ in Hatfield [*supra*], Justice Miller explained this instruction was merely intended to convey the notion that it is possible for deliberation and premeditation to precede the formation of the actual intent to kill. Justice Miller further stated:

‘Here, the Clifford instruction refers primarily to the intention to kill not existing for any particular time and arising at the moment of the killing. This means the specific intent to kill and is to be distinguished from the elements of deliberation and premeditation which are the state of mind conveying the characteristics of reflection.’ Hatfield, 169 W.Va. at 201, 286 S.E.2d at 409.

This is the meaning of the so-called Clifford instruction and, when it is given, its significance should be explained to the jury.

COMMENTS

1. The element which distinguishes willful, deliberate, and premeditated murder from murder of the second degree is the specific intention to take life. State v. Hertzog, 55 W.Va. 74, 46 S.E. 792 (1904); State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982).

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

In State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994), the Court noted that State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982), said that the concept of malice is often used as a substitute for specific intent to kill or an intentional killing, and had concluded that the intent to kill or malice is a required element of both first and second degree murder but the distinguishing feature for first degree murder is the existence of premeditation and deliberation. Hatfield, 169 W.Va. 191, 286 S.E.2d at 407-08.

2. The doctrine of transferred intent can be described by stating that when one party shoots at another with the intent to kill, and accidentally kills a third party, the same intent will be transferred to the killing of the third party. Syl. pt. 8, State v. Meadows, 18 W.Va. 658 (1881). State v. Daniel, 182 W.Va. 643, 391 S.E.2d 90 (1990). See also, State v. Hall, 174 W.Va. 599, 328 S.E.2d 206, 209 n.2 (1985); State v. Currey, 133 W.Va. 676, 57 S.E.2d 718 (1950).

3. The doctrine of transferred intent provided that where a person intends to kill or injure someone, but in the course of attempting to commit the crime accidentally injures or kills a third party, the defendant's criminal intent will be transferred to the third party. Syl. pt. 6, State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991).

In Julius, *supra*, at 11, the Court found even though the defendant did not intend to hurt Joseph Vance, under the doctrine of transferred intent, he may be charged and convicted of malicious assault.

**HOMICIDE
FIRST DEGREE MURDER
Murder by Any Willful, Deliberate and Premeditated Killing
Deliberation**

To deliberate is to reflect, with a view to making a choice. If a person reflects even for a moment before he acts it is sufficient deliberation. ¹

FOOTNOTE

- ¹ State v. Dodds, 54 W.Va. 289, 46 S.E. 228 (1903); footnote 6, State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982).

Carefully review State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995) before offering an instruction on deliberation.

COMMENT

1. In State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996), the Court, in discussing the appellant's claim that the indictment was insufficient due to the omission of the word "premeditation", stated that "[u]nder West Virginia law, the terms 'deliberate' and 'premeditate' are synonymous. As early as seventy-eight years ago, this Court stated in Syllabus Point 3, in part, of State v. Worley, 82 W.Va. 350, 96 S.E. 56 (1918), that '[t]he element of premeditation is comprehended in the term deliberate, . . . the words, deliberate and premeditate, being employed in the statute as synonymous terms.' (Emphasis in original). In West Virginia, deliberation means the defendant considered the taking of another's life while in a cool and deliberate state of mind. See State v. Guthrie, 194 W.Va. 657, 674-75, 461 S.E.2d 163, 180-181 (1995). It is 'deliberation' that separates first degree murder from second degree murder."

HOMICIDE
FIRST DEGREE MURDER
Murder by Any Willful, Deliberate and Premeditated Killing
Premeditation

The Court instructs the jury that “First Degree Murder” consists of an intentional, deliberate and premeditated killing which means that the killing is done after a period of time for prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ, and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for “First Degree Murder”. ¹

FOOTNOTE

- ¹ State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982).

COMMENT

1. In State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995), the defendant contended on appeal that the instructions were inadequate and failed to inform the jury of the difference between first and second degree murder. In particular, the defendant contended the instructions regarding the elements of first degree murder were improper because the terms wilful, deliberate, and premeditated were equated with a mere intent to kill.

In Guthrie, the jury was instructed that in order to find the defendant guilty of murder it had to find five elements beyond a reasonable doubt: “The Court further instructs the jury that murder in the first degree is when one person kills another person unlawfully, willfully, maliciously, deliberately and premeditatedly[.]” The trial court then gave three instructions in an effort to define the terms. State’s Instruction No. 8, commonly referred to as the Clifford instruction [State v. Clifford, 59 W.Va. 1, 52 S.E. 981 (1906)], stated:

“The Court instructs the jury that to constitute a willful, deliberate and premeditated killing, it is not necessary that the intention to kill should exist for any particular length of time prior to the actual killing; it is only necessary that such intention should have come into existence for the first time at the time of such killing, or at any time previously.”

State’s Instruction No. 10 stated: “The Court instructs the jury that in order to constitute a ‘premeditated’ murder an intent to kill need exist only for an instant.”

State’s Instruction No. 12 stated: “The Court instructs the jury that what is meant by the language willful, deliberate and premeditated is that the killing be intentional.” The Supreme Court noted that State’s Instruction Nos. 10 and 12 are commonly referred to as Schrader instructions [State v. Schrader, 172 W.Va. 1, 302 S.E.2d 70 (1982)].

The Court noted that the Schrader instructions fail to adequately inform the jury of the difference between first and second degree murder. The Court had particular concern with the lack of guidance to the jury as to what constitutes premeditation and the manner in which the instructions infused premeditation with the intent to kill.

The Court found the Schrader definition of premeditation and deliberation was confusing, if not meaningless. The Court found to allow the State to prove premeditation and deliberation by only showing that the intention came “into existence for the first time at the time of such killing” completely eliminates the distinction between first and second degree murder.

The Court found first degree murder requires an opportunity for some reflection on the intention to kill after it is formed. The accused must kill purposely after contemplating the intent to kill. The Court concluded that Schrader’s notion of instantaneous premeditation and momentary deliberation is not satisfactory to prove first degree murder. The Court concluded that language in Schrader equating premeditation with the formation of the intent to kill virtually eliminates the distinction between first and second degree murder. To the extent Schrader is inconsistent with the decision in Guthrie, it was overruled.

The Court offered the above instruction found in footnote 7 of Hatfield as an acceptable instruction defining premeditation. The instruction was paraphrased from 2 Devitt and Blackmar, Federal Jury Practice and Instructions, § 41.03, at 214.

HOMICIDE
FIRST DEGREE MURDER
Murder by Any Willful, Deliberate and Premeditated Killing
Malice

Malice appears when the circumstances show such a reckless disregard for human life as necessarily to include a formed design against the life of a person slain. ¹

“Malice” is defined as an action flowing from a wicked and corrupt motive, a thing done with wrongful intent, under circumstances as carry in them the plain indication of a heart heedless of social duty and fatally bent on mischief. ²

It is not essential that malice exist for any length of time before the killing. It is sufficient if malice springs into the mind before the accused did the killing. ³

Malice is a species of criminal intent ⁴ and must be shown to exist against the deceased in a homicide case. ⁵

FOOTNOTES

¹ State v. Saunders, 108 W.Va. 148, 150 S.E. 519 (1929).

² (“a thing done *malo animo*”) State v. Douglass, 28 W.Va. 297, 299 (1886); State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219, 223 (1978); State v. Bongalis, 180 W.Va. 584, 378 S.E.2d 449 (1989).

³ Syl. pt. 2, State v. Slonaker, 167 W.Va. 97, 280 S.E.2d 212 (1981).

⁴ Is this appropriate to put in the instruction? See State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994).

⁵ State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994). The one exception may be a transferred intent homicide. See footnote 7, Jenkins.

COMMENTS

1. An instruction in a first degree murder case that informs the jury that malice need not be shown on the part of the defendant against the deceased is erroneous. Syl. pt. 4, State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994).

2. In State v. Mullins, 193 W.Va. 315, 456 S.E.2d 42 (1995) a portion of the instruction on malice given to the jury read as follows:

Malice is not confined to ill will toward any one or more particular persons, but malice is every evil design in general, and by that is meant that the fact has been attended by such circumstances as are ordinary symptoms of a wicked, depraved and malignant spirit and carry with them the plain indications of a heart, regardless of social duty and fatally bent upon mischief.

The Appellant argued that this instruction was erroneous and was like the instruction condemned in State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994). The instruction rejected by the Jenkins court began: “The Court instructs the jury that to convict one of murder, it is not necessary that malice should exist in the heart of the defendant, . . . against the deceased.” The Mullins court found no reversible error in the trial court’s instructions regarding malice.

3. In State v. Garrett, 195 W.Va. 630, 466 S.E.2d 481 (1995), the appellant contended the trial court committed reversible error in reading to the jury the instruction on malice. The Court found that defense counsel did not object to the instruction and indicated his approval of it. The Court found the issue was not preserved for appellate review.

The instruction as stated in footnote 20 reads as follows:

The word malice as used in these instructions is used in a technical sense. It may be either expressed or implied, and it includes not only anger, hatred and revenge, but other unjustifiable motives. It may be inferred or implied by you from all the evidence in this case.

If you find such inference is reasonable from the facts and circumstances in this case which have been proven to your satisfaction beyond all reasonable doubt, it may be inferred from any deliberate and cruel act done by the defendant without any reasonable provocation or excuse, however sudden.

Malice is not confined to ill will towards any one or more particular persons, but malice is every evil design in general. And by it is meant that the fact has been attended by such circumstances as are ordinarily symptoms of a wicked, depraved and malignant spirit and carry with them a plain indication of a heart, regardless of social duty, fatally bent upon mischief.

It is not necessary that malice must have existed for any particular length of time and it may first come into existence at the time of the act or at any previous time.

Although in the text of the opinion, the Court found the issue was not preserved for appellate review, the Court noted in footnote 21 that the thrust of the appellant's argument was that the malice instruction was overly broad in that it did not require the jury to find that malice must be shown against the victim. Instead, the appellant contended, the jury was instructed that malice may be inferred from any deliberate and cruel act done by the appellant, without linking such act to any act or person involved in the murder at issue. In syl. pt 4 of State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994), the Court held that an instruction in a first degree murder case that informs the jury that malice need not be shown on the part of the defendant against the deceased is erroneous.

The Court went on to find that upon review of the entire instruction, which had been previously approved in State v. Bongalis, 180 W.Va. 584, 588 n.1, 378 S.E.2d 449, 453 n.1 (1989), the jury was specifically instructed that malice "may be inferred or implied by you from all of the evidence in this case if you find such inference is reasonable from facts and circumstances in this case which have been proven to your satisfaction beyond all reasonable doubt[.]" The Court stated in the footnote that this instruction sufficiently required the jury to find that malice must be shown by the appellant against the victim in this case.

HOMICIDE
FIRST DEGREE MURDER
Murder by Any Willful, Deliberate and Premeditated Killing
Inference of Malice from Intentional Use of a Deadly Weapon¹

The Court instructs the jury that malice may be inferred from the defendant's intentional use of a deadly weapon under circumstances which you believe do not afford the defendant excuse, justification or provocation for his conduct.

You are prohibited from finding any inference of malice from the use of a weapon unless you are satisfied that the State of West Virginia has proven beyond a reasonable doubt that the defendant did in fact use a deadly weapon. If the State has proven beyond a reasonable doubt that the defendant intentionally used a deadly weapon, then you may find the existence of malice from the use of such weapon and other surrounding circumstances, unless there are explanatory or mitigating circumstances surrounding the case which you believe afford the defendant excuse, justification or provocation for his conduct. If you believe that there was legal justification, excuse or provocation for the defendant's conduct, you may not infer malice from the use of a deadly weapon. If you have found there was legal justification, excuse or provocation for the defendant's conduct, the State must prove malice beyond a reasonable doubt independently and without the aid of the inference. You are not obliged to find, however, and you may not find the defendant guilty unless you are satisfied that the State has proven the element of malice beyond a reasonable doubt.²

FOOTNOTES

¹ An "inference" of malice instruction is not required but is entirely a discretionary decision of the trial court. Once a trial court decides to give such an instruction, the instruction must be complete and fair to both sides and any inference the jury draws should result from the reasoning process of the jury and not merely from the trial court calling a permissive inference to the jury's attention. State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996).

² If requested by a defendant, the trial court must instruct the jury that the defendant has no obligation to offer the evidence on the subject and the jury may not draw any inference from the defendant's silence. State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996).

In Miller, the Court found “the reach of Jenkins [State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994)] can be limited to three salient points: (a) The use of a deadly weapon does not alone support an inference of “premeditation and deliberation”, State v. Jenkins, 191 W.Va. at 93, 443 S.E.2d at 250, and, therefore, it is erroneous to instruct the jury that intent, wilfulness, deliberation and premeditation may be inferred from the use of a deadly weapon “where there is evidence that the defendant’s actions were based on some legal excuse, justification, or provocation.” 191 W.Va. at 95, 443 S.E.2d at 252; (b) “[a]n instruction which informs the jury that it may find the defendant guilty of first degree murder if it finds that he used a deadly weapon to kill the deceased unconstitutionally shifts the burden of proof.” Syl. pt. 8, Jenkins; and (c) when an impermissible burden-shifting instruction is given, the error likely is not to be harmless. State v. Jenkins, 191 W.Va. at 98-99, 443 S.E.2d at 255-56.”

In Miller, State’s instruction number 2, given by the trial court, provided:

The Court instructs the jury that in a prosecution for murder, if the State proves beyond a reasonable doubt that the defendant, without lawful justification, excuse or provocation, fired a deadly weapon in the direction where a person was located then from such circumstances it may be inferred that the defendant acted with malice and the intent to kill.

The appellant contended that permitting a jury to infer intent to kill and malice when there is evidence of a legal excuse, justification, or provocation conflicts with the holding in Jenkins. The Court found the instruction was consistent with Jenkins and in no way approximated the burden-shifting instruction found in Jenkins for two reasons: first, the inference went only to malice and intent to kill, not to premeditation and deliberation; and second, the inference was a permissible one, not a conclusive one.

COMMENTS

1. Malice and intent could be inferred by the jury from the defendant’s use of a deadly weapon, under circumstances which they did not believe afforded him excuse, justification or provocation for his conduct. State v. Bowles, 117 W.Va. 217, 221, 185 S.E. 205, 207 (1936); State v. Boggs, 129 W.Va. 603, 42 S.E.2d 1 (1946); State v. Bragg, 140 W.Va. 585, 87 S.E.2d 689 (1955); State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990).

“In a homicide trial, malice and intent may be inferred by the jury from the defendant’s use of a deadly weapon, under circumstances which the jury does not believe afforded the defendant excuse, justification or provocation for his conduct. Whether premeditation and deliberation may likewise be inferred, depends upon the

circumstances of the case.’ Point 2, Syllabus, State v. Bowles, 117 W.Va. 217,[185 S.E. 205 (1936)].” Syllabus, State v. Johnson, 142 W.Va. 284, 95 S.E.2d 409 (1956). Syl. pt. 5, State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994).

It is erroneous in a first degree murder case to instruct the jury that if the defendant killed the deceased with the use of a deadly weapon, then intent, malice, willfulness, deliberation, and premeditation may be inferred from that fact, where there is evidence that the defendant’s actions were based on some legal excuse, justification, or provocation. To the extent that the instruction in State v. Louk, 171 W.Va. 639, 643, 301 S.E.2d 596, 600 (1983) is contrary to these principles, it is disapproved. Syl. pt. 6, State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994).

Read State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994) carefully before offering a tailored instruction on inferences of elements of the offense from the defendant’s use of a deadly weapon. [“What is important to realize is that these cases (cases setting forth generally accepted rule in a murder case as to what inferences are permissible from the defendant’s use of a deadly weapon) are allowing an inference of malice and intent from the use of a deadly weapon so long as the instruction is qualified by language that informs the jury that this may be done if the evidence does not show that the defendant had an excuse, justification, or provocation.”] Jenkins, 191 W.Va. 87, 443 S.E.2d at 251.

In State v. Bradshaw, 193 W.Va. 519, 457 S.E.2d 456 (1995), the appellant contended the trial court, over his objection, improperly gave the following jury instruction on malice and intent:

The Court instructs the jury that malice and intent may be inferred from the defendant’s use of a deadly weapon, under circumstances which you believe do not afford the defendant excuse, justification or provocation for his conduct.

Where it is shown that the defendant used a deadly weapon in the commission of a homicide, then you may find the existence of malice from the use of such weapon and other surrounding circumstances, unless there are explanatory or mitigating circumstances surrounding the case which you believe affords the defendant excuse, justification or provocation for his conduct. You

are not obliged to find, however, and you may not find the defendant guilty, unless you are satisfied that the State has established the element of malice beyond a reasonable doubt.

Relying on State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994), the appellant contended this instruction suggested to the jury that malice and intent could be inferred by the use of a weapon regardless of whether there were justifications for a defendant's use of a weapon. Applying State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994), the Bradshaw Court found the instruction clearly indicated the jury may not infer malice from the use of a deadly weapon where there is excuse or justification. See Bradshaw for further discussion.

2. "Malice may be inferred from the intentional use of a deadly weapon; however, where the State's own evidence demonstrates circumstances affirmatively showing an absence of malice which would make an inference of malice from the use of a deadly weapon alone improper, a conviction of first or second degree murder cannot be upheld." Syl. pt. 2, State v. Brant, 162 W.Va. 762, 252 S.E.2d 901 (1979).
3. "A jury instruction which infers malice and deliberation from the intentional use of a deadly weapon does not violate a West Virginia citizen's constitutional right to keep and bear arms." State v. Daniel, 182 W.Va. 643, 391 S.E.2d 90 (1990).
4. "Where a defendant is the victim of an unprovoked assault and in a sudden heat of passion uses a deadly weapon and kills the aggressor, he cannot be found guilty of murder where there is no proof of malice except the use of a deadly weapon." Syl. pt. 2, State v. Kirtley, 162 W.Va. 249, 252 S.E.2d 374 (1978); Syl. pt. 3, State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994).
5. In State ex rel. Bailey v. Legursky, 200 W.Va. 770, 490 S.E.2d 858 (1997), the trial court denied the appellant habeas corpus relief with regard to his conviction of first degree murder without a recommendation of mercy. The order of the circuit court was affirmed. The Court noted in footnote 1, in part, that:

. . . [T]he appellant asserts that State's instruction number 5, concerning the use of a deadly weapon in this case, should have been tempered by language to the effect that the appellant claims

to have been under the influence of alcohol and drugs at the time of the shooting. As syllabus point 6 of State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994) states in part:

It is erroneous in a first degree murder case to instruct the jury that if the defendant killed the deceased with the use of a deadly weapon, then intent, malice, willfulness, deliberation, and premeditation may be inferred from that fact, where there is evidence that the defendant's actions were based on some legal excuse, justification, or provocation.

Nevertheless, considering State's instruction number 5, which stated that "[t]he Court instructs the jury that malice, wilfulness, and deliberation, which are elements of the crime of first degree murder, may be inferred from the intentional use of a deadly weapon in the commission of said offense," the circuit court during the habeas proceeding, referring to other jury instructions, found that the jury was "properly and fully instructed on his diminished capacity defense as excuse or justification for commission of the act."

In particular, State's instruction no. 6, given at trial, allowed the jury to consider the appellant's evidence of intoxication in connection with the evidence of the State. As this court held in syllabus point 6 of State v. Milam, 159 W.Va. 691, 226 S.E.2d 433 (1976):

"When instructions are read as a whole and adequately advise the jury of all necessary elements for their consideration, the fact that a single instruction is incomplete or lacks a particular element will not constitute grounds for disturbing a jury verdict."

6. In State v. Browning, 199 W.Va. 417, 485 S.E.2d 1 (1997), the defendant was convicted of first-degree murder with mercy and shooting at a person in a public street. On appeal, she contended the trial court erred in instructing the jury that it could infer malice and intent from the use of a deadly weapon. The Court instructed the jury that:

The Court instructs the jury that in a prosecution for murder, if the State proves beyond a reasonable doubt that the defendant, without lawful justification, excuse or provocation, shot the deceased with a firearm, then from such circumstances it may be inferred that the defendant acted with malice and the intent to kill.

The defendant noted that no instruction was given to the jury to the effect that such an inference was rebuttable, or that the jury could use other evidence to negate the inference of malice. The defendant argued that this instruction was an unconstitutional deviation from the requirement that the State prove every element of the crime beyond a reasonable doubt.

Syl. pt. 2 - In a murder case, an instruction that a jury may infer malice and the intent to kill where the State proves beyond a reasonable doubt that the defendant, without lawful justification, excuse or provocation, shot the victim with a firearm, does not unconstitutionally shift the burden of proof.

The Court found the trial court did not err in giving this instruction.

**HOMICIDE
FIRST DEGREE MURDER
Recommendation of Mercy**

If you find the defendant guilty of murder of the first degree, the Court must sentence the defendant to confinement in the penitentiary for life. The defendant will not be eligible for parole unless you add to your verdict a “recommendation of mercy”. A recommendation of mercy would mean the defendant could be eligible for parole consideration only after having served a minimum of 15 years.¹ Otherwise the defendant would be confined to the penitentiary for life without possibility of parole.²

Mere eligibility for parole in no way guarantees immediate parole after 15 years. Parole is given to inmates only after a thorough consideration of their records by the parole board.³

FOOTNOTES

¹ See W.Va. Code, 62-3-15 (1994).

² State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977).

³ State v. Headley, 168 W.Va. 138, 282 S.E.2d 872 (1981). State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994).

COMMENTS

1. “In a case in which a jury may return a verdict of guilty of murder of the first degree, it is the mandatory duty of the trial court, without request, to instruct the jury that to such verdict it may add a recommendation of mercy, that such recommendation would mean that the defendant could be eligible for parole consideration only after having served a minimum of ten years and that otherwise the defendant would be confined to the penitentiary for life without possibility of parole.” Syl. pt. 3, State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977).

“...Furthermore, the Court must explain that mere eligibility for parole in no way guarantees immediate parole after ten years and that parole is given to inmates only after a thorough consideration of their records by the parole board. See W.Va. Code, 62-12-13 (1981).” State v. Headley, 168 W.Va. 138, 282 S.E.2d 872, 875 (1981).

Eligibility for parole does not insure or entitle a prisoner to release from prison on parole. Lindsey, *supra*.

2. “It is the mandatory duty of the trial court to instruct the jury that it may add a recommendation of mercy to a verdict of murder of the first degree and such duty shall be fulfilled by the trial court over the objection of the defendant unless it affirmatively appears from the record that the defendant understands the consequences of his action.” Syl. pt. 3, State v. Kopa, 173 W.Va. 43, 311 S.E.2d 412 (1983).
3. “[T]he defendant is entitled to any instruction which correctly states the law and which he deems will present the proposition in its most favorable light.” State v. Wayne, 162 W.Va. 41, 245 S.E.2d 838, at 843 (1978). State v. Headley, *supra*, at 875.
4. “An instruction outlining factors which a jury should consider in determining whether to grant mercy in a first degree murder case should not be given.” Syl. pt. 1, State v. Miller, 178 W.Va. 618, 363 S.E.2d 504 (1987); Billotti v. Dodrill, 183 W.Va. 48, 394 S.E.2d 32 (1990).
5. In State v. LaRock, 196 W.Va. 294, 470 S.E.2d 613 (1996), the Court authorized the discretionary bifurcation of a first degree murder trial into a “guilt phase” and a “mercy phase”, as a matter of trial management procedure.

In State v. Rygh, 206 W.Va. 295, 524 S.E.2d 447 (1999), the Court noted that there was nothing in the bifurcation procedure established in LaRock which “alter[s] or expand[s] the scope of admissible prosecutorial evidence to include evidence that has been historically inadmissible in murder cases in this state.”

HOMICIDE
FIRST DEGREE MURDER
Murder by Lying in Wait

The Court instructs the jury that “Murder by Lying in Wait” is First Degree Murder.

The Court instructs the jury that “Murder by Lying in Wait” is committed when any person does lie in wait and intentionally, maliciously and unlawfully slay, kill and murder another person. ¹

The Court further instructs the jury that the term, “lying in wait” has both mental and physical elements. The “mental” element is the purpose or intent to kill or inflict bodily harm upon someone. The “physical” elements consist of waiting, watching and secrecy or concealment. In other words, in order to prove that a defendant was “lying in wait”, the prosecution must prove beyond a reasonable doubt that an accused was waiting and watching with concealment or secrecy for the purpose of or with the intent to kill or inflict bodily harm upon a person. ²

Therefore, in order to prove the commission of the offense of “First Degree Murder by Lying in Wait”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did lie in wait, and
5. unlawfully,
6. intentionally ³
7. and maliciously ⁴
8. slay, kill and murder _____.

FOOTNOTES

- ¹ W.Va. Code, 61-2-1 (1991).
- ² Syllabus Point 1, State v. Walker, 181 W.Va. 162, 381 S.E.2d 277 (1989), *citing* Syllabus Point 2, State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987).
- ³ See page 69 for definition of “intent”.
- ⁴ See page 73 for definition of “malice”.

COMMENTS

1. In State v. Walker, *supra*, the jury sent out a question during deliberations regarding the amount of time required to formulate premeditation. Noting that the jury’s inquiry demonstrated confusion as to the elements of a prosecution for a “lying-in-wait” killing, the Court noted, “[i]f anything may be inferred from the jury’s question concerning premeditation, it is that the jury was unclear as to the elements of murder perpetrated by lying in wait, the only form of first degree murder for which it was instructed. *Premeditation, per se, is not an element of murder by lying in wait.* Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987).” [emphasis added].
2. “As to the first two categories, this court recognized in State v. Abbott, 8 W.Va. 741 (1875), that the term ‘murder by poison, lying in wait, imprisonment, starving’ does not require that premeditation or a specific intent to kill has to be shown, but to elevate the homicide to first degree murder a killing with malice must be proved and one of the four enumerated acts must be established: ‘If it be proved that the killing was of such a character that, under ordinary circumstances, it would have been murder at common law, and the fact of lying in wait exist, that fact will make it a case of murder in the first degree. [8 W.Va. at 770-71].’” State v. Sims, 162 W.Va. 212, 248 S.E.2d 834, 840 (1978).

Abbott relied in part on Commonwealth v. Jones, 28 Va. (1 Leigh) 598 (1829). Jones found cases of murder by poison, lying in wait, imprisonment, starving, torture or malicious whipping did not require proof of the defendant’s will, deliberation and premeditation.

3. “Where, in the prosecution of first degree murder by lying in wait, there is sufficient evidence before the trial court that the defendant was unaware that the principal in the first degree was preparing to kill or inflict bodily harm upon the victim, the trial court should also instruct the jury on the offense of second degree murder if the elements of that offense are present.” Syl. Pt. 4, State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987).

HOMICIDE
FIRST DEGREE MURDER
Murder by Poison

The Court instructs the jury that “Murder by Poison” is First Degree Murder. ¹

Therefore, in order to prove the commission of “Murder by Poison”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. unlawfully,
5. intentionally ²
6. and maliciously ³
7. poisoned ⁴
8. and killed _____ (name victim).

FOOTNOTES

¹ W.Va. Code, 61-2-1 (1991).

² “We express no view as to the intent requirement of the statutory grounds for first degree murder such as by poison, imprisonment and starving.” Footnote 4, State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219, 223 (1978).

³ See page 73 for definition of “malice”.

⁴ A substance is a “poison or other destructive thing” under W.Va. Code, 61-2-7 (attempt to kill or injure by poison) if the defendant knows or reasonably should know that in the quantity administered it will have a poisonous or destructive effect on the victim such that it may injure or kill. State v. Weaver, 181 W.Va. 274, 382 S.E.2d 327 (1989).

COMMENTS

1. In State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999), the Court addressed the appellant's conviction of murder by poison and noted that "the plain language of (§ 61-2-1) indicates that in order to elevate murder by poison to first degree murder, there must be both a murder, the unlawful killing of another with malice aforethought, *and* the act of the administration of poison. In other words, if the State proves that the killing was such that it would have been murder at common law, and the murder was accomplished by the administration of poison, *W.Va. Code* 61-2-1 elevates the common law murder to murder in the first degree."

The Court held in Syllabus Point 8 of Davis that, "[s]pecific intent to kill, premeditation and deliberation are not elements of the crime of first degree murder by means of poison pursuant to *W.Va. Code* 61-2-1 (1991). Rather, in order to sustain a conviction for first degree murder by poison pursuant to *W.Va. Code* 61-2-1, the State must prove that the accused committed the act of administration of poison unlawfully, willfully and intentionally for the purpose of or with the intent to kill, do serious bodily harm or that the accused's conduct evinced a depraved heart."

2. See, State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987); State v. Walker, 181 W.Va. 162, 381 S.E.2d 277 (1989); State v. Abbott, 8 W.Va. 741 (1875).

"As to the first two categories, this court recognized in State v. Abbott, 8 W.Va. 741, 770-72 (1875), that the term "murder by poison, lying in wait, imprisonment, starving" does not require that premeditation or a specific intent to kill has to be shown, but to elevate the homicide to first degree murder a killing with malice must be proved and one of the four enumerated acts must be established: 'If it be proved that the killing was of such a character that, under ordinary circumstances, it would have been murder at common law, and the fact of lying in wait exist, that fact will make it a case of murder in the first degree. [8 W.Va. at 770-71].'" State v. Sims, 162 W.Va. 212, 248 S.E.2d 834, 840 (1978).

Abbott relied in part on Commonwealth v. Jones, 28 Va. (1 Leigh) 598 (1829). Jones found cases of murder by poison, lying in wait, imprisonment, starving, torture or malicious whipping did not require proof of the defendant's will, deliberation and premeditation.

3. Poison may take the life of one or more not within the design of the person who lays the bait, and in such a case, the perpetrator is guilty of murder in the first degree without proof that the death was the ultimate result sought by the will, deliberation and premeditation of the party accused. Commonwealth v. Jones, 28 Va. (1 Leigh) 598 (1829).
4. "Where, in the prosecution of first degree murder by lying in wait, there is sufficient evidence before the trial court that the defendant was unaware that the principal in the first degree was preparing to kill or inflict bodily harm upon the victim, the trial court should also instruct the jury on the offense of second degree murder if the elements of that offense are present." Syl. pt. 4, State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987).

HOMICIDE
FIRST DEGREE MURDER
Murder by Imprisonment

The Court instructs the jury that “Murder by Imprisonment” is First Degree Murder. ¹

Therefore, in order to prove the commission of “Murder by Imprisonment”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. unlawfully,
5. intentionally ²
6. and maliciously ³
7. imprisoned ⁴
8. and killed _____ (name victim).

FOOTNOTES

¹ W.Va. Code, 61-2-1 (1991).

² “We express no view as to the intent requirement of the statutory grounds for first degree murder such as by poison, imprisonment and starving.” Footnote 4, State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219, 223 (1978).

³ See page 73 for definition of “malice”

⁴ Imprisonment, confinement or starvation may be with a view of reducing the victim to the necessity of yielding to some proposed condition, as well as a punishment for failure to obey without any clear intent to destroy life. Proof that death was intended is not necessary to convict. Commonwealth v. Jones, 28 Va. (1 Leigh) 598 (1829).

COMMENTS

1. See, State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987); State v. Walker, 181 W.Va. 162, 381 S.E.2d 277 (1989); State v. Abbott, 8 W.Va. 741 (1875).

“As to the first two categories, this court recognized in State v. Abbott, 8 W.Va. 741, 770-72 (1875), that the term ‘murder by poison, lying in wait, imprisonment, starving’ does not require that premeditation or a specific intent to kill has to be shown, but to elevate the homicide to first degree murder a killing with malice must be proved and one of the four enumerated acts must be established: ‘If it be proved that the killing was of such a character that, under ordinary circumstances, it would have been murder at common law, and the fact of lying in wait exist, that fact will make it a case of murder in the first degree. [8 W.Va. at 770-71].’” State v. Sims, 162 W.Va. 212, 248 S.E.2d 834, 840 (1978).

Abbott relied in part on Commonwealth v. Jones, 28 Va. (1 Leigh) 598 (1829). Jones found cases of murder by poison, lying in wait, imprisonment, starving, torture or malicious whipping did not require proof of the defendant’s will, deliberation and premeditation.

2. “Where, in the prosecution of first degree murder by lying in wait, there is sufficient evidence before the trial court that the defendant was unaware that the principal in the first degree was preparing to kill or inflict bodily harm upon the victim, the trial court should also instruct the jury on the offense of second degree murder if the elements of that offense are present.” Syl. pt. 4, State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987).
3. “*W. Va Code* enumerates three broad categories of homicide constituting first degree murder: (1) murder by poison, lying in wait, imprisonment, and starving; (2) by any wilful, deliberate and premeditated killing; and (3) in the commission of, or attempt to commit, *inter alia*, arson, sexual assault, robbery or burglary.” State v. Sims, 162 W.Va. 212, 221, 248 S.E.2d 834, 840 (1978).

HOMICIDE
FIRST DEGREE MURDER
Murder by Starving

The Court instructs the jury that “Murder by Starving” is First Degree Murder. ¹

Therefore, in order to prove the commission of “Murder by Starving”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following element:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. unlawfully,
5. intentionally ²
6. and maliciously ³
7. starved ⁴
8. and killed _____ (name victim).

FOOTNOTES

¹ W.Va. Code, 61-2-1 (1991).

² “We express no view as to the intent requirement of the statutory grounds for first degree murder such as by poison, imprisonment and starving.” Footnote 4, State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219 (1978).

³ See page 73 for definition of “malice”.

⁴ Imprisonment, confinement or starvation may be with a view of reducing the victim to the necessity of yielding to some proposed condition, as well as a punishment for the failure to obey without any clear intent to destroy life. Proof that death was intended is not necessary to convict. Commonwealth v. Jones, 28 Va. (1 Leigh) 598 (1829).

COMMENTS

1. See, State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987); State v. Walker, 181 W.Va. 162, 381 S.E.2d 277 (1989); State v. Abbott, 8 W.Va. 741 (1875).

“As to the first two categories, this court recognized in State v. Abbott, 8 W.Va. 741, 770-72 (1875), that the term ‘murder by poison, lying in wait, imprisonment, starving’ does not require that premeditation or a specific intent to kill has to be shown, but to elevate the homicide to first degree murder a killing with malice must be proved and one of the four enumerated acts must be established: ‘If it be proved that the killing was of such a character that, under ordinary circumstances, it would have been murder at common law, and the fact of lying in wait exist, that fact will make it a case of murder in the first degree. [8 W.Va. at 770-71].’” State v. Sims, 162 W.Va. 212, 248 S.E.2d 834, 840 (1978).

Abbott relied in part on Commonwealth v. Jones, 28 Va. (1 Leigh) 598 (1829). Jones found cases of murder by poison, lying in wait, imprisonment, starving, torture or malicious whipping did not require proof of the defendant’s will, deliberation and premeditation.

2. “Where, in the prosecution of first degree murder by lying in wait, there is sufficient evidence before the trial court that the defendant was unaware that the principal in the first degree was preparing to kill or inflict bodily harm upon the victim, the trial court should also instruct the jury on the offense of second degree murder if the elements of that offense are present.” Syl. pt. 4, State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987).
3. “*W. Va Code* enumerates three broad categories of homicide constituting first degree murder: (1) murder by poison, lying in wait, imprisonment, and starving; (2) by any wilful, deliberate and premeditated killing; and (3) in the commission of, or attempt to commit, *inter alia*, arson, sexual assault, robbery or burglary.” State v. Sims, 162 W.Va. 212, 221, 248 S.E.2d 834, 840 (1978).

HOMICIDE
FIRST DEGREE MURDER
Felony Murder

The Court instructs the jury that a death which occurs during the commission of 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 First Degree Murder. ¹ This type of murder is commonly known as “Felony Murder”, because the death has occurred during the commission of one of these felony offenses. ²

Therefore, in order to prove the commission of the offense of “First Degree Murder”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. participated in the commission of _____ ³
(list relevant enumerated felony offense)
5. and during the commission of the said _____,
6. the death of _____ resulted as a direct result of injuries received in
the commission of the _____ in which the defendant participated
therein.

FOOTNOTES

¹ W.Va. Code, 61-2-1 (1991).

² State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983); State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991); State v. Wade, 200 W.Va. 637, 490 S.E.2d 724 (1997); State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998).

³ See separate instruction on underlying felony *supra*. “Since the underlying felony is an essential element of felony murder, the jury must be instructed as to the elements which constitute the underlying felony.” Syl. Pt. 2, State v. Stacy, 181 W.Va. 736, 384 S.E.2d 347 (1989).

COMMENTS

1. To sustain a conviction of felony-murder, proof of the elements of malice, premeditation or specific intent to kill is not required. State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983); State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991).
2. “In a prosecution for first-degree murder, the State must submit jury instructions which distinguish between the two categories of first-degree murder -- willful, deliberate, and premeditated killing and felony-murder -- if, under the facts of the particular case, the jury can find the defendant guilty of either category of first-degree murder. When the State also proceeds against the defendant on the underlying felony, the verdict forms provided to the jury should also reflect the foregoing distinction so that, if a guilty verdict is returned, the theory of the case upon which the jury relied will be apparent.” Syl. pt. 9, State v. Giles, 183 W.Va. 237, 395 S.E.2d 481 (1990). Syl. pt. 1, State v. Walker, 188 W.Va. 661, 425 S.E.2d 616 (1992). Syl. pt. 5, State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996).

“However, the Giles decision contemplated a situation where the State did not elect between premeditated murder and felony murder, but offered a general jury instruction for first-degree murder that encompassed both theories[.] In this case, the State elected only to proceed on felony murder, not on premeditated murder[.]” State v. Walker, *supra* at 621.

The State need not elect whether it will proceed on premeditated murder or felony murder until the close of all evidence; however, a defendant may make a motion to force an earlier election if he can make a strong, particularized showing that he will be prejudiced by further delay in electing. Syl. pt. 2, State v. Walker, *supra*.

The granting of a motion to force the State to elect rests within the discretion of the trial court, and such a decision will not be reversed unless there is a clear abuse of discretion. Syl. pt. 3, State v. Walker, *supra*.

Here, the Court found the only thing the defendant was deprived of was a jury instruction concerning the lesser offenses included within a premeditated murder

indictment. The Court found, however, if the prosecutor can make a valid felony murder case, there is no error in the Court's giving only the felony murder charge to the jury.

3. See, State v. Ruggles, 183 W.Va. 58, 394 S.E.2d 42 (1990) for discussion of lesser included offenses of felony murder.
4. A person cannot be charged with felony-murder pursuant to *W.Va. Code*, 61-2-1 (1991) if the only death which occurred in the commission of the underlying felony was the suicide of a co-conspirator in the criminal enterprise. Syl. pt. 2, State ex rel. Painter v. Zakaib, 186 W.Va. 82, 411 S.E.2d 25 (1991).
5. In State v. Justice, 191 W.Va. 261, 445 S.E.2d 202 (1994), the Court found the trial court properly instructed the jury on the elements of felony murder. The instruction, set forth in footnote 1, provided:

Murder of the first degree is when one person, with intent to kill, kills another person feloniously, unlawfully, willfully, maliciously, deliberately and premeditatedly.

The Court instructs the jury that murder in the first degree is also committed if the homicide occurs accidentally or otherwise during the commission or the attempt to commit arson, sexual assault, robbery or burglary. In such cases, the State is not required to prove malice or premeditation or that the defendant had any specific intent to kill the victim. This crime is called felony murder.
6. In State v. Satterfield, 193 W.Va. 503, 457 S.E.2d 440 (1995), the appellant contended since the indictment did not reflect that the murder occurred during a robbery, it was error for the trial judge to read instructions regarding felony murder.

“An indictment which charges that the defendant feloniously, wilfully, maliciously, deliberately, premeditatedly and unlawfully did slay, kill and murder is sufficient to support a conviction for murder committed in the commission of, or attempt to commit arson, rape, robbery or burglary, it not being necessary, under *W.Va. Code*, 61-2-1, to set forth the manner or means by which the death of the deceased was caused.’ Syllabus Point 5, State v. Bragg, 160 W.Va. 455, 235 S.E.2d 466 (1977).” Syl. pt. 10, State v. Young, 173 W.Va. 1, 311 S.E.2d 118 (1983). Syl. pt. 4, State v. Satterfield, 193 W.Va. 503, 457 S.E.2d 440 (1995).

The Court found it was not error for the trial judge to read instructions regarding felony murder.

7. In State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996), the Court held that because the State indicted and tried the defendant on felony murder, there was no error in the circuit court's refusal to instruct the jury and provide verdict forms for second degree murder. The Court held that because of the State's decision to proceed solely on a felony murder theory, the defendant was not entitled to jury instructions on second degree murder because second degree murder is not a lesser included offense under a felony murder theory.
8. In State v. Wade, 200 W.Va. 637, 490 S.E.2d 724 (1997), the appellant was convicted of felony-murder with mercy. He contends the circuit court erred in refusing to instruct the jury regarding self-defense and provocation. The appellant also argued that the trial judge erred in refusing to instruct the jury on second-degree murder, voluntary manslaughter, and involuntary manslaughter as lesser included offenses of felony-murder. The Court found the circuit court properly denied the appellant's request for such instructions.

Syl. pt. 2 - Self-defense and provocation instructions are not available in response to a charge of felony-murder where the predicate felony is the delivery of a controlled substance.

Syl. pt. 4 - As a matter of law, second-degree murder, voluntary manslaughter, and involuntary manslaughter are not lesser included offenses of felony-murder.

After setting forth the elements of involuntary manslaughter, the Court noted they had previously indicated that involuntary manslaughter is not a lesser included offense to felony-murder in State v. Humphrey, 177 W.Va. 264, 270, 351 S.E.2d 613, 619 (1986). Moreover, the Court perceived a difference between felony-murder and involuntary manslaughter is found in the degree of the unlawful act in which the defendant is engaged at the time of the killing. The Court found that if the unlawful act is one of the felonies enumerated in *W.Va. Code*, 61-2-1 (1991) (Repl.Vol.

1992), then the defendant would be guilty of felony-murder. If, on the other hand, the defendant is engaged in an unlawful act other than those designated as predicates to felony-murder, then he or she would be guilty of involuntary manslaughter, so long as the killing was unintentional. Thus, the Court concluded that involuntary manslaughter is not a lesser included offense of felony-murder.

Evaluating the appellant's sufficiency of the evidence contention, the Court found that they could not say that the evidence was insufficient for the jury to find beyond a reasonable doubt that the offense of the delivery of a controlled substance had occurred, that the appellant had participated in such offense as a principal in the second degree, that a death had occurred and that the felony offense and the homicide were parts of one continuous transaction. The Court found the verdict was supported by the evidence.

9. In State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998), the Court held that the section of *W.Va. Code* 61-2-1 (1991) regarding murders occurring in the commission of felony offenses of manufacturing or delivering a controlled substance is also applicable in cases of overdoses of such substances. In Syllabus Point 3, the Court held:

“Pursuant to *W.Va. Code* 61-2-1 (1991), death resulting from an overdose of a controlled substance as defined in *W.Va. Code*, 60A-4-401 *et seq.* and occurring in the commission of or attempt to commit a felony offense of manufacturing or delivering such controlled substance, subjects the manufacturer or deliverer of the controlled substance to the felony murder rule.”

**HOMICIDE
FIRST DEGREE MURDER
Felony Murder
Proof of Underlying Felony**

The Court instructs the jury that in order to prove the commission of “Felony Murder”, the State of West Virginia must prove, beyond a reasonable doubt, that the defendant was engaged in the commission of (or the attempted commission of) the felony offense of _____ [state underlying felony].

The Court instructs the jury that in order to prove the commission of _____ [underlying felony], the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. [list elements of underlying felony] ¹

FOOTNOTE

- ¹ “Since the underlying felony is an essential element of felony-murder, the jury must be instructed as to the elements which constitute the underlying felony”. Syl. pt. 2, State v. Stacy, 181 W.Va. 736, 384 S.E.2d 347 (1989).

COMMENT

1. Where there is more than one underlying felony supporting a felony murder conviction and one of the underlying felonies is committed upon a separate and distinct victim who was actually murdered, that underlying felony conviction does not merge with the felony murder conviction for the purposes of double jeopardy. Syl. pt. 3, State v. Elliott, 186 W.Va. 361, 412 S.E.2d 762 (1991).

**HOMICIDE
FIRST DEGREE MURDER
Felony Murder
Accident**

The Court instructs the jury that 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 by “accident” during the commission of, or the attempt to commit, one of the enumerated felonies. ¹

FOOTNOTE

- ¹ Syl. pt. 7, State v. Sims, 162 W.Va. 212, 248 S.E.2d 834 (1978); Syl. pt. 1, State ex rel. Painter v. Zakaib, 186 W.Va. 82, 411 S.E.2d 25 (1991). However, a person cannot be charged with felony murder under § 61-2-1 if the only death which occurred in the commission of the underlying felony was the suicide of a co-conspirator in the criminal enterprise. Syl. Pt. 2, State ex rel. Painter v. Zakaib, *supra*.

**HOMICIDE
FIRST DEGREE MURDER
Felony Murder
Continuous Transaction**

The Court instructs the jury that 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. ¹

FOOTNOTE

- ¹ (As where the killing was done in flight from the scene of the crime to prevent detection or promote escape). State v. Wayne, 169 W.Va. 785, 289 S.E.2d 480 (1982); Syl. pt. 9, State v. Wade, 200 W.Va. 637, 490 S.E.2d 724 (1997).

HOMICIDE
FIRST DEGREE MURDER
Felony Murder
Attempted Commission of Underlying Felony

The Court instructs the jury that a death which occurs during the attempted commission of 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 First Degree Murder.¹ This type of murder is commonly known as “Felony Murder”, because the death has occurred during the commission of one of these felony offenses.

Therefore, in order to prove the commission of the offense of “First Degree Murder”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt², each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. attempted³ to participate in the commission of _____,⁴
(list relevant enumerated felony offense)
5. and during the attempted commission of the said _____,
6. the death of _____ resulted as a direct result of injuries received in
the attempted commission of the _____ in which the defendant
participated therein.

FOOTNOTES

¹ W.Va. Code, 61-2-1 (1991).

² State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983); State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991); State v. Wade, 200 W.Va. 637, 490 S.E.2d 724 (1997); State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998).

³ See page 107 for definition of “attempt”.

⁴ See separate instruction on underlying felony *supra*. “Since the underlying felony is an essential element of felony murder, the jury must be instructed as to the elements which constitute the underlying felony.” Syl. Pt. 2, State v. Stacy, 181 W.Va. 736, 384 S.E.2d 347 (1989).

COMMENTS

1. To sustain a conviction of felony-murder, proof of the elements of malice, premeditation or specific intent to kill is not required. State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983); State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991).
2. “In a prosecution for first-degree murder, the State must submit jury instructions which distinguish between the two categories of first-degree murder -- willful, deliberate, and premeditated killing and felony-murder -- if, under the facts of the particular case, the jury can find the defendant guilty of either category of first-degree murder. When the State also proceeds against the defendant on the underlying felony, the verdict forms provided to the jury should also reflect the foregoing distinction so that, if a guilty verdict is returned, the theory of the case upon which the jury relied will be apparent.” Syl. pt. 9, State v. Giles, 183 W.Va. 237, 395 S.E.2d 481 (1990). Syl. pt. 1, State v. Walker, 188 W.Va. 661, 425 S.E.2d 616 (1992). Syl. pt. 5, State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996).

“However, the Giles decision contemplated a situation where the State did not elect between premeditated murder and felony murder, but offered a general jury instruction for first-degree murder that encompassed both theories[.] In this case, the State elected only to proceed on felony murder, not on premeditated murder[.]” State v. Walker, *supra* at 621.

The State need not elect whether it will proceed on premeditated murder or felony murder until the close of all evidence; however, a defendant may make a motion to force an earlier election if he can make a strong, particularized showing that he will be prejudiced by further delay in electing. Syl. pt. 2, State v. Walker, *supra*.

The granting of a motion to force the State to elect rests within the discretion of the trial court, and such a decision will not be reversed unless there is a clear abuse of discretion. Syl. pt. 3, State v. Walker, *supra*.

Here, the Court found the only thing the defendant was deprived of was a jury instruction concerning the lesser offenses included within a premeditated murder

indictment. The Court found, however, if the prosecutor can make a valid felony murder case, there is no error in the court's giving only the felony murder charge to the jury.

3. See, State v. Ruggles, 183 W.Va. 58, 394 S.E.2d 42 (1990) for discussion of lesser included offenses of felony murder.
4. A person cannot be charged with felony-murder pursuant to *W.Va. Code*, 61-2-1 (1991) if the only death which occurred in the commission of the underlying felony was the suicide of a co-conspirator in the criminal enterprise. Syl. pt. 2, State ex rel. Painter v. Zakaib, 186 W.Va. 82, 411 S.E.2d 25 (1991).
5. In State v. Justice, 191 W.Va. 261, 445 S.E.2d 202 (1994), the Court found the trial court properly instructed the jury on the elements of felony murder. The instruction, set forth in footnote 1, provided:

Murder of the first degree is when one person, with intent to kill, kills another person feloniously, unlawfully, willfully, maliciously, deliberately and premeditatedly.

The Court instructs the jury that murder in the first degree is also committed if the homicide occurs accidentally or otherwise during the commission or the attempt to commit arson, sexual assault, robbery or burglary. In such cases, the State is not required to prove malice or premeditation or that the defendant had any specific intent to kill the victim. This crime is called felony murder.
6. In State v. Satterfield, 193 W.Va. 503, 457 S.E.2d 440 (1995), the appellant contended since the indictment did not reflect that the murder occurred during a robbery, it was error for the trial judge to read instructions regarding felony murder.

“An indictment which charges that the defendant feloniously, wilfully, maliciously, deliberately, premeditatedly and unlawfully did slay, kill and murder is sufficient to support a conviction for murder committed in the commission of, or attempt to commit arson, rape, robbery or burglary, it not being necessary, under *W.Va. Code*, 61-2-1, to set forth the manner or means by which the death of the deceased was caused.’ Syllabus Point 5, State v. Bragg, 160 W.Va. 455, 235 S.E.2d 466 (1977).” Syl. pt. 10, State v. Young, 173 W.Va. 1, 311 S.E.2d 118 (1983). Syl. pt. 4, State v. Satterfield, 193 W.Va. 503, 457 S.E.2d 440 (1995).

The Court found it was not error for the trial judge to read instructions regarding felony murder.

7. In State v. Hottle, 197 W.Va. 529, 476 S.E.2d 200 (1996), the Court held that because the State indicted and tried the defendant on felony murder, there was no error in the circuit court's refusal to instruct the jury and provide verdict forms for second degree murder. The Court held that because of the State's decision to proceed solely on a felony murder theory, the defendant was not entitled to jury instructions on second degree murder because second degree murder is not a lesser included offense under a felony murder theory.
8. In State v. Wade, 200 W.Va. 637, 490 S.E.2d 724 (1997), the appellant was convicted of felony-murder with mercy. He contends the circuit court erred in refusing to instruct the jury regarding self-defense and provocation. The appellant also argued that the trial judge erred in refusing to instruct the jury on second-degree murder, voluntary manslaughter, and involuntary manslaughter as lesser included offenses of felony-murder. The Court found the circuit court properly denied the appellant's request for such instructions.

Syl. pt. 2 - Self-defense and provocation instructions are not available in response to a charge of felony-murder where the predicate felony is the delivery of a controlled substance.

Syl. pt. 4 - As a matter of law, second-degree murder, voluntary manslaughter, and involuntary manslaughter are not lesser included offenses of felony-murder.

After setting forth the elements of involuntary manslaughter, the Court noted they had previously indicated that involuntary manslaughter is not a lesser included offense to felony-murder in State v. Humphrey, 177 W.Va. 264, 270, 351 S.E.2d 613, 619 (1986). Moreover, the Court perceived a difference between felony-murder and involuntary manslaughter is found in the degree of the unlawful act in which the defendant is engaged at the time of the killing. The Court found that if the unlawful act is one of the felonies enumerated in *W.Va. Code*, 61-2-1 (1991) (Repl.Vol.

1992), then the defendant would be guilty of felony-murder. If, on the other hand, the defendant is engaged in an unlawful act other than those designated as predicates to felony-murder, then he or she would be guilty of involuntary manslaughter, so long as the killing was unintentional. Thus, the Court concluded that involuntary manslaughter is not a lesser included offense of felony-murder.

Evaluating the appellant's sufficiency of the evidence contention, the Court found that they could not say that the evidence was insufficient for the jury to find beyond a reasonable doubt that the offense of the delivery of a controlled substance had occurred, that the appellant had participated in such offense as a principal in the second degree, that a death had occurred and that the felony offense and the homicide were parts of one continuous transaction. The Court found the verdict was supported by the evidence.

9. In State v. Rodoussakis, 204 W.Va. 58, 511 S.E.2d 469 (1998), the Court held that the section of *W.Va. Code* 61-2-1 (1991) regarding murders occurring in the commission of felony offenses of manufacturing or delivering a controlled substance is also applicable in cases of overdoses of such substances. In Syllabus Point 3, the Court held:

“Pursuant to *W.Va. Code* 61-2-1 (1991), death resulting from an overdose of a controlled substance as defined in *W.Va. Code* 60A-4-401 *et seq.* and occurring in the commission of or attempt to commit a felony offense of manufacturing or delivering such controlled substance, subjects the manufacturer or deliverer of the controlled substance to the felony murder rule.”

**HOMICIDE
FIRST DEGREE MURDER
Felony Murder
Definition of Attempt**

The Court instructs the jury that in order to constitute the crime of “attempt”, two requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime. ¹

FOOTNOTE

- ¹ Syl. pt. 2, State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219 (1978), *overruled on other grounds*, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995); State v. Burd, 187 W.Va. 415, 419 S.E.2d 676 (1991); Syl. pt. 4, State v. Mayo, 191 W.Va. 79, 443 S.E.2d 236 (1994).

COMMENT

1. Where formation of criminal intent is accompanied by preparation to commit the crime of murder and a direct overt and substantial act toward its perpetration, it constitutes the offense of attempted murder. Syl. pt. 2, State v. Burd, 187 W.Va. 415, 419 S.E.2d 676 (1991).

HOMICIDE SECOND DEGREE MURDER

“Second Degree Murder” is committed when any person does intentionally, maliciously and unlawfully slay, kill and murder another person. ¹

Therefore, in order to prove the commission of the offense of “Second Degree Murder”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did intentionally, ²
5. maliciously ³
6. and unlawfully
7. slay, kill and murder _____.

FOOTNOTES

¹ “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, is murder of the first degree. All other murder is murder of the second degree.” W.Va. Code, 61-2-1 (1991).

Carefully review State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995), before drafting instructions on second degree murder

State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987); State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982); State v. Allen, 131 W.Va 667, 49 S.E.2d 847 (1948).

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

³ See page 73 for definition of “malice”.

COMMENTS

1. A specific intention to kill is not essential to murder in the second degree. State v. Morrison, 49 W.Va. 210, 38 S.E. 481 (1901); State v. Beatty, 51 W.Va. 232, 41 S.E. 434 (1902) overruled on other grounds, State v. Chaney, 117 W.Va. 605, 186 S.E. 607 (1936); State v. Hertzog, 55 W.Va. 74, 46 S.E. 792 (1904).

The element distinguishing second degree murder from willful, deliberate and premeditated murder is the absence of specific intent to take life. State v. Hertzog, 55 W.Va. 74, 46 S.E. 792 (1904). *But see*, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Specific intent to kill is not an element of the crime of second degree murder, see, e.g. State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219, 223 (1978). A conviction for second degree murder cannot be sustained without proof beyond a reasonable doubt that the accused had the requisite criminal intent. In regard to second degree murder, the requisite criminal intent is the intent to do great bodily harm, or a criminal intent aimed at life, or the intent to commit a specific felony, or the intent to commit an act involving all the wickedness of a felony. State v. Haddox, 166 W.Va. 630, 276 S.E.2d 788 (1981), citing State v. Starkey, *supra*, and State v. Hedrick, 99 W.Va. 529, 130 S.E. 295 (1925).

In State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994), the Court noted that said that the concept of malice is often used as a substitute for specific intent to kill or an intentional killing, and had concluded that the intent to kill or malice is a required element of both first and second degree murder but the distinguishing feature for first degree murder is the existence of premeditation and deliberation. Hatfield, 169 W.Va. 191, 286 S.E.2d at 407-08.

2. “Where, in the prosecution of first degree murder by lying in wait, there is sufficient evidence before the trial court that the defendant was unaware that the principal in the first degree was preparing to kill or inflict bodily harm upon the victim, the trial court should also instruct the jury on the offense of second degree murder if the elements of that offense are present.” Syl. pt. 4, State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987).

HOMICIDE VOLUNTARY MANSLAUGHTER

“Voluntary Manslaughter” is committed when any person does intentionally, unlawfully and feloniously kills another person , without premeditation, deliberation or malice. ¹

Therefore, in order to prove the commission of the offense of “Voluntary Manslaughter”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did intentionally, ²
5. unlawfully
6. and feloniously
7. kill _____.

FOOTNOTES

¹ W.Va. Code, 61-2-4 (1994); State ex rel. Combs v. Boles, 151 W.Va. 194, 151 S.E.2d 115 (1966).

² See page 66 for definition of “intent”.

It is fundamental in West Virginia that voluntary manslaughter requires an intent to kill. State v. Wright, 162 W.Va. 332, 249 S.E.2d 519 (1978); State v. Barker, 128 W.Va. 744, 38 S.E.2d 346 (1946); State v. Foley, 131 W.Va. 326, 47 S.E.2d 40 (1948); State v. Reppert, 132 W.Va. 675, 52 S.E.2d 820 (1949); State v. Blizzard, 152 W.Va. 810, 166 S.E.2d 560 (1969). The court’s failure to include in its instructions that voluntary manslaughter requires a specific intent to kill is reversible error. State v. Hamrick, 160 W.Va. 673, 236 S.E.2d 247 (1977).

COMMENTS

1. “This Court has rather consistently defined voluntary manslaughter as a sudden, intentional killing upon gross provocation and in the heat of passion. See State v. Stalnaker, 167 W.Va. 225, 279 S.E.2d 416 (1981); State v. Duvall, 152 W.Va. 162,

160 S.E.2d 155 (1968); State v. Bowyer, 143 W.Va. 302, 101 S.E.2d 243 (1957); State v. Foley, 131 W.Va. 326, 47 S.E.2d 40 (1948); State v. Zannino, 129 W.Va. 775, 41 S.E.2d 641 (1947); State v. Barker, 128 W.Va. 744, 38 S.E.2d 346 (1946).” State v. Beegle, 188 W.Va. 681, 425 S.E.2d 823, 827 (1992).

2. The term “provocation”, as it is used to reduce murder to voluntary manslaughter, consists of certain types of acts committed against the defendant which would cause a reasonable man to kill. This means that the provocation is such that it would cause a reasonable person to lose control of himself, that is, act out of the heat of passion, and that he in fact did so. Footnote 7, State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219 (1978), citing State v. Clifford, 59 W.Va. 1, 52 S.E. 981 (1906), disapproved on other grounds, State v. Lawson, 128 W.Va. 136, 36 S.E.2d 26 (1945); State v. Michael, 74 W.Va. 3, 82 S.E. 1 (1914); State v. Galford, 87 W.Va. 358, 105 S.E. 237 (1920).
3. In State v. Smith, 198 W.Va. 441, 481 S.E.2d 747 (1996), the appellant was convicted of second degree murder. She contends on appeal, among other things, that the trial court erred in refusing to give instructions to the jury concerning self-defense and voluntary manslaughter. In that regard, the appellant contends the trial court erred in refusing to admit evidence concerning the victim’s prior acts of misconduct or violence toward the appellant or her children. In particular, she contends the trial court erred in refusing to allow the appellant’s expert to testify that, although the appellant did not meet the criteria of the battered woman syndrome, she feared the decedent. On the facts of this case where the victim was sleeping while the appellant held the rifle and the appellant’s son pulled the trigger, the Court was of the opinion that the circuit court did not commit error in refusing to instruct the jury on self-defense. The Court also held that the trial court did not abuse its discretion in refusing to instruct the jury upon voluntary manslaughter. The Court again noted that the victim was asleep at the time of the killing and that although the evidence indicated the victim struck the appellant earlier in the day, the record did not indicate that any physical altercation took place between the appellant and the victim the evening of the killing. The Court concluded the evidence did not warrant the giving of a voluntary manslaughter instruction.

4. In State v. McGuire, 200 W.Va. 824, 490 S.E.2d 912 (1997), the appellant was convicted of the voluntary manslaughter of her newborn daughter. The conviction was affirmed.

The appellant gave birth to a baby girl at her parent's home. Her parents were unaware of the pregnancy and of the birth. The appellant testified she believed the baby was stillborn, wrapped it in a towel and placed the baby in an operating woodstove. She subsequently retrieved the baby's severely burned body from the woodstove, wrapped the body in a plastic bag and placed the body in the trunk of her car. The appellant proceeded on to her college classes for the day. She consistently maintained the baby was dead at birth and described the baby as not moving and being blue in appearance. The baby's body was discovered by police and taken for an autopsy. After authorities learned from the autopsy that the baby was born alive, the appellant was arrested and charged with murder. At trial, the appellant contended she was not guilty by reason of insanity, she was not guilty of any offense greater than involuntary manslaughter because she believed the baby was dead when she placed her in the woodstove, or she was not guilty because the baby was, in fact, dead at birth.

The appellant contended the trial court erred in denying five jury instructions submitted by defense counsel. The appellant contends the trial court erred in rejecting the defense instructions which informed that the State had to establish beyond a reasonable doubt that there was a death of a human being, that the death occurred as a result of a criminal act, that to establish the death of a human being, the State must prove a live birth and informed of what factors are necessary for the State to prove the baby was born alive. The appellant contended that the issue of whether the baby was born alive was a contested issue at trial and the failure of the trial court to give any instruction in this respect was reversible error. The Court held that in light of the evidence introduced at trial demonstrating that the baby was alive when she was placed in the woodstove and was able to survive therein for five to fifteen minutes the trial court did not err by refusing to give the appellant's instruction. The Court found the testimony presented by the appellant's expert witness did not refute the cause of death in any way. The Court held the trial court did not abuse its

discretion when it rejected appellant's proposed instruction on what shall constitute a live birth as there was insufficient evidence for the jury to consider the issue.

The appellant also contended the trial court erred in refusing to give her proposed instructions regarding involuntary manslaughter. A lengthy instruction offered by the state advising the jury as to the elements of first and second degree murder and voluntary and involuntary manslaughter was given. A portion of the instruction stated that "in order to convict the defendant of the offense of involuntary manslaughter you must find from the evidence beyond a reasonable doubt each of the above stated essential elements [for first degree murder] except that the killing was unlawful but not feloniously, deliberate, premeditated, maliciously, or that it was intentional." The Court found that the instruction, while taking a backwards approach to describing the elements of involuntary manslaughter, sufficiently informed the jury that the appellant was guilty of involuntary manslaughter if the jury found she unlawfully, yet unintentionally, caused her newborn's death. The Court found that although a better approach would be for the trial court to affirmatively state the elements of each crime, the trial court did not abuse its discretion by accepting the way appellee worded the involuntary manslaughter instruction at issue. The Court held the trial court did not err by refusing appellant's instructions on involuntary manslaughter as it was covered in the charge and since the appellant's instructions represented incomplete statements of the law.

Appellant also contended that the trial court erred by finding there was sufficient evidence to support an instruction on voluntary manslaughter and that the instruction contains an inaccurate statement of the law. The state's instruction provided in relevant part: "In order to convict the defendant of the offense of voluntary manslaughter you must find from the evidence beyond a reasonable doubt each of the above stated essential elements [for first degree murder] except that the killing was not deliberate, premeditated, or maliciously, but that it was intentional." The appellant contended the trial court completely failed in this instruction to inform the jury on the elements of gross provocation and in the heat of passion. The Court found the trial court's exclusion of these factors did not warrant reversal under the facts of this case.

Syl. pt. 3 - Gross provocation and heat of passion are not essential elements of voluntary manslaughter, and, therefore, they need not be proven by evidence beyond a reasonable doubt. It is intent without malice, not heat of passion, which is the distinguishing feature of voluntary manslaughter.

Viewing the evidence in the light most favorable to the prosecution, the Court found there was sufficient evidence to support the jury's verdict of voluntary manslaughter.

5. See also State v. Boxley, 201 W.Va. 292, 496 S.E.2d 242 (1997), where the Court, citing McGuire, *supra*, held that the omission of the word "anger" in a voluntary manslaughter instruction did not constitute error.

HOMICIDE
VOLUNTARY MANSLAUGHTER
Intent as an Element

The Court instructs the jury that “Voluntary Manslaughter” requires a specific “intent” on the part of the defendant to kill another person. It is not necessary that this intention to kill exist for any particular length of time prior to the actual killing. It is only necessary that such intention come into existence for the first time at the time of the killing or at any previous time thereto.¹

FOOTNOTE

¹ See State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982).

It is fundamental in West Virginia that voluntary manslaughter requires an intent to kill. State v. Wright, 162 W.Va. 332, 249 S.E.2d 519 (1978). A trial court’s failure to include in its instructions that voluntary manslaughter requires a specific intent to kill is reversible error. State v. Hamrick, 160 W.Va. 673, 236 S.E.2d 247 (1977).

HOMICIDE
VOLUNTARY MANSLAUGHTER
Lack of Malice

The Court instructs the jury that in a prosecution for “Voluntary Manslaughter”, it is not necessary that the State of West Virginia prove the existence of malice. Malice is not an element of voluntary manslaughter. Thus, it is the element of malice which forms the critical distinction between Second Degree Murder and Voluntary Manslaughter. ¹

FOOTNOTE

¹ See State v. Kirtley, 162 W.Va. 249, 252 S.E.2d 374 (1978).

HOMICIDE INVOLUNTARY MANSLAUGHTER

“Involuntary Manslaughter”¹ is committed when a person, while engaged in an unlawful act, unintentionally causes the death of another, or where a person engaged in a lawful act, unlawfully [and with a reckless disregard of the safety of others]² causes the death of another.

To prove the commission of “Involuntary manslaughter”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. while engaged in an unlawful act
5. unintentionally
6. [and with a reckless disregard of the safety of others]²
7. caused the death of
8. _____ (deceased).

OR

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. while engaged in a lawful act,
5. unlawfully,
6. [and with a reckless disregard of the safety of others]²
7. caused the death of
8. _____ (deceased).

FOOTNOTES

¹ State v. Cobb, 166 W.Va. 65, 272 S.E.2d 467 (1980); Syl. pt. 7, State v. Barker, 128 W.Va. 744, 38 S.E.2d 346 (1946).

²

“and with reckless disregard of the safety of others”? See discussion of involuntary manslaughter as it relates to deaths resulting from the operation of a motor vehicle which follows below in this footnote.

In State v. Lawson, 128 W.Va. 136, 36 S.E.2d 26 (1945), the Court discussed the definition of involuntary manslaughter as it relates to deaths resulting from the operation of a motor vehicle. In Lawson, the Court noted that something more than ordinary negligence is required to sustain an involuntary manslaughter conviction. See also, State v. Hose, 187 W.Va. 429, 419 S.E.2d 690 (1992) and State v. Vollmer, 163 W.Va. 711, 259 S.E.2d 837 (1979). In State v. Hughes, 197 W.Va. 518, 476 S.E.2d 189 (1996), where the operation of a motor vehicle was not involved, the Court cites Hose, *supra*, for the proposition that “something more than ordinary negligence is required to sustain an involuntary manslaughter conviction” and Lawson, *supra*, for the proposition that reckless or wanton conduct of a nature calculated to cause injury to another should . . . be considered as acting in an unlawful manner, however lawful that act might have been if performed in a proper manner.

COMMENTS

1. “The giving of an instruction, at the instance of the State, which tells the jury ‘that involuntary manslaughter is where one person while engaged in an unlawful act, unintentionally causes the death of another person; or when a person engaged in a lawful act negligently causes the death of another person’ is error.” Syl. pt. 1, State v. Lawson, 128 W.Va. 136, 36 S.E.2d 26 (1945).

“To the extent only that they tend to hold that the crime of involuntary manslaughter may be committed in the performance of a lawful act by simple negligence, the cases of State v. Clifford, 59 W.Va. 1, 52 S.E. 981 (1906), and State v. Whitt, 96 W.Va. 268, 122 S.E. 742 (1924), are disapproved.” Syl. pt. 4, State v. Lawson, 128 W.Va. 136, 36 S.E.2d 26 (1945).

2. “An involuntary manslaughter charge arising from a death resulting from the operation of a motor vehicle requires something more than an act of ordinary negligence or the violation of a motor vehicle statute to sustain the conviction.” See also, State v. Lott, 170 W.Va. 65, 289 S.E.2d 739 (1982). Syl. pt. 1, State v. Vollmer, 163 W.Va. 711, 259 S.E.2d 837 (1979).

“Our negligent homicide statute, *W.Va. Code*, 17C-5-1, requires the driving of ‘[a] vehicle in reckless disregard of the safety of others,’ and this means that more than ordinary negligence is required. It is compatible with the involuntary manslaughter standard set in State v. Lawson, 128 W.Va. 136, 36 S.E.2d 26 (1945).” Syl. pt. 2, State v. Vollmer, 163 W.Va. 711, 259 S.E.2d 837 (1979).
3. Defendant was convicted of four counts of involuntary manslaughter and was found not guilty on the reckless driving charge. The charges arose out of a vehicle accident which resulted in the death of four people. The Court found the evidence supported the conviction (see case for facts) and that the apparent inconsistency of the verdicts did not constitute reversible error. State v. Hose, 187 W.Va. 429, 419 S.E.2d 690 (1992).
4. In State v. Hughes, 197 W.Va. 518, 476 S.E.2d 189 (1996), the Court examined the elements of involuntary manslaughter. It was noted that prior case law held that something more than ordinary negligence is required to sustain an involuntary manslaughter conviction and that “reckless or wanton conduct of a nature calculated to cause injury to another should . . . be considered as acting in an unlawful manner, however lawful that act might have been if performed in a proper manner.” State v. Hose, 187 W.Va. 429, 419 S.E.2d 690 (1992), quoting from State v. Lawson, 128 W.Va. 136, 147-48, 36 S.E.2d 26, 31-32 (1945). The Court held the State established that the appellant Hughes acted in an unlawful manner when he engaged in reckless conduct which caused injury to another and that thus there was sufficient evidence from which the jury could have concluded that the appellant was guilty of involuntary manslaughter.
5. See, State v. Ivey, 196 W.Va. 571, 474 S.E.2d 501 (1996).

6. In State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996), the appellant was indicted for the offense of involuntary manslaughter while driving a motor vehicle in an unlawful manner in violation of *W.Va. Code*, 61-2-5 (1923). He was convicted following a jury trial. At issue on appeal was whether the jury was properly instructed as to the defense of unconsciousness. The Court reversed, holding that without an adequate and complete explanation of the unconsciousness defense, the omission in the charge was likely to have created a grave miscarriage of justice.

The Court found that this case required them to harmonize a conflict between the defense of unconsciousness and that of insanity.

Syl. pt. 2 - Unconsciousness (or automatism) is not part of the insanity defense, but is a separate claim which may eliminate the voluntariness of a criminal act. The burden of proof on this issue, once raised by the defense, remains on the State to prove that the act was voluntary beyond a reasonable doubt.

Syl. pt. 3 - An instruction on the defense of unconsciousness is required when there is reasonable evidence that the defendant was unconscious at the time of the commission of the crime.

Syl. pt. 4 - If a defendant is sufficiently appraised and aware of a preexisting condition and previously experienced recurring episodes of loss of consciousness, e.g., epilepsy, then operating a vehicle or other potentially destructive implement, with knowledge of the potential danger, might well amount to reckless disregard for the safety of others. Therefore, the jury should be charged that even if it believes there is a reasonable doubt about the defendant's consciousness at the time of the event, the voluntary operation of a motor vehicle with knowledge of the potential for loss of consciousness can constitute reckless behavior.

7. In State v. McGuire, 200 W.Va. 824, 490 S.E.2d 912 (1997), the appellant was convicted of the voluntary manslaughter of her newborn daughter. The conviction was affirmed.

The appellant gave birth to a baby girl at her parent's home. Her parents were unaware of the pregnancy and of the birth. The appellant testified she believed the baby was stillborn, wrapped it in a towel and placed the baby in an operating woodstove. She subsequently retrieved the baby's severely burned body from the woodstove, wrapped the body in a plastic bag and placed the body in the trunk of her car. The appellant proceeded on to her college classes for the day. She consistently maintained the baby was dead at birth and described the baby as not moving and being blue in appearance. The baby's body was discovered by police and taken for an autopsy. After authorities learned from the autopsy that the baby was born alive, the appellant was arrested and charged with murder. At trial, the appellant contended she was not guilty by reason of insanity, she was not guilty of any offense greater than involuntary manslaughter because she believed the baby was dead when she placed her in the woodstove, or she was not guilty because the baby was, in fact, dead at birth.

The appellant contended the trial court erred in denying five jury instructions submitted by defense counsel. The appellant contends the trial court erred in rejecting the defense instructions which informed that the State had to establish beyond a reasonable doubt that there was a death of a human being, that the death occurred as a result of a criminal act, that to establish the death of a human being, the State must prove a live birth and informed of what factors are necessary for the State to prove the baby was born alive. The appellant contended that the issue of whether the baby was born alive was a contested issue at trial and the failure of the trial court to give any instruction in this respect was reversible error. The Court held that in light of the evidence introduced at trial demonstrating that the baby was alive when she was placed in the woodstove and was able to survive therein for five to fifteen minutes the trial court did not err by refusing to give the appellant's instruction. The Court found the testimony presented by the appellant's expert witness did not refute the cause of death in any way. The Court held the trial court did not abuse its discretion when it rejected appellant's proposed instruction on what shall constitute a live birth as there was insufficient evidence for the jury to consider the issue.

The appellant also contended the trial court erred in refusing to give her proposed instructions regarding involuntary manslaughter. A lengthy instruction offered by the state advising the jury as to the elements of first and second degree murder and voluntary and involuntary manslaughter was given. A portion of the instruction stated that “in order to convict the defendant of the offense of involuntary manslaughter you must find from the evidence beyond a reasonable doubt each of the above stated essential elements [for first degree murder] except that the killing was unlawful but not feloniously, deliberate, premeditated, maliciously, or that it was intentional.” The Court found that the instruction, while taking a backwards approach to describing the elements of involuntary manslaughter, sufficiently informed the jury that the appellant was guilty of involuntary manslaughter if the jury found she unlawfully, yet unintentionally, caused her newborn’s death. The Court found that although a better approach would be for the trial court to affirmatively state the elements of each crime, the trial court did not abuse its discretion by accepting the way appellee worded the involuntary manslaughter instruction at issue. The Court held the trial court did not err by refusing appellant’s instructions on involuntary manslaughter as it was covered in the charge and since the appellant’s instructions represented incomplete statements of the law.

Appellant also contended that the trial court erred by finding there was sufficient evidence to support an instruction on voluntary manslaughter and that the instruction contains an inaccurate statement of the law. The state’s instruction provided in relevant part: “In order to convict the defendant of the offense of voluntary manslaughter you must find from the evidence beyond a reasonable doubt each of the above stated essential elements [for first degree murder] except that the killing was not deliberate, premeditated, or maliciously, but that it was intentional.” The appellant contended the trial court completely failed in this instruction to inform the jury on the elements of gross provocation and in the heat of passion. The Court found the trial court’s exclusion of these factors did not warrant reversal under the facts of this case.

Syl. pt. 3 - Gross provocation and heat of passion are not essential “elements” of voluntary manslaughter, and, therefore, they need not be proven by evidence beyond a reasonable doubt. It is intent without malice, not heat of passion, which is the distinguishing feature of voluntary manslaughter.

Viewing the evidence in the light most favorable to the prosecution, the Court found there was sufficient evidence to support the Jury’s verdict of voluntary manslaughter.

8. In State v. Wade, 200 W.Va. 637, 490 S.E.2d 724 (1997), the appellant was convicted of felony-murder with mercy. He contends the circuit court erred in refusing to instruct the jury regarding self-defense and provocation. The appellant also argued that the trial judge erred in refusing to instruct the jury on second-degree murder, voluntary manslaughter, and involuntary manslaughter as lesser included offenses of felony-murder. The Court found the circuit Court properly denied the appellant’s request for such instructions.

Syl. pt. 2 - Self-defense and provocation instructions are not available in response to a charge of felony-murder where the predicate felony is the delivery of a controlled substance.

Syl. pt. 4 - As a matter of law, second-degree murder, voluntary manslaughter, and involuntary manslaughter are not lesser included offenses of felony-murder.

After setting forth the elements of involuntary manslaughter, the Court noted they had previously indicated that involuntary manslaughter is not a lesser included offense to felony-murder in State v. Humphrey, 177 W.Va. 264, 270, 351 S.E.2d 613, 619 (1986). Moreover, the Court perceived a difference between felony-murder and involuntary manslaughter is found in the degree of the unlawful act in which the defendant is engaged at the time of the killing. The Court found that if the unlawful act is one of the felonies enumerated in *W. Va. Code*, 61-2-1 (1991) (Repl.Vol. 1992), then the defendant would be guilty of felony-murder. If, on the other hand, the defendant is evaluating the appellant’s sufficiency of the evidence contention, the Court found that they could not say that the evidence was insufficient for the jury to find beyond a reasonable doubt that the offense of the delivery of a controlled

substance had occurred, that the appellant had participated in such offense as a principal in the second degree, that a death had occurred and that the felony offense and the homicide were parts of one continuous transaction. The Court found the verdict was supported by the evidence.

9. See also, State v. Davis, 205 W.Va. 569, 519 S.E.2d 852 (1999).

HOMICIDE
INVOLUNTARY MANSLAUGHTER
No Intent to Kill or Produce Death or Great Bodily Harm

The Court instructs the jury that the absence of an intention to kill or to commit any unlawful act which might reasonably produce death or great bodily harm is the distinguishing feature between Voluntary and Involuntary Manslaughter. ¹

FOOTNOTE

¹ State v. Weisengoff, 85 W.Va. 271, 101 S.E. 450 (1919).

 See State v. Hose, 187 W.Va. 429, 419 S.E.2d 690 (1992).

**HOMICIDE
INVOLUNTARY MANSLAUGHTER
Causation**

An essential element or ingredient of the crime of “Involuntary Manslaughter” is that the accused caused the unintentional death of the victim.¹

FOOTNOTE

¹ State v. Craig, 131 W.Va. 714, 51 S.E.2d 283, 290 (1948).

ROBBERY
ROBBERY IN THE FIRST DEGREE

“Robbery in the First Degree” is defined as when any person commits, or attempts to commit, robbery by either (1) committing violence to another 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. ¹

“Robbery” is defined as a felonious taking and carrying away of money, goods or other things of value from the person of another or in their presence, against their will, by force or putting in fear, and with the intent to permanently deprive such person of such property.²

Therefore, in order to prove the commission of the offense of “Robbery in the First Degree”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did
 - a. commit a robbery, (or)
 - b. attempt to commit a robbery
5. against _____, ³
6.
 - a. by committing violence against _____, (or)
 - b. by using the threat of deadly force by the presentment of a deadly weapon, to-wit: _____,
7. and by such action did remove (or attempt to remove) _____
(describe property with particularity ⁴) from _____,
8. with the intent to permanently deprive ⁵ _____ of _____
(property).

FOOTNOTES

- ¹ W.Va. Code, 61-2-12(a) (2000).
- ² "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. England, 180 W.Va. 342, 376 S.E.2d 548 (1988), citing Syl. Pt. 1, State v. Harless, 168 W.Va. 707, 285 S.E.2d 461 (1981); Young v. Boles, 343 F.2d 136 (4th Cir. W.Va. 1965).
- ³ "In the commission of robbery, the property must be taken by force and violence, not necessarily from the owner, but from any person in possession thereof whose right of possession is superior to that of the robber." Johnson v. Commonwealth, 215 Va. 495, 211 S.E.2d 71 (1975).
- ⁴ See Syllabus Point 5, State ex rel. Day v. Silver, 210 W.Va. 175, 556 S.E.2d 820 (2001) ("In order for an indictment for larceny to be sufficient in law, it must identify with specificity the particular items of property which are the subject of the charge by specifically describing said property, unless the property is incapable of identification as in cases involving fungible goods, United States currency, or comparable items.").
- ⁵ "*Animus furandi*, or the intent to steal or to feloniously deprive the owner permanently of his property, is an essential element in the crime of robbery." Syl. Pt. 2, State v. Plumley, 179 W.Va. 356, 368 S.E.2d 726 (1988), citing Syl. Pt. 2, State v. Hudson, 157 W.Va. 939, 206 S.E.2d 415 (1974).

COMMENTS

1. W.Va. Code, 61-2-12, the previous robbery statute, read in part as follows:

"If any person commits, or attempts to commit, robbery by partial strangulation or suffocation, or by striking or beating, or by other violence to the person, or by the threat of or presenting of firearms, or other deadly weapon or instrumentality whatsoever, he shall be guilty of a felony[.]"

Compare with the 2000 revision of the same section:

"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[.]"

Apart from re-designating the offense as “robbery in the first degree”, the 2000 revision removed the “threat...of firearms” provision from the section. As a practical measure, this amendment prohibits the state from prosecuting a defendant for robbery in the first degree for verbally indicating or gesturing to indicate the presence of a firearm, but not actually presenting the weapon. Under the revised section, a defendant must “use[] the threat of deadly force” by the *actual presentment* of a firearm or other deadly weapon.

The Comments included below were included in previous editions of this Manual, and address cases and issues concerning the prior enactment of § 61-2-12.

2. Defenses - Bona fide claim of right.

“A defendant may assert as a defense to a robbery or larceny charge, that he had a bona fide claim of ownership to the specific property stolen and, therefore, that he had no intent to steal. However, this defense is not available where the defendant took money or other property, to which he did not have a specific ownership claim, in satisfaction of a debt.” Syl. pt. 2, State v. Winston, 170 W.Va. 555, 295 S.E.2d 46 (1982).

3. Enactment of robbery statute did not redefine the elements of robbery established by the common law. State v. Collins, 174 W.Va. 767, 329 S.E.2d 839 (1984).

4. In State v. Satterfield, 193 W.Va. 503, 457 S.E.2d 440 (1995), the appellant contended the trial judge erred in granting an instruction defining the elements of robbery without specifically stating that the stolen goods were “of value”. The Court reasoned that force or fear is the main ingredient of robbery and value need not be specifically set forth in the instructions. The Court found the trial judge adequately instructed the jury since he specifically stated in the instructions that the jury must find that the State proved that a wallet or a .22 rifle was taken with force in order to find that robbery had occurred.

5. “While this court in the [State v. Brumfield, 178 W.Va. 240, 358 S.E.2d 801 (1987)] and [State v. Miller 175 W.Va. 616, 336 S.E.2d 910 (1985)] cases, and other courts in cases cited in Brumfield and Miller, have recognized that kidnapping may be so incidental to another crime as not to constitute a separate offense, there is a paucity

of cases addressing the question of whether an aggravated robbery committed in conjunction with another crime should be considered merely incidental to the other crime. The Nevada court, a court which has addressed the question, has concluded that the taking of property might be incidental, but, as in the incidental kidnapping cases, the question of whether it actually should be treated as incidental hinges upon the particular facts and circumstances of the case.” See, McKenna v. State, 98 Nev. 323, 647 P.2d 865 (1982). The Court indicated that where there was a question as to whether the taking was incidental, the question should be resolved by the trier of fact, the jury. State v. Plumley, 179 W.Va. 356, 368 S.E.2d 726, 728 (1988).

6. In State v. Phillips, 199 W.Va. 507, 485 S.E.2d 676 (1997), the appellant was convicted of two counts of aggravated robbery “by the threat or presenting of a firearm” and one count of kidnapping. He contends the trial court erred in refusing to instruct the jury on the lesser included offense of nonaggravated robbery. He argued he was entitled to such instruction because the robbery was committed by the use of an air pistol that discharged pellets, rather than a firearm. The Court found that nonaggravated robbery is a lesser included offense of aggravated robbery and proceeded to consider whether there was evidence presented at trial that would tend to prove that the appellant committed nonaggravated robbery. In making this determination, the Court looked to the evidence pertaining only to the element of aggravated robbery that distinguished it from nonaggravated robbery. The Court noted the element of aggravated robbery that differs from nonaggravated robbery is violence to the victim or the threat or presentation of firearms or other deadly weapons. Thus, the Court found that the appellant would have been entitled to a jury instruction on nonaggravated robbery under the facts of this case only if there was a question of fact as to whether he threatened or presented a firearm or other deadly weapon.

Citing prior case law, the Court found the presence of a firearm is not required for a conviction of aggravated robbery - it is sufficient that the robber threatened the use of a firearm and that the victims reasonably believed that he had possession of a firearm. The Court found the evidence that the appellant displayed the air pistol and

threatened to injure or kill the restaurant employees if they did not follow his instructions was uncontroverted. All of the employees testifying indicated that they believed the weapon displayed by the appellant was a real gun and they believed he would use it against them if they did not cooperate.

The Court held the trial court did not abuse its discretion in refusing the appellant's nonaggravated robbery instruction.

7. In State v. Penwell, 199 W.Va. 111, 483 S.E.2d 240 (1996), the appellant was convicted of aggravated robbery, assault during the commission of a felony, obstructing a police officer, and unauthorized taking of a vehicle. He contends on appeal that the trial court should have found that the assault during the commission of a felony charge contained in the indictment was a lesser included offense in the aggravated robbery charge. The Court did not agree with the appellant's contention that the crime of assault in the commission of a felony is a "lesser included" offense within the crime of "aggravated robbery". The Court also found that the intent of the legislature to create two separate offenses, with two punishments, can be clearly seen from a fair analysis of the elements of the two offenses. Having concluded that the legislature intended *W.Va. Code*, 61-2-10 (1923) to provide for enhancement of a sentence imposed for another felony, where the felony was committed by shooting, stabbing, cutting or wounding, the Court could not conclude in the present case that the trial court erred in refusing to dismiss the assault during the commission of a felony charge.

ROBBERY
ROBBERY IN THE SECOND DEGREE

“Robbery in the Second Degree” is committed when any person commits, or attempts to commit, robbery by placing the victim in fear of bodily injury by any means other than (1) committing violence to a person, or (2) the use of the threat of deadly force by the presentment of a firearm or other deadly weapon, or when such person commits or attempts to commit robbery by the use of any means designed to temporarily disable the victim. ¹

“Robbery” is defined as a felonious taking and carrying away of money, goods or other things of value from the person of another or in their presence, against their will, by force or putting in fear, and with the intent to permanently deprive such person of such property.²

Therefore, in order to prove the commission of the offense of “Robbery in the Second Degree”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did
 - a. commit a robbery, (or)
 - b. attempt to commit a robbery
5. against _____, ³
6. by placing the said _____ in fear of bodily injury,
7. and by such action did remove (or attempt to remove) _____
(describe property with particularity ⁴) from _____,
8. with the intent to permanently deprive ⁵ _____ of _____
(property).

FOOTNOTES

- ¹ W.Va. Code, 61-2-12(b) (2000).
- ² "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. England, 180 W.Va. 342, 376 S.E.2d 548 (1988), citing Syl. Pt. 1, State v. Harless, 168 W.Va. 707, 285 S.E.2d 461 (1981); Young v. Boles, 343 F.2d 136 (4th Cir. W.Va. 1965).
- ³ "In the commission of robbery, the property must be taken by force and violence, not necessarily from the owner, but from any person in possession thereof whose right of possession is superior to that of the robber." Johnson v. Commonwealth, 215 Va. 495, 211 S.E.2d 71 (1975).
- ⁴ See Syllabus Point 5, State ex rel. Day v. Silver, 210 W.Va. 175, 556 S.E.2d 820 (2001) ("In order for an indictment for larceny to be sufficient in law, it must identify with specificity the particular items of property which are the subject of the charge by specifically describing said property, unless the property is incapable of identification as in cases involving fungible goods, United States currency, or comparable items.").
- ⁵ "*Animus furandi*, or the intent to steal or to feloniously deprive the owner permanently of his property, is an essential element in the crime of robbery." Syl. Pt. 2, State v. Plumley, 179 W.Va. 356, 368 S.E.2d 726 (1988), citing Syl. Pt. 2, State v. Hudson, 157 W.Va. 939, 206 S.E.2d 415 (1974).

COMMENTS

1. W.Va. Code, 61-2-12, the previous robbery statute, addressed "unaggravated robbery" as follows:

"If any person commits, or attempts to commit, a robbery by in any other mode or by any other means [other than that designated as aggravated robbery]. . . he shall be guilty of a felony[.]"

Compare with the 2000 revision of the same section:

"Any person who commits or attempts to commit robbery by placing the victim in fear of bodily injury by means other than those set forth in subsection (a) of this section or any person who commits or attempts to commit robbery by the use of any means designed to temporarily disable the victim, including, but not limited to, the use of a disabling chemical substance or an electric shock device... is guilty of robbery in the second degree[.]"

While the new enactment reclassified “unaggravated robbery” as “robbery in the second degree”, and specified a manner in which robbery in the second degree might be committed (i.e., the “disable” provision”), the 2000 enactment did not substantially alter the prior enactment. Thus, the Comments included below, which were included in previous editions of this Manual and address cases and issues concerning the prior enactment of § 61-2-12, are considered relevant.

2. Defenses - Bona fide claim of right.

“A defendant may assert as a defense to a robbery or larceny charge, that he had a bona fide claim of ownership to the specific property stolen and, therefore, that he had no intent to steal. However, this defense is not available where the defendant took money or other property, to which he did not have a specific ownership claim, in satisfaction of a debt.” Syl. pt. 2, State v. Winston, 170 W.Va. 555, 295 S.E.2d 46 (1982).

3. Enactment of robbery statute did not redefine the elements of robbery established by the common law. State v. Collins, 174 W.Va. 767, 329 S.E.2d 839 (1984).

4. In State v. Satterfield, 193 W.Va. 503, 457 S.E.2d 440 (1995), the Appellant contended the trial judge erred in granting an instruction defining the elements of robbery without specifically stating that the stolen goods were “of value”. The Court reasoned that force or fear is the main ingredient of robbery and value need not be specifically set forth in the instructions. The Court found the trial judge adequately instructed the jury since he specifically stated in the instructions that the jury must find that the State proved that a wallet or a .22 rifle was taken with force in order to find that robbery had occurred.

5. “While this Court in the [State v.]Brumfield, [178 W.Va. 240, 358 S.E.2d 801 (1987)] and [State v.] Miller, [175 W.Va. 616, 336 S.E.2d 910 (1985)] cases, and other courts in cases cited in Brumfield and Miller, have recognized that kidnapping may be so incidental to another crime as not to constitute a separate offense, there is a paucity of cases addressing the question of whether an aggravated robbery committed in conjunction with another crime should be considered merely incidental to the other crime. The Nevada court, a Court which has addressed the question, has concluded that the taking of property might be incidental, but, as in the incidental kidnapping cases, the question of whether it actually should be treated as incidental hinges upon

the particular facts and circumstances of the case.” See, McKenna v. State, 98 Nev. 323, 647 P.2d 865 (1982). The Court indicated that where there was a question as to whether the taking was incidental, the question should be resolved by the trier of fact, the jury. State v. Plumley, 179 W.Va. 356, 368 S.E.2d 726, 728 (1988).

6. In State v. Phillips, 199 W.Va. 507, 485 S.E.2d 676 (1997), the appellant was convicted of two counts of aggravated robbery “by the threat or presenting of a firearm” and one count of kidnapping. He contends the trial court erred in refusing to instruct the jury on the lesser included offense of nonaggravated robbery. He argued he was entitled to such instruction because the robbery was committed by the use of an air pistol that discharged pellets, rather than a firearm. The Court found that nonaggravated robbery is a lesser included offense of aggravated robbery and proceeded to consider whether there was evidence presented at trial that would tend to prove that the appellant committed nonaggravated robbery. In making this determination, the Court looked to the evidence pertaining only to the element of aggravated robbery that distinguished it from nonaggravated robbery. The Court noted the element of aggravated robbery that differs from nonaggravated robbery is violence to the victim or the threat or presentation of firearms or other deadly weapons. Thus, the Court found that the appellant would have been entitled to a jury instruction on nonaggravated robbery under the facts of this case only if there was a question of fact as to whether he threatened or presented a firearm or other deadly weapon.

Citing prior case law, the Court found the presence of a firearm is not required for a conviction of aggravated robbery - it is sufficient that the robber threatened the use of a firearm and that the victims reasonably believed that he had possession of a firearm. The Court found the evidence that the appellant displayed the air pistol and threatened to injure or kill the restaurant employees if they did not follow his instructions was uncontroverted. All of the employees testifying indicated that they believed the weapon displayed by the appellant was a real gun and they believed he would use it against them if they did not cooperate.

The Court held the trial court did not abuse its discretion in refusing the appellant’s nonaggravated robbery instruction.

EXTORTION

Extortion by Threats

“Extortion by Threats” ¹ is committed when any person threatens injury to the character, person or property of another person, or to the character, person or property of his wife or child, ² and thereby extorts money, pecuniary benefit, or any bond, note or other evidence of debt.

Therefore, in order to prove the commission of the offense of “Extortion by Threats”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. with the intent ³ to obtain and extort ⁴ money, pecuniary benefit, or any bond, note or other evidence of debt,
5. threatened ⁵ injury to the character, person or property of _____, (name) or _____’s wife or child;
6. and thereby did obtain and extort money, pecuniary benefit, or any bond, note or other evidence of debt.

FOOTNOTES

¹ W.Va. Code, 61-2-13 (1923).

² “...or accuses him or them of any offense...” W.Va. Code, 61-2-13. See separate instruction on extortion by accusation of a criminal offense.

³

Intent is not a *statutory* element of extortion.

⁴ See page 139 for definition of “extort”.

⁵ See page 140 for definition of “threat”.

COMMENT

Should the instruction include elements of unlawfully and feloniously?

1. See, State v. Keiffer, 112 W.Va. 74, 163 S.E. 841 (1932).

EXTORTION
Extortion by Threats
Definition of Extort

To “extort” is to gain by wrongful methods; to obtain in an unlawful manner, as to compel payments by means of threats of injury to person, property or reputation. ¹

FOOTNOTE

¹ Iden v. Adrian Buckhannon Bank, 6 F.Supp. 234 (N.D.W.Va. 1987), modified, 841 F.2d at 1122 (4th Cir. 1988).

EXTORTION
Extortion by Threats
Definition of Threat

A “threat” is defined as “(a) declaration of an intention to injure another or his property by some unlawful act.”¹

A threat may be shown by conduct and representations as well as by specific language.²

FOOTNOTES

¹ Black’s Law Dictionary 1480 (6th ed. 1990); Machinery Hauling v. Steel of W.Va., 181 W.Va. 694, 384 S.E.2d 139, at 141 (1989); Iden v. Adrian Buckhannon Bank, 6 F.Supp. 234 (N.D.W.Va. 1987), modified, 841 F.2d at 1122 (4th Cir. 1988).

² Syl. pt. 2, State v. Keiffer, 112 W.Va. 74, 163 S.E. 841 (1932).

ATTEMPTED EXTORTION
Attempted Extortion by Threats

“Attempted Extortion by Threats”¹ is committed when any person threatens injury to the character, person or property of another person, or to the character, person or property of his wife or child,² with the intent to thereby extort money, pecuniary benefit, or any bond, note or other evidence of debt, but fails thereby to extort money, pecuniary benefit, or any bond, note or other evidence of debt.

Therefore, in order to prove the commission of the offense of “Attempted Extortion by Threats”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. with the intent³ to obtain and extort⁴ money, pecuniary benefit, or any bond, note or other evidence of debt,
5. threatened⁵ injury to the character, person or property of _____, (name) or _____’s wife or child;
6. but failed thereby to obtain and extort money, pecuniary benefit, or any bond, note or other evidence of debt.

FOOTNOTES

¹ W.Va. Code, 61-2-13 (1923).

² “...or accuses him or them of any offense...” W.Va. Code, 61-2-13. Separate instruction on extortion by accusation of a criminal offense.

³ **Intent is not a *statutory* element of extortion.**

⁴ See page 139 for definition of “extort”.

⁵ See page 140 for definition of “threat”.

EXTORTION

Extortion by Accusation of an Offense

“Extortion by Accusation of an Offense”¹ is committed when any person,² accuses another person, or that person’s wife or child of any offense, and thereby extorts money, pecuniary benefit, or any bond, note or other evidence of debt.

Therefore, in order to prove the commission of the offense of “Extortion by Accusation of an Offense”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. with the intent³ to obtain and extort money, pecuniary benefit, or any bond, note or other evidence of debt,
5. accused _____ (name) or _____’s wife or child of _____ (describe offense)⁴
6. and thereby did obtain and extort money, pecuniary benefit, or any bond, note or other evidence of debt.

FOOTNOTES

¹ W.Va. Code, 61-2-13 (1923).

² “threatens injury to the character, person or property of another person or the character, person or property of his wife or child or...” W.Va. Code, 61-2-13. Separate instruction on extortion by threats.

³

Intent is not a *statutory* element of extortion.

⁴ Boggs v. Greenbrier Grocery Co., 53 W.Va. 536, 44 S.E. 777 (1903) seems to indicate the threat of an offense must be a threat of an actual or legitimate offense. (“a threat of arrest for which there is no ground does not constitute duress, as the party could not be put in fear thereby”). This is a civil case.

COMMENT

Should the instruction include the elements unlawfully and feloniously?

1. See, State v. Keiffer, 112 W.Va. 74, 163 S.E. 841 (1932).

ATTEMPTED EXTORTION

Attempted Extortion by Accusation of an Offense

“Attempted Extortion by Accusation ¹ of an Offense” is committed when any person accuses another person, or that person’s wife or child of any offense, ² with the intent to thereby extort money, pecuniary benefit, or any bond, note or other evidence of debt, but fails thereby to extort money, pecuniary benefit, or any bond, note or other evidence of debt.

Therefore, in order to prove the commission of the offense of “Attempted Extortion by Accusation of an Offense”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. with the intent ³ to obtain and extort money, pecuniary benefit, or any bond, note or other evidence of debt,
5. accused _____ (name) or _____’s wife or child of _____ (describe the offense) ⁴
6. but failed thereby to obtain and extort money, pecuniary benefit, or any bond, note or other evidence of debt.

FOOTNOTES

¹ W.Va. Code, 61-2-13 (1923).

² “threatens injury to the character, person or property of another person, or to the character, person or property of his wife or child...” W.Va. Code, 61-2-13. Separate instruction on extortion by threats.

³

Intent is not a *statutory* element of extortion.

⁴ Boggs v. Greenbrier Grocery Co., 53 W.Va. 536, 44 S.E. 777 (1903) seems to indicate the threat of an offense must be a threat of an actual or legitimate offense. (“a threat of arrest for which there is no ground does not constitute duress, as the party could not be put in fear thereby”). This is a civil case.

ASSAULT AND BATTERY

Malicious Assault

The Court instructs the jury that the term, “Malicious Assault”, as that term is used in the indictment herein, is committed when any person shoots, stabs, cuts, wounds or by any means causes another person bodily injury, with the intent to maim, disfigure, disable or kill the other person. ¹

Therefore, in order to prove the commission of the offense of “Malicious Assault”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. unlawfully,
5. feloniously and
6. maliciously ²
7. _____ (specify means by which bodily injury was caused, i.e., shot, stabbed, cut, wounded ³, or other means), ⁴
8. _____ (name of alleged victim)
9. causing bodily injury to _____ (name)
10. with the intent to _____ (maim, disfigure, disable or kill) ⁵
11. _____ (name).

FOOTNOTES

¹ W.Va. Code, 61-2-9(a) (1978); State v. Farmer, 185 W.Va. 232, 406 S.E.2d 458 (1991); State v. George, 185 W.Va. 539, 408 S.E.2d 291 (1991) - (malicious assault requires proof of serious bodily injury).

² See page 147 for definition of “malice”.

³ See page 150 for definition of “wounded”.

⁴ The provision or charge in the indictment with regard to bodily injury must specify the means by which the injury was caused and it is not necessary for the skin to have

been broken in order for a conviction to be sustained under this part of the statute. State v. Gibson, 67 W.Va. 548, 68 S.E. 295, 28 L.R.A.N.S., 965 (1910); State v. Coontz, 94 W.Va. 59, 117 S.E. 701 (1923). State v. Daniel, 144 W.Va. 551, 109 S.E.2d 32 (1959).

In an indictment for causing bodily injury with intent to maim, disable and kill, it is sufficient to allege that such injury was inflicted by means of a blow with defendant's fist. The grade of the offense so charged is the same as stabbing, cutting and wounding and is subject to the same punishment. State v. Coontz, 94 W.Va. 59, 117 S.E. 701 (1923).

Under a proper indictment, any sort of bodily injury, inflicted by any means, with intent to maim, disfigure or kill, is an offense under this section, punishable as a malicious or unlawful wounding, but it is not a technical wounding, and an indictment merely for cutting and wounding does not cover it. State v. Gibson, 67 W.Va. 548, 68 S.E. 295, 28 L.R.A. (n.s.) 965 (1910).

- 5 The State must prove the defendant inflicted the injury with an intent to produce a permanent disability or disfiguration. State v. Scotchel, 168 W.Va. 545, 285 S.E.2d 384 (1981), citing State v. Sacco, 165 W.Va. 91, 267 S.E.2d 193 (1980); State v. Bass, 189 W.Va. 416, 432 S.E.2d 86 (1993); State v. Stalnaker, 138 W.Va. 30, 76 S.E.2d 906 (1953); McComas v. Warth, 113 W.Va. 163, 167 S.E. 96 (1933); and State v. Taylor, 105 W.Va. 298, 142 S.E. 254 (1928). See State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991).

The doctrine of transferred intent provided that where a person intends to kill or injure someone, but in the course of attempting to commit the crime accidentally injures or kills a third party, the defendant's criminal intent will be transferred to the third party. Syl. pt. 6, State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991).

In Julius, *supra*, at 11, the Court found even though the defendant did not intend to hurt Joseph Vance, under the doctrine of transferred intent, he may be charged and convicted of malicious assault.

COMMENT

1. In State v. Wright, 200 W.Va. 549, 490 S.E.2d 636 (1997), convictions of both wanton endangerment and malicious assault do not always constitute double jeopardy because wanton endangerment with a firearm requires proof of an additional element, namely use of a firearm. Malicious assault does not necessarily require use of a firearm. The Court found that given the circumstances of this case, wanton endangerment is a lesser included offense because it would have been impossible for the appellant to have committed malicious assault with a single gunshot without committing wanton endangerment with a firearm.

ASSAULT AND BATTERY
Malicious Assault
Malice

“Malice” is defined as an action flowing from a wicked and corrupt motive, a thing done with wrongful intent, under such circumstances as carry in them the plain indication of a heart heedless of social duty and fatally bent on mischief. ¹

FOOTNOTE

- ¹ (“*malo animo*”) State v. Douglass, 28 W.Va. 297, 299 (1886); State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219, 223 (1978); State v. Bongalis, 180 W.Va. 584, 378 S.E.2d 449 (1989).

COMMENTS

1. An instruction in a first degree murder case that informs the jury that malice need not be shown on the part of the defendant against the deceased is erroneous. Syl. pt. 4, State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994).
2. In State v. Mullins, 193 W.Va. 315, 456 S.E.2d 42 (1995) a portion of the instruction on malice given to the jury read as follows:

Malice is not confined to ill will toward any one or more particular persons, but malice is every evil design in general, and by that is meant that the fact has been attended by such circumstances as are ordinary symptoms of a wicked, depraved and malignant spirit and carry with them the plain indications of a heart, regardless of social duty and fatally bent upon mischief.

The appellant argued that this instruction was erroneous and was like the instruction condemned in State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994). The instruction rejected by the Jenkins Court began: “The Court instructs the jury that to convict one of murder, it is not necessary that malice should exist in the heart of the defendant, . . . against the deceased.” The Mullins court found no reversible error in the trial court’s instructions regarding malice.

3. In State v. Garrett, 195 W.Va. 630, 466 S.E.2d 481 (1995), the appellant contended the trial court committed reversible error in reading to the jury the instruction on malice. The Court found that defense counsel did not object to the instruction and indicated his approval of it. The Court found the issue was not preserved for appellate review.

The instruction as stated in footnote 20 reads as follows:

The word malice as used in these instructions is used in a technical sense. It may be either expressed or implied, and it includes not only anger, hatred and revenge, but other unjustifiable motives. It may be inferred or implied by you from all the evidence in this case.

If you find such inference is reasonable from the facts and circumstances in this case which have been proven to your satisfaction beyond all reasonable doubt, it may be inferred from any deliberate and cruel act done by the defendant without any reasonable provocation or excuse, however sudden.

Malice is not confined to ill will towards any one or more particular persons, but malice is every evil design in general. And by it is meant that the fact has been attended by such circumstances as are ordinarily symptoms of a wicked, depraved and malignant spirit and carry with them a plain indication of a heart, regardless of social duty, fatally bent upon mischief.

It is not necessary that malice must have existed for any particular length of time and it may first come into existence at the time of the act or at any previous time.

Although in the text of the opinion, the Court found the issue was not preserved for appellate review, the Court noted in footnote 21 that the thrust of the appellant's argument was that the malice instruction was overly broad in that it did not require the jury to find that malice must be shown against the victim. Instead, the appellant contended, the jury was instructed that malice may be inferred from any deliberate and cruel act done by the appellant, without linking such act to any act or person involved in the murder at issue. In syl. pt 4 of State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994), the Court held that an instruction in a first degree murder case that informs the jury that malice need not be shown on the part of the defendant against the deceased is erroneous.

The Court went on to find that upon review of the entire instruction, which had been previously approved in State v. Bongalis, 180 W.Va. 584, 588 n.1, 378 S.E.2d 449, 453 n.1 (1989), the jury was specifically instructed that malice “may be inferred or implied by you from all of the evidence in this case if you find such inference is reasonable from facts and circumstances in this case which have been proven to your satisfaction beyond all reasonable doubt[.]” The Court stated in the footnote that this instruction sufficiently required the jury to find that malice must be shown by the appellant against the victim in this case.

ASSAULT AND BATTERY
Malicious Assault
Wound

To constitute a “wound”, within the meaning of this section, an injury must have been inflicted with a weapon, other than a part of the human body, and must include a complete parting or breaking of the skin. ¹

FOOTNOTE

- ¹ To constitute a wound, within the meaning of this section, an injury must have been inflicted with a weapon, other than any of those with which the human body is provided by nature, and must include a complete parting or solution of the external or internal skin. State v. Gibson, 67 W.Va. 548, 68 S.E. 295 (1910); State v. Stalnaker, 138 W.Va. 30, 76 S.E.2d 906 (1953); State v. Daniel, 144 W.Va. 551, 109 S.E.2d 32 (1959).

ASSAULT AND BATTERY

Unlawful Assault

The Court instructs the jury that the term, “Unlawful Assault”, as that term is used in the indictment herein, is committed when any person unlawfully, but not maliciously, shoots, stabs, cuts, wounds or by any means causes another person bodily injury, with the intent to maim, disfigure, disable or kill the other person. ¹

Therefore, in order to prove the commission of the offense of “Unlawful Assault”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. unlawfully and maliciously
5. _____ (specify means by which bodily injury was caused, i.e., shot, stabbed, cut, wounded ² or by other means), ³
6. _____ (name of alleged victim)
7. causing bodily injury to _____ (name)
8. with the intent to _____ (maim, disfigure, disable or kill) ⁴
9. _____ (name).

FOOTNOTES

¹ W.Va. Code, 61-2-9(a) (1978); State v. George, 185 W.Va. 539, 408 S.E.2d 291 (1991) - (malicious assault requires proof of serious bodily injury).

² See page 150 for definition of “wound”.

³ The provision or charge in the indictment with regard to bodily injury must specify the means by which the injury was caused. It is not necessary for the skin to have been broken in order for a conviction to be sustained under this part of the statute. State v. Gibson, 67 W.Va. 548, 68 S.E. 295, 28 L.R.A.N.S., 965 (1910); State v. Coontz, 94 W.Va. 59, 117 S.E. 701 (1923). State v. Daniel, 144 W.Va. 551, 109 S.E.2d 32 (1959).

In an indictment for causing bodily injury with intent to maim, disable and kill, it is sufficient to allege that such injury was inflicted by means of a blow with defendant's fist. The grade of the offense so charged is the same as a technical stabbing, cutting and wounding and is subject to the same punishment. State v. Coontz, 94 W.Va. 59, 117 S.E. 701 (1923).

Under a proper indictment, any sort of bodily injury, inflicted by any means, with the intent to maim, disfigure or kill, is an offense under this section, punishable as a malicious or unlawful wounding, but it is not a technical wounding, and an indictment merely for cutting and wounding does not cover it. State v. Gibson, 67 W.Va. 548, 68 S.E. 295, 28 L.R.A. (N.S.) 965 (1910).

- 4 The State must prove the defendant inflicted the injury with an intent to produce a permanent disability or disfigurement. State v. Scotchel, 168 W.Va. 545, 285 S.E.2d 384 (1981), citing State v. Sacco, 165 W.Va. 91, 267 S.E.2d 193 (1980); State v. Stalnaker, 138 W.Va. 30, 76 S.E.2d 906 (1953); McComas v. Warth, 113 W.Va. 163, 167 S.E. 96 (1933); and State v. Taylor, 105 W.Va. 298, 142 S.E. 254 (1928).

The doctrine of transferred intent provides that where a person intends to kill or injure someone, but in the course of attempting to commit the crime accidentally injures or kills a third party, the defendant's criminal intent will be transferred to the third party. Syl. pt. 6, State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991).

In Julius, *supra*, at 11, the Court found even though the defendant did not intend to hurt Joseph Vance, under the doctrine of transferred intent, he may be charged and convicted of malicious assault.

COMMENT

1. In State v. Wright, 200 W.Va. 549, 490 S.E.2d 636 (1997), convictions of both wanton endangerment and malicious assault do not always constitute double jeopardy because wanton endangerment with a firearm requires proof of an additional element, namely use of a firearm. Malicious assault does not necessarily require use of a firearm. The Court found that given the circumstances of this case, wanton endangerment is a lesser included offense because it would have been impossible for the appellant to have committed malicious assault with a single gunshot without committing wanton endangerment with a firearm.

ASSAULT AND BATTERY

Assault

The Court instructs the jury that the term, “Assault”, as the term is used in the indictment herein, is committed when any person unlawfully attempts to commit a violent injury to another person, or unlawfully commits an act which places another person in reasonable apprehension of immediately receiving a violent injury. ¹

Therefore, in order to prove the commission of the offense of “Assault”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. unlawfully
 - a. attempted to commit a violent injury to _____ (name);
 - b. committed an act which placed _____ (name) in reasonable apprehension of immediately ² receiving a violent injury.

FOOTNOTES

¹ W.Va. Code, 61-2-9(b) (1978). See State v. Eddie “Tosh” K., 194 W.Va. 354, 460 S.E.2d 489 (1995).

² “A comment that an individual should have done some act in the past could not be construed as either civil or criminal assault.” Maxey v. McDowell Board of Education, 212 W.Va 668, 575 S.E.2d 278 (2002).

ASSAULT AND BATTERY

Battery

The Court instructs the jury that the term, “Battery”, as that term is used in the indictment herein, is committed when any person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person, of another or unlawfully and intentionally causes physical harm to another. ¹

Therefore, in order to prove the commission of the offense of “Battery”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did unlawfully and intentionally
 - a. made physical contact of an insulting or provoking nature with _____ (name).
 - b. caused physical harm to _____ (name).

FOOTNOTE

- ¹ W.Va. Code, 61-2-9(c) (1978).

COMMENT

1. See State v. Rummer, 189 W.Va. 369, 432 S.E.2d 39, 49 (1993) for discussion of double jeopardy analysis for separate portions of the body touched during the commission of a sexual abuse. The rationale underlying this decision may be analogous to a situation involving separate blows struck during the course of a battery.

ASSAULT AND BATTERY
Assault During the (Attempted) Commission of a Felony Offense

The Court instructs the jury that the offense of “Assault During the (Attempted) Commission of a Felony Offense”, is committed when, during the (attempted) commission of a felony, any person unlawfully shoots, stabs, cuts or wounds another person. ¹

Therefore, in order to prove the commission of the offense of “Assault During the (Attempted) Commission of a Felony Offense”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. during the (Attempted²) Commission of a felony offense, to wit: _____
(list underlying felony) ³
5. _____ (specify means by which bodily injury was caused, i.e., shot, stabbed, cut or wounded or other means),
6. _____ (name).

FOOTNOTES

¹ W.Va. Code, 61-2-10 (1923).

² See page 107 for definition of “attempt”.

³ Because one of the elements of this offense is that the State prove that the defendant was committing, or attempting to commit, a felony offense at the time of the alleged assault, it would be necessary to require that the jury be instructed as to the specific elements of the underlying offense. (“Since the underlying felony is an essential element of felony murder, the jury must be instructed as to the elements which constitute the underlying felony.” Syl. Pt. 2, State v. Stacy, 181 W.Va. 736, 384 S.E.2d 347 (1989)).

COMMENTS

1. In State v. Lockhart, 200 W.Va. 479, 490 S.E.2d 298 (1997), the appellant was convicted of sexual assault in the first degree, battery, burglary and assault during the commission of a felony. The appellant contended the trial court committed error in not ruling that the use of a weapon is required in order to sustain a conviction of assault during the commission of a felony. The Court found that nothing in the express language of *W.Va. Code*, 61-2-10 [1923], concerning that offense requires as an element thereof the use of a weapon.
2. In State v. Penwell, 199 W.Va. 111, 483 S.E.2d 240 (1996), the appellant was convicted of aggravated robbery, assault during the commission of a felony, obstructing a police officer, and unauthorized taking of a vehicle. He contends on appeal that the trial court should have found that the assault during the commission of a felony charge contained in the indictment was a lesser included offense in the aggravated robbery charge. The Court did not agree with the appellant's contention that the crime of assault in the commission of a felony is a "lesser included" offense within the crime of "aggravated robbery". The Court also found that the intent of the legislature to create two separate offenses, with two punishments, can be clearly seen from a fair analysis of the elements of the two offenses. Having concluded that the legislature intended *W.Va. Code*, 61-2-10 (1923) to provide for enhancement of a sentence imposed for another felony, where the felony was committed by shooting, stabbing, cutting or wounding, the Court could not conclude in the present case that the trial court erred in refusing to dismiss the assault during the commission of a felony charge.

ASSAULT AND BATTERY
Assault During the (Attempted) Commission of a Felony Offense
Underlying Felony Instruction

You have been instructed that it is an element of the offense of "Assault During the (Attempted) Commission of a Felony Offense" that you find, beyond a reasonable doubt, that the defendant was committing (or attempting to commit) the felony offense of _____ (designate specific felony offense) at the time of the assault alleged herein.

Therefore, the Court instructs the jury that it is necessary that the State of West Virginia prove to you each of the following elements of the felony offense of _____:

1. _____ (list all elements of felony offense). ¹

FOOTNOTE

¹ Because one of the elements of this offense is that the State prove that the defendant was committing, or attempting to commit, a felony offense at the time of the alleged assault, it would be necessary to require that the jury be instructed as to the specific elements of the underlying offense. ("Since the underlying felony is an essential element of felony murder, the jury must be instructed as to the elements which constitute the underlying felony." Syl. Pt. 2, State v. Stacy, 181 W.Va. 736, 384 S.E.2d 347 (1989))

DOMESTIC OFFENSES

Domestic Battery

“Domestic Battery” is committed if any person unlawfully and intentionally makes physical contact of an insulting or provoking nature with his or her family or household member, or unlawfully and intentionally causes physical harm to his or her family or household member.¹

Therefore, in order to prove the commission of “Domestic Battery”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did unlawfully
5. and intentionally
6. a. make physical contact of an insulting or provoking nature
b. cause physical harm
7. to _____, a family or household member.

FOOTNOTE

- ¹ W.Va. Code, 61-2-28(a) (2001).

COMMENTS

1. As with driving under the influence prosecutions, domestic battery convictions may be enhanced by evidence of prior convictions. *W.Va. Code*, 61-2-28(c) and (d) set forth, respectively, the guidelines and punishments in prosecutions for second and third or subsequent offense domestic violence offenses.

2. In State v. Hulbert, 209 W.Va. 217, 544 S.E.2d 919 (2001), the Court held that out-of-state domestic violence convictions could be used as predicate offenses for penalty enhancement purposes under W.Va. Code, 61-2-28, provided that the statute under which such convictions were obtained had the same elements as the West Virginia statute. If the statute contains different elements, the State must show that the factual predicate upon which the conviction was based would have sustained a conviction under § 61-2-28.

DOMESTIC OFFENSES

Domestic Assault

“Domestic Assault” is committed if any person unlawfully attempts to commit a violent injury against his or her family or household member or unlawfully commits an act which places his or her family or household member in reasonable apprehension of immediately receiving a violent injury. ¹

In order to prove the commission of “Domestic Assault”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did unlawfully
5. a. attempt to commit a violent injury against _____, a family or household member.
- b. commit an act which placed _____, a family or household member, in reasonable apprehension of immediately receiving a violent injury.

FOOTNOTE

- ¹ W.Va. Code, 61-2-28(b) (2001).

COMMENTS

1. As with driving under the influence prosecutions, domestic battery convictions may be enhanced by evidence of prior convictions. *W.Va. Code*, 61-2-28(c) and (d) set forth, respectively, the guidelines and punishments in prosecutions for second and third or subsequent offense domestic violence offenses.

2. In State v. Hulbert, 209 W.Va. 217, 544 S.E.2d 919 (2001), the Court held that out-of-state domestic violence convictions could be used as predicate offenses for penalty enhancement purposes under *W. Va. Code*, 61-2-28, provided that the statute under which such convictions were obtained had the same elements as the West Virginia statute. If the statute contains different elements, the State must show the factual predicate upon which the conviction was based would have sustained a conviction under § 61-2-28.

DOMESTIC OFFENSES
“Family or Household Members”

The term “Family or Household Members” means persons who:

1. Are or were married to each other
2. Are or were living together as spouses
3. Are or were sexual or intimate partners
4. Are or were dating; however, a casual acquaintance or ordinary fraternization between persons in a business or social context does not establish a dating relationship
5. Are or were residing together in the same household
6. Have a child in common regardless of whether they have ever married or lived together
7. Have the following relationships to another person:
 - a. Parent
 - b. Stepparent
 - c. Brother or sister
 - d. Half-brother or half-sister
 - e. Stepbrother or stepsister
 - f. Father-in-law or mother-in-law
 - g. Stepfather-in-law or stepmother-in-law
 - h. Child or stepchild
 - i. Daughter-in-law or son-in-law
 - j. Stepdaughter-in-law or stepson-in-law
 - k. Grandparent
 - l. Step grandparent
 - m. Aunt, aunt-in-law or step aunt
 - n. Uncle, uncle-in-law or step uncle
 - o. Niece or nephew
 - p. First or second cousin
8. Have the relationship set forth above to a family or household member ¹

FOOTNOTE

¹ W.Va. Code, 48-27-204 (2002).

DOMESTIC OFFENSES

Stalking

“Stalking” is committed when any person willfully and repeatedly follows and harasses a person with whom he or she has, or in the past has had, or with whom he or she seeks to establish, a personal or social relationship whether or not the intention is reciprocated, a member of that person’s immediate family, or his or her current social companion, his or her professional counsel or attorney.

Therefore, in order to prove the commission of “Stalking”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on or about the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did willfully and repeatedly follow
5. and harass
6.
 - a. _____, a person with whom he/she has, or in the past has had, or with whom he/she seeks to establish a personal or social relationship, whether or not the intention is reciprocated.
 - b. _____, who is a member of the immediate family of _____, a person with whom he/she has, or in the past has had, or with whom he/she seeks to establish a personal or social relationship, whether or not the intention is reciprocated.
 - c. _____, who is the current social companion of _____, a person with whom he/she has, or in the past has had, or with whom he/she seeks to establish a personal or social relationship, whether or not the intention is reciprocated.
 - d. _____, who is the professional counselor/attorney of _____, a person with whom he/she has, or in the past has had, or with whom he/she seeks to establish a personal or social relationship, whether or not the intention is reciprocated. ¹

FOOTNOTE

- ¹ W.Va. Code, 61-2-9a(a) (2001).

COMMENT

1. “Harasses” means willful conduct directed at a specific person or persons which would cause a reasonable person mental injury or emotional distress. *W.Va. Code*, 61-2-9a(g)(1) (2001).

DOMESTIC OFFENSES
Stalking
Stalking - with Credible Threat

“Stalking” is committed when any person willfully and repeatedly follows and makes a “credible threat” against a person with whom he or she has, or in the past has had, or with whom he or she seeks to establish, a personal or social relationship whether or not the intention is reciprocated, a member of that person’s immediate family, or his or her current social companion, his or her professional counsel or attorney.

Therefore, in order to prove the commission of “Stalking”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on or about the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did willfully and repeatedly follow
5. and make a credible threat against
6.
 - a. _____, a person with whom he/she has, or in the past has had, or with whom he/she seeks to establish a personal or social relationship, whether or not the intention is reciprocated
 - b. _____, who is a member of the immediate family of _____, a person with whom he/she has, or in the past has had, or with whom he/she seeks to establish a personal or social relationship, whether or not the intention is reciprocated.
 - c. _____, who is the current social companion of _____, a person with whom he/she has, or in the past has had, or with whom he/she seeks to establish a personal or social relationship, whether or not the intention is reciprocated.
 - d. _____, who is the professional counselor/attorney of _____, a person with whom he/she has, or in the past has had, or with whom he/she seeks to establish a personal or social relationship, whether or not the intention is reciprocated. ¹

FOOTNOTE

- ¹ W.Va. Code, 61-2-9a(b) (2001).

COMMENT

1. “Credible threat” means a threat of bodily injury made with the apparent ability to carry out the threat and with the result that a reasonable person would believe that the threat could be carried out. *W.Va. Code*, 61-2-9a(g)(2) (2001).

DOMESTIC OFFENSES
Stalking
Stalking - Repeated Harassment or Threats

“Stalking” is committed when any person repeatedly harasses or repeatedly makes credible threats against a person with whom he or she has, or in the past has had, or with whom he or she seeks to establish, a personal or social relationship whether or not the intention is reciprocated, a member of that person’s immediate family, or his or her current social companion, or his or her professional counsel or attorney.

Therefore, in order to prove the commission of “Stalking”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on or about the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did repeatedly harass or repeatedly make credible threats against
5.
 - a. _____, a person with whom he/she has, or in the past has had, or with whom he/she seeks to establish a personal or social relationship, whether or not the intention is reciprocated.
 - b. _____, who is a member of the immediate family of _____, a person with whom he/she has, or in the past has had, or with whom he/she seeks to establish a personal or social relationship, whether or not the intention is reciprocated.
 - c. _____, who is the current social companion of _____, a person with whom he/she has, or in the past has had, or with whom he/she seeks to establish a personal or social relationship, whether or not the intention is reciprocated.
 - d. _____, who is the professional counselor/attorney of _____, a person with whom he/she has, or in the past has had, or with whom he/she seeks to establish a personal or social relationship, whether or not the intention is reciprocated. ¹

FOOTNOTE

- ¹ W.Va. Code, 61-2-9a(b)(2001).

COMMENTS

1. “Harasses” means willful conduct directed at a specific person or persons which would cause a reasonable person mental injury or emotional distress. *W. Va Code*, 61-2-9a(g)(1) (2001).
2. “Credible threat” means a threat of bodily injury made with the apparent ability to carry out the threat and with result that a reasonable person would believe that the threat could be carried out. *W. Va. Code*, 61-2-9a(g)(2)(2001).

DOMESTIC OFFENSES
Violation of Domestic Violence Protection Order

A “Violation of a Domestic Violence Protection Order” is committed when any person abuses another person or minor children, or is physically present at a location, in knowing and willful violation of an emergency or final protective order issued by a court of competent jurisdiction.

Therefore, in order to prove the commission of “Violation of a Domestic Violence Protection Order”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. a. did abuse _____,
b. was physically present at _____,
5. in knowing and willful violation of an emergency or final domestic violence protective order issued by a court of competent jurisdiction. ¹

FOOTNOTE

- ¹ W.Va. Code, 48-27-903(a) (2001).

COMMENT

1. The penalty for the offense described in § 48-27-903(a) may be enhanced by evidence of a prior conviction under this section. *W.Va. Code*, 48-27-903(b) (2001).

ABDUCTION AND KIDNAPPING

Abduction with Intent to Defile

The Court instructs the jury that the offense of “Abduction with the Intent to Defile”, as used in the indictment herein, is committed when any person takes away another person, or detains another person against such person’s will, with the intent to defile the person, or to cause the person to be defiled by another person. ¹

Therefore, in order to prove the commission of the offense of “Abduction with the Intent to Defile”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. for a sexual purpose or motivation ²
 - a. took away _____ (name) ³
 - b. detained _____ (name) against his/her will
5. with the intent to
 - a. defile _____ (name)
 - b. cause _____ (name) to be defiled by _____.

FOOTNOTES

¹ W.Va. Code, 61-2-14(a) (1984).

² “A sexual purpose or motivation is an essential element of the offense of abduction with intent to defile contained in West Virginia Code § 61-2-14.” Syl. Pt. 6, State v. Hanna, 180 W.Va. 598, 378 S.E.2d 640 (1989).

³ Force or compulsion may be an element of the offense of abduction with intent to defile. See State v. Hanna, 180 W.Va. 598, 378 S.E.2d 640 (1989), and separate instruction regarding force or compulsion.

COMMENTS

1. “The term “defile” has been defined as follows: to corrupt purity or perfection of; to debase; to make ceremonially unclean; to pollute; to sully; to dishonor. State v. Kasnett, 30 Ohio App.2d 77, 283 N.E.2d 636, 638 (1972). To debauch, deflower, or corrupt the chastity of a woman. The term does not necessarily imply force or ravishment, nor does it connote previous immaculateness. Black’s Law Dictionary 380 (5th ed. 1979).” State v. Hatfield, 181 W.Va. 106, 380 S.E.2d 670 (1988).
2. “A defendant can not be convicted of abduction under *W.Va. Code*, 61-2-14(b) if the movement or detention of the victim is merely incidental to the commission of another crime. The factors to be considered in determining whether the abduction is incidental to the commission of another crime are the length of time the victim was held or moved, the distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm.” Syl. pt. 2, State v. Weaver, 181 W.Va. 274, 382 S.E.2d 327 (1989).

Is this an issue for the jury to determine? If so, offer an instruction on this point.

3. “The crimes of abduction with intent to defile, *W.Va. Code*, 61-2-14 (1984), and kidnaping with intent to avoid arrest, *W.Va. Code*, 61-2-14a (1965), are separate offenses.” Syl. pt. 13, State v. Fortner, 182 W.Va. 345, 387 S.E.2d 812 (1989).
4. Under the facts of this case, abduction of the victim was merely incidental or ancillary to the commission of sexual assault. The conviction and punishment for abduction with intent to defile violated the prohibition against double jeopardy. State v. Davis, 180 W.Va. 357, 376 S.E.2d 563 (1988).

ABDUCTION AND KIDNAPPING
Abduction of Child under the Age of 16
For Purpose of Prostitution or Concubinage

The Court instructs the jury that the offense of “Abduction of Child under the Age of Sixteen (16) for the Prostitution or Concubinage”, as used in the indictment herein, is committed when any person takes away a child under the age of sixteen (16) years, from the person having lawful charge of such child, for the purpose of prostitution or concubinage. ¹

Therefore, in order to prove the commission of the offense of “Abduction of Child under the Age of Sixteen (16) for the Prostitution or Concubinage”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. took away _____ (name),
5. a child under the age of sixteen (16) years of age,
6. from _____, the person having lawful charge of such child,
7. for the purpose of prostitution or concubinage.

FOOTNOTE

¹ W.Va. Code, 61-2-14(a) (1984).

ABDUCTION AND KIDNAPPING
Abduction of Child under Age 16

The Court instructs the jury that the offense of “Abduction of a Child under the Age Sixteen (16)”, as used in the indictment herein, is committed when any person, other than the father or the mother, illegally, or for any unlawful, improper or immoral purpose ¹ seizes, takes or secretes a child under sixteen (16) years, from the person or persons having lawful charge of the child. ²

Therefore, in order to prove the commission of this offense of “Abduction of a Child under the Age Sixteen (16)”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. a. illegally
b. for an unlawful, immoral or improper purpose
5. seized, took or secreted,
6. _____ (name of child), a child under the age of sixteen (16) years,
7. of whom the defendant was not the (mother)(father),
8. from _____, the person having lawful charge of such child.

FOOTNOTES

¹ “. . .other than the purposes stated in subsection (a) of this section or section fourteen-a or fourteen-c [§61-2-14a or §61-2-14c] of this article...”. W.Va. Code, 61-2-14 (b) (1984).

² W.Va. Code, 61-2-14(b) (1984).

COMMENT

1. “A defendant cannot be convicted of abduction under *W.Va. Code*, 61-2-14(b) if the movement or detention of the victim is merely incidental to the commission of another crime. The factors to be considered in determining whether the abduction is incidental to the commission of another crime are the length of time the victim was held or moved, the distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm.” Syl. pt. 2, State v. Weaver, 181 W.Va. 274, 382 S.E.2d 327 (1989).

Is this an issue for the jury to determine? If so, offer an instruction on this point.

ABDUCTION AND KIDNAPPING

Kidnapping

The Court instructs the jury that the term, “Kidnapping”, as that term is used in the indictment herein, is committed when a person, by force, threat, duress, fraud or enticement take, confines, conceals, or decoys, inveigles or entices away, or transports into or out of this State or in any other manner kidnaps another person, for the purpose or with the intent of taking, receiving, demanding or extorting from such person or from any other person, any ransom, money or other thing, or to obtain any concession or advantage of any sort, or for the purpose or with the intent of shielding or protecting himself or herself or others from bodily harm or of evading capture or arrest after he or she may have committed a crime. ¹

Therefore, in order to prove the commission of “Kidnapping”, the State of West Virginia must overcome the presumption of innocence and prove, beyond of reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. by use of
 - a. force ²
 - b. threats
 - c. duress
 - d. fraud
 - e. enticement
5.
 - a. took
 - b. confined
 - c. concealed
 - d. decoyed
 - e. inveigled
 - f. enticed away
 - g. transported out of the State of West Virginia
 - h. transported into the State of West Virginia

- i. held hostage ³
- j. _____ (specify means of kidnapping)
- 6. _____ (name of alleged kidnap victim)
- 7. a. for the purpose of
- b. with the intent of
- 8. a. taking
- b. receiving
- c. demanding
- d. extorting
- 9. from _____ (name of person or persons)
- 10. any
- a. ransom
- b. money
- c. concession
- d. advantage ⁴
- 11. for the purpose or with the intent of
- a. shielding or protecting himself or others from bodily harm.
- b. evading capture or arrest after he or others (they) have committed a crime.

FOOTNOTES

¹ W.Va. Code, 61-2-14a(a) (1999).

² See page 182 for separate instruction on “force or compulsion”.

³ “For the purposes of this section, the terms “to hold hostage” means to seize or detain and threaten to kill or injure another in order to compel, a third person or a governmental organization to do or abstain from doing any legal act as an explicit or implicit condition for the release of the person detained.” W.Va. Code, 62-2-14a(b) (1999).

⁴ The specific intent necessary to the offense of kidnapping as charged in the indictment is the intent to demand “any concession or advantage of any sort.” . . . Although a sexual purpose or motivation has been held to satisfy kidnapping statutes requiring such an intent. . . the intent to demand a concession or advantage has a much broader meaning and may encompass other benefits or purposes as well. (cites omitted). State v. Hanna, 180 W.Va. 598, 378 S.E.2d 640 (1989).

COMMENTS

1. Is section creates a single offense, with different punishments dependent upon and determined by the manner in which it is committed. Pyles v. Boles, 148 W.Va. 465, 135 S.E.2d 692 (1964), *cert. denied*, 379 U.S. 864, 85 S.Ct. 130, 13 L.Ed.2d 67 (1964); State v. Slie, 158 W.Va. 672, 213 S.E.2d 109 (1975).

Punishment for the offense of kidnapping is confinement in the penitentiary for life, with no eligibility for parole, unless (1) mercy is recommended by a jury, or (2) a court, in its discretion, determines eligibility for parole after a plea of guilty. § 61-2-14a(a) (1999).

However, “in all cases where the person against whom the offense is committed is returned, or is permitted to return, alive, without bodily harm having been inflicted upon him, but after ransom, money or other thing, or any concession or advantage of any sort has been paid or yielded, the punishment shall be confinement. . .for a definite term of years not less than twenty nor more than fifty[.]” *W.Va. Code*, 61-2-14a(a)(3) (1999).

Further, “in all cases where the person against whom the offense is committed is returned, or is permitted to return, alive, without bodily harm having been inflicted upon him or her, but without ransom, money or other thing, or any concession or advantage of any sort having been paid or yielded, the punishment shall be confinement. . .for a definite term of years not less than ten nor more than thirty.” *W.Va. Code*, 61-2-14a(a)(4) (1999).

2. In State v. Farmer, 193 W.Va. 84, 454 S.E.2d 378 (1994), the Court quoted the following excerpt from Pyles v. Boles, 148 W.Va. 465, 479, 135 S.E.2d 692, 701 (1964), *cert. denied*, 379 U.S. 864, 85 S.Ct. 130, 13 L.Ed.2d 67: “[T]he foregoing statutory provisions [found in *W.Va. Code*, 61-2-14(a)] relating to the punishment do not state or prescribe degrees or essential elements of the crime of kidnapping, “therefore,” the jury is not required to make any finding with respect to the punishment to be imposed, except in the case in which it finds that the accused should be punished by confinement in the penitentiary for life.” The Court went on to state “Pyles clearly points out that the factual determinations regarding the existence of

bodily harm and the payment of ransom, money, or the yielding of any other concession, relate to the punishment rather than to the proof required of the State as to the elements of the crime.”

“Trial judges routinely make factual determinations when determining the sentences defendants should receive. As long as the jury is required to find whether the elements of a crime have been proven, the defendant’s due process rights and right to a trial by jury are not violated by a trial court making factual determinations relating to sentencing.” State v. Farmer, 193 W.Va. 84, 454 S.E.2d 378 at 381 (1994).

Footnote 11 of State v. Farmer, *supra*, provides:

“The appellant raises an additional issue on whether a general verdict of guilty returned by a jury is void as a matter of law when it cannot be said, upon review of the record, that the jury was unanimous in their findings. The appellant argues since *W.Va. Code*, 61-2-14a (1965) provides several different ways a kidnapping can occur, the jury must specify exactly how the kidnapping occurred. For instance, *W.Va. Code*, 61-2-14a (1965) provides, in part: ‘If any person, by force, threat, duress, fraud or enticement take, confine, conceal, or decoy, inveigle or entice away, or transport into or out of this State or within this State . . . for the purpose or with the intent of shielding or protecting himself or others . . .’ The appellant argues that the jury must agree and indicate their agreement as to whether the person took by force or duress or fraud or etc. We disagree.”

“In syllabus point 1 of Pyles, *supra*, this court held that *W.Va. Code*, 61-2-14(a) created only one criminal offense of kidnapping: ‘Section 14a, Article 2, Chapter 61, Code, 1931, as amended, creates a single capital offense.’ The statute merely gives an elaborate definition of what constitutes the *actus reus* (guilty act) and *mens rea* (guilty mind) of kidnapping. Therefore, the jury is only required to determine beyond a reasonable doubt whether a defendant has committed kidnapping, and if requested, whether or not the defendant should be given mercy. Accordingly, since we find that the appellant’s contentions are without merit, we decline to further address this issue.”

In State v. Hopkins, 192 W.Va. 483, 453 S.E.2d 317 (1994), the appellant was convicted of shoplifting, third offense. On appeal he contended the circuit court improperly failed to sever evidence of his previous shoplifting convictions. The Court set forth *W.Va. Code*, 61-3A-3(c) (1981) the provision dealing with third offense shoplifting convictions, and quoted the following from State v. Cozart, 177 W.Va. 400,

402 n.1, 352 S.E.2d 152, 153 n.1 (1986), discussing whether the State improperly admitted evidence of a defendant's two prior convictions for driving under the influence: "Obviously, where a prior conviction is a necessary element of the current offense charged or is utilized to enhance the penalty after a jury finding that the defendant has committed such prior offense, it is admissible for jury purposes and [State of West Virginia v.] McAboy [160 W.Va. 497, 236 S.E.2d 431 (1977)] is not applicable." Cites omitted.

The Hopkins court found the defendant was charged with shoplifting, third offense, and under the Code, the State was required to prove at least two prior convictions for shoplifting. The Court found that since evidence of the prior convictions is a necessary element of the crime charged, the evidence is admissible for jury purposes. In his concurring/dissenting opinion, Justice Cleckley opines that the holding in State v. Cozart relied upon by the majority is wrong. *Id.* at 329. He finds that "allowing the admission of prior convictions in this case on the merits, ostensibly as elements, conflicts with all the policies behind Rule 404(b) of the West Virginia Rules of Evidence. . . . The prior convictions are not elements of the current charge; they are elements of penalty enhancement." *Id.* at 330. In note 5 of his concurring/dissenting opinion, Justice Cleckley opines that the majority decision on this point is inconsistent with McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) and conflicts with the court's decision in State v. Farmer, 193 W.Va. 84, 454 S.E.2d 378 (1994). He notes that in Farmer, the Court held that for purposes of determining whether the ten- or twenty-year sentence is applicable under the kidnapping statute, a trial court may make the necessary findings as to bodily harm, etc. since these matters are relevant for sentencing and are not elements of the crime. Justice Cleckley also opines that since the Hopkins majority finds the prior convictions to be elements of the offense, they must be proved beyond a reasonable doubt. *Id.* at 330 n.5.

3. The statutory definition of kidnapping is broad enough to encompass "almost any" forced movement or detention within the State. State v. Miller, 175 W.Va. 616, 336 S.E.2d 910 (1985); State v. Fortner, 182 W.Va. 345, 387 S.E.2d 812 (1989).

4. “Defendant argues he cannot be convicted of kidnapping if he is convicted of murder, because the kidnapping would be only incidental to the murder. ... There are situations where an offense that would technically constitute kidnapping under our broadly worded statute cannot be considered a separate offense...Here it is highly unlikely that the defendant enticed the victim to his trailer exclusively in order to kill; rather the jury could have reasonably believed that he enticed her to his trailer in order to commit the offense of rape, an offense with which he was not charged. Therefore, we find no reason that defendant cannot be convicted of the separate offenses of kidnapping and murder.” State v. Ferrell, 184 W.Va. 123, 399 S.E.2d 834 (1990), *cert. denied*, 111 S.Ct. 2801, 115 L.Ed.2d 974, 59 U.S.L.W. 3823 (1991).

“In interpreting and applying a generally worded kidnapping statute, such as *W.Va. Code*, 61-2-14(a), in a situation where another offense was committed, some reasonable limitations on the broad scope of kidnapping must be developed. The general rule is that a kidnapping has not been committed when it is incidental to another crime. In deciding whether the acts that technically constitute kidnapping were incidental to another crime, courts (emphasis added) examine the length of time the victim was held or moved, the distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm.” Syl. pt. 2, State v. Miller, 175 W.Va. 616, 336 S.E.2d 910 (1985); State v. Farmer, 191 W.Va. 372, 445 S.E.2d 759 (1994).

“Where an inmate by force, has unlawfully confined a correctional officer for a minimal period of time within the walls of a correctional facility in order to facilitate his escape, and movement of that officer was slight and did not result in exposure to an increased risk of harm, a conviction for the offense of kidnapping pursuant to *W.Va. Code*, 61-2-14a [1965] will be reversed where the confinement was incidental to the escape and the inmate has not utilized the officer as a hostage nor as a shield to protect that inmate or others from bodily harm or capture or arrest after that inmate or others have committed a crime.” Syl. pt. 3, State v. Brumfield, 178 W.Va. 240, 358 S.E.2d 801 (1987).

Does the jury determine this issue? (See Plumley, below). If so, offer an instruction.

While this court in the Brumfield and Miller cases, and other courts in cases cited in Brumfield and Miller, have recognized that kidnaping may be so incidental to another crime as not to constitute a separate offense, there is a paucity of cases addressing the question of whether an aggravated robbery committed in conjunction with another crime should be considered merely incidental to the other crime. The Nevada court, a court which has addressed the question, has concluded that the taking of property might be incidental, but, as in the incidental kidnaping cases, the question of whether it actually should be treated as incidental hinges upon the particular facts and circumstances of the case. See, McKenna v. State, 98 Nev. 323, 647 P.2d 865 (1982). The Court indicated that where there was a question as to whether the taking was incidental, the question should be resolved by the trier of fact, the jury. State v. Plumley, 179 W.Va. 356, 368 S.E.2d 726, 728 (1988).

5. Under *W.Va. Code*, 61-2-14(a), the prosecution may produce evidence indicating that the defendant used fraud to entice the victim to the area for the purpose of gaining a “concession or advantage” in the form of sexual gratification. State v. Ferrell, 184 W.Va. 123, 399 S.E.2d 834 (1990), *cert. denied*, 111 S.Ct. 2801, 115 L.Ed.2d 974, 59 U.S.L.W. 3823 (1991).

Under Hanna, it is clear kidnaping can be accomplished without force or compulsion since the statute uses terms such as fraud, decoy inveigle or entice away.

Just as the general kidnaping statute does not require force, neither does it require transportation or confinement of the victim.

6. See, *W.Va. Code*, 61-2-14(c) for penalty for threats to kidnap or demand ransom.
7. See, State v. Kitchen, 207 W.Va. 724, 536 S.E.2d 488 (2000), for a discussion of the implications of multiple convictions of kidnapping and robbery for a single event.

ABDUCTION AND KIDNAPPING

Kidnapping Force or Compulsion

The Court instructs the jury that where “force or compulsion” is an element in a prosecution for Kidnapping, the State of West Virginia is not required to show that the accused used actual physical force or express threats of physical violence to accomplish the act. Rather, it is sufficient if the State proves, beyond a reasonable doubt, that the alleged victim submitted because of a reasonable fear of harm or injury from the accused. ¹

The Court further instructs the jury that the consent of an alleged victim is not a defense to a charge of Kidnapping where such consent was obtained because the alleged victim had a reasonable fear of harm or injury if he or she does not consent.

FOOTNOTE

¹ Syl. Pt. 4, State v. Hanna, 180 W.Va. 598, 378 S.E.2d 640 (1989).

COMMENT

1. The general rule is that in order to prove force or compulsion on a kidnaping ...charge, the state is not required to show that the accused used actual physical force or express threats of violence to accomplish the crime. It is sufficient if the victim submits because of a reasonable fear of harm or injury from the accused.

By the same token, consent of the victim is not a defense to a charge of kidnaping or abduction where such consent is obtained because the victim has a reasonable fear of harm or injury if he or she does not consent.

State v. Hanna, 180 W.Va. 598, 378 S.E.2d 640 (1989).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
By Infliction of Serious Bodily Injury or Use of Deadly Weapon

The Court instructs the jury that the term “Sexual Assault in the First Degree”, as that term is used in the indictment herein, is committed when any person engages in (sexual intercourse) (sexual intrusion) with another person, without the consent of such person, and in so doing (inflicts serious bodily injury upon the person) (uses a deadly weapon in the commission of the act). ¹

Therefore, in order to prove the commission of the offense of ‘Sexual Assault in the First Degree’, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. engaged in
 - a. sexual intercourse ²
 - b. sexual intrusion ³
5. with _____ (name),
6. without the consent of _____ (name) ⁴
7. and in so doing
 - a. inflicted serious bodily injury ⁵ upon _____
 - b. employed a deadly weapon ⁶ in the commission of the act.

FOOTNOTES

¹ W.Va. Code, 61-8B-3(a)(1) (2000).

² See page 191 for separate instruction regarding “sexual intercourse”.

³ See page 194 for separate instruction regarding “sexual intrusion”.

- ⁴ See page 189 for separate instruction regarding the issue of consent. Note that while W.Va. Code, 61-8B-3 does not specifically address the issue of consent, W.Va. Code, 61-8B-2 states, “[w]hether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.” W.Va. Code, 61-8B-2(a) (1984).
- ⁵ See page 196 for separate instruction regarding “serious bodily injury”.
- ⁶ See page 197 for separate instruction regarding “deadly weapon”.

COMMENTS

1. See *W.Va. Code*, 61-8B-12 (1984).
2. The sexual abuse statute involving parents, custodians, or guardians, *W.Va. Code*, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, *W.Va. Code*, 61-8B-1, *et seq.*, for purposes of punishment. *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992); *State v. George W.H.*, 190 W.Va. 558, 439 S.E.2d 423 (1993).
3. In *State v. Lockhart*, 200 W.Va. 479, 490 S.E.2d 298 (1997), the appellant was convicted of sexual assault in the first degree, battery, burglary and assault during the commission of a felony. The appellant contended the trial court committed error in not properly instructing the jury concerning sexual assault in the first degree, i.e., in failing to differentiate for the jury psychological injury and bodily injury. The Court found that the instructions to the jury concerning sexual assault in the first degree substantially followed the language of *W.Va. Code*, 61-8B-3 (1991) and that they had held in syllabus point 8 of *State v. Slie*, 158 W.Va. 672, 213 S.E.2d 109 (1975): “An instruction for a statutory offense is sufficient if it adopts and follows the language of the statute, or uses substantially equivalent language and plainly informs the jury of the particular offense for which the defendant is charged.” See also syl. pt. 8, *State v. Banjoman*, 178 W.Va. 311, 359 S.E.2d 331 (1987).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
By Infliction of Serious Bodily Injury or Use of Deadly Weapon
Lack of Consent Resulting from Forcible Compulsion ¹

The Court instructs the jury that one of the elements of the offense of “Sexual Assault in the First Degree” is that the (act of sexual intercourse) (act of sexual intrusion) was committed without the consent of the alleged victim. In this case, the State of West Virginia has alleged that the lack of consent resulted from forcible compulsion exerted by the defendant upon the alleged victim.

“Forcible compulsion”, as that term applies in this case, means either (a) physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or (b) threat or intimidation, expressed or implied, placing a person in fear of immediate death or bodily injury to himself or herself or another person or in fear that he or she or another person will be kidnapped; or (c) fear by a person under sixteen years of age caused by intimidation, expressed or implied, by another person who is at least four years older than the alleged victim.

The Court further instructs the jury that “resistance”, for the purpose of this instruction, may include either physical resistance or any clear communication of the alleged victim’s lack of consent. ²

FOOTNOTES

¹ W.Va. Code, 61-8B-2(b) (1984).

² W.Va. Code, 61-8B-1(1) (2000).

COMMENTS

1. Where evidence conclusively establishes that the victim of a sexual assault offered no resistance to his attacker, was neither struck dumb with fear during the assault, nor attempted to utter any plea for assistance, no “earnest resistance” to “forcible compulsion” exists under *W.Va. Code*, 61-8B-1(a)(1)(iii) (1976). Syl. pt. 1, State v. Hartshorn, 175 W.Va. 274, 332 S.E.2d 574 (1985).

The Court found the complainant did not offer the degree of “earnest resistance” to the sexual assault contemplated by *W.Va. Code*, 61-8B-3(a)(iii) (1976) and necessary to sustain a conviction for sexual assault in the first degree.

See case for definition of “forcible compulsion” as defined under 1976 law.

2. In determining whether the victim of a sexual assault exercised “earnest resistance” as defined in *W.Va. Code*, 61-8B-1(1) (1976), the following factors should be considered: the age and mental and physical conditions of the complainant as well as those of the defendant, together with the circumstances leading up to and surrounding the assault. Syl. pt. 4, State v. Miller, 175 W.Va. 616, 336 S.E.2d 910 (1985).

See Miller *supra*, at 918, for further discussion of earnest resistance.

3. In State v. Green, 163 W.Va. 681, 260 S.E.2d 257 (1979), the trial court correctly refused defendant’s instruction on “forcible compulsion” in the second degree sexual assault prosecution where the instruction wholly ignored or misstated *W.Va. Code*, 61-8B-1.
4. In State v. Wallace, 175 W.Va. 663, 337 S.E.2d 321, 323 (1985), “... the term forcible compulsion” is statutorily defined as indicating a victim’s lack of consent. *W.Va. Code*, 61-8B-2(b). The term “forcible compulsion” also relates to the amount of force used as set out in *W.Va. Code*, 61-8B-1(1)...”

5. Evidence that a defendant committed violent or turbulent acts toward a rape victim or toward others of which she is aware, is relevant to establish her fear of her attacker that is a major element of proof of first-degree sexual assault. *W.Va. Code*, 61-8B-1(1)(b). Syl. pt. 4, State v. Pancake, 170 W.Va. 690, 296 S.E.2d 37 (1982).
6. In State v. Miller, 175 W.Va. 616, 336 S.E.2d 910 (1985), the Court found the circumstances that may be considered in determining forcible compulsion include acts of violence or other misconduct committed by the defendant that would be relevant in establishing the victim's fear of his attacker.
7. See State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986), footnote 13.
8. *Ex post facto* principles prohibited application of statute defining "forcible compulsion" (amended to include "fear by child under sixteen ... caused by intimidation... by (one) ... four years older ...") to sexual abuse prosecution based on events occurring before amendment's effective date. State v. Hensler, 187 W.Va. 81, 415 S.E.2d 885 (1992); State v. George W.H., 190 W.Va. 558, 439 S.E.2d 423 (1993) (Sexual assault prosecution).
9. In State v. Hottinger, 194 W.Va. 716, 461 S.E.2d 462 (1995), the appellant was convicted of sexual assault in the second degree and sexual assault in the third degree. On appeal, he contended the evidence was insufficient to support a finding of forcible compulsion pursuant to *W.Va. Code*, 61-8B-4 [1991] which sets forth the elements of second degree sexual assault. The State stipulated that the appellant did not forcibly compel the victim, a fifteen year old, to have sexual intercourse. Instead, the State's theory was that the forcible compulsion came from the victim's mother's boyfriend, and that the appellant was aware that the boyfriend, who was four years older than the victim, intimidated the victim into having sexual relations with the appellant against her will. In footnote 4, the Court noted the appellant did not assert that forcible compulsion cannot be found to arise from one other than the one committing the sexual assault pursuant to *W.Va. Code*, 61-8B-4 [1991] and, therefore, that issue was not addressed. The Court found the evidence was sufficient to support the second degree sexual assault conviction. Justice Cleckley dissented

finding the appellant correctly contended the evidence was insufficient to permit any rational trier of fact to find beyond a reasonable doubt that he knew the victim was being forced or coerced into having sexual intercourse with him, which is a critical and material element of sexual assault in the second degree.

10. In State v. Miller, 195 W.Va. 656, 466 S.E.2d 507 (1995), the appellant was convicted of two counts of sexual assault in the second degree and two counts of sexual assault in the third degree. On appeal he contended, among other things, that there was insufficient evidence of the victim's fear, coercion or intimidation to support the second degree sexual assault convictions. He contended no evidence was presented to show that he was aware of or responsible for any of the victim's fear, coercion or intimidation. The Court noted that the State did not allege that the defendant forcibly compelled the 13 year old victim to have sexual intercourse, but that the forcible compulsion came from the victim's step-father, and that the defendant, who was more than four years older than the victim, was aware that this compulsion intimidated the victim into having sexual relations with him. The Court found no merit to the contention finding the prosecution established beyond a reasonable doubt that the defendant was aware of the forcible compulsion by a third party which coerced the victim.

In footnote 3 of Miller, the Court noted that the defendant did not object to an instruction given by the circuit court which provided, in part, that the lack of consent was the result of forcible compulsion by the step-father and the existence of said forcible compulsion was known by the defendant. The defendant did not assert on appeal that forcible compulsion cannot arise from a person other than the person committing the sexual assault pursuant to *W.Va. Code*, 61-8B-4 (1991). The Court, therefore, declined to address the issue.

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
By Infliction of Serious Bodily Injury or Use of Deadly Weapon
Lack of Consent Based Upon Incapacity to Consent¹

The Court instructs the jury that one of the elements of the offense of “Sexual Assault in the First Degree” is that the act of (sexual intercourse) (sexual intrusion) was committed without the consent of the alleged victim. In this case, the State of West Virginia has alleged that the lack of consent resulted from the incapacity on the part of the alleged victim to consent to the acts alleged in the indictment.

A person is considered to be incapable of consent when such person is less than sixteen years of age; mentally defective; mentally incapacitated; or physically helpless.²

“Mentally defective” means that a person suffers from a mental disease or defect which renders that person incapable of appraising the nature of his or her conduct.³

“Mentally incapacitated” means that a person is rendered temporarily incapable of appraising or controlling his or her conduct as a result of the influence of a controlled or intoxicating substance administered to that person without his or her consent or as a result of any other act committed upon that person without his or her consent.⁴

FOOTNOTES

¹ W.Va. Code, 61-8B-2(b)(2) (1984).

² W.Va. Code, 61-8B-2(c) (1984).

³ W.Va. Code, 61-8B-1(3) (2000).

⁴ W.Va. Code, 61-8B-1(4) (2000).

COMMENTS

1. “(a) In any prosecution under this article in which the victim’s lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.

(b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three [§ 61-8B-3(a)(2)], and under subdivision (3), subsection (a), section seven [§ 61-8B-7(a)(3)] of this article.” *W.Va. Code*, 61-8B-12 (1984).
2. In State v. Hottinger, 194 W.Va. 716, 461 S.E.2d 462 (1995), the appellant was convicted of sexual assault in the second degree and sexual assault in the third degree. On appeal, he contended the evidence was insufficient to support a conviction of third degree sexual assault. The appellant contended he had an affirmative defense pursuant to *W.Va. Code*, 61-8B-12(a) [1984], since he did not know the victim’s age when the incident occurred nor was he reckless in failing to discover that information. The jury was instructed on the affirmative defense pursuant to *W.Va. Code*, 61-8B-12(a) [1984], saw the victim and saw a picture of the victim around the time of the incident. The Court found the evidence was sufficient to support the third degree sexual assault conviction.

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
By Infliction of Serious Bodily Injury or Use of Deadly Weapon
Sexual Intercourse

The Court instructs the jury that the term, “sexual intercourse” means any act between persons involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person. ¹

FOOTNOTE

- ¹ W.Va. Code, 61-8b-1(7) (2000).

COMMENTS

1. *W.Va. Code*, 61-8B-1(7), defining sexual intercourse, when read in conjunction with *W.Va. Code*, 61-8B-3, defining sexual assault in the first degree, indicates that an act of forcible oral intercourse and an act of forcible anal intercourse are separate and distinct offenses. Syl. pt. 1, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

Where a defendant commits separate acts of our statutorily defined term “sexual intercourse” in different ways, each act may be prosecuted and punished as a separate offense. Syl. pt. 2, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

(Defendant was convicted on two counts of first degree sexual assault. The Court found this case distinguishable from State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981).

2. In State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982), States instruction 3-A defined sexual intercourse following the provisions of *W.Va. Code*, 61-8B-1(7). The State had originally offered its Instruction 3 which defined sexual intercourse using only the statutory language applicable to the facts proved. The defendant objected because the instruction did not set out all of the language in the statute. The trial

court granted the objection and the state then offered Instruction 3-A. The Court found:

“Furthermore, the fact that State’s Instruction No. 3-A was broader than it needed to be since it included all of the acts that make up the statutory definition of sexual intercourse, does not mean that it was fatally defective and, therefore, reversible error. It was not an erroneous statement of our law but rather one that might be confusing in view of the fact that it covered legal definitions of sexual intercourse that were not presented in the evidence. Certainly, some of the confusion was clarified by Defense Instruction No. 1 which defined “sexual intercourse” solely under the facts presented. In Syllabus Point 4 State v. Stone, 165 W.Va. 266, 268 S.E.2d 50 (1980) we stated:

“The giving of confusing or incomplete instructions does not constitute reversible error where a reading and consideration of the instructions as a whole cure any defects in the complained of instructions.”

In view of the foregoing, we decline to find the State’s Instruction No. 3-A constituted reversible error.”

3. In State v. Barker, 178 W.Va. 736, 364 S.E.2d 264 (1987), the appellant was convicted of sexual assault in the first degree. He contends the trial court erred by not directing a verdict of acquittal, because the evidence presented was insufficient, as a matter of law, to convict the appellant. In so arguing, the appellant asserts that because Dr. Cox’s testimony reported that there was no physical evidence of penetration, a sexual assault had not occurred on the victim. *W.Va. Code*, 61-8B-1(7) [1986] defines “sexual intercourse” as “involving penetration however slight, of the female organ.” Dr. Cox’s findings did not rule out a sexual assault of the victim involving a slight penetration of her sex organ which would be consistent with the victim’s description of the appellant’s conduct.

“A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury.” Syl. pt. 5, State v. Beck, 167 W.Va. 830, 286 S.E.2d 234 (1981). The victim knew the appellant, a neighbor who was a social friend of her mother and her mother’s boyfriend. She was capable of describing to the jury the conduct of the appellant in a clear and credible fashion. In addition, the victim’s

testimony is corroborated by Dr. Cox's testing which revealed the presence of an organism which is normally transmitted only through sexual contact and therefore is rarely found in children such as the victim.

4. "To constitute the crime of rape, there must be some degree of penetration of the female genital organ by the male genital organ, but any penetration, however slight, of the labia or external lips of the vulva of the female is all that is necessary. The hymen need not be ruptured to sustain a conviction for rape." Point 8, syllabus, State v. Brady, 104 W.Va. 523, (140 S.E. 546 (1927)). Syl. pt. 1, State v. Vance, 146 W.Va. 925, 124 S.E.2d 252 (1962) overruled on other grounds, State ex rel. Grob v. Blair, 158 W.Va. 647, 214 S.E.2d 330 (1975).
5. Applying syl. pt. 2 of State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981), the Court found the defendant engaged in two separate acts of sexual intercourse as those terms are statutorily understood under *W.Va. Code*, 61-8B-1(7) (1986). State v. Koon, 190 W.Va. 632, 440 S.E.2d 442 (1993).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
By Infliction of Serious Bodily Injury or Use of Deadly Weapon
Sexual Intrusion

The Court instructs the jury that the term “sexual intrusion” means any act between persons involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party. ¹

FOOTNOTE

- ¹ W.Va. Code, 61-8B-1(8) (2000).

COMMENTS

1. In State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981), the defendant was convicted of sexual misconduct and sexual abuse in the first degree.

The defendant contends the statutory offense of sexual abuse is void for vagueness. Under *W.Va. Code*, 61-8B-1 (1976), the definition of sexual contact, the defendant contends the language “done for the purpose of gratifying the sexual desire of either party” is unconstitutionally vague because there is no definition of sexual gratification or “sexual desire”. The Court found the terms are both plain and unambiguous on their face.

2. See State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991).
3. See State v. Mitter, 168 W.Va. 531, 285 S.E.2d 376 (1981); called into doubt, footnote 5, State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1990).
4. *W.Va. Code*, 61-8B-7 (1984) which defines sexual abuse in the first degree, involves “sexual contact” with another person. The term “sexual contact” is defined in *W.Va. Code*, 61-8B-1(6) (1986) and identifies several different acts which constitute sexual contact. Each act requires proof of a fact which the other does not. Consequently,

a defendant who commits two or more of the separate acts of sexual contact on a victim may be convicted of each separate act without violation of double jeopardy principles. Syl. pt. 5, State v. Rummer, 189 W.Va. 369, 432 S.E.2d 39 (1993).

See footnote 13, State v. Rummer, 189 W.Va. 369, 432 S.E.2d 39 (1993) for discussion of double jeopardy analysis of the different acts which constitute “sexual intrusion”.

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
By Infliction of Serious Bodily Injury or Use of Deadly Weapon
Serious Bodily Injury

The Court instructs the jury that “serious bodily injury” means bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.¹

FOOTNOTE

- ¹ W.Va. Code, 61-8B-1(10) (2000).

COMMENT

1. Psychological injury is not a “serious bodily injury” under *W. Va. Code*, 61-8B-3(a)(1)(i) (1976). Syl. pt. 2, State v. Hartshorn, 175 W.Va. 274, 332 S.E.2d 574 (1985).

The Court noted the statutory definition in W.Va. of “serious bodily injury” is the definition recommended by the Model Penal Code (MPC). In the MPC definition, psychological injuries were specifically excluded.

The Court found that until the Legislature defines a serious personal injury expansively to include mental anguish or trauma it would be improvident to enlarge upon the statutory definition of a serious bodily injury. The Court found the statute is very specific in its definition and it excludes psychological injury.

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
By Infliction of Serious Bodily Injury or Use of Deadly Weapon
Deadly Weapon

The Court instructs the jury that “deadly weapon” means any instrument, device or thing capable of inflicting death or serious bodily injury, and designed or specially adapted for use as a weapon, or possessed, carried or used as a weapon.¹

FOOTNOTE

¹ W.Va. Code, 61-8B-1(11) (2000).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
Based on Difference in Age

The Court instructs the jury that the term “Sexual Assault in the First Degree”, as that term is used in the indictment herein, is committed when any person who is fourteen (14) years of age or more, engages in (sexual intercourse) (sexual intrusion) with another person who is eleven (11) years of age or less, and is not married to that person. ¹

Therefore, in order to prove the commission of the offense of “Sexual Assault in the First Degree”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. and being fourteen (14) years of age or older,
5. engaged in
 - a. sexual intercourse ²
 - b. sexual intrusion ³
6. with _____ (name),
7. who was eleven (11) years of age or less, and
8. that the defendant was not married to the said _____ (name).

FOOTNOTES

¹ W.Va. Code, 61-8B-3(a)(2) (2000).

² See page 191 for separate instruction regarding “sexual intercourse”.

³ See page 194 for separate instruction regarding “sexual intrusion”.

COMMENTS

1. Note that while *W.Va. Code*, 61-8B-3(a)(2) does not specifically address the issue of consent, *W.Va. Code*, 61-8B-2 states, “[w]hether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.” *W.Va. Code*, 61-8B-2(a) (1984).

See page 189 for an instruction addressing the Lack of Consent Based Upon Incapacity (“A person is deemed incapable of consent when such person is . . . less than sixteen years old.” *W.Va. Code*, 61-8B-2(c)(1) [1984]).

2. The affirmative defense set forth in *W.Va. Code*, 61-8B-12(a) is not available in a prosecution for this offense. *W.Va. Code*, 61-8B-12(b) (1984).
3. Where the exact age is not required to be proved, the defendant’s physical appearance may be considered by the jury in determining age but there must be some additional evidence suggesting the defendant’s age. Syl. pt. 6, *State v. Richey*, 171 W.Va. 342, 298 S.E.2d 879 (1982).
4. In *State v. Dellinger*, 178 W.Va. 265, 358 S.E.2d 826 (1987), the defendant was charged with sexually assaulting an eight-year old girl by forcing her to perform oral sex on him. He was convicted of first degree sexual assault. He contends the Court erred in failing to give an instruction permitting the jury to find him guilty of sexual abuse in the first degree. (The defendant was indicted under former *W.Va. Code*, 61-8B-3(3) (1976)).

Applying the two-part test set forth in syl. pt. 1, *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981) and syl. pt. 2, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982), to the facts of this case, the Court concluded the defendant was entitled to an instruction on sexual abuse in the first degree. The Court found it was legally impossible to commit the first degree sexual assault charged in this case without committing sexual abuse in the first degree. The Court found there were no elements in the sexual abuse statute not required for first degree sexual assault under *W.Va. Code*, 61-8B-3(3) [1976].

5. In State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991), the appellant was convicted of two counts of first degree sexual assault. She contends the conviction of first degree sexual assault as a principal in the first degree and the conviction of first degree sexual assault as a principal in the second degree result from the same conduct and violate double jeopardy principles. The Court found two separate and distinct acts were committed and found no error.
6. In State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981), the appellant was convicted in November 1977 of first degree sexual assault. He contends he was entitled to an instruction on third degree sexual assault. The Court found this contention meritless.
7. The sexual abuse statute involving parents, custodians, or guardians, *W.Va. Code*, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, *W.Va. Code*, 61-8B-1, et seq., for purposes of punishment. State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992); State v. George W.H., 190 W.Va. 558, 439 S.E.2d 423 (1993).
8. The offense of first degree sexual assault under *W.Va. Code*, 61-8B-3(a)(2) (1984), involves violence to a person and is, therefore, subject to the provisions of *W.Va. Code*, 62-1C-1(b) (1983), with regard to post-conviction bail. Syl., State ex rel. Spaulding v. Watt, 188 W.Va. 124, 423 S.E.2d 217 (1992).

The Court held that although forcible compulsion is not an element of the crime of sexual assault in the first degree when the victim is eleven years old or younger, the crime does involve violence to the person precluding the grant of post conviction bail.

9. The Court held in State v. Leep, 212 W.Va. 57, 569 S.E.2d 133 (2002) that the trial court's statements to the jury regarding the reliability of a scientific test used to detect the presence of chlamydia was not harmless error and required reversal of the appellate's conviction.

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE SECOND DEGREE
By Forcible Compulsion

The Court instructs the jury that the term “Sexual Assault in the Second Degree”, as that term is used in the indictment herein, is committed when any person engages in (sexual intercourse) (sexual intrusion) with another person without that person’s consent, and the lack of consent is the result of forcible compulsion. ¹

Therefore, in order to prove the commission of the offense of “Sexual Assault in the Second Degree”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County , West Virginia;
4. engaged in
 - a. sexual intercourse ²
 - b. sexual intrusion ³
5. with _____ (name),
6. without the consent of _____ (name),
7. and that the lack of consent was the result of forcible compulsion. ⁴

FOOTNOTES

¹ W.Va. Code, 61-8B-4(a)(1) (1991).

² See page 191 for separate instruction regarding “sexual intercourse”.

³ See page 194 for separate instruction regarding “sexual intrusion”.

⁴ See page 185 for separate instruction regarding “forcible compulsion”.

COMMENTS

1. The affirmative defense set forth in *W.Va. Code*, 61-8B-12(a) (1984) is not available in a prosecution for this offense.
2. See State v. Woodall, 182 W.Va. 15, 385 S.E.2d 253, 265 (1989)“...A conviction for first degree sexual assault requires proof of non-consensual sexual intercourse when serious bodily injury is inflicted or when the defendant employs a deadly weapon in the commission of the act.’ *W.Va. Code*, 61-8B-3 (1984) ...A charge of sexual assault in the second degree requires no showing of an injury or a weapon...”
3. In State v. Sayre, 183 W.Va. 376, 395 S.E.2d 799 (1990), the appellant was convicted of second-degree sexual assault. The same act of sexual intercourse also resulted in the appellant’s conviction of third-degree sexual assault. He contends the two convictions constitute double jeopardy because they are for the same offense.

The Court found the two convictions do not impugn double jeopardy protection.

The Court found:

Contrary to the appellant’s assertion, lack of consent is not an element of both second and third-degree sexual assault. A third-degree sexual assault, more commonly referred to as statutory rape, is committed when a person sixteen years old or older engages in sexual intercourse or sexual intrusion with a person who is less than sixteen years old and is also at least four years younger than the person committing the act. Consent to the act is irrelevant. However, consent is not irrelevant to a charge of second-degree sexual assault because forcible compulsion is a necessary element of this crime.

In this case, the jury found that the twenty-five-year-old appellant forced a fifteen-year-old girl to have sexual intercourse with him. Under these particular facts, it is true that it would have been impossible for the jury to find that the appellant committed second-degree sexual assault without also finding him guilty of third-degree sexual assault. Once the appellant admitted that he had sexual intercourse

with the fifteen-year-old and their ages were established, the fact that he was guilty of statutory rape was beyond dispute. However, the issue of whether force was involved, so as to also make the appellant guilty of second-degree sexual assault, remained to be determined by the jury.

Sayre, *supra*, at 803,

4. A third-degree sexual assault, more commonly referred to as statutory rape, is committed when a person sixteen years old or older engages in sexual intercourse or sexual intrusion with a person who is less than sixteen years old and is also at least four years younger than the person committing the act. Consent to the act is irrelevant. However, consent is not irrelevant to a charge of second-degree sexual assault because forcible compulsion is a necessary element of this crime. Syl. pt. 5, State v. Sayre, 183 W.Va. 376, 395 S.E.2d 799 (1990).
5. The sexual abuse statute involving parents, custodians, or guardians, *W.Va. Code*, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, *W.Va. Code*, 61-8B-1, et seq., for purposes of punishment. State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992); State v. George W.H., 190 W.Va. 558, 439 S.E.2d 423 (1993).
6. In State v. Hottinger, 194 W.Va. 716, 461 S.E.2d 462 (1995), the appellant was convicted of sexual assault in the second degree and sexual assault in the third degree. On appeal, he contended the jury should have been instructed on the elements of the offense of fornication because it is a lesser included offense of second or third degree sexual assault. The Court found this issue to be without merit.

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE SECOND DEGREE
Physically Helpless Victim

The Court instructs the jury that the term “Sexual Assault in the Second Degree”, as that term is used in the indictment herein, is committed when any person engages in (sexual intercourse) (sexual intrusion) with another person who is physically helpless. ¹

Therefore, in order to prove the commission of the offense of “Sexual Assault in the Second Degree”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. engaged in
 - a. sexual intercourse ²
 - b. sexual intrusion ³
5. with _____ (name),
6. who was physically helpless ⁴ at the time of the commission of the act.

FOOTNOTES

¹ W.Va. Code, 61-8B-4(a)(2) (1991).

² See page 191 for separate instruction regarding “sexual intercourse”.

³ See page 194 for separate instruction regarding “sexual intrusion”.

⁴ See page 206 for separate instruction regarding “physically helpless”.

COMMENTS

1. “(a) In any prosecution under this article in which the victim’s lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative

defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.

(b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three [§ 61-8B-3(a)(2)], and under subdivision (3), subsection (a), section seven [§ 61-8B-7(a)(3)] of this article.” *W.Va. Code*, 61-8B-12 (1984).

2. In determining whether the victim of a sexual assault exercised “earnest resistance” as defined in *W.Va. Code*, 61-8B-1(1) (1976), the following factors should be considered: the age and mental and physical conditions of the two. The sexual abuse statute involving parents, custodians, or guardians, *W.Va. Code*, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, *W.Va. Code*, 61-8B-1, *et seq.*, for purposes of punishment. *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992); *State v. George W.H.*, 190 W.Va. 558, 439 S.E.2d 423 (1993).
3. In *State v. Hottinger*, 194 W.Va. 716, 461 S.E.2d 462 (1995), the appellant was convicted of sexual assault in the second degree and sexual assault in the third degree. On appeal, he contended the evidence was insufficient to support a conviction of third degree sexual assault. The appellant contended he had an affirmative defense pursuant to *W.Va. Code*, 61-8B-12(a) [1984], since he did not know the victim’s age when the incident occurred nor was he reckless in failing to discover that information. The jury was instructed on the affirmative defense pursuant to *W.Va. Code*, 61-8B-12(a) [1984], saw the victim and saw a picture of the victim around the time of the incident. The Court found the evidence was sufficient to support the third degree sexual assault conviction.
4. In *State v. Hottinger*, 194 W.Va. 716, 461 S.E.2d 462 (1995) the appellant was convicted of sexual assault in the second degree and sexual assault in the third degree. On appeal, he contended the jury should have been instructed on the elements of the offense of fornication because it is a lesser included offense of second or third degree sexual assault. The Court found this issue to be without merit.

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE SECOND DEGREE
Definition of Physically Helpless

The Court instructs the jury that the term “physically helpless” means that a person is unconscious or for any reason is physically unable to communicate unwillingness to an act.¹

FOOTNOTE

¹ W.Va. Code, 61-8B-1(5) (2000).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE THIRD DEGREE
Mentally Defective or Mentally Incapacitated

The Court instructs the jury that the term “Sexual Assault in the Third Degree”, as that term is used in the indictment herein, is committed when any person engages in (sexual intercourse) (sexual intrusion) with another person who is mentally defective or mentally incapacitated. ¹

Therefore, in order to prove the commission of the offense of “Sexual Assault in the Third Degree”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. engaged in
 - a. sexual intercourse ²
 - b. sexual intrusion, ³
5. with _____ (name),
6. who was (mentally defective) (mentally incapacitated) ⁴ at the time of the commission of the act.

FOOTNOTES

¹ W.Va. Code, 61-8B-5(a)(1) (2000).

² See page 191 for separate instruction regarding “sexual intercourse”.

³ See page 194 for separate instruction regarding “sexual intrusion”.

⁴ See page 210 for separate instruction regarding the definitions of “mentally defective” and “mentally incapacitated”.

COMMENTS

1. “(a) In any prosecution under this article in which the victim’s lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.

(b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three [§ 61-8B-3(a)(2)], and under subdivision (3), subsection (a), section seven [§ 61-8B-7(a)(3)] of this article.” *W.Va. Code*, 61-8B-12 (1984).
2. The sexual abuse statute involving parents, custodians, or guardians, *W.Va. Code*, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, *W.Va. Code*, 61-8B-1, *et seq.*, for purposes of punishment. *State v. Gill*, 187 W.Va. 136, 416 S.E.2d 253 (1992); *State v. George W.H.*, 190 W.Va. 558, 439 S.E.2d 423 (1993).
3. In *State v. Hottinger*, 194 W.Va. 716, 461 S.E.2d 462 (1995), the appellant was convicted of sexual assault in the second degree and sexual assault in the third degree. On appeal, he contended the evidence was insufficient to support a conviction of third degree sexual assault. The appellant contended he had an affirmative defense pursuant to *W.Va. Code*, 61-8B-12(a) [1984], since he did not know the victim’s age when the incident occurred nor was he reckless in failing to discover that information. The jury was instructed on the affirmative defense pursuant to *W.Va. Code*, 61-8B-12(a) [1984], saw the victim and saw a picture of the victim around the time of the incident. The Court found the evidence was sufficient to support the third degree sexual assault conviction.

4. In State v. Hottinger, 194 W.Va. 716, 461 S.E.2d 462 (1995), the appellant was convicted of sexual assault in the second degree and sexual assault in the third degree. On appeal, he contended the jury should have been instructed on the elements of the offense of fornication because it is a lesser included offense of second or third degree sexual assault. The Court found this issue to be without merit.

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE THIRD DEGREE
Definitions of Mentally Defective and Mentally Incapacitated

The Court instructs the jury that one of the essential elements of “Sexual Assault in the Third Degree” is that the act must have occurred while the alleged victim, _____ (name), was (mentally defective) (mentally incapacitated).

“Mentally defective”, as that term is used in the indictment herein, means that a person suffers from a mental disease or defect which renders that person incapable of appraising the nature of his or her conduct. ¹

“Mentally incapacitated”, as that term is used in the indictment herein, means that a person is rendered temporarily incapable of appraising or controlling his or her conduct as a result of the influence of a controlled or intoxicating substance administered to that person without his or her consent or as a result of any other act committed upon that person without his or her consent. ²

FOOTNOTES

¹ W.Va. Code, 61-8B-1(3) (2000).

² W.Va. Code, 61-8B-1(4) (2000).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE THIRD DEGREE
Based on Age Difference Between Accused and Alleged Victim

The Court instructs the jury that the term “Sexual Assault in the Third Degree”, as that term is used in the indictment herein, is committed when any person, being sixteen years old or more, engages in (sexual intercourse) (sexual intrusion) with another person who is less than sixteen years old and who is at least four years younger than the defendant, and is not married to the defendant. ¹

Therefore, in order to prove the commission of the offense of “Sexual Assault in the Third Degree”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. and being sixteen years of age or more,
5. engaged in
 - a. sexual intercourse ²
 - b. sexual intrusion, ³
6. with _____ (name),
7. who was less than sixteen years of age,
8. and who was at least four years younger than the defendant,
9. and who was not married to the defendant.

FOOTNOTES

¹ W.Va. Code, 61-8B-5(a)(2) (2000).

² See page 191 for separate instruction regarding “sexual intercourse”.

³ See page 194 for separate instruction regarding “sexual intrusion”.

COMMENTS

1. “(a) In any prosecution under this article in which the victim’s lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.

(b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three [§ 61-8B-3(a)(2)], and under subdivision (3), subsection (a), section seven [§ 61-8B-7(a)(3)] of this article.” *W.Va. Code*, 61-8B-12 (1984).
2. In State v. Sayre, 183 W.Va. 376, 395 S.E.2d 799 (1990), the appellant was convicted of second-degree sexual assault. The same act of sexual intercourse also resulted in the appellant’s conviction of third-degree sexual assault. He contends the two convictions constitute double jeopardy because they are for the same offense.

The Court found the two convictions do not impugn double jeopardy protection.

The Court found:

Contrary to the appellant’s assertion, lack of consent is not an element of both second and third-degree sexual assault. A third-degree sexual assault, more commonly referred to as statutory rape, is committed when a person sixteen years old or older engages in sexual intercourse or sexual intrusion with a person who is less than sixteen years old and is also at least four years younger than the person committing the act. Consent to the act is irrelevant. However, consent is not irrelevant to a charge of second-degree sexual assault because forcible compulsion is a necessary element of this crime.

In this case, the jury found that the twenty-five-year-old appellant forced a fifteen-year-old girl to have sexual intercourse with him. Under these particular facts, it is true that it would have been impossible for the jury to find that the appellant committed second-degree sexual assault without also finding him guilty of third-degree sexual assault. Once the appellant admitted that he had sexual intercourse

with the fifteen-year-old and their ages were established, the fact that he was guilty of statutory rape was beyond dispute. However, the issue of whether force was involved, so as to also make the appellant guilty of second-degree sexual assault, remained to be determined by the jury.

3. Where the exact age is not required to be proved, the defendant's physical appearance may be considered by the jury in determining age but there must be some additional evidence suggesting the defendant's age. Syl. pt. 6, State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982).
4. In State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981), the appellant was convicted in November 1977 of first degree sexual assault. He contends he was entitled to an instruction on third degree sexual assault. The Court found this contention meritless.
5. The sexual abuse statute involving parents, custodians, or guardians, *W.Va. Code*, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, *W.Va. Code*, 61-8B-1, et seq., for purposes of punishment. State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992); State v. George W.H., 190 W.Va. 558, 439 S.E.2d 423 (1993).
6. The Court found the evidence established all elements required for a conviction of third degree sexual assault under *W.Va. Code*, 61-8B-5 (1984). State v. Koon, 190 W.Va. 632, 440 S.E.2d 442 (1993).
7. In State v. Hottinger, 194 W.Va. 716, 461 S.E.2d 462 (1995), the appellant was convicted of sexual assault in the second degree and sexual assault in the third degree. On appeal, he contended the evidence was insufficient to support a conviction of third degree sexual assault. The appellant contended he had an affirmative defense pursuant to *W.Va. Code*, 61-8B-12(a) [1984] since he did not know the victim's age when the incident occurred nor was he reckless in failing to

discover that information. The jury was instructed on the affirmative defense pursuant to *W.Va. Code*, 61-8B-12(a) [1984], saw the victim and saw a picture of the victim around the time of the incident. The Court found the evidence was sufficient to support the third degree sexual assault conviction.

8. In State v. Hottinger, 194 W.Va. 716, 461 S.E.2d 462 (1995), the appellant was convicted of sexual assault in the second degree and sexual assault in the third degree. On appeal, he contended the jury should have been instructed on the elements of the offense of fornication because it is a lesser included offense of second or third degree sexual assault. The Court found this issue to be without merit.
9. In State v. Leep, 212 W.Va. 57, 569 S.E.2d 133 (2002), the Court held that the trial judge's comments to the jury regarding the reliability of tests used to detect the present of chlamydia were inappropriate and denied the defendant a full and fair opportunity to fully cross examine the State's witnesses.

SEXUAL OFFENSES
SEXUAL ABUSE IN THE FIRST DEGREE
Lack of Consent Resulting from Forcible Compulsion

The Court instructs the jury that the term “Sexual Abuse in the First Degree”, as that term is used in the indictment herein, is committed when any person subjects another person to sexual contact without their consent and the lack of consent results from forcible compulsion exerted upon the person. ¹

Therefore, in order to prove the commission of the offense of “Sexual Abuse in the First Degree”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. subjected _____ (name),
5. to sexual contact, ²
6. without the consent of _____,
7. and that said lack of consent was the result of forcible compulsion. ³

FOOTNOTES

¹ W.Va. Code, 61-8B-7(a)(1) (1984).

² See page 218 for separate instruction regarding “sexual contact”.

³ See page 185 for separate instruction regarding “forcible compulsion”.

SEXUAL OFFENSES
SEXUAL ABUSE IN THE FIRST DEGREE
Physically Helpless Victim

The Court instructs the jury that the term “Sexual Abuse in the First Degree”, as that term is used in the indictment herein, is committed when any person subjects another person, who is physically helpless, to sexual contact. ¹

Therefore, in order to prove the commission of this offense of “Sexual Abuse in the First Degree”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. subjected _____ (name),
5. to sexual contact ²
6. while the said _____ was physically helpless. ³

FOOTNOTES

¹ W.Va. Code, 61-8B-7(a)(2) (1984).

² See page 218 for separate instruction regarding “sexual contact”.

³ See page 206 for separate instruction regarding “physically helpless”.

COMMENTS

1. “(a) In any prosecution under this article in which the victim’s lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.

(b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three [§ 61-8B-3(a)(2)], and under subdivision (3), subsection (a), section seven [§ 61-8B-7(a)(3)] of this article.”

W.Va. Code, 61-8B-12 (1984).

2. In State v. Hottinger, 194 W.Va. 716, 461 S.E.2d 462 (1995), the appellant was convicted of sexual assault in the second degree and sexual assault in the third degree. On appeal, he contended the evidence was insufficient to support a conviction of third degree sexual assault. The appellant contended he had an affirmative defense pursuant to *W.Va. Code*, 61-8B-12(a) [1984] since he did not know the victim’s age when the incident occurred nor was he reckless in failing to discover that information. The jury was instructed on the affirmative defense pursuant to *W.Va. Code*, 61-8B-12(a) [1984], saw the victim and saw a picture of the victim around the time of the incident. The Court found the evidence was sufficient to support the third degree sexual assault conviction.

SEXUAL OFFENSES
SEXUAL ABUSE IN THE FIRST DEGREE
Sexual Contact¹

“Sexual contact” means any intentional touching, either directly or through clothing, of the anus or any part of the sex organs of another person, or the breasts of a female or intentional touching of any part of another person’s body by the actor’s sex organs, where the victim is not married² to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.³

FOOTNOTES

¹ W.Va. Code, 61-8B-1(6) (2000).

² “Married” for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va. Code, 61-8B-1(2) (2000).

³ In State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981), the defendant was convicted of sexual misconduct and sexual abuse in the first degree.

The defendant contended that the statutory offense of sexual abuse was void for vagueness. The defendant contended that the language “done for the purpose of gratifying the sexual desire of either party” was unconstitutionally vague because there was no definition of “sexual gratification” or “sexual desire”. The Court found that the terms were both plain and unambiguous on their face.

COMMENTS

1. See State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991).
2. See State v. Mitter, 168 W.Va. 531, 285 S.E.2d 376 (1981); called into doubt, footnote 5, State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1990).
3. *W.Va. Code*, 61-8B-7 (1984) which defines sexual abuse in the first degree, involves “sexual contact” with another person. The term “sexual contact” is defined in *W.Va. Code*, 61-8B-1(6) (1986) and identifies several different acts which constitute sexual contact. Each act requires proof of a fact which the other does not. Consequently, a defendant who commits two or more of the separate acts of sexual contact on a

victim may be convicted of each separate act without violation of double jeopardy principles. Syl. pt. 5, State v. Rummer, 189 W.Va. 369, 432 S.E.2d 39 (1993).

The Court held the defendant was not subjected to unconstitutional double jeopardy when he was convicted of two counts of sexual abuse in the first degree for separately and unlawfully touching his victim's breasts and sex organ in a single criminal episode. (See footnote 16 for hypothetical where defendant touches both of the victims's breasts at the same time.)

SEXUAL OFFENSES
SEXUAL ABUSE IN THE FIRST DEGREE
Based Upon Difference in Age

The Court instructs the jury that the term “Sexual Abuse in the First Degree”, as that term is used in the indictment herein, is committed when any person being fourteen years of age or more subjects another person, who is eleven years of age or less, to sexual contact.¹

Therefore, in order to prove the commission of the offense of “Sexual Abuse in the First Degree”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. and being fourteen years of age or more,
5. subjected _____ (name),
6. who was eleven years of age or less,
7. to sexual contact. ²

FOOTNOTES

¹ W.Va. Code, 61-8B-7(a)(3) (1984).

² See page 218 for separate instruction regarding “sexual contact”.

COMMENTS

1. The affirmative defense provided in *W.Va. Code*, 61-8B-12(a) does not apply in the context of a prosecution under *W.Va. Code*, 61-8B-7(a)(3). See *W.Va. Code*, 61-8B-12(b) (1984).

2. In State v. Greenlief, 168 W.Va. 561, 568, 285 S.E.2d 391 (1981), the elements of the offense to which the defendant was found guilty are (1) that he being fourteen years or more old (2) subjects another person to sexual contact who is incapable of consent because she is less than eleven years old. *W.Va. Code*, 61-8B-6 (1977 Replacement Vol.). Sexual contact is defined as any touching of the anus or any part of the sex organs of another person ... where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.
3. Where the exact age is not required to be proved, the defendant's physical appearance may be considered by the jury in determining age but there must be some additional evidence suggesting the defendant's age. Syl. pt. 6, State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982).
4. In State v. Dellinger, 178 W.Va. 265, 358 S.E.2d 826 (1987), the defendant was charged with sexually assaulting an eight-year old girl by forcing her to perform oral sex on him. He was convicted of first degree sexual assault. He contends the Court erred in failing to give an instruction permitting the jury to find him guilty of sexual abuse in the first degree. (The defendant was indicted under former *W.Va. Code*, 61-8B-3(3) (1976)).

Applying the two-part test set forth in syl. pt. 1, State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1981) and syl. pt. 2, State v. Neider, 170 W.Va. 662, 295 S.E.2d 902 (1982), to the facts of this case, the Court concluded the defendant was entitled to an instruction on sexual abuse in the first degree. The Court found it was legally impossible to commit the first degree sexual assault charged in this case without committing sexual abuse in the first degree. The Court found there were no elements in the sexual abuse statute not required for first degree sexual assault under *W.Va. Code*, 61-8B-3(3) [1976].

5. In State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991), the appellant was convicted of two counts of first degree sexual assault. She contends the conviction of first degree sexual assault as a principal in the first degree and the conviction of

first degree sexual assault as a principal in the second degree result from the same conduct and violate double jeopardy principles. The Court found two separate and distinct acts were committed and found no error.

6. In State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981), the appellant was convicted in November 1977 of first degree sexual assault. He contends he was entitled to an instruction on third degree sexual assault. The Court found this contention meritless.
7. The sexual abuse statute involving parents, custodians, or guardians, *W.Va. Code*, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, *W.Va. Code*, 61-8B-1, et seq., for purposes of punishment. State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992); State v. George W.H., 190 W.Va. 558, 439 S.E.2d 423 (1993).

SEXUAL OFFENSES
SEXUAL ABUSE IN THE SECOND DEGREE

The Court instructs the jury that the term “Sexual Abuse in the Second Degree”, as that term is used in the indictment herein, is committed when any person subjects another person, who is mentally defective or mentally incapacitated, to sexual contact. ¹

Therefore, in order to prove the commission of the offense of “Sexual Abuse in the Second Degree”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. subjected _____ (name),
5. to sexual contact, ²
6. while the said _____ was (mentally defective) or (mentally incapacitated). ³

FOOTNOTES

¹ W.Va. Code, 61-8B-8(a) (1984).

² See page 218 for separate instruction regarding “sexual contact”.

³ See page 210 for separate instruction regarding the definitions of “mentally defective” and “mentally incapacitated”.

COMMENTS

1. “(a) In any prosecution under this article in which the victim’s lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.

(b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three [§ 61-8B-3(a)(2)], and under subdivision (3), subsection (a), section seven [§ 61-8B-7(a)(3)] of this article.”

W.Va. Code, 61-8B-12 (1984).

2. The sexual abuse statute involving parents, custodians, or guardians, *W.Va. Code*, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, *W.Va. Code*, 61-8B-1, *et seq.*, for purposes of punishment. State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992); State v. George W.H., 190 W.Va. 558, 439 S.E.2d 423 (1993).
3. In State v. Hottinger, 194 W.Va. 716, 461 S.E.2d 462 (1995), the appellant was convicted of sexual assault in the second degree and sexual assault in the third degree. On appeal, he contended the evidence was insufficient to support a conviction of third degree sexual assault. The appellant contended he had an affirmative defense pursuant to *W.Va. Code*, 61-8B-12(a) [1984] since he did not know the victim’s age when the incident occurred nor was he reckless in failing to discover that information. The jury was instructed on the affirmative defense pursuant to *W.Va. Code*, 61-8B-12(a) [1984], saw the victim and saw a picture of the victim around the time of the incident. The Court found the evidence was sufficient to support the third degree sexual assault conviction.

SEXUAL OFFENSES
SEXUAL ABUSE IN THE THIRD DEGREE

The Court instructs the jury that the term “Sexual Abuse in the Third Degree”, as that term is used in the indictment herein, is committed when any person subjects another person, who is less than sixteen years of age, to sexual contact. ¹

Therefore, in order to prove the commission of the offense of “Sexual Abuse in the Third Degree”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. subjected _____ (name),
5. who was less than sixteen years of age,
6. to sexual contact. ²

FOOTNOTES

¹ W.Va. Code, 61-8B-9(a) (1984).

² See page 218 for separate instruction regarding “sexual contact”.

COMMENTS

1. “A person is guilty of sexual abuse in the third degree when he subjects another person to sexual contact without the latter’s consent, when such lack of consent is due to the victim’s incapacity to consent by reason of being less than sixteen years old.” *W.Va. Code*, 61-8B-9(a) (1984).
2. The statute provides two affirmative defenses to sexual abuse in the third degree: first, that the defendant was less than sixteen years of age; and second, that the defendant was less than four older than the alleged victim. *See W.Va. Code*, 61-8B-9(b) (1984).

3. Where the exact age is not required to be proved, the defendant's physical appearance may be considered by the jury in determining age but there must be some additional evidence suggesting the defendant's age. Syl. pt. 6, State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982).
4. The sexual abuse statute involving parents, custodians, or guardians, *W.Va. Code*, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, *W.Va. Code*, 61-8B-1, *et seq.*, for purposes of punishment. State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992); State v. George W.H., 190 W.Va. 558, 439 S.E.2d 423 (1993).
5. In State v. Hottinger, 194 W.Va. 716, 461 S.E.2d 462 (1995), the appellant was convicted of sexual assault in the second degree and sexual assault in the third degree. On appeal, he contended the evidence was insufficient to support a conviction of third degree sexual assault. The appellant contended he had an affirmative defense pursuant to *W.Va. Code*, 61-8B-12(a) [1984] since he did not know the victim's age when the incident occurred nor was he reckless in failing to discover that information. The jury was instructed on the affirmative defense pursuant to *W.Va. Code*, 61-8B-12(a) [1984], saw the victim and saw a picture of the victim around the time of the incident. The Court found the evidence was sufficient to support the third degree sexual assault conviction.

SEXUAL OFFENSES INCEST

The Court instructs the jury that the term “Incest”, as that term is used in the indictment herein, is committed when any person engages in (sexual intercourse) (sexual intrusion) with his or her father, mother, brother, sister, daughter, son, grandfather, grandmother, grandson, granddaughter, nephew, niece, uncle or aunt. ¹

Therefore, in order to prove the commission of the offense of “Incest”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. engaged in
 - a. sexual intercourse, ²
 - b. sexual intrusion, ³
5. with _____ (name),
6. who was the _____ (nature of relationship) of the defendant.

FOOTNOTES

¹ W.Va. Code, 61-8-12(b) (1994).

² W.Va. Code, 61-8-12(a)(12) (1994). Note that this definition is the same as that prescribed in W.Va. Code, 61-8B-1(7).

³ W.Va. Code, 61-8-12(a)(13) (1994). Note that this definition is the same as that prescribed in W.Va. Code, 61-8B-1(8).

COMMENTS

1. *W.Va. Code*, 61-8-12(a) lists the definitions of the pertinent terms, degrees of relationship and consanguinity relevant to a prosecution for incest.

2. Intent or wilfulness need not be proven as element of incest, and the age of the parties is immaterial. United States ex rel. Preece v. Coiner, 150 F. Supp. 511 (N.D. W.Va., 1957).
3. A defendant's convictions for incest under *W.Va. Code*, 61-8-12 and sexual abuse by a custodian under § 61-8D did not violate the double jeopardy prohibition against multiple punishments for the same offense. The language of *W.Va. Code*, 61-8D-5(a) notes that sexual abuse by a parent, guardian or custodian is a "separate and distinct offense", and that a person may be punished for this offense "in addition to any other offenses set forth in this code". State v. George W. H., 190 W.Va. 558, 439 S.E.2d 423 (1993).
4. *W.Va. Code*, 61-8-13 (1994) prescribes various limitations on interviews, and also places restrictions upon testimony of specific instances of prior sexual conduct by the alleged victim. See also *W.Va. Code*, 61-8B-11 (1986), and *W.Va. Code*, 61-8B-14 (1986).

SEXUAL OFFENSES
SEXUAL ABUSE BY A PARENT, GUARDIAN OR CUSTODIAN

The Court instructs the jury that the offense of “Sexual Abuse by a Parent, Guardian or Custodian” is committed when any parent, guardian or custodian of a child under his or her care, custody or control, engages in or attempts to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with, a child under his or her care, custody or control. ¹

Therefore, in order to prove the commission of the offense of “Sexual Abuse by a Parent, Guardian or Custodian” ², the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did engage in, or attempt to engage in,
5.
 - a. sexual exploitation ³ of
 - b. sexual intercourse ⁴ with
 - c. sexual intrusion ⁵ with
 - d. sexual contact ⁶ with
6. _____, a child under (his/her) care, custody and control.

FOOTNOTES

¹ W.Va. Code, 61-8D-5 (1998).

² See W.Va. Code, 61-8D-1 [1988], for relevant definitions of “parent”, “guardian”, and “custodian”.

³ W.Va. Code, 61-8D-1(9) [1988].

⁴ W.Va. Code, 61-8D-1(7) [1988].

⁵ W.Va. Code, 61-8D-1(8) [1988].

⁶ W.Va. Code, 61-8D-1(6) [1988].

COMMENTS

1. A babysitter may be a custodian under the provision of *W.Va. Code*, 61-8D-5(1998), and whether a babysitter in fact a custodian under this statute is a question for the jury. State v. Stephens, 206 W.Va. 420, 525 S.E.2d 301 (1999).
2. Multiple prosecutions and punishments for the offenses of sexual abuse by a parent, guardian or custodian, incest (*W.Va. Code*, 61-8-12 [1994]), and sexual offenses under *W.Va. Code*, 61-8D-5(a) (1998), states in part: ‘In addition to any other offenses set forth in this code, the Legislature hereby declares a separate and distinct offense under this subsection [.]’ Thus, the legislature has clearly and unequivocally declared its intention that sexual abuse involving parents, custodians, or guardians, *W.Va. Code*, 61-8D-5, is a separate and distinct crime from general sexual offenses, *W.Va. Code*, 61-8B-1, *et seq.*, for purposes of punishment.” Syllabus Point 9, State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992), cited in Syllabus Pt. 7, State v. George W. H., 190 W.Va. 558, 439 S.E.2d 423 (1993).

SEXUAL OFFENSES
FAILURE TO REGISTER AS A SEXUAL OFFENDER

The Court instructs the jury that the offense of “Failure to Register as A Sexual Offender” is committed when any person, who is required to register as a sexual offender under West Virginia Law, knowingly provides false information, or refuses to provide accurate information as required by law, or knowingly fails to register as required by law, or knowingly fails to provide a change of information as required by law. ¹

Therefore, in order to prove the commission of the offense of “Failure to Register as A Sexual Offender”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did knowingly
5.
 - a. provide false information regarding (his/her) status,
 - b. refuse to provide accurate information when required to do so,
 - c. fail to register,
 - d. fail to provide a change of required information,
6. while the said defendant was required to provide accurate information regarding (his/her) status according to law.

FOOTNOTE

¹ W.Va. Code, 15-12-8 [2000].

COMMENTS

1. *W.Va. Code*, 15-12-2 [2001] lists the requirements for registration as a sexual offender, noting that persons convicted under the provisions of §§ 61-8B-1, *et seq.*; §§ 61-8C-1, *et. seq.*; §§ 61-8D-5 and 61-8D-6; § 61-2-14; and §§ 61-8-6, 61-8-7, 61-

8-12, and 61-8-13, are required to register under the article. In addition, under *W. Va. Code*, 15-12-2(d), a person convicted of any other criminal offense may be required to register if the sentencing judge makes a written finding that the offense was sexually motivated. However, in order to make such a finding, a circuit court is required to advise the defendant, prior to trial or the entry of a plea, of the possibility of such a finding. State v. Whalen, ____ W.Va. ____, 588 S.E.2d 677 (2003).

2. The United States Supreme Court has upheld the constitutionality of similar sexual offender acts in other states. See Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) [Alaska's Sexual Offender Registration Act was not a retroactive punishment prohibited by the *Ex Post Facto* clause]; and Connecticut Dept. of Public Safety v. Doe, 538 U.S. 84, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003) [Connecticut sexual offender registration law which did not provide registrants a hearing to determine whether registrants were "currently dangerous" did not violate Due Process]. See also, Haislop v. Edgell, ____ W.Va. ____, ____ S.E.2d ____ (No. 31261, December 5, 2003) (application of life registration for certain offenders does not violate *ex post facto* clause of West Virginia Constitution.)

ARSON
ARSON IN THE FIRST DEGREE

The Court instructs the jury that “Arson in the First Degree” is committed if any person willfully and maliciously sets fire to or burns, or causes to be burned, or aids, counsels, procures, persuades, incites, entices or solicits any person to burn, any dwelling, whether occupied, unoccupied or vacant, or any outbuilding, whether the property of himself or herself or of another. ¹

Therefore, in order to prove the commission of the offense of “Arson in the First Degree”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. willfully ²
5. and maliciously ²
6.
 - a. set fire to
 - b. burned
 - c. caused to be burned
 - d. (aided) (counseled) (procured) (persuaded) (incited) (enticed) (solicited)
any person to burn
7.
 - a. any dwelling, whether occupied, unoccupied or vacant
 - b. or any outbuilding
8. whether the property of himself or herself or of another. ³

FOOTNOTES

¹ W.Va. Code, 61-3-1 (1997)

² “The phrase ‘willfully and maliciously’ in our arson statutes is common to arson statutes in other states. Courts have rather uniformly held that this phrase means an intentional as distinguished from an accidental burning and without lawful reason, cause, or excuse.” Syl. pt. 4, State v. Davis, 178 W.Va. 87, 357 S.E.2d 769 (1987).

³ Ownership of the property is not essential as an element of the crime. State v. Boles, 276 F.Supp. 161 (N.D.W.Va. 1967).

COMMENTS

1. Defendant was indicted for and convicted of arson in the first degree. The Court concluded arson in the third degree is a lesser included offense of arson in the first degree. Based upon the evidence submitted at trial, petitioner was entitled to an instruction upon arson in the third degree as a lesser included offense under the indictment. State v. Jones, 174 W.Va. 700, 329 S.E.2d 65 (1985).

Appellant contends he was entitled to an instruction on the misdemeanor offense of destruction of property as a lesser included offense under the indictment. *W.Va. Code*, 61-3-30 (1975). The Court found that the offense of destruction of property may be a lesser included offense of arson, but the evidence did not warrant the giving of such an instruction. Footnote 8, State v. Jones, *supra*.

2. “To sustain a conviction of arson, when the evidence offered at trial is circumstantial evidence, the evidence must show that the fire was of an incendiary origin and the defendant must be connected with the actual commission of the crime.” Syl. pt. 5, State v. Mullins, 181 W.Va. 415, 383 S.E.2d 47 (1989); Syl. pt. 1, State v. Adkins, 191 W.Va. 480, 446 S.E.2d 702 (1994). See, State v. Hanson, 181 W.Va. 353, 382 S.E.2d 547 (1989); State v. Gebhart, 70 W.Va. 232, 73 S.E. 964 (1912).
3. The value of the dwelling house is not material. Hicks v. Boles, 276 F.Supp. 161 (N.D.W.Va. 1967).

“A building that contains an apartment intended for habitation, whether occupied, unoccupied, or vacant, is a ‘dwelling house’ for purposes of *W.Va. Code*, 61-3-1, as amended.” Syl. pt. 3, State v. Mullins, 181 W.Va. 415, 383 S.E.2d 47 (1989).

See, State v. Mullins, *supra*, at 51, 52 for discussion of the meaning of “dwelling house”.

“...Arson is an offense against the security of the habitation, alluding to possession, not property. Daniels v. Commonwealth, 172 Va. 583, 588, 1 S.E.2d 333, 336 (1939). See also 2A M.J. Arson § 1 (1980). Because a part of the building burned in this case was intended for habitation, and therefore was a dwelling, the security of the habitation was affected.” State v. Mullins, *supra*, at 52.

4. “Any person who violates the provisions of sections one, two, three, four, five or six [§ 61-3-1, § 61-3-2, § 61-3-3, § 61-3-4, § 61-3-5, or § 61-3-6] of this article, which violation causes bodily injury, but does not result in death, to any person shall be guilty of a felony[.]” *W.Va. Code*, 61-3-7(a) (1997).

“Any person who violates the provisions of sections one, two, three, four, five or six of this article, which violation causes serious bodily injury which maims, disfigures, or disables any person, but does not result in death, to any person shall be guilty of a felony[.]” *W.Va. Code*, 61-3-7(b) (1997).

ARSON
Definition of Willful and Malicious

The Court instructs the jury that it is a necessary and essential element of the offense charged in the indictment that the alleged act was done “willfully and maliciously”.

In the context of this case, the phrase “willfully and maliciously” means that an act was an intentional act, as distinguished from an accidental burning, and was without lawful reason, cause or excuse.¹

FOOTNOTE

¹ See Syl. Pt. 4, State v. Davis, 178 W.Va. 87, 357 S.E.2d 769 (1987).

ARSON
Definition of Dwelling

“Dwelling” means any building or structure intended for habitation or lodging in whole or in part, regularly or occasionally, and shall include, but not be limited to, any house, apartment, hotel, dormitory, hospital, nursing home, jail, prison, mobile home, house trailer, modular home, factory-built home or self-propelled motor home. ¹

FOOTNOTE

¹ W.Va. Code, 61-3-1(b)(1) (1997)

ARSON
Definition of Outbuilding

“Outbuilding” means any building or structure which adjoins, is part of, belongs to, or is used in connection with a dwelling, and shall include, but not be limited to, any garage, shop, shed, barn or stable. ¹

FOOTNOTE

¹ W.Va. Code, 61-3-1(b)(2) (1997).

ARSON
ARSON IN THE SECOND DEGREE

The Court instruct the jury that “Arson in the Second Degree” is committed if any person willfully and maliciously sets fire to or burns, or causes to be burned, or aids, counsels, procures, persuades, incites, entices or solicits any person to burn, any building or structure of any class or character which is not a dwelling or outbuilding, whether the property of himself or herself or of another. ¹

Therefore, in order to prove the commission of the offense of “Arson in the Second Degree”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. willfully ²
5. and maliciously ²
6.
 - a. set fire to
 - b. burned
 - c. caused to be burned
 - d. (aided) (counseled) (procured) (persuaded) (incited) (enticed) (solicited)
any person to burn
7. any building or structure of any class or character which is not a dwelling or outbuilding
8. whether the property of himself or herself or of another. ³

FOOTNOTES

¹ W.Va. Code, 61-3-2 (1997).

² “The phrase “willfully and maliciously” in our arson statutes is common to arson statutes in other states. Courts have rather uniformly held that this phrase means an intentional as distinguished from an accidental burning and without lawful reason, cause, or excuse.” Syl. pt. 4, State v. Davis, 178 W.Va. 87, 357 S.E.2d 769 (1987).

³ Ownership of the property is not essential as an element of the crime. Hicks v. Boles, 276 F.Supp. 161 (N.D.W.Va. 1967).

COMMENTS

1. Defendant was indicted for and convicted of arson in the first degree. The Court concluded arson in the third degree is a lesser included offense of arson in the first degree. Based upon the evidence submitted at trial, petitioner was entitled to an instruction upon arson in the third degree as a lesser included offense under the indictment. State v. Jones, 174 W.Va. 700, 329 S.E.2d 65 (1985).

Appellant contends he was entitled to an instruction upon the misdemeanor offense of destruction of property, as a lesser included offense under the indictment. *W.Va. Code*, 61-3-30 (1975). The Court found the offense of destruction of property may be a lesser included offense of arson, but the evidence did not warrant the giving of such an instruction. Footnote 8, State v. Jones, *supra*.

2. “To sustain a conviction of arson, when the evidence offered at trial is circumstantial evidence, the evidence must show that the fire was of an incendiary origin and the defendant must be connected with the actual commission of the crime.” Syl. pt. 5, State v. Mullins, 181 W.Va. 415, 383 S.E.2d 47 (1989); Syl. pt. 1, State v. Adkins, 191 W.Va. 480, 446 S.E.2d 702 (1994). See, State v. Hanson, 181 W.Va. 353, 382 S.E.2d 547 (1989); State v. Gebhart, 70 W.Va. 232, 73 S.E. 964 (1912).
3. “A building that contains an apartment intended for habitation, whether occupied, unoccupied, or vacant, is a dwelling house for purposes of *W.Va. Code*, 61-3-1, as amended.” Syl. pt. 3, State v. Mullins, 181 W.Va. 415, 383 S.E.2d 47 (1989).

See, State v. Mullins, *supra*, at 51, 52 for discussion of the meaning of “dwelling house”.

“...Arson is an offense against the security of the habitation, alluding to possession, not property. Daniels v. Commonwealth, 172 Va. 583, 588, 1 S.E.2d 333, 336 (1939). See also 2A M.J. Arson sec.1 (1980). Because a part of the building burned in this case was intended for habitation, and therefore was a dwelling, the security of the habitation was affected.” State v. Mullins, *supra*, at 52.

4. “Any person who violates the provisions of sections one, two, three, four, five or six [§ 61-3-1, § 61-3-2, § 61-3-3, § 61-3-4, § 61-3-5, or § 61-3-6] of this article, which violation causes bodily injury, but does not result in death, to any person shall be guilty of a felony[.]” *W.Va. Code*, 61-3-7(a) (1997).

“Any person who violates the provisions of sections one, two, three, four, five or six of this article, which violation causes serious bodily injury which maims, disfigures, or disables any person, but does not result in death, to any person shall be guilty of a felony[.]” *W.Va. Code*, 61-3-7(b) (1997).

ARSON
ARSON IN THE THIRD DEGREE

The Court instructs the jury that “Arson in the Third Degree” is committed if any person willfully and maliciously sets fire to or burns, or causes to be burned, or aids, counsel, procures, persuades, incites, entices or solicits any person to burn, any personal property of any class or character, of the value of not less than five hundred dollars, and the property of another person. ¹

Therefore, in order to prove the commission of the offense of “Arson in the Third Degree”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. willfully ²
5. and maliciously ²
6.
 - a. set fire to or burned
 - b. caused to be burned
 - c. aided, counseled, procured, persuaded, incited, enticed, solicited any person to burn
7. any personal property of any class or character
8. of the value of not less than five hundred dollars
9. and the property of another person.

FOOTNOTES

¹ W.Va. Code, 61-3-3 (1997).

² “The phrase “willfully and maliciously” in our arson statutes is common to arson statutes in other states. Courts have rather uniformly held that this phrase means an intentional as distinguished from an accidental burning and without lawful reason, cause, or excuse.” Syl. pt. 4, State v. Davis, 178 W.Va. 87, 357 S.E.2d 769 (1987).

COMMENTS

1. Defendant was indicted for and convicted of arson in the first degree. The Court concluded arson in the third degree is a lesser included offense of arson in the first degree. Based upon the evidence submitted at trial, petitioner was entitled to an instruction upon arson in the third degree as a lesser included offense under the indictment. State v. Jones, 174 W.Va. 700, 329 S.E.2d 65 (1985).

Appellant contends he was entitled to an instruction upon the misdemeanor offense of destruction of property, as a lesser included offense under the indictment. *W.Va. Code*, 61-3-30 (1975). The Court found the offense of destruction of property may be a lesser included offense of arson, but the evidence did not warrant the giving of such an instruction. Footnote 8, State v. Jones, *supra*.

2. To sustain a conviction of arson, by circumstantial evidence, the evidence must show that the fire was of an incendiary origin and the defendant must be connected with the actual commission of the crime. Syl. pt. 5, State v. Mullins, 181 W.Va. 415, 383 S.E.2d 47 (1989); Syl. pt. 1, State v. Adkins, 191 W.Va. 480, 446 S.E.2d 702 (1994). See, State v. Hanson, 181 W.Va. 353, 382 S.E.2d 547 (1989); State v. Gebhart, 70 W.Va. 232, 73 S.E. 964 (1912).
3. “Any person who violates the provisions of sections one, two, three, four, five or six [§ 61-3-1, § 61-3-2, § 61-3-3, § 61-3-4, § 61-3-5, or § 61-3-6] of this article, which violation causes bodily injury, but does not result in death, to any person shall be guilty of a felony[.]” *W.Va. Code*, 61-3-7(a) (1997).

“Any person who violates the provisions of sections one, two, three, four, five or six of this article, which violation causes serious bodily injury which maims, disfigures, or disables any person, but does not result in death, to any person shall be guilty of a felony[.]” *W.Va. Code*, 61-3-7(b) (1997).

ARSON
ARSON IN THE FOURTH DEGREE
Attempted Arson

The Court instructs the jury that “Arson in the Fourth Degree” is committed if any person willfully and maliciously attempts to set fire to or burn, or attempts to cause to be burned, or attempts to aid, counsel, procure, persuade, incite, entice or solicit any person to burn, any dwelling, whether occupied, unoccupied or vacant, or any outbuilding, whether the property of himself or herself or of another; any building or structure of any class or character which is not a dwelling or outbuilding, whether the property of himself or herself or of another; any personal property of any class or character, of the value of not less than five hundred dollars, and the property of another person; or who commits any act preliminary thereto, or in furtherance thereof. ¹

Therefore, in order to prove the commission of the offense of “Arson in the Fourth Degree”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. willfully ²
5. and maliciously ²
6.
 - a. attempted to set fire to or burn
 - b. attempted to cause to be burned
 - c. attempted to (aid) (counsel) (procure) (persuade) (incite) (entice) (solicit) any person to burn
7.
 - a. any dwelling, whether occupied, unoccupied or vacant, whether the property of himself or herself or of another
 - b. any outbuilding whether the property of himself or herself or of another
 - c. any building or structure of any class or character which is not a dwelling or outbuilding, whether the property of himself or herself or of another
 - d. any personal property of any class or character, of the value of not less than five hundred dollars, and the property of another person
8. or committed any act preliminary thereto, or in furtherance thereof.

FOOTNOTES

- ¹ W.Va. Code, 61-3-4 (1997).
- ² The phrase willfully and maliciously in our arson statutes is common to arson statutes in other states. Courts have rather uniformly held that this phrase means an intentional as distinguished from an accidental burning and without lawful reason, cause, or excuse. Syl. pt. 4, State v. Davis, 178 W.Va. 87, 357 S.E.2d 769 (1987).

COMMENTS

1. “The property distinctions that are relevant to determine the degree of other arson charges are irrelevant under our attempted arson statute, *W.Va. Code*, 61-3-4, which specifically incorporates any of the buildings or property mentioned in the foregoing sections. Thus attempted arson is not confined to a dwelling.” Syl. pt. 6, State v. Davis, 178 W.Va. 87, 357 S.E.2d 769 (1987).
2. In State v. Davis, *supra*, the defendant was convicted of attempted arson. He contended the State failed to prove any intent or motive for the fire.

For arson, as distinguished from attempted arson, the fire must be of an incendiary origin and the defendant must be personally connected to the fire.

For purposes of an attempted arson, the requisite proof for the State to show under State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219 (1978) is a specific intent to commit the underlying crime, i.e., arson, and an overt act toward its completion.

Here, the jury was instructed that each of the elements of fourth degree arson, including that the defendant willfully and maliciously attempted to set the fire, must be proven by the State beyond a reasonable doubt. In a separate instruction, the Court defined “willful and malicious” to mean a “deliberate and intentional attempt to set fire to or burn a building as contrasted with an accidental or unintentional attempt to set fire to or burn a building.” The Court found the jury was properly instructed on intent.

3. “Any person who violates the provisions of sections one, two, three, four, five or six [§ 61-3-1, § 61-3-2, § 61-3-3, § 61-3-4, § 61-3-5, or § 61-3-6] of this article, which violation causes bodily injury, but does not result in death, to any person shall be guilty of a felony[.]” *W.Va. Code*, 61-3-7(a) (1997).

“Any person who violates the provisions of sections one, two, three, four, five or six of this article, which violation causes serious bodily injury which maims, disfigures, or disables any person, but does not result in death, to any person shall be guilty of a felony[.]” *W.Va. Code*, 61-3-7(b) (1997).

4. “In order to constitute the crime of attempt, two requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime.”

Syl. pt. 2, State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219 (1978); State v. Burd, 187 W.Va. 415, 419 S.E.2d 676 (1991); Syl. pt. 4, State v. Mayo, 191 W.Va. 79, 443 S.E.2d 236 (1994).

Where formation of criminal intent is accompanied by preparation to commit the crime of murder and a direct overt and substantial act toward its perpetration, it constitutes the offense of attempted murder. Syl. pt. 2, State v. Burd, 187 W.Va. 415, 419 S.E.2d 676 (1991).

ARSON
ARSON IN THE FOURTH DEGREE
Placing of Materials or Explosives as Constituting Attempt

The placing or distributing of any inflammable, explosive or combustible material or substance, or any device in any dwelling, whether occupied, unoccupied or vacant, or any outbuilding, whether the property of himself or herself or of another; any building or structure of any class or character which is not a dwelling or outbuilding, whether the property of himself or herself or of another; any personal property of any class or character, of the value of not less than five hundred dollars, and the property of another person in an arrangement or preparation with intent to eventually, willfully and maliciously, set fire to or burn, or to cause to be burned, or to aid, counsel, procure, persuade, incite, entice or solicit the setting fire to or burning of any outbuilding, whether the property of himself or herself or of another; any building or structure of any class or character which is not a dwelling or outbuilding, whether the property of himself or herself or of another; any personal property of any class or character, of the value of not less than five hundred dollars, and the property of another person shall constitute an attempt to burn that building, structure or personal property. ¹

FOOTNOTE

¹ W.Va. Code, 61-3-4(b) (1997)

ARSON
BURNING, OR ATTEMPTING TO BURN INSURED PROPERTY

The Court instructs the jury that the offense “Burning, or Attempting to Burn Insured Property” is committed if any person willfully and with intent to injure or defraud an insurer sets fire to or burns, or attempts so to do, or causes to be burned, or aids, counsels, procures, persuades, incites, entices or solicits any person to burn, any building, structure or personal property, of any class or character, whether the property of himself or herself or of another, which shall at the time be insured or which is believed by the person committing an act prohibited as set forth herein to be insured by any person against loss or damage by fire. ¹

Therefore, in order to prove the commission of the offense of “Burning, or Attempting to Burn Insured Property”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. willfully
5. and with intent to injure or defraud an insurer
6.
 - a. set fire to or burned
 - b. attempted to set fire to or burn ²
 - c. caused to be burned
 - d. aided, counseled, procured, persuaded, incited, enticed or solicited any person to burn
7. any building, structure or personal property of any class or character
8. whether the property of himself or herself or of another
9.
 - a. which shall at the time be insured
 - b. which is believed by the defendant to be insured by any person against loss or damage by fire.

FOOTNOTES

¹ W.Va. Code, 61-3-5 (1997)

² See page 250 for definition of “attempt” in the context of an arson prosecution.

COMMENT

1. “Any person who violates the provisions of sections one, two, three, four, five or six [§ 61-3-1, § 61-3-2, § 61-3-3, § 61-3-4, § 61-3-5, or § 61-3-6] of this article, which violation causes bodily injury, but does not result in death, to any person shall be guilty of a felony[.]” *W.Va. Code*, 61-3-7(a) (1997).

“Any person who violates the provisions of sections one, two, three, four, five or six of this article, which violation causes serious bodily injury which maims, disfigures, or disables any person, but does not result in death, to any person shall be guilty of a felony[.]” *W.Va. Code*, 61-3-7(b) (1997).

ARSON
BURNING OR ATTEMPTING TO BURN INSURED PROPERTY
Definition of Attempt

“In order to constitute the crime of “attempt”, two requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime.” ¹

FOOTNOTE

- ¹ Syl. pt. 2, State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219 (1978); State v. Burd, 187 W.Va. 415, 419 S.E.2d 676 (1991); Syl. pt. 4, State v. Mayo, 191 W.Va. 79, 443 S.E.2d 236 (1994).

COMMENT

1. Where formation of criminal intent is accompanied by preparation to commit the crime of murder and a direct overt and substantial act toward its perpetration, it constitutes the offense of attempted murder. Syl. pt. 2, State v. Burd, 187 W.Va. 415, 419 S.E.2d 676 (1991).

ARSON SETTING FIRE ON LANDS

The Court instructs the jury that the offense of “Setting Fire on Lands” is committed if any person willfully, unlawfully and maliciously sets fire to any woods, fence, grass, straw or other thing capable of spreading fire on lands. ¹

Therefore, in order to prove the commission of the offense of “Setting Fire on Lands”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. willfully,
5. unlawfully,
6. and maliciously
7. set fire to
 - a. any woods
 - b. any fence
 - c. any grass
 - d. any straw
 - e. _____ (specify)
8. capable of spreading fire on lands.

FOOTNOTE

¹ W.Va. Code, 61-3-6 (1997).

COMMENT

1. “Any person who violates the provisions of sections one, two, three, four, five or six [§ 61-3-1, § 61-3-2, § 61-3-3, § 61-3-4, § 61-3-5, or § 61-3-6] of this article, which violation causes bodily injury, but does not result in death, to any person shall be guilty of a felony[.]” *W.Va. Code*, 61-3-7(a) (1997).

“Any person who violates the provisions of sections one, two, three, four, five or six of this article, which violation causes serious bodily injury which maims, disfigures, or disables any person, but does not result in death, to any person shall be guilty of a felony[.]” *W.Va. Code*, 61-3-7(b) (1997).

BURGLARY

NIGHTTIME BURGLARY

The Court instructs the jury that the term “Nighttime Burglary”, as that term is used in the indictment herein, is committed when any person, during the nighttime, (breaks and enters) (enters without breaking) a dwelling house or an outhouse adjoining thereto or occupied therewith, of another person, with the intent to commit a crime therein. ¹

Therefore, in order to prove the commission of the offense of “Nighttime Burglary”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. during the nighttime,
5. did feloniously ²
 - a. break and enter
 - b. enter without breaking
6. a dwelling house ³ or an outhouse adjoining to or occupied therewith ⁴
7. belonging to _____ (name) ⁵
8. with the intent to commit a crime ⁶, to-wit; _____, therein.

FOOTNOTES

¹ W.Va. Code, 61-3-11(a) (1993).

² An indictment for burglary must charge that the offense was committed “feloniously and burglariously”. State v. Meadows, 22 W.Va. 766 (1883); State v. McDonald, 9 W.Va. 456 (1876); State ex rel. Thompson v. Watkins, 200 W.Va. 214, 488 S.E.2d 894 (1997). The question of whether the omission of the word “burglariously” in an instruction remains unresolved.

³ See page W.Va. Code, § 61-3-11(c) for definition of “dwelling house” in the context of a burglary prosecution.

- ⁴ An outhouse subject to burglary under this section must be a house within the ordinary meaning of the word and must adjoin the dwelling house of its owner or be occupied in connection therewith. State v. Neff, 122 W.Va. 549, 11 S.E.2d 171 (1940).
- ⁵ See page 260 for separate instruction regarding ownership of real property.
- ⁶ See page 259 for separate instruction regarding the underlying crime in a prosecution for burglary.

COMMENTS

1. Under the prior enactment of *W.Va. Code*, 61-3-11, a required element of burglary was that it be proven that a defendant had entered a dwelling house or outhouse with the “intent to commit a felony or any larceny therein”. The 1993 amendment to § 61-3-11 altered this language to require proof of an “intent to commit a crime”, thus substantially broadening the scope of the statute.

As a result of this amendment, a number of the earlier cases dealing with the definition of burglary address the court’s interpretation of the previous language.

2. A burglary is complete once there has been an unauthorized entry and an intent to commit a felony. State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1981).

‘The common-law definition of burglary consisted of (1) breaking and (2) entering of (3) a dwelling house (4) of another (5) in the nighttime (6) with the intent to commit a felony therein.” Louk, n.1, at 434, *citing* State v. Caddle, 35 W.Va. 73, 12 S.E. 1098 (1891).

3. The only element of larceny necessary to be shown for a burglary conviction is the intent to commit the larceny. Thus, larceny is not a lesser included offense of burglary. Syl. Pt. 4, Louk, *supra*.

BURGLARY

DAYTIME BURGLARY

The Court instructs the jury that the term “Daytime Burglary”, as that term is used in the indictment herein, is committed when any person, during the daytime, breaks and enters a dwelling house or an outhouse adjoining thereto or occupied therewith, of another person, with the intent to commit a crime therein. ¹

Therefore, in order to prove the commission of the offense of “Daytime Burglary”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. during the daytime,
5. did feloniously ² break and enter
6. a dwelling house ³ or an outhouse adjoining to or occupied therewith ⁴
7. belonging to _____ (name) ⁵
8. with the intent to commit a crime ⁶, to-wit; _____, therein.

FOOTNOTES

¹ W.Va. Code, 61-3-11(a) (1993).

² An indictment for burglary must charge that the offense was committed “feloniously and burglariously”. State v. Meadows, 22 W.Va. 766 (1883); State v. McDonald, 9 W.Va. 456 (1876); State ex rel. Thompson v. Watkins, 200 W.Va. 214, 488 S.E.2d 894 (1997). The question of whether the omission of the word “burglariously” in an instruction remains unresolved.

³ See W.Va. Code, § 61-3-11(c) for definition of “dwelling house” in the context of a burglary prosecution

⁴ An outhouse subject to burglary under this section must be a house within the ordinary meaning of the word and must adjoin the dwelling house of its owner or be occupied in connection therewith. State v. Neff, 122 W.Va. 549, 11 S.E.2d 171 (1940).

- ⁵ See page 260 for separate instruction regarding ownership of real property.
- ⁶ See page 264 for separate instruction regarding the underlying crime in a prosecution for burglary.

COMMENTS

1. Under the prior enactment of *W.Va. Code*, 61-3-11, a required element of burglary was that it be proven that a defendant had entered a dwelling house or outhouse with the “intent to commit a felony or any larceny therein”. The 1993 amendment to § 61-3-11 altered this language to require proof of an “intent to commit a crime”, thus substantially broadening the scope of the statute.

As a result of this amendment, a number of the earlier cases dealing with the definition of burglary address the court’s interpretation of the previous language.

2. A burglary is complete once there has been an unauthorized entry and an intent to commit a felony. State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1981).

‘The common-law definition of burglary consisted of (1) breaking and (2) entering of (3) a dwelling house (4) of another (5) in the nighttime (6) with the intent to commit a felony therein.’ Louk, n.1, at 434, *citing* State v. Caddle, 35 W.Va. 73, 12 S.E. 1098 (1891).

3. The only element of larceny necessary to be shown for a burglary conviction is the intent to commit the larceny. Thus, larceny is not a lesser included offense of burglary. Syl. Pt. 4, Louk, *supra*.

BURGLARY
ENTERING WITHOUT BREAKING OF A DWELLING HOUSE (DAYTIME)

The Court instructs the jury that the term “Breaking and Entering of a Dwelling House”, as that term is used in the indictment herein, is committed when any person, during the daytime, enters without breaking a dwelling house or an outhouse adjoining thereto or occupied therewith, of another person, with the intent to commit a crime therein. ¹

Therefore, in order to prove the commission of the offense of “Breaking and Entering of a Dwelling House”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. during the daytime,
5. did feloniously ² enter without breaking
6. a dwelling house ³ or an outhouse adjoining to or occupied therewith ⁴
7. belonging to _____ (name) ⁵
8. with the intent to commit a crime ⁶, to-wit; _____, therein.

FOOTNOTES

¹ W.Va. Code, 61-3-11(b) (1993).

² An indictment for burglary must charge that the offense was committed “feloniously and burglariously”. State v. Meadows, 22 W.Va. 766 (1883); State v. McDonald, 9 W.Va. 456 (1876); State ex rel. Thompson v. Watkins, 200 W.Va. 214, 488 S.E.2d 894 (1997). The question of whether the omission of the word “burglariously” in an instruction remains unresolved.

³ See W.Va. Code, § 61-3-11(c) for definition of “dwelling house” in the context of a burglary prosecution

⁴ An outhouse subject to burglary under this section must be a house within the ordinary meaning of the word and must adjoin the dwelling house of its owner or be occupied in connection therewith. State v. Neff, 122 W.Va. 549, 11 S.E.2d 171 (1940).

- ⁵ See page 260 for separate instruction regarding ownership of real property.
- ⁶ See page 259 for separate instruction regarding the underlying crime in a prosecution for burglary.

COMMENTS

1. Under the prior enactment of *W.Va. Code*, 61-3-11, a required element of burglary was that it be proven that a defendant had entered a dwelling house or outhouse with the “intent to commit a felony or any larceny therein”. The 1993 amendment to § 61-3-11 altered this language to require proof of an “intent to commit a crime”, thus substantially broadening the scope of the statute.

As a result of this amendment, a number of the earlier cases dealing with the definition of burglary address the court’s interpretation of the previous language.

2. A burglary is complete once there has been an unauthorized entry and an intent to commit a felony. State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1981).

“The common-law definition of burglary consisted of (1) breaking and (2) entering of (3) a dwelling house (4) of another (5) in the nighttime (6) with the intent to commit a felony therein.” Louk, n.1, at 434, *citing* State v. Caddle, 35 W.Va. 73, 12 S.E. 1098 (1891).

3. The only element of larceny necessary to be shown for a burglary conviction is the intent to commit the larceny. Thus, larceny is not a lesser included offense of burglary. Syl. Pt. 4, Louk, *supra*.

BURGLARY
Underlying Offense for Burglary and
Entering Without Breaking of a Dwelling House (Daytime)

One of the essential elements of the offense of (Nighttime Burglary) (Daytime Burglary) (Entering Without Breaking of a Dwelling House) is that there must be an intent on the part of an accused to commit a crime within the property that the accused has allegedly entered.

It is, therefore, necessary for the State of West Virginia to prove, beyond a reasonable doubt, that the defendant, _____, entered the property of _____ with the intent to commit the criminal offense of _____ (state underlying offense).

The Court instructs the jury that the offense of _____ (state underlying offense) is defined as: _____ (list statutory definition of underlying offense).

BURGLARY

Ownership of Real Property

The term “ownership”, for the purposes of establishing a (burglary) (breaking and entering), means not only the actual titled owner or owners of the property, but such persons that may have possession and occupancy of the property. ¹

FOOTNOTE

- ¹ Syllabus Point 1, Newcomb v. Coiner, 154 W.Va. 653, 178 S.E.2d 155 (1970).

COMMENT

1. “The specific ownership of a building involved in the crime of burglary is not an essential element of that offense, and title, as far as the law of burglary is concerned, follows possession, and an allegation of possession constitutes a sufficient allegation of ownership in an indictment for the offense of breaking and entering.” Syl. Pt. 3, Newcomb v. Coiner, *supra*.

BREAKING AND ENTERING
BREAKING AND ENTERING OR ENTERING WITHOUT BREAKING
Building (Other Than Dwelling) or Other Vessel

The Court instructs the jury that the term “Breaking and Entering or Entering Without Breaking”, as that term is used in the indictment herein, is committed when any person (breaks and enters) (enters without breaking), any office, shop, storehouse, warehouse, banking house, railroad or traction car, propelled by steam electricity or otherwise, steamboat or other boat or vessel, or any house or building other than a dwelling house or outhouse adjoining thereto or occupied therewith, with the intent to commit a felony or any larceny therein. ¹

Therefore, in order to prove the commission of the offense of “Breaking and Entering or Entering Without Breaking”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did feloniously ²
 - a. break and enter
 - b. enter without breaking
5. a(n)
 - a. office
 - b. shop
 - c. storehouse
 - d. warehouse
 - e. banking house
 - f. railroad or traction car, propelled by steam, electricity, or otherwise
 - g. boat or other vessel
 - h. house or building ³
6. which was not a dwelling house ⁴ or outhouse adjoining thereto or occupied therewith,
7. owned by _____, ⁵

8. with the intent to commit
 - a. the felony offense ⁶ of _____ therein.
 - b. a larceny ⁷ therein.

FOOTNOTES

¹ W.Va. Code, 61-3-12 (1923).

² An indictment for burglary must charge that the offense was committed “feloniously and burglariously”. State v. Meadows, 22 W.Va. 766 (1883); State v. McDonald, 9 W.Va. 456 (1876); State ex rel. Thompson v. Watkins, 200 W.Va. 214, 488 S.E.2d 894 (1997).

³ The term “building”, while specifically undefined in the Code, does not, by the terms of § 61-3-12, include dwelling houses. In State v. Sampson, 200 W.Va. 53, 488 S.E.2d 53 (1997), the Court declined to address the accuracy of instruction defining “building” as “a structure designed for habitation, shelter, storage, trade, manufacture, religion, business, education and the like; a structure or edifice inclosing a space within its walls, and usually, but not necessarily, covered with a roof.”

This instruction was apparently taken verbatim from Black’s Law Dictionary. (See *Black’s Law Dictionary* 194 (6th Edition 1990)). Rather than addressing the Appellant’s argument, the Court held that the Appellant’s failure to object to the instruction constituted a waiver of his right to raise the issue on appeal.

Justice Starcher noted in his dissent that the relevant structure, an outdoor fenced-in area adjacent to a hospital, did not constitute a “building” within the meaning of the statute.

⁴ See W.Va. Code, § 61-3-11(c) for definition of “dwelling house” in the context of a burglary prosecution

⁵ See page 260 for separate instruction regarding ownership of real property.

⁶ See page 259 for separate instruction regarding underlying felony offenses.

⁷ See page 269 for separate instruction regarding the definition of “larceny”.

COMMENT

1. “The primary difference between burglary and breaking and entering is that the former involves the breaking and entering or entering without breaking of a dwelling house or outbuilding adjoining thereto at nighttime or breaking and entering of a dwelling

house or outbuilding adjoining thereto during the daytime. *W. Va. Code*, 61-3-11(a). If there is an entering without breaking of a dwelling during the daytime, *W. Va. Code*, 61-3-11(b), or the breaking and entering or entering without breaking of certain structures enumerated in *W. Va. Code*, 61-3-12, the offense is a felony with a penalty of one to ten years. These latter offenses are commonly called “breaking and entering” or “entering without breaking”. In all the offenses, the entry must be with the intent to commit a felony or any larceny.” Footnote 5, State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1981).

BREAKING AND ENTERING
BREAKING AND ENTERING OR ENTERING WITHOUT BREAKING
Underlying Felony Offense for Breaking and Entering
or Entering Without Breaking

One of the essential elements of the offense of “Breaking and Entering or Entering Without Breaking” is that there must have been an intent on the part of accused, at the time of the commission of the offense, to commit a felony offense within the property that the accused has allegedly entered. ¹

It is, therefore, necessary for the State of West Virginia to prove, beyond a reasonable doubt, that the defendant, _____, entered the property of _____ with the intent to commit the felony offense of _____ (state underlying felony offense).

The Court further instructs the jury that the felony offense of _____ (state underlying felony offense) is defined as _____ (list statutory definition and essential elements of underlying felony offense).

FOOTNOTE

¹ W.Va. Code, 61-3-12 (1923).

BREAKING AND ENTERING
BREAKING AND ENTERING OR ENTERING WITHOUT BREAKING
Intent to Commit Larceny as Element of Breaking and Entering
and Entering Without Breaking

One of the essential elements of the offense of “Breaking and Entering or Entering Without Breaking” is that there must have been an intent on the part of accused, at the time of the commission of the offense, to commit a larceny within the property that the accused has allegedly entered. ¹

It is, therefore, necessary for the State of West Virginia to prove, beyond a reasonable doubt, that the defendant, _____, entered the property of _____ with the intent to commit a larceny therein.

The Court further instructs the jury that “larceny” is defined as unlawful stealing, taking and carrying away of the personal property of another, against his or her will, with the intent to permanently deprive the owner of the property. ²

FOOTNOTES

¹ W.Va. Code, 61-3-12 (1923).

² “To support a conviction for larceny at common law, it must be shown that the defendant took and carried away the personal property of another against his will and with the intent to permanently deprive him of the ownership thereof.” Syl. Pt. 1, State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53 (1985), citing Syl. Pt. 3, State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1981).

BREAKING AND ENTERING
BREAKING AND ENTERING OR ENTERING WITHOUT BREAKING
Automobile, Motorcar or Bus

The Court instructs the jury that the term “Breaking and Entering or Entering Without Breaking of an Automobile”, as that term is used in the indictment herein, is committed when any person (breaks and enters) (enters without breaking), any automobile, motorcar or bus, with the intent to commit a felony or any larceny therein. ¹

Therefore, in order to prove the commission of the offense of “Breaking and Entering or Entering Without Breaking of an Automobile”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did
 - a. break and enter
 - b. enter without breaking
5. a(n)
 - a. automobile
 - b. motorcar
 - c. bus
6. belonging to _____,
7. with the intent to commit
 - a. the felony offense ² of _____ therein.
 - b. a larceny ³ therein.

FOOTNOTES

¹ W.Va. Code, 61-3-12 (1923).

² See page 264 for separate instruction regarding underlying felony offenses.

³ See page 269 for separate instruction regarding the definition of “larceny”.

LARCENY GRAND LARCENY

The Court instructs the jury that the term “Grand Larceny”, as that term is used in the indictment herein, is committed when any person unlawfully and feloniously steals, takes and carries away the personal property of another of the value of one thousand dollars or more, against the will of the owner of the property, and with the intent to permanently deprive the owner of the property. ¹

Therefore, in order to prove the commission of the offense of “Grand Larceny”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. unlawfully and
5. feloniously ²
6. stole, took and carried away
7. property, to-wit: _____ (describe property), ³
8. of the value of one thousand dollars (\$1,000.00) or more,
9. which was the property of _____ (list owner), ⁴
10. against the will of _____ (list owner),
11. with the felonious intent to permanently deprive _____ of the said property. ⁵

FOOTNOTES

¹ Crow v. Coiner, 323 F.Supp. 555 (N.D.W.Va. 1971); State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1981); See State v. Sharp, 184 W.Va. 292, 400 S.E.2d 300 (1990). W.Va. Code, 61-3-13(a) (1994).

² Indictment must charge that acts were done feloniously. State ex rel. Harding v. Boles, 150 W.Va. 534, 148 S.E.2d 169 (1966), overruled on other grounds, State v. Manns, 174 W.Va. 793, 329 S.E.2d 865 (1985).

- ³ “In order for an indictment for larceny to be sufficient in law, it must identify with specificity the particular items of property which are the subject of the charge by specifically describing said property, unless the property is incapable of identification as in cases involving fungible goods, United States currency, or comparable articles.” Syl. Pt. 5, State ex rel. Day v. Silver, 210 W.Va. 175, 556 S.E.2d 820 (2001).
- ⁴ The generally recognized rule relating to the conformity of proof in a larceny case is that the proof must show ownership of the property stolen in a person of the same name stated in the indictment, although an immaterial variance may be disregarded in the absence of prejudice to the accused. State v. Scarberry, 187 W.Va. 251, 418 S.E.2d 361 at 365 (1992).
- ⁵ “‘The *animus furandi*, or the intent to take and deprive another of his property, is an essential element in the crimes of robbery and larceny.’ Syl. pt. 2, State v. McCoy, 63 W.Va. 69, 59 S.E. 758 (1907).” Syl. pt. 1, State v. Wolfe, 166 W.Va. 815, 277 S.E.2d 640 (1981). State v. Simmons, 168 W.Va. 400, 285 S.E.2d 136 (1981).

COMMENTS

1. Breaking and entering and larceny are distinct and separate offenses and indictment and conviction for both offenses even though they occurred close in time does not violate double jeopardy principles. State v. Johnson, 179 W.Va. 9, 371 S.E.2d 340 (1988).
2. “...The distinction between embezzlement and larceny is that embezzlement is the wrongful conversion of property without trespass, or where the original taking and possession is lawful. In order to constitute the offense, it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes.” State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905). Quoted in State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980); State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53, 56 (1985).

Although a common law larceny indictment will support an embezzlement conviction, if the state proves the elements of embezzlement, it is a basic tenet of law that the jury must be instructed on the elements of embezzlement before a conviction can be sustained by proof of them. State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53 (1985).

LARCENY PETIT LARCENY

The Court instructs the jury that the term “Petit Larceny”, as that term is used in the indictment herein, is committed when any person unlawfully steals, takes and carries away the personal property of another of the value of less than one thousand dollars, against the will of the owner of the property, and with the intent to permanently deprive the owner of the property. ¹

Therefore, in order to prove the commission of the offense of “Petit Larceny”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. unlawfully,
5. stole, took and carried away,
6. property, to-wit: _____ (describe property), ²
7. of the value of less than one thousand dollars (\$1,000.00),
8. which was the property of _____ (list owner), ³
9. against the will of _____ (list owner),
10. with the felonious intent to permanently deprive _____ of the said property. ⁴

FOOTNOTES

¹ Crow v. Coiner, 323 F.Supp. 555 (N.D.W.Va. 1971); State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1981). W.Va. Code, 61-3-13(b) (1994).

² “In order for an indictment for larceny to be sufficient in law, it must identify with specificity the particular items of property which are the subject of the charge by specifically describing said property, unless the property is incapable of identification as in cases involving fungible goods, United States currency, or comparable articles.” Syl. Pt. 5, State ex rel. Day v. Silver, 210 W.Va. 175, 556 S.E.2d 820 (2001).

³ The generally recognized rule relating to the conformity of proof in a larceny case is that the proof must show ownership of the property stolen in a person of the same

name stated in the indictment, although an immaterial variance may be disregarded in the absence of prejudice to the accused. State v. Scarberry, 187 W.Va. 251, 418 S.E.2d 361 at 365 (1992).

- 4 “The *animus furandi*, or the intent to take and deprive another of his property, is an essential element in the crimes of robbery and larceny.’ Syl. pt. 2, State v. McCoy, 63 W.Va. 69, 59 S.E. 758 (1907).” Syl. pt. 1, State v. Wolfe, 166 W.Va. 815, 277 S.E.2d 640 (1981). State v. Simmons, 168 W.Va. 400, 285 S.E.2d 136 (1981).

COMMENTS

1. Breaking and entering and larceny are distinct and separate offenses and indictment and conviction for both offenses even though they occurred close in time does not violate double jeopardy principles. State v. Johnson, 179 W.Va. 9, 371 S.E.2d 340 (1988).
2. “...The distinction between embezzlement and larceny is that embezzlement is the wrongful conversion of property without trespass, or where the original taking and possession is lawful. In order to constitute the offense, it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes.” State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905). Quoted in State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980); State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53, 56 (1985).

Although a common law larceny indictment will support an embezzlement conviction, if the state proves the elements of embezzlement, it is a basic tenet of law that the jury must be instructed on the elements of embezzlement before a conviction can be sustained by proof of them. State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53 (1985).

3. When a person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he has been before sentenced in the United States for the like offense, he shall be sentenced to be confined in the penitentiary for the term of one year. *W.Va. Code*, 61-11-20 (1923). State ex rel. Roach v. Dietrick, 185 W.Va. 23, 404 S.E.2d 415 (1991).

**LARCENY
EMBEZZLEMENT
Basic Elements - Felony/Misdemeanor**

The Court instructs the jury that “Embezzlement”, as that term is used in the indictment herein, is committed when any officer, agent, clerk or servant of the State of West Virginia,¹ or any county, district, school district, or municipal corporation, or any other corporation, or any officer of public trust in the State of West Virginia; or any agent, clerk or servant of any firm or person, or company or association of persons not incorporated, embezzles or fraudulently converts to his or her own use, bullion, money, bank notes, drafts, security for money, or any effects or property of another person, which shall have come into his or her possession, or have been placed under his or her management or care, by virtue of his or her office, place or employment.²

Therefore, in order to prove the commission of the offense of “Embezzlement”³, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. while in the position of (select as appropriate)⁴
 - a. an officer, agent clerk or servant of the State of West Virginia (or of any county, district, school district, or municipal corporation
 - b. an officer of public trust in the State of West Virginia
 - c. an officer, agent, clerk or servant of a corporation, to-wit: _____ (specify corporation)
 - d. an agent, clerk or servant of a firm, person, company or association not incorporated, to-wit: _____ (specify)
5. did embezzle⁵ or fraudulently convert⁶ to (his/her) own use⁷,
6. (bullion, money, bank notes, drafts, security for money or other effects or property - select as appropriate and specify),⁸
7. of the value of _____,⁹
8. of _____ (specify ownership),¹⁰

9. which came into the possession of the defendant ¹¹ or was placed under the defendant's care or management by virtue of (his/her) employment, office or place, ¹²
10. with the intent to permanently deprive _____ (owner of property) of the use and possession thereof. ¹³

FOOTNOTES

¹ See instruction on embezzlement by a public official of public funds.

It appears from a comparison of the two embezzlement crimes in W.Va. Code, 61-3-20 that the crime of embezzlement by a public official does not contain as many elements of proof as the general embezzlement crime. It is generally recognized that the Legislature may set higher standards on public officials by defining embezzlement by public officials without all of the elements found in the general embezzlement statutes. (Cites omitted). Footnote 4, State ex rel. Cogar v. Kidd, 160 W.Va. 371, 234 S.E.2d 899 (1977).

² W.Va. Code, 61-3-20 (1929).

³ The crime of embezzlement is purely a statutory crime, the statutes being enacted to reach and punish fraudulent conversions which could not be reached under the common law pertaining to larceny. State v. Riley, 151 W.Va. 364, 151 S.E. 308 (1966); State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

“(I)n order to constitute the crime of embezzlement, it is necessary to show, (1) the trust relation of the person charged, and that he falls within that class of persons named; (2) that the property or thing claimed to have been embezzled or converted is such property as is embraced in the statute; (3) that it is the property of another person; (4) that it came into the possession, or was placed in the care, of the accused, under and by virtue of his office, place or employment; (5) that his manner of dealing with or disposing of the property, constituted a fraudulent conversion and an appropriation of the same to his own use, and (6) that the conversion of the property to his own use was with the intent to deprive the owner thereof.” Syl. pt. 1, State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980), citing Syl. pt. 2 of State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

⁴ The agency of one charged with the embezzlement of money or other property is sufficiently established by evidence showing that the agency related to the single transaction of entrusting the property embezzled to the defendant, and no previous relationship of principal and agent is necessary.

An agency is considered to come within the statute whether the contract of agency provides for compensation or not.

The agency relationship need not be a formalized agreement, but occurs as the result of a trust relationship where a person is entrusted with the possession of another's property.

"Agent" can be anyone entrusted with property by virtue of his position, and not simply an agent within the strict definition of the common law.

If at the time of a fraudulent conversion the accused was an agent for any purpose and the property appropriated was entrusted to him by virtue of such agency, embezzlement is committed. It is not the extent of the authority conferred, but the fact of the relationship which constitutes the agency, which is an essential element of the crime of embezzlement.

State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980).

- ⁵ Embezzlement is a fraudulent appropriation or misapplication of the property of another by one in whose care it has been entrusted, with the intention of depriving the owner thereof.

Syl. pt. 1, State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

- ⁶ Conversion is the fraudulent appropriation of another's property to one's own use.

State v. Holley, 115 W.Va. 464, 177 S.E. 302 (1934); State v. Pietranton, 140 W.Va. 444, 84 S.E.2d. 774 (1954).

Conversion is an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to alter their condition or exclude the owner's rights.

State v. Pietranton, 140 W.Va. 444, 84 S.E.2d 774 (1954); State v. De Berry, 75 W.Va. 632, 84 S.E. 508 (1915).

- ⁷ To appropriate to one's own use, does not necessarily mean to one's personal use or advantage, State v. Cantor, 93 W.Va. 238, 116 S.E. 396 (1923).

- ⁸ "...And it shall not be necessary to describe in the indictment, or to identify upon the trial, the particular bullion, money, bank note, draft or security for money which is so taken, converted to his own use, or embezzled..." W.Va. Code, 61-3-20 (1929).

- ⁹ Our embezzlement statute, except for banking employees, is tied to the larceny statute for punishment. State v. Wetzel, 75 W.Va. 7, 83 S.E. 68 (1914). See W.Va. Code, 61-3-13 (1994) for distinction between and penalties for grand and petit larceny. (Simple larceny of goods or chattels of the value of one thousand dollars or more is grand larceny; simple larceny of goods or chattels of the value of less than one thousand dollars is petit larceny).

- ¹⁰ The taking of the property need not be from the actual owner of the property, but may be from one who has lawful possession of it.

State v. De Berry, 75 W.Va. 632, 84 S.E. 508 (1915); State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980).

¹¹ Actual possession (by embezzler) not necessary. State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980), citing State v. Workman, 91 W.Va. 771, 114 S.E. 276 (1922).

¹² In order for a taking to be embezzlement and not larceny, the money or property must have come into the possession of the accused lawfully, or with the consent of the owner, and a fiduciary relationship must have existed between the owner and the offender.

State v. Smith, 97 W.Va. 313, 125 S.E. 90 (1924); State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

The hallmark of embezzlement is the trust relationship and the subsequent conversion or appropriation of the entrusted property.

State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980).

¹³ In State v. Brown, 188 W.Va. 12, 422 S.E.2d 489 (1992), a case concerning embezzlement by a public official, the Court noted in footnote 4 that,

“[w]e use the terminology ‘specific intent’ in its ‘most common usage’ which is to designate a special mental element which ‘is required above and beyond any mental state required with respect to the *actus reus* of the crime.’ Wayne R. LaFare & Austin W. Scott, Jr., *Handbook on Criminal Law* § 28 at 202 (1972). To illustrate, common-law embezzlement (and statutory embezzlement pursuant to paragraph one of W.Va. Code 61-3-20; i.e., embezzlement which does not involve a public official) requires as an element of proof that the defendant intended to permanently deprive an owner of the use of his property. This particular element of proof is what renders garden variety embezzlement a specific intent offense. As this opinion explains, embezzlement by a public official is not a specific intent crime because proof that the public official intended to deprive the public of its property is not required.” [emphasis added].

COMMENTS

1. “...The distinction between embezzlement and larceny is that embezzlement is the wrongful conversion of property without trespass, or where the original taking and possession is lawful. In order to constitute the offense, it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes.”

State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905). Quoted in State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980); State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53, 56 (1985).

Although a common law larceny indictment will support an embezzlement conviction, if the state proves the elements of embezzlement, it is a basic tenet of law that the jury must be instructed on the elements of embezzlement before a conviction can be sustained by proof of them. State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53 (1985).

2. “Where the State elects to cumulate separate acts of embezzlement in one indictment on the theory they were committed pursuant to a common design and common criminal intent, it must prove such common design and common criminal intent, and the question of whether the cumulative act is grand or petit larceny by embezzlement may depend on the proof and would be determined by the jury upon proper instruction.” Syl. pt. 7, State ex rel. Cogar v. Kidd, 160 W.Va. 371, 234 S.E.2d 899 (1977).
3. Multiple convictions for larceny by embezzlement and larceny by fraudulent schemes, arising from the same act or incident, can constitute a violation of double jeopardy. See Syl. Pt. 9, State v. Rogers, 209 W.Va. 348, 547 S.E.2d 910 (2001); State v. Brown, 212 W.Va. 397, 572 S.E.2d 920 (2002).

**LARCENY
EMBEZZLEMENT**
By Officer, Agent, Clerk or Servant of a Banking Institution

The Court instructs the jury that “Embezzlement”, as that term is used in the indictment herein, is committed when any officer, agent clerk or servant of any banking institution embezzles or fraudulently converts to his or her own use, bullion, money, bank notes, drafts, security for money, or any effects or property of any other person, which shall have come into his or her possession , or been placed under his or her care or management, by virtue of his or her office, place or employment. ¹

Therefore, in order to prove the commission of the offense of “Embezzlement” ², the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. while in the position of _____ (designate position), ³
5. of _____ (designate banking institution),
6. did embezzle ⁴ or fraudulently convert ⁵ to (his/her) own use, ⁶
7. (bullion, money, bank notes, drafts, security for money or other effects or property - select as appropriate and specify), ⁷
8. of the value of _____,
9. and being the property of _____ (specify ownership), ⁸
10. which came into the possession ⁹ of the defendant or was placed under the defendant’s care or management by virtue of (his/her) employment, office or place, ¹⁰
11. with the intent to permanently deprive _____ (owner of property) of the use and possession thereof. ¹¹

FOOTNOTES

¹ W.Va. Code, 61-3-20 (1929).

² The crime of embezzlement is purely a statutory crime, the statutes being enacted to reach and punish fraudulent conversions which could not be reached under the common law pertaining to larceny. State v. Riley, 151 W.Va. 364, 151 S.E. 308 (1966); State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

“(I)n order to constitute the crime of embezzlement, it is necessary to show, (1) the trust relation of the person charged, and that he falls within that class of persons named; (2) that the property or thing claimed to have been embezzled or converted is such property as is embraced in the statute; (3) that it is the property of another person; (4) that it came into the possession, or was placed in the care, of the accused, under and by virtue of his office, place or employment; (5) that his manner of dealing with or disposing of the property, constituted a fraudulent conversion and an appropriation of the same to his own use, and (6) that the conversion of the property to his own use was with the intent to deprive the owner thereof.” Syl. pt. 1, State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980), citing syl. pt. 2 of State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

³ The agency of one charged with the embezzlement of money or other property is sufficiently established by evidence showing that the agency related to the single transaction of entrusting the property embezzled to the defendant, and no previous relationship of principal and agent is necessary.

An agency is considered to come within the statute whether the contract of agency provides for compensation or not.

The agency relationship need not be a formalized agreement, but occurs as the result of a trust relationship where a person is entrusted with the possession of another’s property.

“Agent” can be anyone entrusted with property by virtue of his position, and not simply an agent within the strict definition of the common law.

If at the time of a fraudulent conversion the accused was an agent for any purpose and the property appropriated was entrusted to him by virtue of such agency, embezzlement is committed. It is not the extent of the authority conferred, but the fact of the relationship which constitutes the agency, which is an essential element of embezzlement.

State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980).

⁴ Embezzlement is a fraudulent appropriation or misapplication of the property of another by one in whose care it has been entrusted, with the intention of depriving the owner thereof.

Syl. pt. 1, State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

- ⁵ Conversion is the fraudulent appropriation of another's property to one's own use. State v. Holley, 115 W.Va. 464, 177 S.E. 302 (1934); State v. Pietranton, 140 W.Va. 444, 84 S.E.2d. 774 (1954).

Conversion is an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to alter their condition or exclude the owner's rights.

State v. Pietranton, 140 W.Va. 444, 84 S.E.2d 774 (1954); State v. De Berry, 75 W.Va. 632, 84 S.E. 508 (1915).

- ⁶ To appropriate to one's own use, does not necessarily mean to one's personal use or advantage, State v. Cantor, 93 W.Va. 238, 116 S.E. 396 (1923).

- ⁷ "...And it shall not be necessary to describe in the indictment, or to identify upon the trial, the particular bullion, money, bank note, draft or security for money which is so taken, converted to his own use, or embezzled..." W.Va. Code, 61-3-20.

- ⁸ The taking of the property need not be from the actual owner of the property, but may be from one who has lawful possession of it.

State v. De Berry, 75 W.Va. 632, 84 S.E. 508 (1915); State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980).

- ⁹ Actual possession (by embezzler) not necessary. State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980), citing State v. Workman, 91 W.Va. 771, 114 S.E. 276 (1922).

- ¹⁰ In order for a taking to be embezzlement and not larceny, the money or property must have come into the possession of the accused lawfully, or with the consent of the owner, and a fiduciary relationship must have existed between the owner and the offender.

State v. Smith, 97 W.Va. 313, 125 S.E. 90 (1924); State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

The hallmark of embezzlement is the trust relationship and the subsequent conversion or appropriation of the entrusted property.

State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980).

- ¹¹ In State v. Brown, 188 W.Va. 12, 422 S.E.2d 489 (1992), a case concerning embezzlement by a public official, the Court noted in footnote 4 that,

"[w]e use the terminology 'specific intent' in its 'most common usage' which 'is to designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime.' Wayne R. LaFave & Austin W. Scott, Jr., *Handbook on Criminal Law* § 28 at 202 (1972). To illustrate, common-law embezzlement (and statutory embezzlement pursuant to paragraph one of W.Va. Code 61-3-20; i.e., embezzlement

which does not involve a public official) requires as an element of proof that the defendant intended to permanently deprive an owner of the use of his property. This particular element of proof is what renders garden variety embezzlement a specific intent offense. As this opinion explains, embezzlement by a public official is not a specific intent crime because proof that the public official intended to deprive the public of its property is not required.” [emphasis added].

COMMENTS

1. “...The distinction between embezzlement and larceny is that embezzlement is the wrongful conversion of property without trespass, or where the original taking and possession is lawful. In order to constitute the offense, it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes.” State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905). Quoted in State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980); State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53, 56 (1985).

Although a common law larceny indictment will support an embezzlement conviction, if the state proves the elements of embezzlement, it is a basic tenet of law that the jury must be instructed on the elements of embezzlement before a conviction can be sustained by proof of them. State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53 (1985).

2. Multiple convictions for larceny by embezzlement and larceny by fraudulent schemes, arising from the same act or incident, can constitute a violation of double jeopardy. See Syl. Pt. 9, State v. Rogers, 209 W.Va. 348, 547 S.E.2d 910 (2001); State v. Brown, 212 W.Va. 397, 572 S.E.2d 920 (2002).

**LARCENY
EMBEZZLEMENT
By a Public Official of Public Funds**

The Court instructs the jury that “Embezzlement”¹, as that term is used in the indictment herein, is committed when any officer, agent, clerk or servant of this State of West Virginia, or of any county, district, school district or municipal corporation, appropriates or uses for his or her own benefit, or for the benefit of any other person, any bullion, money, bank notes, drafts, security for money, or funds, belonging to the State of West Virginia, or to any such county, district, school district or municipal corporation.²

Therefore, in order to prove the commission of the offense of “Embezzlement”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. while employed as _____ (designate specific employment),³
5. of _____ (designate employment entity, i.e., State of West Virginia, county, district, school district or municipal corporation),
6. intentionally⁴ appropriated
7. a. for (his/her) own use or benefit
b. for the benefit of another person, to-wit; _____ (identify),
8. bullion, money, bank notes, drafts, security for money or other effects or property (select as appropriate and specify),⁵
9. of the value of _____,⁶
10. belonging to _____ (identify agency owner, i.e., State of West Virginia, county, district, school district or municipal corporation).

FOOTNOTES

¹ W.Va. Code, 61-3-20 (1929).

- ² It appears from a comparison of the two embezzlement crimes in W.Va. Code, 61-3-20 that the crime of embezzlement by a public official does not contain as many elements of proof as the general embezzlement crime.

It is generally recognized that the Legislature may set higher standards on public officials by defining embezzlement by public officials without all of the elements found in the general embezzlement statutes. (Cites omitted). Footnote 4, State ex rel. Cogar v. Kidd, 160 W.Va. 371, 234 S.E.2d 899 (1977).

- ³ The agency of one charged with the embezzlement of money or other property is sufficiently established by evidence showing that the agency related to the single transaction of entrusting the property embezzled to the defendant, and no previous relationship of principal and agent is necessary.

An agency is considered to come within the statute whether the contract of agency provides for compensation or not.

The agency relationship need not be a formalized agreement, but occurs as the result of a trust relationship where a person is entrusted with the possession of another's property.

"Agent" can be anyone entrusted with property by virtue of his position, and not simply an agent within the strict definition of the common law.

State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980).

- ⁴ "The crime of embezzlement by a public official, as that offense is set forth in West Virginia Code § 61-3-20, is not a specific intent crime." Syl. pt. 1, State v. Brown, 188 W.Va. 12, 422 S.E.2d 489 (1992).

"While proof of intent to steal or misappropriate is not required, proof that the public official intended to do the act or acts that resulted in the embezzlement is necessary to convict a public official of embezzlement pursuant to the second paragraph of West Virginia Code § 61-3-20 (1989)." Syl. pt. 2, State v. Brown, 188 W.Va. 12, 422 S.E.2d 489 (1992).

- ⁵ "...it shall not be necessary to describe in the indictment, or to identify upon the trial, the particular bullion, money, bank notes, drafts, security for money, or funds, appropriated or used for his own benefit or for the benefit of any other person." W.Va. Code, 61-3-20.

- ⁶ Our embezzlement statute, except for banking employees, is tied to the larceny statute for punishment.

See W.Va. Code, 61-3-13 (1994) for the distinction between and penalties for grand and petit larceny. (Simple larceny of goods or chattels of the value of one thousand dollars or more is grand larceny; simple larceny of goods or chattels of the value of less than one thousand dollars is petit larceny).

COMMENTS

1. “...The distinction between embezzlement and larceny is that embezzlement is the wrongful conversion of property without trespass, or where the original taking and possession is lawful. In order to constitute the offense, it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes.” State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905). Quoted in State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980); State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53, 56 (1985).

Although a common law larceny indictment will support an embezzlement conviction, if the state proves the elements of embezzlement, it is a basic tenet of law that the jury must be instructed on the elements of embezzlement before a conviction can be sustained by proof of them. State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53 (1985).

2. “Where the State elects to cumulate separate acts of embezzlement in one indictment on the theory they were committed pursuant to a common design and common criminal intent, it must prove such common design and common criminal intent, and the question of whether the cumulative act is grand or petit larceny by embezzlement may depend on the proof and would be determined by the jury upon proper instruction.” Syl. pt. 7, State ex rel. Cogar v. Kidd, 160 W.Va. 371, 234 S.E.2d 899 (1977).
3. As with simple larceny a second conviction for misdemeanor embezzlement may constitute a felony. “When a person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he has been before sentenced in the United States for the like offense, he shall be sentenced to be confined in the penitentiary for the term of one year.” *W.Va. Code*, 61-11-20 (1923); State ex rel. Roach v. Dietrick, 185 W.Va. 23, 404 S.E.2d 415 (1991).

LARCENY
BUYING AND/OR RECEIVING STOLEN PROPERTY ¹
Basic Elements ²

The Court instructs the jury that the term “Buying and/or Receiving Stolen Property”, as that term is used in the indictment herein, is committed when any person (buys) (receives) from another person any stolen property, goods or thing of value, which he or she knows or has reason to believe has been stolen.

Therefore, in order to prove the commission of the offense of “Buying and/or Receiving Stolen Property”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. bought and/or received,
5. _____ (describe property with particularity),
6. of the value of _____, ³
7. from _____ (designate person from whom property was received), ⁴
8. which property belonged to _____ (designate owner(s)),
9. which was stolen by someone other than the defendant, ⁵
10. that the defendant knew or had reason to know that the property was stolen ⁶
11. and that the defendant (bought) (received) the property with a dishonest purpose and with the intent to permanently deprive the owner thereof. ⁷

FOOTNOTES

¹ “If any person buy or receive from another person, or aid in concealing, or transfer to a person other than the owner thereof, any stolen goods or other thing of value, which he knows or has reason to believe has been stolen, he shall be deemed guilty of the larceny thereof, and may be prosecuted although the principal offender be not convicted.” W.Va. Code, 61-3-18 (1923).

W.Va. Code, 61-3-18 “contains a series of offenses which relate to stolen property and, despite some commonality in the elements, the offenses are separate and distinct[.]”. Syl. Pt. 1, State v. Taylor, 176 W.Va. 671, 346 S.E.2d 822 (1986). Thus,

this Edition contains separate instructions for Buying/Receiving Stolen Property; Concealing/Aiding in Concealing Stolen Property; and Transferring Stolen Property.

- ² “The essential elements of the offense created by (W.Va. Code, 61-3-18 (1931)) are: (1) The property must have been previously stolen by some person other than the defendant; (2) the accused must have bought or received the property from another person or must have aided in concealing it; (3) he must have known, or had reason to believe, when he bought or received or aided in concealing the property, that it had been stolen; and (4) he must have bought or received or aided in concealing the property with a dishonest purpose.’ State v. McGraw, 140 W.Va. 547, 550, 85 S.E.2d 849, 852 (1955).” Syl. pt. 3, State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986). Syl. pt. 6, State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982).

- ³ Violation of this section is punishable as larceny. State v. Oldaker, 172 W.Va. 258, 304 S.E.2d 843 (1983).

See W.Va. Code, 61-3-13 (1994) for the distinction between and penalties for grand and petit larceny. (Simple larceny of goods or chattels of the value of one thousand dollars or more is grand larceny; simple larceny of goods or chattels of the value of less than one thousand dollars is petit larceny).

If one is indicted for a simple larceny and upon the trial it appears that he did not actually steal the property but did receive it with knowledge of the theft, he is nevertheless guilty of the larceny and amenable to the same penalties. State v. West, 157 W.Va. 209, 200 S.E.2d 859 (1973).

- ⁴ Prior delivery to the defendant from another person is a necessary element of this offense. The mere discovery and appropriation of stolen goods by a person does not constitute a crime under this section. State v. Fowler, 117 W.Va. 761, 188 S.E. 137 (1936).

An indictment must allege the name of the person or persons from whom the stolen goods were bought or received, or that such goods were bought or received from a person or persons unknown to the grand jury. State v. Smith, 98 W.Va. 185, 126 S.E. 703 (1925).

- ⁵ The first element requires that the property be stolen by some person other than the defendant. This is to prevent a person who is charged with theft of the property from also being charged with concealing it as well...State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982).

- ⁶ There are two ways that the offense may be committed: First by receiving goods knowing them to have been stolen, and second, by receiving goods with reason to believe that they were stolen. State v. Lewis, 117 W.Va. 670, 187 S.E. 315 (1936); State v. Mounts, 120 W.Va. 6, 200 S.E. 53 (1938).

Where one is charged with the crime is operating a legitimate business, it must be shown that actual knowledge had been brought home to him that the seller of the article was the thief or that the property had been stolen. State v. Wallace, 118 W.Va. 127, 189 S.E. 104 (1936).

COMMENTS

1. “While *W. Va. Code*, 61-3-18 provides that one who unlawfully buys or receives stolen goods shall be deemed guilty of the larceny thereof, the traditional offense of larceny and the offense created by the statute are separate and distinct offenses.” Syl. Pt. 5, *State v. Basham*, 159 W.Va. 404, 223 S.E.2d 53 (1976).
2. An indictment for larceny must state the name of the owner of the stolen property or that it is the property of some unknown person or persons; but the crime of buying or receiving, or aiding in concealing, stolen property by a person knowing or having reason to believe that the property has been stolen is based upon a prior commission of the crime of larceny and presupposes but does not include larceny. For this reason the elements of the crime of larceny are not the elements of the crime of buying or receiving, or aiding in concealing, stolen property by a person who knows or has reason to believe that it has been stolen. *State v. McGraw*, 140 W.Va. 547, 85 S.E.2d 849 (1955).
3. “In his petition, appellant contended an indictment for receiving stolen property cannot support a conviction of grand larceny, because grand larceny is not a lesser included offense of receiving stolen property. The assignment of error was waived since it was neither briefed nor argued, but the Court noted receiving stolen property and larceny are separate and distinct offenses.” Footnote 2, *State v. Barker*, 176 W.Va. 553, 346 S.E.2d 344 (1986).
4. “Where the defendant is charged with larceny and receiving stolen goods in two counts of an indictment, even though they are related crimes, the jury cannot find the defendant guilty in separate verdicts on both charges, and the Court should instruct the jury that it can return a verdict of guilty on either count, but not both.” Syl. pt. 4, *State v. Koton*, 157 W.Va. 558, 202 S.E.2d 823 (1974).

5. “Under the provisions of *W. Va. Code*, 61-3-18 (1931) where the State proves that a defendant received or aided in the concealment of property which was stolen from different owners on different occasions, but does not prove that the defendant received or aided in the concealment of the property at different times or different places then such defendant may be convicted of only one offense of receiving or aiding in the concealment of stolen property.” Syl. pt. 9, State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982).
6. In State v. Casto, 198 W.Va. 316, 480 S.E.2d 525 (1996), the appellant was indicted for burglary and grand larceny. He was acquitted of the burglary charge and found guilty of grand larceny. He contended on appeal that the trial court erred in giving a State instruction which included the offense of receiving stolen property within the definition of grand larceny. The Court found that they have recognized that larceny and receiving stolen property are separate offenses. The Court noted the indictment in this case charged the appellant with burglary and grand larceny and did not charge him with receiving stolen property or with any other acts described in *W. Va. Code*, 61-3-18 [1923]. The Court found the instruction in referring to the separate offense of receiving stolen property was at variance with the indictment upon which the trial was conducted and was at variance with an admonishment given to the jury during the State’s case-in-chief. The Court agreed that the giving of the instruction was error and reversed and remanded for a new trial.
7. “When a person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he has been before sentenced in the United States for the like offense, he shall be sentenced to be confined in the penitentiary for the term of one year.” *W. Va. Code*, 61-11-20 (1923); State ex rel. Roach v. Dietrick, 185 W.Va. 23, 404 S.E.2d 415 (1991).

LARCENY
BUYING AND/OR RECEIVING STOLEN PROPERTY
Necessity for Prior Delivery by Another

The Court instructs the jury that one of the essential elements of the offense alleged in this case is that there must have been a prior delivery of the stolen property to the defendant from another person. A mere discovery and appropriation of stolen property by a person does not constitute an offense. ¹

FOOTNOTE

- ¹ State v. Fowler, 117 W.Va. 761, 188 S.E. 137 (1936).

COMMENT

1. An instruction regarding the necessity for a prior delivery by another person appears to be required under each of the offenses specified under *W.Va. Code*, 61-3-18 (1923), i.e., Buying/Receiving Stolen Property, Aiding in Concealing Stolen Property, and Transferring Stolen Property.

LARCENY
BUYING AND/OR RECEIVING STOLEN PROPERTY
Element of “Dishonest Purpose”

The Court instructs the jury that one of the essential elements of “Buying and/or Receiving Stolen Property” is that the State of West Virginia must prove, beyond a reasonable doubt, that the defendant acted with a “dishonest purpose” and with the intent to permanently deprive the owner of the property. ¹

FOOTNOTE

- ¹ In a prosecution under this section for buying or receiving stolen goods, a jury must find beyond a reasonable doubt that the accused acted with a “dishonest purpose” before it can find him guilty of the offense, and the accused is entitled to have the jury properly instructed on the question of his intent. State v. Taylor, 176 W.Va. 671, 346 S.E.2d 822 (1986); State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986); State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976).

In Barker, *supra*, the appellant was charged with receiving stolen goods. The Court found having a dishonest purpose, at the time a defendant receives stolen property, is an essential element of the crime charged. The element of dishonest purpose is distinct from the element of knowledge. The Court, at 349, quotes the following from *Lafave and Scott Handbook on Criminal Law*, section 93 (5th Reprint 1980):

“It is not enough for guilt that one receives stolen property with knowledge that it is stolen... Some sort of a bad state of mind in addition to the guilty knowledge, is required...”

“The necessary intent, as in the related crime of larceny, is an intent to deprive the owner of his property. The receiver’s purpose is generally, of course, to deprive the owner by benefitting himself. But he is equally guilty though his purpose is to deprive the owner, not by benefitting himself but rather by aiding the thief, as by hiding the stolen property for him...”

COMMENT

1. An instruction regarding the element of a “dishonest purpose” appears to be required under each of the offenses specified under *W.Va. Code*, 61-3-18 (1923), i.e., Buying/Receiving Stolen Property, Aiding in Concealing Stolen Property, and Transferring Stolen Property.

LARCENY
CONCEALING/AIDING IN CONCEALING STOLEN PROPERTY ¹
Basic Elements ²

The Court instructs the jury that the term “Concealing/Aiding in Concealing Stolen Property”, as that term is used in the indictment herein, is committed when any person (conceals) (aids in concealing) any stolen property, goods or other thing of value, which he or she knows or has reason to know has been stolen.

Therefore, in order to prove the commission of the offense of “Concealing/Aiding in Concealing Stolen Property”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. concealed or aided in concealing ³
5. _____ (describe property with particularity),
6. of the value of _____, ⁴
7. which property belonged to _____ (designate owner(s)),
8. which was stolen by someone other than the defendant, ⁵
9. that the defendant knew or had reason to know that the property was stolen ⁶
and
10. that the defendant concealed or aided in concealing the property with a dishonest purpose and with the intent to permanently deprive the owner thereof.⁷

FOOTNOTES

¹ “If any person buy or receive from another person, or aid in concealing, or transfer to a person other than the owner thereof, any stolen goods or other thing of value, which he knows or has reason to believe has been stolen, he shall be deemed guilty of the larceny thereof, and may be prosecuted although the principal offender be not convicted.” W.Va. Code, 61-3-18 (1923).

W.Va. Code, 61-3-18 “contains a series of offenses which relate to stolen property and, despite some commonality in the elements, the offenses are separate and distinct[.]”. Syl. Pt. 1, State v. Taylor, 176 W.Va. 671, 346 S.E.2d 822 (1986). Thus,

this Edition contains separate instructions for Buying/Receiving Stolen Property; Concealing/Aiding in Concealing Stolen Property, and Transferring Stolen Property.

- ² “The essential elements of the offense created by W.Va. Code, 61-3-18 (1931) are: (1) The property must have been previously stolen by some person other than the defendant; (2) the accused must have bought or received the property from another person or must have aided in concealing it; (3) he must have known, or had reason to believe, when he bought or received or aided in concealing the property, that it had been stolen; and (4) he must have bought or received or aided in concealing the property with a dishonest purpose.’ Syl. pt. 6, State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982). State v. McGraw, 140 W.Va. 547, 550, 85 S.E.2d 849, 852 (1955).” Syl. pt. 3, State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986).

Where the charge is aiding in concealing stolen property, it is not necessary that a defendant had bought or received the property from another person. State v. Taylor, 176 W.Va. 671, 346 S.E.2d 822 (1986). State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982).

- ³ It is not always necessary to physically hide stolen property before a person may be said to conceal it. It is just as much of a concealment if someone hinders the return of the property to its rightful owner...State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982); State v. Oldaker, 172 W.Va. 258, 304 S.E.2d 843 (1983).

- ⁴ Violation of this section is punishable as larceny. State v. Oldaker, 172 W.Va. 258, 304 S.E.2d 843 (1983).

See W.Va. Code, 61-3-13 (1994) for the distinction between and penalties for grand and petit larceny. (Simple larceny of goods or chattels of the value of one thousand dollars or more is grand larceny; simple larceny of goods or chattels of the value of less than one thousand dollars is petit larceny).

If one is indicted for a simple larceny and upon the trial it appears that he did not actually steal the property but did receive it with knowledge of the theft, he is nevertheless guilty of the larceny and amenable to the same penalties. State v. West, 157 W.Va. 209, 200 S.E.2d 859 (1973).

- ⁵ The first element requires that the property be stolen by some person other than the defendant. This is to prevent a person who is charged with theft of the property from also being charged with concealing it as well...State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982). State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986).

- ⁶ Where the man who is charged with crime is operating a legitimate business, it must be shown that actual knowledge had been brought home to him that the seller of the article was the thief or that the property had been stolen. State v. Wallace, 118 W.Va. 127, 189 S.E. 104 (1936).

- ⁷ See page 288 for definition of “dishonest purpose”.

COMMENTS

1. “While *W. Va. Code*, 61-3-18 provides that one who unlawfully buys or receives stolen goods shall be deemed guilty of the larceny thereof, the traditional offense of larceny and the offense created by the statute are separate and distinct offenses.” Syl. Pt. 5, *State v. Basham*, 159 W.Va. 404, 223 S.E.2d 53 (1976).
2. An indictment for larceny must state the name of the owner of the stolen property or that it is the property of some unknown person or persons; but the crime of buying or receiving, or aiding in concealing, stolen property by a person knowing or having reason to believe that the property has been stolen is based upon a prior commission of the crime of larceny and presupposes but does not include larceny. For this reason the elements of the crime of larceny are not the elements of the crime of buying or receiving, or aiding in concealing, stolen property by a person who knows or has reason to believe that it has been stolen. *State v. McGraw*, 140 W.Va. 547, 85 S.E.2d 849 (1955).
3. “In his petition, appellant contended an indictment for receiving stolen property cannot support a conviction of grand larceny, because grand larceny is not a lesser included offense of receiving stolen property. The assignment of error was waived since it was neither briefed nor argued, but the Court noted receiving stolen property and larceny are separate and distinct offenses.” Footnote 2, *State v. Barker*, 176 W.Va. 553, 346 S.E.2d 344 (1986).
4. “Where a defendant is charged with larceny and receiving stolen goods in two counts of an indictment, even though they are related crimes, the jury cannot find the defendant guilty in separate verdicts on both charges, and the Court should instruct the jury that it can return a verdict of guilty on either count, but not both.” Syl. pt. 4, *State v. Koton*, 157 W.Va. 558, 202 S.E.2d 823 (1974).
5. “Under the provisions of *W. Va. Code*, 61-3-18 [1923] where the State proves that a defendant received or aided in the concealment of property which was stolen from different owners on different occasions, but does not prove that the defendant received or aided in the concealment of the property at different times or different places then such defendant may be convicted of only one offense of receiving or

aiding in the concealment of stolen property.” Syl. pt. 9, State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982).

6. In State v. Casto, 198 W.Va. 316, 480 S.E.2d 525 (1996), the appellant was indicted for burglary and grand larceny. He was acquitted of the burglary charge and found guilty of grand larceny. He contended on appeal that the trial court erred in giving a State instruction which included the offense of receiving stolen property within the definition of grand larceny. The Court found that they have recognized that larceny and receiving stolen property are separate offenses. The Court noted the indictment in this case charged the appellant with burglary and grand larceny and did not charge him with receiving stolen property or with any other acts described in *W.Va. Code*, 61-3-18 [1923]. The Court found the instruction in referring to the separate offense of receiving stolen property was at variance with the indictment upon which the trial was conducted and was at variance with an admonishment given to the jury during the State’s case-in-chief. The Court agreed that the giving of the instruction was error and reversed and remanded for a new trial.
7. “When a person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he has been before sentenced in the United States for the like offense, he shall be sentenced to be confined in the penitentiary for the term of one year.” *W.Va. Code*, 61-11-20 (1923); State ex rel. Roach v. Dietrick, 185 W.Va. 23, 404 S.E.2d 415 (1991).

LARCENY
TRANSFERRING STOLEN PROPERTY ¹
Basic Elements ²

The Court instructs the jury that the term “Transferring Stolen Property”, as that term is used in the indictment herein, is committed when any person transfers to another person, other than the owner thereof, any stolen property, goods or thing of value, which he or she knows or has reason to believe has been stolen.

Therefore, in order to prove the commission of the offense of “Transferring Stolen Property”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. transferred
5. to _____, a person other than the owner thereof,
6. _____ (specifically describe property)
7. of the value of _____, ³
8. which property belonged to _____ (designate owner(s)),
9. which was stolen by someone other than the defendant, ⁴
10. that the defendant knew or had reason to know that the property was stolen ⁵
11. and that the defendant transferred the property with a dishonest purpose and with the intent to permanently deprive the owner thereof. ⁶

FOOTNOTES

¹ “If any person buy or receive from another person, or aid in concealing, or transfer to a person other than the owner thereof, any stolen goods or other thing of value, which he knows or has reason to believe has been stolen, he shall be deemed guilty of the larceny thereof, and may be prosecuted although the principal offender be not convicted.” W.Va. Code, 61-3-18 (1931).

W.Va. Code, 61-3-18 “contains a series of offenses which relate to stolen property and, despite some commonality in the elements, the offenses are separate and distinct[.]”. Syl. Pt. 1, State v. Taylor, 176 W.Va. 671, 346 S.E.2d 822 (1986). Thus,

this Edition contains separate instructions for Buying/Receiving Stolen Property; Concealing/Aiding in Concealing Stolen Property; and Transferring Stolen Property.

- ² The elements of transferring stolen property are: (1) the property must have been stolen by someone other than the accused; (2) the accused must have transferred the property knowing or having reason to believe that the property was stolen; (3) the property must have been transferred to someone other than the owner; and (4) the accused must have transferred the property with a dishonest purpose. State v. Taylor, 176 W.Va. 671, 346 S.E.2d 822 (1986).

In an indictment for transferring stolen goods, it is not necessary to aver that the defendant obtained the goods from another person before he transferred them as this is not an element of the crime. Taylor, *supra*.

- ³ Violation of this section is punishable as larceny. State v. Oldaker, 172 W.Va. 258, 304 S.E.2d 843 (1983).

See W.Va. Code, 61-3-13 (1994) for the distinction between and penalties for grand and petit larceny. (Simple larceny of goods or chattels of the value of one thousand dollars or more is grand larceny; simple larceny of goods or chattels of the value of less than one thousand dollars is petit larceny).

- ⁴ The first element requires that the property be stolen by some person other than the defendant. This is to prevent a person who is charged with theft of the property from also being charged with concealing it as well...State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982).

- ⁵ State v. Taylor, 176 W.Va. 671, 346 S.E.2d 822 (1986).

Where one is charged with crime is operating a legitimate business, it must be shown that actual knowledge had been brought home to him that the seller of the article was the thief or that the property had been stolen. State v. Wallace, 118 W.Va. 127, 189 S.E. 104 (1936).

- ⁶ See page 288 for definition of “dishonest purpose”.

COMMENTS

1. “While *W. Va. Code*, 61-3-18 provides that one who unlawfully buys or receives stolen goods shall be deemed guilty of the larceny thereof, the traditional offense of larceny and the offense created by the statute are separate and distinct offenses.”
2. An indictment for larceny must state the name of the owner of the stolen property or that it is the property of some unknown person or persons; but the crime of buying or receiving, or aiding in concealing, stolen property by a person knowing or having

reason to believe that the property has been stolen is based upon a prior commission of the crime of larceny and presupposes but does not include larceny. For this reason the elements of the crime of larceny are not the elements of the crime of buying or receiving, or aiding in concealing, stolen property by a person who knows or has reason to believe that it has been stolen. State v. McGraw, 140 W.Va. 547, 85 S.E.2d 849 (1955).

3. “In his petition, appellant contended an indictment for receiving stolen property cannot support a conviction of grand larceny, because grand larceny is not a lesser included offense of receiving stolen property. The assignment of error was waived since it was neither briefed nor argued, but the Court noted receiving stolen property and larceny are separate and distinct offenses.” Footnote 2, State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986).
4. “Where the defendant is charged with larceny and receiving stolen goods in two counts of an indictment, even though they are related crimes, the jury cannot find the defendant guilty in separate verdicts on both charges, and the Court should instruct the jury that it can return a verdict of guilty on either count, but not both.” Syl. pt. 4, State v. Koton, 157 W.Va. 558, 202 S.E.2d 823 (1974).
5. “Under the provisions of *W. Va. Code*, 61-3-18 [1923] where the State proves that a defendant received or aided in the concealment of property which was stolen from different owners on different occasions, but does not prove that the defendant received or aided in the concealment of the property at different times or different places then such defendant may be convicted of only one offense of receiving or aiding in the concealment of stolen property.” Syl. pt. 9, State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982).
6. In State v. Casto, 198 W.Va. 316, 480 S.E.2d 525 (1996), the appellant was indicted for burglary and grand larceny. He was acquitted of the burglary charge and found guilty of grand larceny. He contended on appeal that the trial court erred in giving a State instruction which included the offense of receiving stolen property within the definition of grand larceny. The Court found that they have recognized that larceny and receiving stolen property are separate offenses. The Court noted the indictment

in this case charged the appellant with burglary and grand larceny and did not charge him with receiving stolen property or with any other acts described in *W. Va. Code*, 61-3-18 [1923]. The Court found the instruction in referring to the separate offense of receiving stolen property was at variance with the indictment upon which the trial was conducted and was at variance with an admonishment given to the jury during the State's case-in-chief. The Court agreed that the giving of the instruction was error and reversed and remanded for a new trial.

7. "When a person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he has been before sentenced in the United States for the like offense, he shall be sentenced to be confined in the penitentiary for the term of one year." *W. Va. Code*, 61-11-20 (1923); State ex rel. Roach v. Dietrick, 185 W.Va. 23, 404 S.E.2d 415 (1991).
8. In State v. Anderson, 212 W.Va. 761, 575 S.E.2d 371 (2002), the Court reaffirmed Syl. Pt. 1 of State v. Taylor, *supra*, and held that the trial court's failure to instruct the jury that it must find that the property was stolen by someone other than the appellant constituted reversible error.

LARCENY
BRINGING STOLEN PROPERTY INTO THE STATE OF WEST VIRGINIA

The Court instructs the jury that the offense of “Bringing Stolen Property into the State of West Virginia” is committed when any person brings into the State, or receives, converts to his or her own use, or sells, property of any character, of value, which was stolen in another State, and which he or she knows or has reason to know has been stolen. ¹

Therefore, in order to prove the commission of the offense of “Bringing Stolen Property into the State of West Virginia”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. brought into the State of West Virginia, received, converted to (his/her) own use or sold
5. property, to-wit: _____ (describe property)
6. of the value of _____,
7. which was stolen in the State of _____,
8. and which the defendant knew or had reason to believe was stolen.

FOOTNOTE

- ¹ W.Va. Code, 61-3-19 (1931).

COMMENT

1. *W.Va. Code*, 61-3-19 provides that a defendant charged with this offense may be “deemed guilty of the larceny thereof in the county in which such property may be found, used, converted or sold, and may be prosecuted for such offense therein, and, upon conviction, shall be punished as provided for the offense of larceny committed within this State.” Thus, this offense may be either a felony or a misdemeanor, depending on the value of the property.

LARCENY
OBTAINING MONEY, GOODS, PROPERTY, LABOR OR OTHER SERVICES
BY FALSE PRETENSES¹

The Court instructs the jury that “Obtaining (Money) (Goods) (Property) (Labor) (Other Services) by False Pretenses” is committed when any person obtains from another, by any false pretense, token or representation, and with the intent to defraud, any (money) (goods) (property) (labor) (services) which may be the subject of larceny.²

Therefore, in order to prove the commission of the offense of “Obtaining (Money), (Goods), (Property), (Labor), or (Other Services) by False Pretenses”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. with intent at the time to defraud,³
5. obtained from _____,⁴
6. possession and title to⁵
7. _____ (describe money, goods, property, labor or services),
8. of a value of _____,⁶
9. belonging to _____,
10. by false pretense⁷, token or representation,
11. and that such false pretense, token or representation induced the said _____ to part with such (money) (goods) (property) (labor) (services).⁸

FOOTNOTES

¹ W.Va. Code, 61-3-24(a)(1) and (d) (1994). The statute makes this offense a form of larceny.

² Under this section it is necessary to allege and prove the essential elements constituting the offense, namely: (1) the intent to defraud; (2) actual fraud; (3) the false pretense was used to accomplish the objective, and, (4) the fraud was

accomplished by means of the false pretense, that is, the false pretense must be in some degree the cause, if not the controlling cause, which induced the owner to part with his property. State v. Pishner, 72 W.Va. 603, 78 S.E. 752 (1913); State v. Moore, 166 W.Va. 97, 273 S.E.2d 821 (1980); State v. Barnes, 177 W.Va. 510, 354 S.E.2d 606 (1987).

- ³ See page 301 for separate instruction on “intent” in the context of a false pretense prosecution.
- ⁴ The State of West Virginia, or a political subdivision of the State, are included with the definition of the terms “person” and “another”, and therefore may be a victim under W.Va. Code, 61-3-24 (1994). State v. Zain, 207 W.Va. 54, 528 S.E.2d 748 (1999).
- ⁵ The distinction between the crimes of obtaining by false pretense and larceny lies in the intention with which the owner parts with the property. If the owner intends to invest the accused with the title as well as the possession the accused has committed the crime of obtaining the property by false pretense. If the owner intends to invest the accused with the mere possession of the property, and the accused with the requisite intent receives it and converts it to his own use, it is larceny. State v. Martin, 103 W.Va. 446, 137 S.E. 885 (1927); footnote 4, State v. Barnes, 177 W.Va. 510, 354 S.E.2d 606 (1987); State v. Edwards, 51 W.Va. 220, 41 S.E. 429 (1902).
- ⁶ W.Va. Code, 61-3-24(a)(3) (1994).
- ⁷ See page 302 for a separate instruction defining “false pretense”.
- ⁸ See page 303 for a separate instruction on “causation”.

COMMENTS

1. The crime of obtaining money or property by false pretenses is complete when the fraud intended is consummated by obtaining title to and possession of property by means of a knowing false representation or pretense. The crime is not purged by the ultimate restoration or payment to the victim; it is sufficient if the fraud has put the victim in such a position that he or she may eventually suffer loss, State v. Barnes, 177 W.Va. 510, 354 S.E.2d 606 (1987).

Pecuniary loss by victim was not required for conviction of obtaining money by false pretenses.

2. Within the true meaning of this section one cannot be held guilty of procuring money by false pretense, with intent to defraud, when one collects a debt justly due even

though in making the collection he has used false pretense. State v. Williams, 68 W.Va. 86, 69 S.E. 474 (1910); State v. Hurst, 11 W.Va. 54 (1877).

3. In State v. Zain, 207 W.Va. 54, 528 S.E.2d 748 (1999), the State appealed the trial court's dismissal of an indictment charging the defendant with obtaining salary and benefits from the State. The State alleged that the defendant had fraudulently misrepresented his academic and scientific qualifications in obtaining his position as the head of the Serology section with the West Virginia State Police.

The Court determined (1) that the State can be a victim under *W.Va. Code*, 61-3-24, and (2) that unlawfully obtained salaries and benefits may be the subject of larceny, and are therefore intended to be included under § 61-3-24.

"The obvious purpose of this section is to discourage the act of obtaining money, goods, labor, services and other things of value by false pretenses. It makes no sense to prohibit such conduct when it is used to obtain something of value from a natural person, yet freely permit such conduct when the victim is other than a natural person". Zain, *supra*.

4. Multiple convictions for larceny by false pretenses under § 61-3-24 and for larceny by fraudulent schemes under § 61-3-24d may constitute a violation of double jeopardy.

"Every element necessary for a conviction of larceny by false pretense under [*W.Va. Code*, 61-3-24] is also an element for conviction of larceny by fraudulent scheme under [*W.Va. Code*, 61-3-24d]." Syl. Pt. 8, State v. Rogers, 209 W.Va. 348, 547 S.E.2d 910 (2001).

**OBTAINING MONEY, GOODS, PROPERTY, LABOR OR OTHER SERVICES
BY FALSE PRETENSE ¹**

Intent

The Court instructs the jury that to warrant conviction for “Obtaining (Money), (Goods), (Property), (Labor) or (Other Services) by False Pretense” the accused must have had the present intent to commit the offense at the time he obtained possession or custody. ¹

FOOTNOTE

¹ State v. Smith, 97 W.Va. 313, 125 S.E. 90 (1924).

**OBTAINING MONEY, GOODS, PROPERTY, LABOR OR OTHER SERVICES
BY FALSE PRETENSES
Definition of False Pretense**

A “false pretense”, as that term is defined in this case, is the false representation of a past or existing fact, whether by oral words, written words, or conduct, which is calculated to deceive and which in fact does deceive, and by means of which one person obtains something of value from another without compensation. ¹

In order to support a conviction of “Obtaining (Money), (Goods), (Property), (Labor), or (Other Services) by False Pretenses”, the false statement or representation alleged to have been made must relate to existing facts or past events. When one makes a promise to perform in the future with the intent to cheat, defraud or deceive, such a promise may constitute a misrepresentation of existing fact which is a “false pretense”. ²

FOOTNOTES

¹ Hubbard v. Com., 201 Va. 61, 109 S.E.2d 100 (1959).

² Syllabus, State v. Moore, 166 W.Va. 97, 273 S.E.2d 821 (1980); State v. Barnes, 177 W.Va. 510, 354 S.E.2d 606 (1987).

**OBTAINING MONEY, GOODS, PROPERTY, LABOR, OR OTHER SERVICES
BY FALSE PRETENSE
Causation / Inducement**

In a prosecution for “Obtaining (Money), (Goods), (Property), (Labor) or (Other Services) by False Pretenses”, the fraud must be accomplished by means of the false pretense, that is, the false pretense must be in some degree the cause, if not the controlling cause, which induced the owner to part with his property. ¹

FOOTNOTE

- ¹ State v. Pishner, 72 W.Va. 603, 78 S.E. 752 (1913); State v. Moore, 166 W.Va. 97, 273 S.E.2d 821 (1980); State v. Barnes, 177 W.Va. 510, 354 S.E.2d 606 (1987).

LARCENY
ATTEMPTED OR FRAUDULENT USE OF A CREDIT CARD

The Court instructs the jury that the offense of “Attempted Use or Fraudulent Use of a Credit Card” is committed when any person knowingly obtains or attempts to obtain credit, or purchases or attempts to purchase any goods, property or service, by the use of any false, fictitious or counterfeit credit card, telephone number, credit number or other credit device, or by the use of any credit card, telephone number, credit number or other credit device of another beyond or without the authority of the person to whom such card number or device was issued, or by the use of any credit card, telephone number, credit number or other credit device in any case where such card, number or device has been revoked and notice of such revocation has been given to the person to whom issued. ¹

Therefore, in order to prove the commission of the offense “Attempted Use or Fraudulent Use of a Credit Card”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. knowingly
5. a. obtained or attempted to obtain credit
- b. purchased or attempted to purchase _____,
6. by the use of
 - a. a false, fictitious or counterfeit credit card, telephone number, credit number or other credit device
 - b. a credit card, telephone number, credit number or other credit device belonging to _____ (owner of card or device) without the authority of the said _____
 - c. a credit card, telephone number, credit number or other credit device where such card, number or device has been revoked and notice of such revocation has been given to the person to whom issued,
7. and that the credit, goods, property, service or transmission was the value of _____.

²

FOOTNOTES

¹ W.Va. Code, 61-3-24a(b)(1) (1994).

² “Any person who violates any provision of [§ 61-3-24a(b)], if the credit, goods, property, service or transmission is of the value of one thousand dollars or more, is guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary not less than one year nor more than ten years or, in the discretion of the Court, be confined in jail not more than one year and be fined not more than two thousand five hundred dollars; and if of less value, is guilty of a misdemeanor, and, upon conviction thereof, shall be confined in jail not more than one year or fined not more than two thousand five hundred dollars, or both.” W.Va. Code, 61-3-24a(b)(3) (1994).

**LARCENY
FORGERY OF A CREDIT CARD**

The Court instructs the jury that the offense of “Forgery of a Credit Card” is committed when any person knowingly makes, manufactures, presents, embosses, alters or utters a credit card with the intent to defraud any person, issuer of credit or organization providing money, goods, services or anything else of value in exchange for payment by credit card.¹

Therefore, in order to prove the commission of the offense “Forgery of a Credit Card”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. knowingly
5. (made) (manufactured) (presented) (embossed) (altered) (uttered)
6. a credit card
7. with the intent to defraud
8. _____ (list person, issuer of credit or organization which provides money, goods, services or other value in exchange for payment by credit card.)

FOOTNOTE

- ¹ W.Va. Code, 61-3-24a(c) (1994).

COMMENT

1. Unlike the offense of fraudulent use of a credit card, forgery of a credit card is a felony regardless of the amount involved in the transaction. (“[H]e or she is guilty of a felony, and, upon conviction, thereof, shall be imprisoned in the penitentiary not less than one year nor more than ten years or, in the discretion of the Court, be confined in jail not more than one year and be fined not less than fifty nor more than two thousand five hundred dollars.”) *W.Va. Code*, 61-3-24a(c) (1994).

LARCENY FRAUDULENT SCHEMES

The Court instructs the jury that the offense of “Fraudulent Schemes”, as the term is used in the indictment herein, is committed when any person wilfully deprives another person or entity of any money, goods, property or services by means of fraudulent pretenses, representations or promises. ¹

The Court further instructs the jury that in determining the value of the money, goods, property, labor or services alleged to have been fraudulently obtained, it is permissible for you to cumulate the amounts or values, if such money, goods, property or services were fraudulently obtained as part of a common scheme or plan. ²

Therefore, in order to prove the commission of the offense of “Fraudulent Schemes”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. deprived _____,
5. of (money) (goods) (property) (services), to-wit: _____,
6. of a value of _____,
7. by the means of a common scheme or plan of fraudulent pretenses, promises or representations.

FOOTNOTE

¹ W.Va. Code, 61-3-24d [1995].

COMMENT

1. In State v. Rogers, 209 W.Va. 348, 547 S.E.2d 910 (2001), the Court addressed whether multiple convictions for larceny by embezzlement (§ 61-3-20), larceny by

false pretenses (*W. Va. Code*, 61-3-24) and larceny by fraudulent schemes could be sustained. The Court determined that such multiple convictions violated double jeopardy.

Syllabus Point 8 - Every element necessary for a conviction of larceny by false pretense under West Virginia Code § 61-3-24 (1994) (Repl. Vol. 2000) is also an element for conviction of larceny by fraudulent scheme under West Virginia Code § 61-3-24d (1995) (Repl. Vol. 2000).

Syllabus Point 9 - In the absence of proof that a defendant obtained "services" by a fraudulent scheme, every element necessary for a conviction of larceny by fraudulent scheme under West Virginia Code § 61-3-24d (1995) (Repl. Vol. 2000) is also an element for conviction of an agent or employee for larceny by embezzlement under West Virginia Code § 61-3-20 (1929) (Repl. Vol. 2000).

WORTHLESS CHECKS
OBTAINING PROPERTY IN RETURN FOR WORTHLESS CHECK

The Court instructs the jury that “Obtaining Property in Return for a Worthless Check” ¹ is committed if any person, firm or corporation obtains money, services, goods or other property or thing of value by means of a check, draft or order for the payment of money or its equivalent upon any bank or other depository, knowing at the time of the making, drawing, issuing, uttering or delivering of such check, draft or order that there are insufficient funds on deposit in or credit with such bank or other depository with which to pay the same upon presentation. ²

Therefore, in order to prove the commission of the offense of “Obtaining Property in Return for a Worthless Check”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. (with intent to defraud) ³
5. obtained _____ (money, services, goods or other property or thing of value) ⁴
6. from _____
7. by means of a check, draft or order for payment of money or its equivalent
8. in the amount of _____,
9. drawn upon _____ (bank or other depository)
10. knowing at the time of the making, drawing, issuing and delivering of such check, draft or order there are insufficient funds on deposit in or credit with such bank or other depository with which to pay the same upon presentation,
11. and at the time of the making, drawing issuing and delivering of such check that there were insufficient funds on deposit in or credit with such bank with which to pay the same upon presentation; ⁵

12. and further _____ (the payee or holder of the check) did not know, or was not notified prior to the acceptance of the check, or had no reason to believe (or could not have known by exercising ordinary prudence, using means readily at hand), ⁶ that the defendant did not have on deposit or to his/her credit with the bank or depository sufficient funds to insure payment of the check; ⁶
13. and the check, draft or order was not postdated. ⁶

FOOTNOTES

¹ It is a misdemeanor if the amount of the check, draft or order is less than five hundred dollars; a felony if it is five hundred dollars or more. W.Va. Code, 61-3-39 (1994).

² W.Va. Code, 61-3-39 (1994).

³ The instruction set forth in footnote 4 of State v. Griffith, 168 W.Va. 718, 285 S.E.2d 469 (1981), does not include intent to defraud, nor is fraud an element set forth in W.Va. Code, 61-3-39 (1977). The Court in State v. Orth, 178 W.Va. 303, 359 S.E.2d 136 (1987), however, finds “fraud is the gravamen of the offense proscribed by section thirty-nine” and cites State v. McGinnis, 116 W.Va. 473, 181 S.E. 820 (1935). (The statute set forth “intent to defraud” as an element of the offense at the time McGinnis was written).

⁴ W.Va. Code, 61-3-39 (1994) proscribes issuing worthless checks in order to obtain property or [a] thing of value[.] “... State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 621 (1991).”

Appellant obtained an interest in a commercial lease by issuing a worthless check for a security deposit. The Court found “[c]learly this lease represented ‘property or [a] thing of value’ as that phrase is used in W.Va. Code, 61-3-39 (1977).” State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991).

⁵ This language is not in W.Va. Code, 61-3-39 (1994) but is included in the instruction set forth in footnote 4 State v. Griffith, 168 W.Va. 718, 285 S.E.2d 469 (1981).

⁶ When the payee or holder accepting a check knows there are not sufficient funds on deposit, he cannot be the victim of fraud and no offense is committed under this section. Syl. pt. 1, State v. Orth, 178 W.Va. 303, 359 S.E.2d 136 (1987).

“When the payee or holder accepting a check knows there are not sufficient funds on deposit, he cannot be the victim of fraud and, thus, no offense is committed under West Virginia Code § 61-3-39 (1984 Replacement Vol.).” Syl. pt. 1, State v. Orth, 178 W.Va. 303, 359 S.E.2d 136 (1987).

“A payee or holder accepting a check cannot be defrauded by representations he knows to be untrue or could have known to be untrue by exercising ordinary prudence, using means readily at hand.” Syl. pt. 2, State v. Orth, 178 W.Va. 303, 359 S.E.2d 136 (1987).

This section shall not apply to any such check, draft or order when the payee or holder knows or has been expressly notified prior to the acceptance of same or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment as aforesaid, nor shall this section apply to any postdated check, draft or order. W.Va. Code, 61-3-39 (1994).

NOTE: If the above are defenses to the charge, do they need to be included in the instruction? Should they only be included if the defendant offers evidence of payee’s knowledge, etc.?

COMMENTS

[**NOTE:** Many of these comments address prior enactments of the relevant statutes. Carefully examine the statutes to determine if the comments remain applicable.]

Should the following presumptions be included in the instructions?

1. “It shall be the duty of the drawee of any check, draft or order, before refusing to pay the same to the holder thereof upon presentation, to cause to be written, printed or stamped in plain language thereon or attached thereto, the reason for drawee’s dishonor or refusal to pay same. In all prosecutions under section 61-3-39 or 61-3-39a, the introduction in evidence of any unpaid and dishonored check, draft or other written order, having the drawee’s refusal to pay stamped or written thereon, or attached thereto, with the reason therefore as aforesaid:
 - a.) shall be prima facie evidence of the making or uttering of said check, draft or other written order, and the due presentation to the drawee for payment and the dishonor thereof, and that the same was properly dishonored for the reasons written, stamped or attached by the drawee on such dishonored checks, drafts or orders; and
 - b.) shall be prima facie evidence, as against the maker or drawer thereof, of the withdrawing from deposit with the drawee named in the check, draft or other written order, of the funds on deposit with such drawee necessary to insure payment of said check, draft or

other written order upon presentation within a reasonable time after negotiation; and

c.) shall be *prima facie* evidence of the drawing, making, uttering or delivering of a check, draft or written order with the knowledge of insufficient funds in or credit with such drawee. *W.Va. Code*, 61-3-39c (1977).

2. “In any prosecution under 61-3-39...the making, drawing, uttering or delivery of a check, draft or order, the payment of which is refused by the drawee because of lack of funds or credit, shall be *prima facie* evidence that the drawer has knowledge at the time of making, drawing, issuing, uttering or delivering such check, draft or order that there is not sufficient funds or credit to pay the same, unless the check, draft or order is paid along with any charges or costs authorized by this article. *W.Va. Code*, 61-3-39d(a) (1977).

SUMMARY OF PRESUMPTIONS

If a check, draft or order is dishonored, the drawee must give the reason for refusing to pay. In any prosecution under *W.Va. Code*, 61-3-39 or *W.Va. Code*, 61-3-39a, the introduction in evidence of the dishonored check, draft or order with the reason for refusal stamped, printed or written thereon, is *prima facie* evidence of:

1. the making or uttering of the check, draft or order;
2. the presentation to the drawee for payment;
3. dishonor for the reason given;
4. the maker’s knowledge of insufficient funds or credit to pay upon presentation. *W.Va. Code*, 61-3-39c (1977).

In any prosecution under *W.Va. Code*, 61-3-39 (1994), the “presumption” of knowledge of insufficient funds is dissipated if payment, plus costs, is made. *W.Va. Code*, 61-3-39d (1977).

See, State ex rel. Walls v. Noland, 189 W.Va. 603, 433 S.E.2d 541 at 544 (1993) for a discussion of the rationale behind the permissive inference relevant to state of mind in bad check cases.

3. Permits (requires, if not multiple offender?) - see 61-3-39j, 39k - requires notice which advises drawer may pay and avoid any further action dismissal of criminal misdemeanor charges upon payment of the check plus costs. *W.Va. Code*, 61-3-39g (2003).

Payment is a defense to charges brought under *W.Va. Code*, 61-3-39a. *W.Va. Code*, 61-3-39b.

4. “The making, drawing, issuing, uttering or delivery of any such check, draft or order, for or on behalf of any corporation, or its name, by any officer or agent of such corporation, shall subject such officer or agent to the penalties of this section to the same extent as though such check, draft or order was his own personal act, when such agent or officer knows that such corporation does not have sufficient funds on deposit in or credit with such bank or depository from which such check, draft or order can legally be paid upon presentment.” *W.Va. Code*, 61-3-39 (1994).
5. Bank ledgers of a customer’s account are probative and admissible evidence, though not conclusive, that the customer had knowledge of lack of funds when he or she drew checks on the account. *State v. Griffith*, 168 W.Va. 718, 285 S.E.2d 469 (1981).
6. Where the giving of a bad check only results in the entry of an item of credit on the pre-existing debt of the person giving the check, no money or property of value passes from the creditor to the debtor, and such giving does not constitute a crime under this section. *State v. Stout*, 142 W.Va. 182, 95 S.E.2d 639 (1956).
7. The failure of the payee in a check to present it within a reasonable time will not affect the liability of the drawer of such check to indictment, under this section, for obtaining goods or other property by giving a check therefore without having sufficient funds to meet the same, where it appears that the drawer of the check did not lose anything by reason of the failure to present the same earlier than it was actually presented. *State v. Price*, 83 W.Va. 71, 97 S.E. 582, 5 ALR 1247 (1918).
8. The making, issuance and delivery of a check on a bank in payment of a pre-existing debt, to his creditor, by one who has no funds or insufficient funds to his credit in such bank to pay the same is not an offense under this section. *State v. Pishner*, 72 W.Va. 603, 78 S.E. 752 (1913).
9. It is not necessary that the indictment identify with specificity the entity in whose name the account was held; however, where the indictment identifies the defendant individually as the holder of the account, the prosecution is required to prove that the

defendant individually did not have sufficient funds on deposit with the bank to cover the subject check at the time he wrote it. State v. Pruitt, 178 W.Va. 147, 358 S.E.2d 231 (1987).

10. *W.Va. Code*, 61-3-39 [1994] and *W.Va. Code*, 61-3-39a [2000] are not unconstitutionally vague in violation of U.S. Const. amend. XIV, § 1, or *W.Va. Const. art.* III. § 10. Syl. pt. 2, State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991).
11. A violation of *W.Va. Code*, 61-3-39a [2000] is not a lesser included offense of *W.Va. Code*, 61-3-39 [1977]. Consequently, a defendant who is accused of violating *W.Va. Code*, 61-3-39 [1977] is not entitled to a “lesser included offense” instruction reflecting the elements of *W.Va. Code*, 61-3-39a [1977]. Syl. pt. 5, State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991).
12. See footnote 7, State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991) for discussion of whether or not conviction of violating *W.Va. Code*, 61-3-39 and *W.Va. Code*, 61-3-39a upon the same facts would violate double jeopardy principles.
13. Permitting an accused to respond prior to the issuance of a warrant provides a reasonable assurance against misidentification. State ex rel. Walls v. Noland, 189 W.Va. 603, 433 S.E.2d 541, 544 (1993).

WORTHLESS CHECKS MAKING, ISSUING WORTHLESS CHECKS

“Making or Issuing Worthless Checks” ¹ is committed if any person, firm or corporation make, draw, issue, utter or deliver any check, draft or order for the payment of money or its equivalent upon any bank or other depository, knowing or having reason to know there are insufficient funds on deposit in or credit with such bank or other depository with which to pay the same upon presentation.

Therefore, in order to prove the commission of the offense of “Making or Issuing Worthless Checks”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. in order to satisfy a preexisting debt, ²
5. made, drew, issued, uttered or delivered
6. any check, draft or order
7. to _____
8. in the amount of _____,
9. drawn upon _____ (bank or other depository)
10. knowing at the time of the making, drawing, issuing and delivering of such check, draft or order there are insufficient funds on deposit in or credit with such bank or other depository with which to pay the same upon presentation,
11. (and at the time of the making, drawing issuing and delivering of such check that there were insufficient funds on deposit in or credit with such bank with which to pay the same upon presentation); ³
12. and further _____ (the payee or holder of the check) did not know, or was not notified prior to the acceptance of the check, or had no reason to believe (or could not have known by exercising ordinary prudence, using means readily at hand), ⁴ that the defendant did not have on deposit or to his/her credit with the bank or depository sufficient funds to insure payment of the check; ⁵
13. and the check, draft or order was not postdated; ⁵

14. the insufficiency of funds or credit was not caused by any adjustment to the drawer's account by the bank or other depository without notice to the drawer;⁵
15. and the insufficiency of funds or credit was not caused by the dishonoring of any check, draft or order deposited in the account unless there is knowledge or reason to believe such check, draft or order would be so dishonored. ⁵

FOOTNOTES

¹ W.Va. Code, 61-3-39a (2000). The 1999 Amendment to this section eliminated the imposition of a jail sentence for non-recidivist offenses under this section.

² W.Va. Code, 61-3-39a [1977] proscribes issuing a worthless check in order to satisfy a preexisting debt. State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991).

"Nothing in W.Va. Code, 61-3-39a [1977] indicates that a security deposit for a commercial lease is a preexisting debt under that section. Despite the passing of several months between the time that the appellant issued the worthless check for the security deposit and the time that he finally made payment therefor, the appellant committed a violation of W.Va. Code, 61-3-39 [1977]. This violation occurred at the time that the appellant issued the worthless check in exchange for the security deposit. In other words, the security deposit in this case never became a preexisting debt under W.Va. Code, 61-3-39a [1977]." State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 621 (1991).

³ This language is not in W.Va. Code, 61-3-39a (1977), but see instruction set forth in footnote 4, State v. Griffith, 168 W.Va. 718, 285 S.E.2d 469 (1981) which refers to W.Va. Code, 61-3-39.

⁴ State v. Orth, 178 W.Va. 303, 359 S.E.2d 136 (1987) adds this *proviso*, but did not refer to this section of the Code.

⁵ This section shall not apply to any such check, draft or order when the payee or holder knows or has been expressly notified prior to the acceptance of same or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment as aforesaid, nor shall this section apply to any postdated check, draft or order. W.Va. Code, 61-3-39a (1977).

This section shall not apply when such insufficiency of funds or credit is caused by any adjustment to the drawer's account by the bank or other depository without notice to the drawer or is caused by the dishonoring of any check, draft or order deposited in the account unless there is knowledge or reason to believe that such check, draft or order would be so dishonored.

NOTE: If the above are defenses to the charge, do they need to be included in the instruction? Should they only be included if the defendant offers evidence of payee's knowledge, etc.?

COMMENTS

[**NOTE:** Many of these comments address prior enactments to the relevant statutes. Carefully examine the statutes to determine whether the comments remain applicable.]

Should the following: presumptions be included in the instructions?

1. It shall be the duty of the drawee of any check, draft or order, before refusing to pay the same to the holder thereof upon presentation, to cause to be written, printed or stamped in plain language thereon or attached thereto, the reason for drawee's dishonor or refusal to pay same. In all prosecutions under *W.Va. Code*, 61-3-39 or *W.Va. Code*, 61-3-39a, the introduction in evidence of any unpaid and dishonored check, draft or other written order, having the drawee's refusal to pay stamped or written thereon, or attached thereto, with the reason therefore as aforesaid:
 - a.) shall be *prima facie* evidence of the making or uttering of said check, draft or other written order, and the due presentation to the drawee for payment and the dishonor thereof, and that the same was properly dishonored for the reasons written, stamped or attached by the drawee on such dishonored checks, drafts or orders; and
 - b.) shall be *prima facie* evidence, as against the maker or drawer thereof, of the withdrawing from deposit with the drawee named in the check, draft or other written order, of the funds on deposit with such drawee necessary to insure payment of said check, draft or other written order upon presentation within a reasonable time after negotiation; and
 - c.) shall be *prima facie* evidence of the drawing, making, uttering or delivering of a check, draft or written order with the knowledge of insufficient funds in or credit with such drawee. *W.Va. Code*, 61-3-39c (1977).
2. "In any prosecution under 61-3-39a...it shall constitute *prima facie* evidence of the identity of the drawer of a check, draft or order if at the time of acceptance of such check, draft or order there is obtained the following information: Name and residence, business or mailing address and either a valid motor vehicle operator's number or the

drawer's home or work phone number or place of employment. Such information may be recorded on the check, draft or order itself or may be retained on file by the payee and referred to on the check, draft or order by identifying number or other similar means. *W.Va. Code*, 61-3-39d(a) (1977).

SUMMARY OF PRESUMPTIONS

If a check, draft or order is dishonored, the drawee must give the reason for refusing to pay. In any prosecution under *W.Va. Code*, 61-3-39 or *W.Va. Code*, 61-3-39a, the introduction in evidence of the dishonored check, draft or order with the reason for refusal stamped, printed or written thereon, is prima facie evidence of:

1. the making or uttering of the check, draft or order;
2. the presentation to the drawee for payment;
3. dishonor for the reason given;
4. the maker's knowledge of insufficient funds or credit to pay upon presentation. *W.Va. Code*, 61-3-39c (1977).

See, *State ex rel. Walls v. Noland*, 189 W.Va. 603, 433 S.E.2d 541, 544 (1993) for a discussion of the rationale behind the permissive inference relevant to state of mind in bad check cases.

3. Payment of a dishonored check, including any authorized charges or costs, shall constitute a defense or grounds for dismissal of charges brought under section thirty-nine-a of this article. *W.Va. Code*, 61-3-39b (1977).
4. The making, drawing, issuing, uttering or delivering of any such check, draft or order, for or on behalf of any corporation, or its name, by any officer or agent of such corporation, shall subject such officer or agent to the penalties of this section to the same extent as though such check, draft or order was his own personal act. 61-3-39a (2000).
5. *W.Va. Code*, 61-3-39g (2003) permits dismissal of criminal misdemeanor charges upon payment of the check plus costs.
6. *W.Va. Code*, 61-3-39 [1977] and *W.Va. Code*, 61-3-39a [1977] are not unconstitutionally vague in violation of U.S. Const. amend. XIV, § 1, or *W.Va. Const.* art. III. § 10. Syl. pt. 2, *State v. Hays*, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991).

7. A violation of *W. Va. Code*, 61-3-39a [1977] is not a lesser included offense of *W. Va. Code*, 61-3-39 [1977]. Consequently, a defendant who is accused of violating *W. Va. Code*, 61-3-39 [1977] is not entitled to a “lesser included offense” instruction reflecting the elements of *W. Va. Code*, 61-3-39a [1977]. Syl. pt. 5, State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991).
8. See footnote 7, State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991) for discussion of whether or not conviction of violating *W. Va. Code*, 61-3-39 and *W. Va. Code*, 61-3-39a upon the same facts would violate double jeopardy principles.
9. Permitting an accused to respond prior to the issuance of a warrant provides a reasonable assurance against misidentification. State ex rel. Walls v. Noland, 189 W.Va. 603, 433 S.E.2d 541, 544 (1993).
10. The statutory complaint form in *W. Va. Code*, 61-3-39f is constitutionally sound; it requires a detailed itemization of the relevant facts and provides a sufficient basis for an independent determination of whether there is probable cause to proceed with a worthless check prosecution. Syl., State ex rel. Walls v. Noland, 189 W.Va. 603, 433 S.E.2d 541 (1993).

SHOPLIFTING

Concealment of Merchandise

The Court instructs the jury that the offense of “Shoplifting”, as that term is used in the indictment herein, is committed when any person, acting alone or in concert with another person, knowingly, and with the intent to appropriate merchandise without paying the merchant’s stated price for the merchandise, conceals merchandise upon his or her person or in another manner. ¹

Therefore, in order to prove the commission of the offense of “Shoplifting”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. alone, or in concert with another person,
5. knowingly
6. concealed ²
 - a. on (his/her) person
 - b. _____ (describe other manner of concealment)
7. _____ (describe merchandise) ³
8. offered for sale by _____ (name merchant) ⁴
9. of the value of _____, ⁵
10. with the intent to appropriate the said merchandise,
11. and without paying to (merchant) the merchant’s stated price for the merchandise. ⁶

FOOTNOTES

¹ W.Va. Code, 61-3A-1(a)(1) (1991).

² See page 344 for separate instruction defining “conceal”.

³ See page 347 for separate instruction defining “merchandise”.

- ⁴ See page 346 for separate instruction defining “mercantile establishment”.
- ⁵ See page 348 for separate instruction defining “value of the merchandise”.
- ⁶ See page 345 for separate instruction defining “merchant”.

COMMENTS

1. Penalties for shoplifting vary depending upon (1) the value of the merchandise and (2) whether the defendant has previously been convicted of a shoplifting offense. For example, a person with no prior shoplifting convictions who is convicted of shoplifting merchandise of a value of less than \$500 may be punished by a maximum fine of \$250; if, however, the value of the merchandise exceeds \$500, the defendant may be fined up to \$500 and may be jailed up to sixty days.

See *W.Va. Code*, 61-3A-3 (1994) for the range of penalties for shoplifting offenses.

2. Shoplifting constitutes a breach of peace and the owner of merchandise or his agent or employee or any law enforcement officer who has reasonable grounds to believe a person has committed shoplifting, may detain in a reasonable manner for a reasonable time not to exceed 30 minutes to investigate. The detention is not an arrest. *W.Va. Code*, 61-3A-4 (1981).
3. “An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest.” Syl. pt. 1, *State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987).

“Constitutional protections apply to those arrested by privately employed security officers acting pursuant to statutory authority.” Syl. pt. 2, *State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987).

4. In State v. Hopkins, 192 W.Va. 483, 453 S.E.2d 317 (1994), the appellant was convicted of shoplifting, third offense. On appeal he contended the circuit court improperly failed to sever evidence of his previous shoplifting convictions. The Court set forth *W.Va. Code*, 61-3A-3(c) (1981), the provision dealing with third offense shoplifting convictions, and quoted the following from State v. Cozart, 177 W.Va. 400, 402 n.1, 352 S.E.2d 152, 153 n.1 (1986), discussing whether the State improperly admitted evidence of a defendant's two prior convictions for driving under the influence:

“Obviously, where a prior conviction is a necessary element of the current offense charged or is utilized to enhance the penalty after a jury finding that the defendant has committed such prior offense, it is admissible for jury purposes and [State of West Virginia v. McAboy, 160 W.Va. 497, 236 S.E.2d 431 (1977)] is not applicable.”
Cites omitted.

The Hopkins Court found the defendant was charged with shoplifting, third offense, and under the *Code*, the State was required to prove at least two prior convictions for shoplifting. The Court found that since evidence of the prior convictions is a necessary element of the crime charged, the evidence is admissible for jury purposes.

In his concurring/dissenting opinion, Justice Cleckley opines that the holding in State v. Cozart relied upon by the majority is wrong. Id. at 329. He finds that “allowing the admission of prior convictions in this case on the merits, ostensibly as elements, conflicts with all the policies behind Rule 404(b) of the West Virginia Rules of Evidence. . . . The prior convictions are not elements of the current charge; they are elements of penalty enhancement.” Id. at 330. In note 5 of his concurring/dissenting opinion, Justice Cleckley opines that the majority decision on this point is inconsistent with McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) and conflicts with the court's decision in State v. Farmer, 193 W.Va. 84, 454 S.E.2d 378 (1994). He notes that in Farmer, the Court held that for purposes of determining whether the ten- or twenty-year sentence is applicable under the kidnapping statute, a trial court may make the necessary findings as to bodily harm, etc. since these matters are relevant for sentencing and are not elements of the crime. Justice Cleckley also opines that since the Hopkins majority finds the prior convictions to be elements of the offense, they must be proved beyond a reasonable doubt. Id. at 330 n.5.

5. “Our holding in State v. Armstrong, 175 W.Va. 381, 332 S.E.2d 837 (1985) is overruled because it imposes an unnecessary restriction on the use of valid uncounseled previous convictions and we find that under the sixth amendment to the U.S. Constitution and article III, section 14 of the West Virginia Constitution, ‘an uncounseled misdemeanor conviction,’ valid under Scott [v. Illinois], 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979)], because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction. Nichols [v. United States], ___ U.S. ___, 114 S.Ct. 1921, 1928, 128 L.E.2d 745, 755 (1994).” Syl. pt. 3, State v. Hopkins, 192 W.Va. 483, 453 S.E.2d 317 (1994).
6. In State ex rel. Chadwell v. Duncil, 196 W.Va. 643, 474 S.E.2d 573 (1996), the main issue in this habeas corpus proceeding was the use of a third offense shoplifting conviction, a statutory felony, as a prior felony under *W.Va. Code*, 61-11-18, the habitual criminal offender statute, to impose a five-year recidivist sentence. The Court held that because felonies resulting from enhancement sentencing for misdemeanors are within the scope of *W.Va. Code*, 61-11-18, the writ was denied.
7. See Belcher v. Wal-Mart Stores, Inc., 211 W.Va. 712, 568 S.E.2d 19 (2002) for a discussion of the breadth of a merchant’s abilities to detain and question a shoplifting suspect.

SHOPLIFTING

Removal of Merchandise

The Court instructs the jury that the offense of “Shoplifting”, as that term is used in the indictment herein, is committed when any person, acting alone or in concert with another person, knowingly, and with the intent to appropriate merchandise without paying the merchant’s stated price for the merchandise, removes or causes the removal of merchandise from the mercantile establishment or beyond the last station for payment. ¹

Therefore, in order to prove the commission of the offense of “Shoplifting”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. alone, or in concert with another person,
5. knowingly
6. removed, or caused the removal,
7. a from _____ (name mercantile establishment), ²
b. beyond the last station for payment at _____,
8. _____ (describe merchandise), ³
9. offered for sale by _____ (name merchant),
10. of the value of _____, ⁴
11. with the intent to appropriate the said merchandise,
12. and without paying to (merchant) the merchant’s stated price for the merchandise. ⁵

FOOTNOTES

¹ W.Va. Code, 61-3A-1(a)(2) (1991).

² See page 346 for separate instruction defining “mercantile establishment”.

³ See page 347 for separate instruction defining “merchandise”.

⁴ See page 348 for separate instruction defining “value of the merchandise”.

⁵ See page 345 for separate instruction defining “merchant”.

COMMENTS

1. Penalties for shoplifting vary depending upon (1) the value of the merchandise and (2) whether the defendant has previously been convicted of a shoplifting offense. For example, a person with no prior shoplifting convictions who is convicted of shoplifting merchandise of a value of less than \$500 may be punished by a maximum fine of \$250; if, however, the value of the merchandise exceeds \$500, the defendant may be fined up to \$500 and may be jailed up to sixty days.

See *W.Va. Code*, 61-3A-3 (1994) for the range of penalties for shoplifting offenses.

2. Shoplifting constitutes a breach of peace and the owner of merchandise or his agent or employee or any law enforcement officer who has reasonable grounds to believe a person has committed shoplifting may detain in a reasonable manner for a reasonable time not to exceed 30 minutes to investigate. The detention is not an arrest. *W.Va. Code*, 61-3A-4 (1981).
3. “An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest.” Syl. pt. 1, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

“Constitutional protections apply to those arrested by privately employed security officers acting pursuant to statutory authority.” Syl. pt. 2, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

4. In State v. Hopkins, 192 W.Va. 483, 453 S.E.2d 317 (1994), the appellant was convicted of shoplifting, third offense. On appeal he contended the circuit court improperly failed to sever evidence of his previous shoplifting convictions. The Court set forth *W.Va. Code*, 61-3A-3(c) (1981), the provision dealing with third offense

shoplifting convictions, and quoted the following from State v. Cozart, 177 W.Va. 400, 402 n.1, 352 S.E.2d 152, 153 n.1 (1986), discussing whether the State improperly admitted evidence of a defendant's two prior convictions for driving under the influence:

“Obviously, where a prior conviction is a necessary element of the current offense charged or is utilized to enhance the penalty after a jury finding that the defendant has committed such prior offense, it is admissible for jury purposes and [State of West Virginia v.] McAboy, [160 W.Va. 497, 236 S.E.2d 431 (1977)] is not applicable.”
Cites omitted.

The Hopkins Court found the defendant was charged with shoplifting, third offense, and under the *Code*, the State was required to prove at least two prior convictions for shoplifting. The Court found that since evidence of the prior convictions is a necessary element of the crime charged, the evidence is admissible for jury purposes.

In his concurring/dissenting opinion, Justice Cleckley opines that the holding in State v. Cozart relied upon by the majority is wrong. Id. at 329. He finds that “allowing the admission of prior convictions in this case on the merits, ostensibly as elements, conflicts with all the policies behind Rule 404(b) of the West Virginia Rules of Evidence. . . . The prior convictions are not elements of the current charge; they are elements of penalty enhancement.” Id. at 330. In note 5 of his concurring/dissenting opinion, Justice Cleckley opines that the majority decision on this point is inconsistent with McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) and conflicts with the court's decision in State v. Farmer, 193 W.Va. 84, 454 S.E.2d 378 (1994). He notes that in Farmer, the Court held that for purposes of determining whether the ten- or twenty-year sentence is applicable under the kidnaping statute, a trial court may make the necessary findings as to bodily harm, etc. since these matters are relevant for sentencing and are not elements of the crime. Justice Cleckley also opines that since the Hopkins majority finds the prior convictions to be elements of the offense, they must be proved beyond a reasonable doubt. Id. at 330 n.5.

5. “Our holding in State v. Armstrong, 175 W.Va. 381, 332 S.E.2d 837 (1985) is overruled because it imposes an unnecessary restriction on the use of valid uncounseled previous convictions and we find that under the sixth amendment to the

U.S. Constitution and article III, section 14 of the West Virginia Constitution, ‘an uncounseled misdemeanor conviction, valid under Scott [v. Illinois], 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979)], because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.’ Nichols [v. United States], ___ U.S. ___, 114 S.Ct. 1921, 1928, 128 L.E.2d 745, 755 (1994).” Syl. pt. 3, State v. Hopkins, 192 W.Va. 483, 453 S.E.2d 317 (1994).

6. In State ex rel. Chadwell v. Duncil, 196 W.Va. 643, 474 S.E.2d 573 (1996), the main issue in this habeas corpus proceeding was the use of a third offense shoplifting conviction, a statutory felony, as a prior felony under *W.Va. Code*, 61-11-18, the habitual criminal offender statute, to impose a five-year recidivist sentence. The Court held that because felonies resulting from enhancement sentencing for misdemeanors are within the scope of *W.Va. Code*, 61-11-18, the writ was denied.
7. See Belcher v. Wal-Mart Stores, Inc., 211 W.Va. 712, 568 S.E.2d 19 (2002) for a discussion of the breadth of a merchant’s abilities to detain and question a shoplifting suspect.

SHOPLIFTING

Altering, Transferring or Removal of Price

The Court instructs the jury that the offense of “Shoplifting”, as that term is used in the indictment herein, is committed when any person, acting alone or in concert with another person, knowingly, and with the intent to appropriate merchandise without paying the merchant’s stated price for the merchandise, alters, transfers or removes any price marking affixed to the merchandise. ¹

Therefore, in order to prove the commission of the offense of “Shoplifting”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. alone, or in concert with another person,
5. knowingly altered, transferred or removed any price marking
6. affixed to _____ (describe merchandise) ²
7. offered for sale by _____ (name merchant), ³
8. with the intent to appropriate the said merchandise,
9. without paying to (merchant) the merchant’s stated price for the merchandise, ⁴
10. and that the difference between the merchant’s stated price of the merchandise and the altered price was _____. ⁵

FOOTNOTES

¹ W.Va. Code, 61-3A-1(a)(3) (1991).

² See page 347 for separate instruction defining “merchandise”.

³ See page 346 for separate instruction defining “mercantile establishment”.

⁴ See page 345 for separate instruction defining “merchant”.

⁵ See page 348 for separate instruction defining “value of the merchandise”.

COMMENTS

1. Penalties for shoplifting vary depending upon (1) the value of the merchandise and (2) whether the defendant has previously been convicted of a shoplifting offense. For example, a person with no prior shoplifting convictions who is convicted of shoplifting merchandise of a value of less than \$500 may be punished by a maximum fine of \$250; if, however, the value of the merchandise exceeds \$500, the defendant may be fined up to \$500 and may be jailed up to sixty days.

See *W.Va. Code*, 61-3A-3 (1994) for the range of penalties for shoplifting offenses.

2. Shoplifting constitutes a breach of peace and the owner of merchandise or his agent or employee or any law enforcement officer who has reasonable grounds to believe a person has committed shoplifting may detain in a reasonable manner for a reasonable time not to exceed 30 minutes to investigate. The detention is not an arrest. *W.Va. Code*, 61-3A-4 (1981).
3. “An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest.” Syl. pt. 1, *State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987).

“Constitutional protections apply to those arrested by privately employed security officers acting pursuant to statutory authority.” Syl. pt. 2, *State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987).

4. In *State v. Hopkins*, 192 W.Va. 483, 453 S.E.2d 317 (1994), the appellant was convicted of shoplifting, third offense. On appeal he contended the circuit court improperly failed to sever evidence of his previous shoplifting convictions. The Court set forth *W.Va. Code*, 61-3A-3(c) (1981), the provision dealing with third offense shoplifting convictions, and quoted the following from *State v. Cozart*, 177 W.Va. 400, 402 n.1, 352 S.E.2d 152, 153 n.1 (1986), discussing whether the State improperly admitted evidence of a defendant’s two prior convictions for driving under the influence:

“Obviously, where a prior conviction is a necessary element of the current offense charged or is utilized to enhance the penalty after a jury finding that the defendant has committed such prior offense, it is admissible for jury purposes and [State of West Virginia v. McAboy, 160 W.Va. 497, 236 S.E.2d 431 (1977)] is not applicable.”
Cites omitted.

The Hopkins Court found the defendant was charged with shoplifting, third offense, and under the *Code*, the State was required to prove at least two prior convictions for shoplifting. The Court found that since evidence of the prior convictions is a necessary element of the crime charged, the evidence is admissible for jury purposes.

In his concurring/dissenting opinion, Justice Cleckley opines that the holding in State v. Cozart relied upon by the majority is wrong. Id. at 329. He finds that “allowing the admission of prior convictions in this case on the merits, ostensibly as elements, conflicts with all the policies behind Rule 404(b) of the West Virginia Rules of Evidence. . . . The prior convictions are not elements of the current charge; they are elements of penalty enhancement”. Id. at 330. In note 5 of his concurring/dissenting opinion, Justice Cleckley opines that the majority decision on this point is inconsistent with McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) and conflicts with the court’s decision in State v. Farmer, 193 W.Va. 84, 454 S.E.2d 378 (1994). He notes that in Farmer, the Court held that for purposes of determining whether the ten- or twenty-year sentence is applicable under the kidnaping statute, a trial court may make the necessary findings as to bodily harm, etc. since these matters are relevant for sentencing and are not elements of the crime. Justice Cleckley also opines that since the Hopkins majority finds the prior convictions to be elements of the offense, they must be proved beyond a reasonable doubt. Id. at 330 n.5.

5. “Our holding in State v. Armstrong, 175 W.Va. 381, 332 S.E.2d 837 (1985) is overruled because it imposes an unnecessary restriction on the use of valid uncounseled previous convictions and we find that under the sixth amendment to the U.S. Constitution and article III, section 14 of the West Virginia Constitution, ‘an uncounseled misdemeanor conviction, valid under Scott [v. Illinois], 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979)], because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.’ Nichols [v.

United States], ___ U.S. ___, 114 S.Ct. 1921, 1928, 128 L.E.2d 745, 755 (1994).” Syl. pt. 3, State v. Hopkins, 192 W.Va. 483, 453 S.E.2d 317 (1994).

6. In State ex rel. Chadwell v. Duncil, 196 W.Va. 643, 474 S.E.2d 573 (1996), the main issue in this habeas corpus proceeding was the use of a third offense shoplifting conviction, a statutory felony, as a prior felony under *W.Va. Code*, 61-11-18, the habitual criminal offender statute, to impose a five-year recidivist sentence. The Court held that because felonies resulting from enhancement sentencing for misdemeanors are within the scope of *W.Va. Code*, 61-11-18, the writ was denied.
7. See Belcher v. Wal-Mart Stores, Inc., 211 W.Va. 712, 568 S.E.2d 19 (2002) for a discussion of the breadth of a merchant’s abilities to detain and question a shoplifting suspect.

SHOPLIFTING
Transferring Merchandise from One Container to Another

The Court instructs the jury that the offense of “Shoplifting”, as that term is used in the indictment herein, is committed when any person, acting alone or in concert with another person, knowingly, and with the intent to appropriate merchandise without paying the merchant’s stated price for the merchandise, transfers the merchandise from one container to another. ¹

Therefore, in order to prove the commission of the offense of “Shoplifting”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. alone, or in concert with another person,
5. knowingly transferred from one container to another,
6. _____ (describe merchandise), ²
7. offered for sale by _____ (name merchant), ³
8. of the value of _____, ⁴
9. with the intent to appropriate the said merchandise,
10. without paying to (merchant) the merchant’s stated price for the merchandise.⁵

FOOTNOTES

¹ W.Va. Code, 61-3A-1(a)(4) (1991).

² See page 347 for separate instruction defining “merchandise”.

³ See page 346 for separate instruction defining “mercantile establishment”.

⁴ See page 348 for separate instruction defining “value of the merchandise”.

⁵ See page 345 for separate instruction defining “merchant”.

COMMENTS

1. Penalties for shoplifting vary depending upon (1) the value of the merchandise and (2) whether the defendant has previously been convicted of a shoplifting offense. For example, a person with no prior shoplifting convictions who is convicted of shoplifting merchandise of a value of less than \$500 may be punished by a maximum fine of \$250; if, however, the value of the merchandise exceeds \$500, the defendant may be fined up to \$500 and may be jailed up to sixty days.

See *W.Va. Code*, 61-3A-3 (1994) for the range of penalties for shoplifting offenses.

2. Shoplifting constitutes a breach of peace and the owner of merchandise or his agent or employee or any law enforcement officer who has reasonable grounds to believe a person has committed shoplifting may detain in a reasonable manner for a reasonable time not to exceed 30 minutes to investigate. The detention is not an arrest. *W.Va. Code*, 61-3A-4 (1981).
3. “An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest.” Syl. pt. 1, *State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987).

“Constitutional protections apply to those arrested by privately employed security officers acting pursuant to statutory authority.” Syl. pt. 2, *State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987).

4. In *State v. Hopkins*, 192 W.Va. 483, 453 S.E.2d 317 (1994), the appellant was convicted of shoplifting, third offense. On appeal he contended the circuit court improperly failed to sever evidence of his previous shoplifting convictions. The Court set forth *W.Va. Code*, 61-3A-3(c) (1981), the provision dealing with third offense shoplifting convictions, and quoted the following from *State v. Cozart*, 177 W.Va. 400, 402 n.1, 352 S.E.2d 152, 153 n.1 (1986), discussing whether the State improperly admitted evidence of a defendant’s two prior convictions for driving under the influence:

“Obviously, where a prior conviction is a necessary element of the current offense charged or is utilized to enhance the penalty after a jury finding that the defendant has committed such prior offense, it is admissible for jury purposes and [State of West Virginia v. McAboy, 160 W.Va. 497, 236 S.E.2d 431 (1977)] is not applicable.”
Cites omitted.

The Hopkins Court found the defendant was charged with shoplifting, third offense, and under the *Code*, the State was required to prove at least two prior convictions for shoplifting. The Court found that since evidence of the prior convictions is a necessary element of the crime charged, the evidence is admissible for jury purposes.

In his concurring/dissenting opinion, Justice Cleckley opines that the holding in State v. Cozart relied upon by the majority is wrong. Id. at 329. He finds that “allowing the admission of prior convictions in this case on the merits, ostensibly as elements, conflicts with all the policies behind Rule 404(b) of the West Virginia Rules of Evidence. . . . The prior convictions are not elements of the current charge; they are elements of penalty enhancement.” Id. at 330. In note 5 of his concurring/dissenting opinion, Justice Cleckley opines that the majority decision on this point is inconsistent with McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) and conflicts with the court’s decision in State v. Farmer, 193 W.Va. 84, 454 S.E.2d 378 (1994). He notes that in Farmer, the Court held that for purposes of determining whether the ten- or twenty-year sentence is applicable under the kidnaping statute, a trial court may make the necessary findings as to bodily harm, etc. since these matters are relevant for sentencing and are not elements of the crime. Justice Cleckley also opines that since the Hopkins majority finds the prior convictions to be elements of the offense, they must be proved beyond a reasonable doubt. Id. at 330 n.5.

5. “Our holding in State v. Armstrong, 175 W.Va. 381, 332 S.E.2d 837 (1985) is overruled because it imposes an unnecessary restriction on the use of valid uncounseled previous convictions and we find that under the sixth amendment to the U.S. Constitution and article III, section 14 of the West Virginia Constitution, ‘an uncounseled misdemeanor conviction, valid under Scott [v. Illinois], 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979)], because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.’ Nichols [v.

United States], ___ U.S. ___, 114 S.Ct. 1921, 1928, 128 L.E.2d 745, 755 (1994).” Syl. pt. 3, State v. Hopkins, 192 W.Va. 483, 453 S.E.2d 317 (1994).

6. In State ex rel. Chadwell v. Duncil, 196 W.Va. 643, 474 S.E.2d 573 (1996), the main issue in this habeas corpus proceeding was the use of a third offense shoplifting conviction, a statutory felony, as a prior felony under *W.Va. Code*, 61-11-18, the habitual criminal offender statute, to impose a five-year recidivist sentence. The Court held that because felonies resulting from enhancement sentencing for misdemeanors are within the scope of *W.Va. Code*, 61-11-18, the writ was denied.
7. See Belcher v. Wal-Mart Stores, Inc., 211 W.Va. 712, 568 S.E.2d 19 (2002) for a discussion of the breadth of a merchant’s abilities to detain and question a shoplifting suspect.

SHOPLIFTING
Causing Sales Recording Device to Reflect Lower Price

The Court instructs the jury that the offense of “Shoplifting”, as that term is used in the indictment herein, is committed when any person, acting alone or in concert with another person, knowingly, and with the intent to appropriate merchandise without paying the merchant’s stated price for the merchandise, causes a cash register or other sales recording device to reflect less than the merchant’s stated price for the merchandise. ¹

Therefore, in order to prove the commission of the offense of “Shoplifting”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. alone, or in concert with another person,
5. knowingly causes a cash register or other sales recording device,
6. at _____ (name mercantile establishment), ²
7. to reflect less than the merchant’s ³ stated price
8. for _____ (describe merchandise),
9. with the intent to appropriate the said merchandise,
10. without paying to (merchant) the merchant’s stated price for the merchandise
11. and that the difference between the merchant’s stated price of the merchandise and the altered price was _____. ⁴

FOOTNOTES

¹ W.Va. Code, 61-3A-1(a)(5) (1991).

² See page 346 for separate instruction defining “mercantile establishment”.

³ See page 345 for separate instruction defining “merchant”.

⁴ See page 348 for separate instruction defining “value of the merchandise”.

COMMENTS

1. Penalties for shoplifting vary depending upon (1) the value of the merchandise and (2) whether the defendant has previously been convicted of a shoplifting offense. For example, a person with no prior shoplifting convictions who is convicted of shoplifting merchandise of a value of less than \$500 may be punished by a maximum fine of \$250; if, however, the value of the merchandise exceeds \$500, the defendant may be fined up to \$500 and may be jailed up to sixty days.

See *W.Va. Code*, 61-3A-3 (1994) for the range of penalties for shoplifting offenses.

2. Shoplifting constitutes a breach of peace and the owner of merchandise or his agent or employee or any law enforcement officer who has reasonable grounds to believe a person has committed shoplifting may detain in a reasonable manner for a reasonable time not to exceed 30 minutes to investigate. The detention is not an arrest. *W.Va. Code*, 61-3A-4 (1981).
3. “An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest.” Syl. pt. 1, *State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987).

“Constitutional protections apply to those arrested by privately employed security officers acting pursuant to statutory authority.” Syl. pt. 2, *State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987).

4. In *State v. Hopkins*, 192 W.Va. 483, 453 S.E.2d 317 (1994), the appellant was convicted of shoplifting, third offense. On appeal he contended the circuit court improperly failed to sever evidence of his previous shoplifting convictions. The Court set forth *W.Va. Code*, 61-3A-3(c) (1981), the provision dealing with third offense shoplifting convictions, and quoted the following from *State v. Cozart*, 177 W.Va. 400, 402 n.1, 352 S.E.2d 152, 153 n.1 (1986), discussing whether the State improperly admitted evidence of a defendant’s two prior convictions for driving under the influence:

“Obviously, where a prior conviction is a necessary element of the current offense charged or is utilized to enhance the penalty after a jury finding that the defendant has committed such prior offense, it is admissible for jury purposes and [State of West Virginia v. McAboy, 160 W.Va. 497, 236 S.E.2d 431 (1977)] is not applicable.”
Cites omitted.

The Hopkins Court found the defendant was charged with shoplifting, third offense, and under the *Code*, the State was required to prove at least two prior convictions for shoplifting. The Court found that since evidence of the prior convictions is a necessary element of the crime charged, the evidence is admissible for jury purposes.

In his concurring/dissenting opinion, Justice Cleckley opines that the holding in State v. Cozart relied upon by the majority is wrong. Id. at 329. He finds that allowing the admission of prior convictions in this case on the merits, ostensibly as elements, conflicts with all the policies behind Rule 404(b) of the West Virginia Rules of Evidence. . . . The prior convictions are not elements of the current charge; they are elements of penalty enhancement. Id. at 330. In note 5 of his concurring/dissenting opinion, Justice Cleckley opines that the majority decision on this point is inconsistent with McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) and conflicts with the court’s decision in State v. Farmer, 193 W.Va. 84, 454 S.E.2d 378 (1994). He notes that in Farmer, the Court held that for purposes of determining whether the ten- or twenty-year sentence is applicable under the kidnaping statute, a trial court may make the necessary findings as to bodily harm, etc. since these matters are relevant for sentencing and are not elements of the crime. Justice Cleckley also opines that since the Hopkins majority finds the prior convictions to be elements of the offense, they must be proved beyond a reasonable doubt. Id. at 330 n.5.

5. “Our holding in State v. Armstrong, 175 W.Va. 381, 332 S.E.2d 837 (1985) is overruled because it imposes an unnecessary restriction on the use of valid uncounseled previous convictions and we find that under the sixth amendment to the U.S. Constitution and article III, section 14 of the West Virginia Constitution, ‘an uncounseled misdemeanor conviction, valid under Scott [v. Illinois], 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979)], because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.’ Nichols [v.

United States], ___ U.S. ___, 114 S.Ct. 1921, 1928, 128 L.E.2d 745, 755 (1994).” Syl. pt. 3, State v. Hopkins, 192 W.Va. 483, 453 S.E.2d 317 (1994).

6. In State ex rel. Chadwell v. Duncil, 196 W.Va. 643, 474 S.E.2d 573 (1996), the main issue in this habeas corpus proceeding was the use of a third offense shoplifting conviction, a statutory felony, as a prior felony under *W.Va. Code*, 61-11-18, the habitual criminal offender statute, to impose a five-year recidivist sentence. The Court held that because felonies resulting from enhancement sentencing for misdemeanors are within the scope of *W.Va. Code*, 61-11-18, the writ was denied.
7. See Belcher v. Wal-Mart Stores, Inc., 211 W.Va. 712, 568 S.E.2d 19 (2002) for a discussion of the breadth of a merchant’s abilities to detain and question a shoplifting suspect.

SHOPLIFTING
Obtaining, Or Attempting to Obtain Fraudulent Exchange or Refund

The Court instructs the jury that the offense of “Shoplifting”, as that term is used in the indictment herein, is committed when any person, acting alone or in concert with another person, knowingly and with intent obtains an exchange or refund or attempts to obtain an exchange or refund for merchandise which has not been purchased from the mercantile establishment. ¹

Therefore, in order to prove the commission of the offense of “Shoplifting”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. alone, or in concert with another person,
5. knowingly
6. and with intent
7. obtained or attempted to obtain an exchange or refund
8. from _____ (name mercantile establishment), ²
9. for _____ (describe merchandise), ³
10. of the value of _____, ⁴
11. which merchandise had not been purchased from _____
(mercantile establishment).

FOOTNOTES

¹ W.Va. Code, 61-3A-1(b) (1991).

² See page 346 for separate instruction defining “mercantile establishment”.

³ See page 347 for separate instruction defining “merchandise”.

⁴ See page 348 for separate instruction defining “value of the merchandise”.

COMMENTS

1. Penalties for shoplifting vary depending upon (1) the value of the merchandise and (2) whether the defendant has previously been convicted of a shoplifting offense. For example, a person with no prior shoplifting convictions who is convicted of shoplifting merchandise of a value of less than \$500 may be punished by a maximum fine of \$250; if, however, the value of the merchandise exceeds \$500, the defendant may be fined up to \$500 and may be jailed up to sixty days.

See *W.Va. Code*, 61-3A-3 (1994) for the range of penalties for shoplifting offenses.

2. Shoplifting constitutes a breach of peace and the owner of merchandise or his agent or employee or any law enforcement officer who has reasonable grounds to believe a person has committed shoplifting may detain in a reasonable manner for a reasonable time not to exceed 30 minutes to investigate. The detention is not an arrest. *W.Va. Code*, 61-3A-4 (1981).
3. “An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest.” Syl. pt. 1, *State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987).

“Constitutional protections apply to those arrested by privately employed security officers acting pursuant to statutory authority.” Syl. pt. 2, *State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987).

4. In *State v. Hopkins*, 192 W.Va. 483, 453 S.E.2d 317 (1994), the appellant was convicted of shoplifting, third offense. On appeal he contended the circuit court improperly failed to sever evidence of his previous shoplifting convictions. The Court set forth *W.Va. Code*, 61-3A-3(c) (1981), the provision dealing with third offense shoplifting convictions, and quoted the following from *State v. Cozart*, 177 W.Va. 400, 402 n.1, 352 S.E.2d 152, 153 n.1 (1986), discussing whether the State improperly admitted evidence of a defendant’s two prior convictions for driving under the influence:

“Obviously, where a prior conviction is a necessary element of the current offense charged or is utilized to enhance the penalty after a jury finding that the defendant has committed such prior offense, it is admissible for jury purposes and [State of West Virginia v. McAboy, 160 W.Va. 497, 236 S.E.2d 431 (1977)] is not applicable.”
Cites omitted.

The Hopkins Court found the defendant was charged with shoplifting, third offense, and under the *Code*, the State was required to prove at least two prior convictions for shoplifting. The Court found that since evidence of the prior convictions is a necessary element of the crime charged, the evidence is admissible for jury purposes.

In his concurring/dissenting opinion, Justice Cleckley opines that the holding in State v. Cozart relied upon by the majority is wrong. Id. at 329. He finds that “allowing the admission of prior convictions in this case on the merits, ostensibly as elements, conflicts with all the policies behind Rule 404(b) of the West Virginia Rules of Evidence. . . . The prior convictions are not elements of the current charge; they are elements of penalty enhancement.” Id. at 330. In note 5 of his concurring/dissenting opinion, Justice Cleckley opines that the majority decision on this point is inconsistent with McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) and conflicts with the court’s decision in State v. Farmer, 193 W.Va. 84, 454 S.E.2d 378 (1994). He notes that in Farmer, the Court held that for purposes of determining whether the ten- or twenty-year sentence is applicable under the kidnaping statute, a trial court may make the necessary findings as to bodily harm, etc. since these matters are relevant for sentencing and are not elements of the crime. Justice Cleckley also opines that since the Hopkins majority finds the prior convictions to be elements of the offense, they must be proved beyond a reasonable doubt. Id. at 330 n.5.

5. “Our holding in State v. Armstrong, 175 W.Va. 381, 332 S.E.2d 837 (1985) is overruled because it imposes an unnecessary restriction on the use of valid uncounseled previous convictions and we find that under the sixth amendment to the U.S. Constitution and article III, section 14 of the West Virginia Constitution, ‘an uncounseled misdemeanor conviction, valid under Scott [v. Illinois], 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979)], because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction.’ Nichols [v.

United States], ___ U.S. ___, 114 S.Ct. 1921, 1928, 128 L.E.2d 745, 755 (1994).” Syl. pt. 3, State v. Hopkins, 192 W.Va. 483, 453 S.E.2d 317 (1994).

6. In State ex rel. Chadwell v. Duncil, 196 W.Va. 643, 474 S.E.2d 573 (1996), the main issue in this habeas corpus proceeding was the use of a third offense shoplifting conviction, a statutory felony, as a prior felony under *W.Va. Code*, 61-11-18, the habitual criminal offender statute, to impose a five-year recidivist sentence. The Court held that because felonies resulting from enhancement sentencing for misdemeanors are within the scope of *W.Va. Code*, 61-11-18, the writ was denied.
7. See Belcher v. Wal-Mart Stores, Inc., 211 W.Va. 712, 568 S.E.2d 19 (2002) for a discussion of the breadth of a merchant’s abilities to detain and question a shoplifting suspect.

SHOPLIFTING
Definition of Conceal

One of the essential elements of “Shoplifting”, as the defendant is charged in this case, is that the defendant must have concealed the merchandise upon (his/her) person or in another manner.

To “conceal” merchandise is to hide, hold or carry merchandise so that, although there may be some notice of its presence, it is not visible through ordinary observation.¹

FOOTNOTE

¹ W.Va. Code, 61-3A-6(a) (1981).

SHOPLIFTING
Definition of Merchant

One of the elements of “Shoplifting”, as the defendant is charged in this case, is that the merchandise and/or property must have been owned or otherwise possessed by a merchant.

To be a “merchant” means to be an owner or operator of any mercantile establishment. This definition also includes any employees, servants, security agents or any other agents of the owner or operator. ¹

FOOTNOTE

¹ W.Va. Code, 61-3A-6(b) (1981).

SHOPLIFTING
Definition of Mercantile Establishment

A “mercantile establishment” as that term is used in this case, means any place where merchandise is displayed, held or offered for sale, either at retail or at wholesale. It does not include adjoining parking lots or adjoining areas of common use with other establishments.¹

FOOTNOTE

¹ W.Va. Code, 61-3A-6(c) (1981).

SHOPLIFTING
Definition of Merchandise

“Merchandise” as that term is used in this case, means any goods, foodstuffs, wares or personal property, or any part or portion thereof of any type or description displayed, held or offered for sale, or a shopping cart. ¹

FOOTNOTE

- ¹ W.Va. Code, 61-3A-6(d) (1981). Further, W.Va. Code, 61-3A-1(a)(6) (1981) specifically makes the removal of a shopping cart from the premises of a mercantile establishment a separate offense.

SHOPLIFTING
Definition of Value of the Merchandise

One of the elements of the offense herein is that the State of West Virginia must prove, beyond a reasonable doubt, the value of the merchandise.

“Value of the merchandise” as that term is used in this case, means the merchant’s stated price of the merchandise. In the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the retail value of the merchandise, it is the difference between the merchant’s stated price and the altered price.¹

FOOTNOTE

¹ W.Va. Code, 61-3A-6(e) (1981).

SHOPLIFTING
Unlawful Removal of Theft Detection Device

The Court instructs the jury that the offense of “Unlawful Removal of a Theft Detection Device”, as that term is used in the indictment herein, is committed when any person intentionally removes any theft detection device by the use of any manual force or by any tool or device, which is not specifically designed or manufactured to remove theft detection devices, from merchandise prior to purchase. ¹

A “theft detection device” means any tag or other device that is used to prevent or detect theft and that is attached to merchandise held for resale by a merchant or to property of a merchant. ²

Therefore, in order to prove the commission of the offense of “Unlawful Removal of Theft Detection Device”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. intentionally
5. removed a theft detection device
6. by the use of manual force or any tool or device not specifically designed or manufactured to remove theft detection devices
7. from merchandise prior to purchase.

FOOTNOTES

¹ W.Va. Code, 61-3A-4a(f) (2000).

² W.Va. Code, 61-3A-4a(a)(1) (2000).

COMMENTS

1. “Any person convicted of violating the provisions of [§ 61-3A-4a(f)] is guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars, and such fine shall not be suspended, or the person shall be confined in the county or regional jail not more than sixty days, or both.” *W.Va. Code*, 61-3A-4a(h) (2000).
2. The activation of an anti-shoplifting device as a result of a person exiting an establishment can constitute reasonable grounds for the detention of the person, provided that notice has been provided within the establishment that the devices are being utilized. Provided that the detention is reasonable, both in manner and time, the merchant and/or their agents cannot be held civilly or criminally liable. *W.Va. Code*, 61-3A-4a(i) and (j) (2000).

SHOPLIFTING
Unlawful Use of Theft Detection Shielding Device
or Theft Detection Device Remover

The Court instructs the jury that the offense of “Unlawful Use of a Theft Detection Shielding Device or Theft Detection Device Remover”, as those terms are used in the indictment herein, is committed when any person intentionally uses or attempts to use a theft detection shielding device, or a theft detection device remover, while committing any offense of shoplifting. ¹

A “theft detection shielding device” means any laminated or coated bag or device designed to shield merchandise held for resale by a merchant or property of a merchant from being detected by an electronic or magnetic theft alarm sensor. ²

A “theft detection device ” means any tag or other device that is used to prevent or detect theft and that is attached to merchandise held for resale by a merchant or to property of a merchant. ³

A “theft detection device remover” means any tool specifically designed or manufactured to be used to remove a theft detection device from merchandise held for resale by a merchant or property of a merchant. ⁴

Therefore, in order to prove the commission of the offense of “Unlawful Use of a Theft Detection Shielding Device or Theft Detection Device Remover”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. intentionally
5. used a theft detection shielding device or theft detection device remover,
6. while engaged in the commission of the offense of shoplifting.

FOOTNOTES

- ¹ W.Va. Code, 61-3A-4a(e) (2000). By the language of the statute, this offense apparently requires a concurrent violation of § 61-3A-1, et. seq.
- ² W.Va. Code, 61-3A-4a(a)(3) (2000).
- ³ W.Va. Code, 61-3A-4a(a)(1) (2000).
- ⁴ W.Va. Code, 61-3A-4a(a)(2) (2000).

COMMENTS

1. “Any person convicted for violating the provisions of [§ 61-3A-4a(e)] is guilty of a misdemeanor, and upon conviction thereof, shall be confined in the county or regional jail facility for not less than thirty days nor more than one year, and fined not less than two hundred fifty dollars nor more than one thousand dollars.” *W.Va. Code*, 61-3A-4a(g) (2000).
2. The activation of an anti-shoplifting device as a result of a person exiting an establishment can constitute reasonable grounds for the detention of the person, provided that notice has been provided within the establishment that the devices are being utilized. Provided that the detention is reasonable, both in manner and time, the merchant and/or their agents cannot be held civilly or criminally liable. *W.Va. Code*, 61-3A-4a(i) & (j) (2000).

SHOPLIFTING
Unlawful Possession of Theft Detection Device Remover

The Court instructs the jury that the offense of “Unlawful Possession of a Theft Detection Device Remover”, as that term is used in the indictment herein, is committed when any person knowingly possesses any theft detection device remover with the intent to use such tool to remove any theft detection device from any merchandise without the permission of the merchant or person owning or holding such merchandise. ¹

A “theft detection device” means any tag or other device that is used to prevent or detect theft and that is attached to merchandise held for resale by a merchant or to property of a merchant. ²

A “theft detection device remover” means any tool specifically designed or manufactured to be used to remove a theft detection device from merchandise held for resale by a merchant or property of a merchant. ³

Therefore, in order to prove the commission of the offense of “Unlawful Possession of a Theft Detection Device Remover”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. knowingly
5. possessed a theft detection device remover,
6. with the intent to use such tool to remove any theft detection device from merchandise owned or held by _____ (name of merchant),
7. without the permission of the said _____.

FOOTNOTES

- ¹ W.Va. Code, 61-3A-4a(d) (2000).
- ² W.Va. Code, 61-3A-4a(a)(1) (2000).
- ³ W.Va. Code, 61-3A-4a(a)(2) (2000).

COMMENTS

1. “Any person convicted for violating the provisions of [§ 61-3A-4a(d)] is guilty of a misdemeanor, and upon conviction thereof, shall be confined in the county or regional jail facility for not less than thirty days nor more than one year, and fined not less than two hundred fifty dollars nor more than one thousand dollars.” *W.Va. Code*, 61-3A-4a(g) (2000).
2. The activation of an anti-shoplifting device as a result of a person exiting an establishment can constitute reasonable grounds for the detention of the person, provided that notice has been provided within the establishment that the devices are being utilized. Provided that the detention is reasonable, both in manner and time, the merchant and/or their agents cannot be held civilly or criminally liable. *W.Va. Code*, 61-3A-4a(i) & (j) (2000).

SHOPLIFTING
Unlawful Possession of Theft Detection Shielding Device

The Court instructs the jury that the offense of “Unlawful Possession of a Theft Detection Shielding Device”, as that term is used in the indictment herein, is committed when any person knowingly possesses any theft detection shielding device with the intent to commit theft or retail theft. ¹

A “theft detection shielding device” means any laminated or coated bag or device designed to shield merchandise held for resale by a merchant or property of a merchant from being detected by an electronic or magnetic theft alarm sensor. ²

Therefore, in order to prove the commission of the offense of “Unlawful Possession of a Theft Detection Shielding Device”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. knowingly
5. possessed a theft detection shielding device,
6. with the intent to commit a theft or retail theft,
7. from _____ (name merchant/mercantile establishment).

FOOTNOTES

¹ W.Va. Code, 61-3A-4a(c) (2000).

² W.Va. Code, 61-3A-4a(a)(3) (2000).

COMMENTS

1. “Any person convicted for violating the provisions of [§ 61-3A-4a(c)] is guilty of a misdemeanor, and upon conviction thereof, shall be confined in the county or regional jail facility for not less than thirty days nor more than one year, and fined not less than two hundred fifty dollars nor more than one thousand dollars.” *W.Va. Code*, 61-3A-4a(g) (2000).
2. The activation of an anti-shoplifting device as a result of a person exiting an establishment can constitute reasonable grounds for the detention of the person, provided that notice has been provided within the establishment that the devices are being utilized. Provided that the detention is reasonable, both in manner and time, the merchant and/or their agents cannot be held civilly or criminally liable. *W.Va. Code*, 61-3A-4a(i) & (j) (2000).

SHOPLIFTING
Unlawful Distribution of Theft Detection Shielding Device

The Court instructs the jury that the offense of “Unlawful Distribution of a Theft Detection Shielding Device”, as that term is used in the indictment herein, is committed when any person knowingly manufactures, sells, or offers to sell or distribute any theft detection shielding device. ¹

A “theft detection shielding device” means any laminated or coated bag or device designed to shield merchandise held for resale by a merchant or property of a merchant from being detected by an electronic or magnetic theft alarm sensor. ²

Therefore, in order to prove the commission of the offense of “Unlawful Distribution of a Theft Detection Shielding Device”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. knowingly
 5. a. manufactured
 - b. sold
 - c. offered to sell or distribute
6. a theft detection shielding device.

FOOTNOTES

¹ W.Va. Code, 61-3A-4a(b) (2000).

² W.Va. Code, 61-3A-4a(a)(3) (2000).

COMMENTS

1. “Any person convicted for violating the provisions of [§ 61-3A-4a(b)] is guilty of a misdemeanor, and upon conviction thereof, shall be confined in the county or regional jail facility for not less than thirty days nor more than one year, and fined not less than two hundred fifty dollars nor more than one thousand dollars.” *W.Va. Code*, 61-3A-4a(g) (2000).
2. The activation of an anti-shoplifting device as a result of a person exiting an establishment can constitute reasonable grounds for the detention of the person, provided that notice has been provided within the establishment that the devices are being utilized. Provided that the detention is reasonable, both in manner and time, the merchant and/or their agents cannot be held civilly or criminally liable. *W.Va. Code*, 61-3A-4a(i) & (j) (2000).

DESTRUCTION OF PROPERTY

Standard Instruction

The Court instructs the jury that the offense of “Destruction of Property”, as that term is used in the indictment herein, is committed when any person shall unlawfully, but not feloniously, take and carry away, or destroy, injure, or deface any property, real or personal, belonging to another. ¹

Therefore, in order to prove the commission of the offense of “Destruction of Property”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. unlawfully
5. (take and carry away) (destroy, injure or deface)
6. certain property, to-wit: _____,
7. belonging to and owned by _____.

FOOTNOTE

- ¹ W.Va. Code, 61-3-30 [1975].

COMMENT

1. “In order for an indictment for destruction of property to be sufficient in law, it must identify with specificity the particular items of property which are the subject of the charge by specifically describing said property, unless the property is incapable of identification as in cases involving fungible goods, United States currency, or comparable articles.” Syl. Pt. 6, State ex rel. Day v. Silver, 210 W.Va. 175, 556 S.E.2d 820 (2001).

DESTRUCTION OF PROPERTY
Boundary Markers or No Trespassing Signs

The Court instructs the jury that the offense of “Destruction of Property”, as the terms is used in the indictment herein, is committed when any person shall unlawfully break-down, destroy, deface or remove any monument erected for the purpose of designating the boundaries of a municipality, tract or lot of land, or any tree marked for that purpose, or any sign or notice upon private property designating no trespassing upon such property. ¹

Therefore, in order to prove the commission of the offense of “Destruction of Property”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did unlawfully and intentionally
5. (break down) (destroy) (deface) (remove)
6. a. (designate type of boundary marker)
b. (designate sign or notice of no trespassing)
7. a. designating the boundary of the property of _____.
b. upon the private property of _____.

FOOTNOTE

- ¹ W.Va. Code, 61-3-30 [1975].

COMMENT

1. While not specifically addressing prosecutions under § 61-3-30, the Court has held in a related opinion that, “[a]n essential element of the offense of removing “posted” signs pursuant to West Virginia Code § 20-2-10 (1961) (Repl. Vol. 2002) is proof that the property on which the signs were posted is owned by someone other than the

person charged with the offense of removing or damaging the signs.” Syl. Pt. 2, State v. Srnsky, ____ W.Va. ____, 582 S.E.2d 859 (No. 30896, May 16, 2003).

Thus, it is advisable to include the identity of the owner of the real property on which the boundary markers or the “No Trespassing” signs were located. See also State ex rel. Day v. Silver, 210 W.Va. 175, 556 S.E.2d 820 (2001).

DRUG OFFENSES
Possession of a Controlled Substance

“Possession of a Controlled Substance” is committed when any person knowingly or intentionally possesses a controlled substance, when said controlled substance was not obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice.¹

Therefore, in order to prove the commission of the offense of “Possession of a Controlled Substance”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did knowingly or intentionally
5. possess
6. a controlled substance, to-wit: _____, a Schedule _____
Controlled Substance,
7. without a valid prescription or order of a practitioner acting in the course of his
or her professional practice.

FOOTNOTE

¹ W.Va. Code, 60A-4-401(c) (1983)

DRUG OFFENSES
Evidence Constituting Possession

The Court instructs the jury that mere proximity to illegal drugs is not sufficient to convict a defendant of possession. The chain of evidence must link the defendant with the drugs to the extent that an inference may be fairly drawn that the defendant had knowledge of the presence of the drugs where they were found and exercised control over them. ¹

The Court further instructs the jury that in determining whether or not the State of West Virginia has proven beyond a reasonable doubt that the defendant was in knowing possession of controlled substances, you may consider such factors as whether the defendant was the owner or lessee of the premises in which the alleged controlled substances were found; whether the defendant had exclusive control over the area within the premises where the alleged controlled substances were found; the defendant's proximity to the alleged controlled substances at the time of the arrest; the number of other people, if any, present at the time the alleged controlled substances were found; the defendant's relationship or association with any other people present at the time the alleged controlled substances were found; and the defendant's conduct at the time the alleged controlled substances were found. ²

FOOTNOTES

¹ See State v. Dudick, 158 W.Va. 629, 213 S.E.2d 458 (1975); State v. Patton, 171 W.Va. 419, 299 S.E.2d 31 (1982).

² State v. Olsen, 482 N.W.2d 212 (Minn. 1992).

DRUG OFFENSES
Possession with Intent to Deliver

“Possession with the Intent to Deliver a Controlled Substance” is committed when any person knowingly and intentionally possesses a controlled substance with the intention of delivering said controlled substance to another person.

Therefore, in order to prove the commission of the offense of “Possession with the Intent to Deliver a Controlled Substance”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did knowingly and intentionally
5. possess
6. a controlled substance, to-wit: _____, a Schedule _____
Controlled Substance,
7. with the intent to deliver the said controlled substance to another person.¹

FOOTNOTE

- ¹ W.Va. Code, 60A-4-401(a) (1983).

COMMENTS

1. *W.Va. Code*, 60A-4-401(c) (1971), which requires misdemeanor treatment for first offenders guilty of possessing less than 15 grams of marijuana, does not discriminate invidiously against second offenders or possessors of greater amounts; it merely establishes what amounts to a presumption of law that first offense possession of less than 15 grams is not with intent to deliver. There is not, however, a concurrent presumption that possession of greater than 15 grams of marijuana is with intent to deliver. State v. Frisby, 161 W.Va. 734, 245 S.E.2d 622 (1978).

2. As to the degree of evidence constituting possession with intent to deliver, the Court has held that this is essentially a factual matter to be determined from the circumstances. Citing authority from other jurisdictions, the Court noted in State v. Drake, 170 W.Va. 169, 291 S.E.2d 484 (1982) that, “[m]ost courts have held that possession with intent to deliver a controlled substance can be proven by establishing a number of circumstances among which are the quantity of the controlled substance possessed and the presence of other paraphernalia customarily used in the packaging and delivery of controlled substances.”

DRUG OFFENSES
Delivery of a Controlled Substance

The Court instructs the jury that “Delivery of A Controlled Substance” is committed when any person knowingly and unlawfully delivers a controlled substance to another person.¹

The Court instructs the jury that the term “delivery”, as it is used in these instructions, means the actual, constructive or attempted transfer from one person to another of (1) a controlled substance, whether or not there is an agency relationship, (2) a counterfeit substance, or (3) an imitation controlled substance.²

Therefore, in order to prove the commission of the offense of “Delivery of a Controlled Substance”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did knowingly
5. deliver a Schedule _____ Controlled Substance, to-wit: _____,
6. to another person.

FOOTNOTES

¹ W.Va. Code, 60A-4-401(a) (1983).

² W.Va. Code, 60A-1-101(g) (1983).

COMMENTS

1. “Constructive transfer” means the transfer of a controlled substance belonging to an individual or under his/her control by some other person or agency at the instance or direction of the accused. See Syl. Pt. 4, State v. Ellis, 161 W.Va. 40, 239 S.E.2d 670 (1977).

2. *W.Va. Code*, 60A-4-402(c) (1971) mandates that any first-offense conviction for delivery of less than fifteen (15) grams of marijuana without remuneration shall be disposed of under the mandatory probation provisions of *W.Va. Code*, 60A-4-407. In State v. Nicastro, 181 W.Va. 556, 383 S.E.2d 521 (1989), the Court expanded upon the provisions of this section by noting that, “prior to imposition of a sentence of incarceration for a defendant convicted of delivery of less than 15 grams of marijuana in violation of *W.Va. Code*, 60A-4-401(a), as amended, who, although not within the ‘without remuneration’ exception of *W.Va. Code*, 60A-4-402(c), as amended, has no prior criminal record, a trial court must consider: (1) whether the defendant has a history of involvement with illegal drugs; (2) whether the defendant is a reasonably good prospect for rehabilitation; (3) whether incarceration would serve a useful purpose; and (4) whether available alternatives to incarceration, such as probation conditioned upon community service, would be more appropriate”.

DRUG OFFENSES
Manufacturing a Controlled Substance

The Court instructs the jury that “Manufacturing a Controlled Substance” is committed when any person knowingly and unlawfully manufactures a controlled substance.¹

Therefore, in order to prove the commission of the offense of “Manufacturing a Controlled Substance”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did knowingly and unlawfully
5. manufacture a Schedule _____ Controlled Substance, to-wit:
_____.

FOOTNOTE

¹ W.Va. Code, 60A-4-401(a) (1983).

DRUG OFFENSES
Manufacturing a Controlled Substance
Definition of Manufacture

The Court instructs the jury that “manufacture” means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use or the preparation, compounding, packaging or labeling of a controlled substance (1) by a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice, or (2) by a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale.¹

FOOTNOTE

¹ W.Va. Code, 60A-1-101(n) (1983).

COMMENT

1. The prohibition against manufacture of a controlled substance under *W.Va. Code*, 60A-1-101(n) includes a prohibition against the growing of marijuana since “production” is a defined term of manufacture and “production” under *W.Va. Code*, 60A-1-101(w) is defined to include planting, cultivating and growing. See Syl. Pt. 2, State v. Underwood, 168 W.Va. 52, 281 S.E.2d 491 (1981).

DRUG OFFENSES
Manufacturing a Controlled Substance
Definition of Knowingly

The Court instructs the members of the jury that a person acts “knowingly” with respect to a material element of an offense when (1) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (2) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result. ¹

FOOTNOTE

¹ Syllabus Point 1, State v. Wyatt, 198 W.Va. 530, 482 S.E.2d 147 (1996).

DRUG OFFENSES
Operating or Attempting to Operate Clandestine Drug Laboratories

The Court instructs the jury that the offense of “Operating or Attempting to Operate a Clandestine Drug Laboratory” is committed when any person knowingly and intentionally operates or attempts to operate a clandestine drug laboratory. ¹

The Court further instructs the jury that a “clandestine drug laboratory” means any property, real or personal, on or in which a person assembles any chemicals or equipment or combination thereof for the purpose of manufacturing methamphetamine, methylenedioxymethamphetamine or lysergic acid diethylamide. ²

Therefore, in order to prove the commission of the offense of “Operating or Attempting to Operate a Clandestine Drug Laboratory”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did knowingly and intentionally
5. (operate)(attempt to operate)
6. a clandestine drug laboratory.

FOOTNOTES

¹ W.Va. Code, 60A-4-411(a) (2003)

² W.Va. Code, 60A-4-411(b) (2003)

DRIVING UNDER THE INFLUENCE
Driving Under the Influence of Alcohol, Controlled Substances,
or While Having Alcohol Concentration of .10 or More

The Court instructs the jury that the term “Driving Under the Influence”, as that term is used in the indictment herein, is committed when any person drives a vehicle in the State of West Virginia while under the influence of alcohol, any controlled substance, any other drug, the combined influence of alcohol or any other controlled substance or drug, or while having an alcohol concentration in his or her blood of ten hundredths of one percent (.10%) or more, by weight. ¹

Therefore, in order to prove the commission of the offense of “Driving Under the Influence”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. drove ²
5. a vehicle ³
6. in the State of West Virginia, ⁴
7.
 - a. while under the influence of alcohol. ⁵
 - b. while under the influence of a controlled substance ⁶, to-wit: _____.
 - c. while under the influence of a drug, to-wit: _____.
 - d. while under the combined influence of alcohol and a (controlled substance)(drug), to-wit: _____.
 - e. while having an alcohol concentration in (his/her) blood of ten hundredths of one percent or more, by weight.

FOOTNOTES

¹ W.Va. Code, 17C-5-2(d) (2001).

² “To constitute driving of an automobile, within the meaning of [pre-existing section], there must be an intentional movement of the automobile by the defendant.” Syl. Pt. 1, State v. Taft, 143 W.Va. 365, 102 S.E.2d 152 (1958). **But see** Carte v. Cline, 200 W.Va. 162, 488 S.E.2d 437 (1997), which questions the continued applicability of this definition.

³ “‘Vehicle’ means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks or wheelchairs.” W.Va. Code, 17C-1-2 (2002).

Compare this definition with the definition of “motor vehicle”: “every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated on rails, except motorized wheelchairs.” W.Va. Code, 17C-1-3 (2002).

⁴ “For the purposes of [§ 17C-5-2], the phrase “in this State” shall mean anywhere within the physical boundaries of this State, including, but not limited to, publicly maintained streets and highways, and subdivision streets or other areas not publicly maintained but nonetheless open to the use of the public for purposes of vehicular travel.” W.Va. Code, 17C-5-2a(a) (1983).

⁵ “When used in this Code, the term or phrases “driving under the influence of intoxicating liquor,” “driving or operating a motor vehicle while intoxicated,” “for any person who is under the influence of any intoxicating liquor to drive any vehicle,” or any similar term or phrase shall be construed to mean and be synonymous with the term or phrase “while under the influence of alcohol . . . drives a vehicle” as the latter term or phrase is used in [§ 17C-5-2] of this article.” W.Va. Code, 17C-5-2a(b) (1983).

⁶ “For purposes of this section [§ 17C-5-2], the term ‘controlled substance’ shall have the meaning ascribed to it in chapter sixty-a [§§ 60A-1-1 et seq.] of this code.” W.Va. Code, 17C-5-2(o) (2001).

“‘Controlled substance’ means a drug, substance or immediate precursor in Schedules I through V of [§§ 60A-2-1 et seq.].” W.Va. Code, 60A-1-101(d) (1983).

COMMENTS

1. **Standards for Admission of Blood Test** - In State v. Dyer, 177 W.Va. 567, 355 S.E.2d 356 (1987), the appellant was convicted of causing a death while driving under the influence of alcohol. The appellant moved to suppress evidence of the results of blood alcohol test on the grounds that the blood sample was not drawn within two hours of his arrest or of the alleged offense, as required by *W.Va. Code*, 17C-5-8.

The trial court determined that the specimen had not been drawn within the two-hour period, but concluded that the results were admissible as long as they were not used as *prima facie* evidence of intoxication.

The Court determined that the admission of the blood test results did not amount to reversible error. The results were not used at trial in conjunction with the statutory presumptions found in § 17C-5-8. The State's expert witness was not questioned, nor did he offer, an opinion as to the appellant's probable blood alcohol level at the time of the alleged offense, or whether the appellant was in fact intoxicated at the time of the incident. Rather, the evidence was deemed relevant because it tended to show that the appellant had consumed alcoholic beverages in substantial amounts on the day in question.

2. **Predicate Offenses - Stipulation and Bifurcation** - Note that *W. Va. Code*, 17C-5-2 permits enhancement of a DUI sentence based on prior convictions under the section, or under statutes or ordinances of municipalities or other states.

"A person violating any provision of subsection (b), (c), (d), (e), (f), (g) or (i) of this section shall, for the second offense under this section, be guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for a period of not less than six months nor more than one year, and the Court may, in its discretion, impose a fine of not less than one thousand dollars nor more than three thousand dollars."

W. Va. Code, 17C-5-2(j) (2001).

"A person violating any provision of subsection (b), (c), (d), (e), (f), (g) or (i) of this section shall, for the third or any subsequent offense under this section, be guilty of a felony and, upon conviction thereof, shall be imprisoned in the penitentiary for not less than one nor more than three years, and the Court may, in its discretion, impose a fine of not less than three thousand dollars nor more than five thousand dollars."

W. Va. Code, 17C-5-2(k) (2001).

A defendant has a right to stipulate to prior convictions and thus avoid reference to these charges at trial. In State v. Nichols, 208 W.Va. 432, 541 S.E.2d 310 (1999), the Court addressed a defendant's right to stipulate to prior convictions and to bifurcate the issue of prior convictions from an underlying charge. The Court concluded that a defendant has a right to stipulate to prior convictions, and the State is thereby precluded from introducing **any** evidence regarding the prior offenses. See *also* State v. Dews, 209 W.Va. 500, 549 S.E.2d 694 (2001); State v. Evans, 210 W.Va. 229, 557 S.E.2d 283 (2001); State v. Haden, ____ W.Va. ____, 582 S.E.2d 732 (2003).

The Court also held in Nichols that a defendant may request bifurcation of prior offenses from an underlying charge and receive separate jury proceedings for both matters. In Nichols, the Court ruled that a defendant seeking bifurcation must present evidence at a hearing that he or she has a "meritorious claim that challenges the legitimacy of the prior conviction". Syl. Pt. 4, Nichols. This holding was modified in State v. McCraine, ____ W.Va. ____, 588 S.E.2d 177 (2003):

"A trial court must grant bifurcation in all cases tried before a jury in which a criminal defendant seeks to contest the validity of any alleged prior conviction as a status element and timely requests that the jury consider the issue of prior conviction separately from the issue of the underlying charge. To the extent that our decision in [Nichols] conflicts with this holding it is hereby modified." Syl. Pt. 11, McCraine.

The Court thus determined that a defendant was not required to present evidence of a "meritorious claim", and that requests for bifurcation in this context are nondiscretionary.

The Court has also held that a defendant may request bifurcation of a driving while revoked for DUI charge from a trial of DUI in order to avoid unfair prejudice resulting from the jury being advised of the occurrence of prior DUI convictions. See Syl. Pt 5, State v. Dews, *supra* ("[w]hen requested by the defendant, the trial of DUI charges and driving while revoked for DUI charges under *W.Va. Code*, 17B-4-3(b) (1999) should ordinarily be severed, when such severance is necessary to avoid unfair prejudice."); see also Syl. Pt. 3, State v. Haden, *supra*.

3. **Specificity of Indictment** - In cases involving charges of second or third offense DUI, the State is required to state, with specificity, facts necessary to advise the defendant of the nature of the predicate offenses. In State v. Satterfield, 182 W.Va. 365, 387 S.E.2d 832 (1989), the Court noted that an indictment alleging only that a defendant “having twice been previously convicted of the crime of driving a motor vehicle while under the influence of alcohol” was defective, because it failed to provide the defendant with any information concerning her previous convictions.

Similarly, in State v. Palmer, 210 W.Va. 372, 557 S.E.2d 779 (2001), the Court held that an indictment which stated that a defendant had been twice previously convicted of driving on a revoked license, without specifying that the prior convictions were for driving while revoked for DUI, could not satisfy the minimum criteria for describing the essential elements of driving on a revoked license, DUI-related, third offense.

4. **Municipal Ordinances** - *W.Va. Code*, 17C-5-11(a) (1983) requires that municipal ordinances addressing DUI-type offenses “shall be null and void and of no effect unless such ordinance defines such an offense in substantially similar terms as an offense defined under [§§ 17C-5-1, et seq.] and such offense contains the same elements as an offense defined herein.”

In a similar vein, § 17C-5-11(b) (1983) requires that municipal ordinances prescribe the same penalty for DUI-type offense as prescribed by the provisions of the *Code*.

5. **Prerequisites for Conviction for Second or Subsequent Offenses** - A conviction for second offense DUI is **not** a prerequisite for a conviction for third offense DUI. In State v. Barker, 179 W.Va. 194, 366 S.E.2d 642 (1988), the Court held that a conviction for third offense DUI requires only two prior DUI convictions. Thus, a defendant who has been convicted of two separate first offense DUI offenses is subject to conviction for third offense DUI if subsequently arrested on this charge.

A defendant may be **charged** with a second or subsequent offense of DUI if the person has been previously charged with a DUI offense, notwithstanding the fact that the conviction may not be final. The defendant may not be **convicted** of a second

or subsequent offense until the previous offense has become final. *W.Va. Code*, 17C-5-2(m) (2001).

6. **Types of Convictions for Second or Subsequent Offenses** - *W.Va. Code*, 17C-5-2(l) (2001) lists the types of convictions which can be regarded as prior convictions in prosecutions for second, third and subsequent offense DUI.

This section permits the use of prior convictions obtained under § 17C-5-2(a) through (f) of the prior enactment of the section which occurred on or after September 1, 1981 and prior to June 10, 1983, the “effective date” of this section [§ 17C-5-2(l)(1)]; prior convictions obtained under §§ 17C-5-2(a) and (b) which occurred within the five years preceding September 1, 1981 [§ 17C-5-2(l)(2)]; and any conviction occurring under a municipal ordinance of this state or any other state, or a statute of the United States or any other state which has the same elements as an offense described in § 17C-5-2 which occurred after June 10, 1983.

7. **Legal Excuse** - Legal entitlement to use alcohol, drugs or a controlled substance does not constitute a defense to a DUI charge. § 17C-5-2(n) (2001).
8. **Use of Out-of-State Convictions for Enhancement Purposes** - “Proof that a defendant has been convicted of the offense of driving under the influence of alcohol in another state is similar to proof of any other material fact in a criminal prosecution; once the State has introduced sufficient evidence to lead impartial minds to conclude that the defendant had once been convicted of driving under the influence of alcohol, the State has made a *prima facie* case.” Syl. Pt. 1, State ex rel. Kutsch v. Wilson, 189 W.Va. 47, 427 S.E.2d 481 (1993).

“A person convicted of driving under the influence of alcohol under an Ohio statute that makes it an offense to operate a motor vehicle with “a concentration of ten hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath” has committed an offense with “the same elements” as the offense set forth in *W.Va. Code*, 17C-5-2(d)(1)(E) of operating a motor vehicle with “an alcohol

concentration in his or her blood of ten hundredths of one percent or more, by weight.” Syl. Pt. 2, State ex rel. Kutsch v. Wilson, *supra*. See *also* State ex rel. Conley v. Hill, 199 W.Va. 686, 487 S.E.2d 344 (1997); State v. Williams, 200 W.Va. 466, 490 S.E.2d 285 (1997).

See State v. Euman, 210 W.Va. 519, 558 S.E.2d 319 (2001) for a discussion of the degree of proof required to sustain a conviction of driving on a revoked license-DUI related based on an Ohio revocation of an Ohio drivers license for a DUI offense.

9. **Application to Recidivist Statute** - In State v. Williams, 196 W.Va. 639, 474 S.E.2d 569 (1996), the appellant challenged the application of *W.Va. Code* 61-11-18, the recidivist statute, and its use in enhancing his sentence for third offense DUI. The Court found no error and affirmed the conviction.

“Despite the fact that a third offense DUI felony conviction pursuant to West Virginia Code § 17C-5-2(j) (Supp.1995) results from an enhanced misdemeanor, the Legislature intended that this type of felony conviction be used for sentence enhancement in connection with the terms of the recidivist statute[.] To the extent that State v. Brown, 91 W.Va. 187, 112 S.E. 408 (1922) is inconsistent with this ruling, we hereby overrule that decision and its progeny.” Syl. Pt. 3, Williams, *supra*.

DRIVING UNDER THE INFLUENCE
Driving Under the Influence Resulting In Death -
Reckless Disregard for the Safety of Others

The Court instructs the jury that the term “Driving Under the Influence Resulting in Death”, as that term is used in the indictment herein, is committed when any person drives a vehicle in the State of West Virginia while under the influence of alcohol, any controlled substance, any other drug, the combined influence of alcohol or any other controlled substance or drug, or while having an alcohol concentration in his or her blood of ten hundredths of one percent (.10%) or more, by weight, and when so driving, does any act forbidden by law or fails to perform any duty imposed by law in the driving of such vehicle, which act or failure proximately causes the death of any person within one year following such act or failure, and commits such act or failure in reckless disregard for the safety of others, and the influence of alcohol, controlled substances or drugs is a contributing cause to such death. ¹

Therefore, in order to prove the commission of the offense of “Driving Under the Influence Resulting in Death”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. drove ²
5. a vehicle ³
6. in the State of West Virginia, ⁴
7.
 - a. while under the influence of alcohol, ⁵
 - b. while under the influence of a controlled substance ⁶, to-wit: _____,
 - c. while under the influence of a drug, to-wit: _____,
 - d. while under the combined influence of alcohol and a (controlled substance)(drug), to-wit: _____,
 - e. while having an alcohol concentration in (his/her) blood of ten hundredths of one percent or more, by weight,

8. and when so driving
 - a. did an act forbidden by law in the driving of such vehicle (specify)
 - b. failed to perform a duty imposed by law in the driving of such vehicle (specify),
9. in reckless disregard ⁷ for the safety of others,
10. which (act) (failure) proximately caused the death of _____,
11. within one (1) year next following such (act) (failure), and
12. the influence of (alcohol) (controlled substances) (drugs) was a contributing cause ⁸ to such death.

FOOTNOTES

¹ W.Va. Code, 17C-5-2(a) (2001).

² “To constitute driving of an automobile, within the meaning of [pre-existing section], there must be an intentional movement of the automobile by the defendant.” Syl. Pt. 1, State v. Taft, 143 W.Va. 365, 102 S.E.2d 152 (1958). **But see** Carte v. Cline, 200 W.Va. 162, 488 S.E.2d 437 (1997), which questions the continued applicability of this definition.

³ “‘Vehicle’ means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks or wheelchairs.” W.Va. Code, 17C-1-2 (2002).

Compare this definition with the definition of “motor vehicle”: “every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated on rails, except motorized wheelchairs.” W.Va. Code, 17C-1-3 (2002).

⁴ “For the purposes of [§ 17C-5-2], the phrase “in this State” shall mean anywhere within the physical boundaries of this State, including, but not limited to, publicly maintained streets and highways, and subdivision streets or other areas not publicly maintained but nonetheless open to the use of the public for purposes of vehicular travel.” W.Va. Code, 17C-5-2a(a) (1983).

⁵ “When used in this Code, the term or phrases “driving under the influence of intoxicating liquor,” “driving or operating a motor vehicle while intoxicated,” “for any person who is under the influence of any intoxicating liquor to drive any vehicle,” or any similar term or phrase shall be construed to mean and be synonymous with the term or phrase “while under the influence of alcohol . . . drives a vehicle” as the latter term or phrase is used in [§ 17C-5-2] of this article.” W.Va. Code, 17C-5-2a(b) (1983).

- 6 “For purposes of this section [§ 17C-5-2], the term ‘controlled substance’ shall have the meaning ascribed to it in chapter sixty-a [§§ 60A-1-1 et seq.] of this code.” W.Va. Code, 17C-5-2(o) (2001).
- “‘Controlled substance’ means a drug, substance or immediate precursor in Schedules I through V of [§§ 60A-2-1 et seq.].” W.Va. Code, 60A-1-101(d) (1983).
- 7 In State v. Bartlett, 177 W.Va. 663, 355 S.E.2d 913 (1987) the defendant offered the following instruction, which was refused by the trial court:
- “The term ‘reckless disregard for the safety of others’ requires proof of conduct indicating an entire absence of care for the safety of others which exhibits an indifference to the consequences of a person’s actions. Such conduct is more than negligence or even gross negligence.”
- The Court affirmed the trial court’s refusal to provide the instruction, holding that ‘reckless disregard’ is not an overly arcane term, and that “a term which is widely used and which is readily comprehensible to the average person without further definition or refinement need not have a defining instruction.” Syl. Pt. 2, Bartlett.
- 8 The following definition of “contributing cause” was given by the trial court in State v. Bartlett, *supra*:
- “The term contributing cause as used in these instructions means that the operation of a motor vehicle while under the influence of alcohol was one of the precipitating causes of the accident occurring and the resultant death of (the victim).”
- “In a prosecution under W.Va. Code, 17C-5-2(a), (1983), the prosecution need not put on medical or scientific evidence of a causal link between the accused’s intoxication and the accident in which the accused was involved. The jury may infer such a causal link once it has been shown that the driver was intoxicated, that the vehicle was driven in a negligent manner, and that an accident occurred.” Syl. Pt. 3, Bartlett, *supra*.

COMMENTS

1. See Comments Section for standard Driving Under the Influence offense, page 372, for numerous DUI-related issues. Only those pertinent to DUI-Causing death cases are repeated here.
2. **Standards for Admission of Blood Test** - In State v. Dyer, 177 W.Va. 567, 355 S.E.2d 356 (1987), the appellant was convicted of causing a death while driving under the influence of alcohol. The appellant moved to suppress evidence of the results of

blood alcohol test on the grounds that the blood sample was not drawn within two hours of his arrest or of the alleged offense, as required by *W.Va. Code*, 17C-5-8. The trial court determined that the specimen had not been drawn within the two-hour period, but concluded that the results were admissible as long as they were not used as *prima facie* evidence of intoxication.

The Court determined that the admission of the blood test results did not amount to reversible error. The results were not used at trial in conjunction with the statutory presumptions found in § 17C-5-8. The State's expert witness was not questioned, nor did he offer, an opinion as to the appellant's probable blood alcohol level at the time of the alleged offense, or whether the appellant was in fact intoxicated at the time of the incident. Rather, the evidence was deemed relevant because it tended to show that the appellant had consumed alcoholic beverages in substantial amounts on the day in question.

3. In State v. Bartlett, 177 W.Va. 663, 355 S.E.2d 913 (1987), the appellant was convicted of DUI- Resulting in Death. He contended, on appeal, that the instructions were incomplete because they did not instruct the jury that he could be convicted of the lesser included offense of violation of *W.Va. Code*, 17C-5-2(b), a misdemeanor. The appellant asserted that the two elements which differentiate § 17C-5-2(a) from § 17C-5-2(b), reckless disregard for the safety of others and alcohol being a contributing cause to the death, were absent in his case.

The Court denied the appellant's contention, noting that the appellant, based on a "strategic decision", had not offered or requested the instruction at trial.

DRIVING UNDER THE INFLUENCE
Driving Under the Influence Resulting In Death
(Misdemeanor)

The Court instructs the jury that the term “Driving Under the Influence Resulting in Death”, as that term is used in the indictment herein, is committed when any person drives a vehicle in the State of West Virginia while under the influence of alcohol, any controlled substance, any other drug, the combined influence of alcohol or any other controlled substance or drug, or while having an alcohol concentration in his or her blood of ten hundredths of one percent (.10%) or more, by weight, and when so driving, does any act forbidden by law or fails to perform any duty imposed by law in the driving of such vehicle, and which act or failure proximately causes the death of any person within one year following such act or failure. ¹

Therefore, in order to prove the commission of the offense of “Driving Under the Influence Resulting in Death”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. drove ²
5. a vehicle ³
6. in the State of West Virginia, ⁴
7.
 - a. while under the influence of alcohol, ⁵
 - b. while under the influence of a controlled substance, ⁶ to-wit: _____,
 - c. while under the influence of a drug, to-wit: _____,
 - d. while under the combined influence of alcohol and a (controlled substance)(drug), to-wit: _____,
 - e. while having an alcohol concentration in (his/her) blood of ten hundredths of one percent (.10%) or more, by weight,
8. and when so driving
 - a. did an act forbidden by law in the driving of such vehicle (specify)
 - b. failed to perform a duty imposed by law in the driving of such vehicle (specify),

9. which (act) (failure) proximately caused the death of _____,
10. within one (1) year next following such (act) (failure).

FOOTNOTES

¹ W.Va. Code, 17C-5-2(b) (2001).

² “To constitute driving of an automobile, within the meaning of [pre-existing section], there must be an intentional movement of the automobile by the defendant.” Syl. Pt. 1, State v. Taft, 143 W.Va. 365, 102 S.E.2d 152 (1958). **But see** Carte v. Cline, 200 W.Va. 162, 488 S.E.2d 437 (1997), which questions the continued applicability of this definition.

³ “‘Vehicle’ means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks or wheelchairs.” W.Va. Code, 17C-1-2 (2002).

Compare this definition with the definition of “motor vehicle”: “every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated on rails, except motorized wheelchairs.” W.Va. Code, 17C-1-3 (2002).

⁴ “For the purposes of [§ 17C-5-2], the phrase “in this State” shall mean anywhere within the physical boundaries of this State, including, but not limited to, publicly maintained streets and highways, and subdivision streets or other areas not publicly maintained but nonetheless open to the use of the public for purposes of vehicular travel.” W.Va. Code, 17C-5-2a(a) (1983).

⁵ “When used in this Code, the term or phrases “driving under the influence of intoxicating liquor,” “driving or operating a motor vehicle while intoxicated,” “for any person who is under the influence of any intoxicating liquor to drive any vehicle,” or any similar term or phrase shall be construed to mean and be synonymous with the term or phrase “while under the influence of alcohol . . . drives a vehicle” as the latter term or phrase is used in [§ 17C-5-2] of this article.” W.Va. Code, 17C-5-2a(b) (1983).

⁶ “For purposes of this section [§ 17C-5-2], the term ‘controlled substance’ shall have the meaning ascribed to it in chapter sixty-a [§§ 60A-1-1 et seq.] of this code.” W.Va. Code, 17C-5-2(o) (2001).

“‘Controlled substance’ means a drug, substance or immediate precursor in Schedules I through V of [§§ 60A-2-1 et seq.].” W.Va. Code, 60A-1-101(d) (1983).

COMMENTS

1. See Comments Section for standard Driving Under the Influence offense, page 372, for numerous DUI-related issues. Only those pertinent to DUI-Causing death cases are repeated here.
2. **Standards for Admission of Blood Test** - In State v. Dyer, 177 W.Va. 567, 355 S.E.2d 356 (1987), the appellant was convicted of causing a death while driving under the influence of alcohol. The appellant moved to suppress evidence of the results of blood alcohol test on the grounds that the blood sample was not drawn within two hours of his arrest or of the alleged offense, as required by *W.Va. Code*, 17C-5-8. The trial court determined that the specimen had not been drawn within the two-hour period, but concluded that the results were admissible as long as they were not used as *prima facie* evidence of intoxication.

The Court determined that the admission of the blood test results did not amount to reversible error. The results were not used at trial in conjunction with the statutory presumptions found in § 17C-5-8. The State's expert witness was not questioned, nor did he offer, an opinion as to the appellant's probable blood alcohol level at the time of the alleged offense, or whether the appellant was in fact intoxicated at the time of the incident. Rather, the evidence was deemed relevant because it tended to show that the appellant had consumed alcoholic beverages in substantial amounts on the day in question.

3. In State v. Bartlett, 177 W.Va. 663, 355 S.E.2d 913 (1987), the appellant was convicted of DUI- Resulting in Death. He contended, on appeal, that the instructions were incomplete because they did not instruct the jury that he could be convicted of the lesser included offense of violation of *W.Va. Code*, 17C-5-2(b), a misdemeanor. The appellant asserted that the two elements which differentiate § 17C-5-2(a) from § 17C-5-2(b), reckless disregard for the safety of others and alcohol being a contributing cause to the death, were absent in his case.

The Court denied the appellant's contention, noting that the appellant, based on a "strategic decision", had not offered or requested the instruction at trial.

DRIVING UNDER THE INFLUENCE
Driving Under the Influence Resulting In Bodily Injury

The Court instructs the jury that the term “Driving Under the Influence Resulting in Bodily Injury”, as that term is used in the indictment herein, is committed when any person drives a vehicle in the State of West Virginia while under the influence of alcohol, any controlled substance, any other drug, the combined influence of alcohol or any other controlled substance or drug, or while having an alcohol concentration in his or her blood of ten hundredths of one percent (.10%) or more, by weight, and when so driving, does any act forbidden by law or fails to perform any duty imposed by law in the driving of such vehicle, and which act or failure proximately causes bodily injury to any person other than himself or herself. ¹

Therefore, in order to prove the commission of the offense of “Driving Under the Influence Resulting in Bodily Injury”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. drove ²
5. a vehicle ³
6. in the State of West Virginia, ⁴
7.
 - a. while under the influence of alcohol, ⁵
 - b. while under the influence of a controlled substance, ⁶ to-wit: _____,
 - c. while under the influence of a drug, to-wit: _____,
 - d. while under the combined influence of alcohol and a (controlled substance)(drug), to-wit: _____,
 - e. while having an alcohol concentration in (his/her) blood of ten hundredths of one percent (.10%) or more, by weight,

8. and when so driving
 - a. did an act forbidden by law in the driving of such vehicle (specify),
 - b. failed to perform a duty imposed by law in the driving of such vehicle (specify),
9. which (act) (failure) proximately caused bodily injury ⁷ to _____.

FOOTNOTES

¹ W.Va. Code, 17C-5-2(c) (2001).

² “To constitute driving of an automobile, within the meaning of [pre-existing section], there must be an intentional movement of the automobile by the defendant.” Syl. Pt. 1, State v. Taft, 143 W.Va. 365, 102 S.E.2d 152 (1958). **But see** Carte v. Cline, 200 W.Va. 162, 488 S.E.2d 437 (1997), which questions the continued applicability of this definition.

³ “‘Vehicle’ means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks or wheelchairs.” W.Va. Code, 17C-1-2 (2002).

Compare this definition with the definition of “motor vehicle”: “every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated on rails, except motorized wheelchairs.” W.Va. Code, 17C-1-3 (2002).

⁴ “For the purposes of [§ 17C-5-2], the phrase “in this State” shall mean anywhere within the physical boundaries of this State, including, but not limited to, publicly maintained streets and highways, and subdivision streets or other areas not publicly maintained but nonetheless open to the use of the public for purposes of vehicular travel.” W.Va. Code, 17C-5-2a(a) (1983).

⁵ “When used in this Code, the term or phrases “driving under the influence of intoxicating liquor,” “driving or operating a motor vehicle while intoxicated,” “for any person who is under the influence of any intoxicating liquor to drive any vehicle,” or any similar term or phrase shall be construed to mean and be synonymous with the term or phrase “while under the influence of alcohol . . . drives a vehicle” as the latter term or phrase is used in [§ 17C-5-2] of this article.” W.Va. Code, 17C-5-2a(b) (1983).

⁶ “For purposes of this section [§ 17C-5-2], the term ‘controlled substance’ shall have the meaning ascribed to it in chapter sixty-a [§§ 60A-1-1 et seq.] of this code.” W.Va. Code, 17C-5-2(o) (2001).

“‘Controlled substance’ means a drug, substance or immediate precursor in Schedules I through V of [§§ 60A-2-1 et seq.].” W.Va. Code, 60A-1-101(d) (1983).

- ⁷ While the term “bodily injury” is not defined within the motor vehicle statutes, it is defined in W.Va. Code, 61-8B-1(9) (2000) as “substantial physical pain, illness or any impairment of physical condition.”

COMMENT

1. See Comments Section for standard Driving Under the Influence offense, page 372, for numerous DUI-related issues.

DRIVING UNDER THE INFLUENCE
Driving Under the Influence by Driver Under Twenty-One Years of Age

The Court instructs the jury that the term “Driving Under the Influence by Driver Under Twenty-One Years of Age”, as that term is used in the indictment herein, is committed when any person, under the age of twenty-one years, drives a vehicle in the State of West Virginia while he or she has an alcohol concentration in his or her blood of two hundredths of one percent (.02%) or more, by weight, but less than ten hundredths of one percent (.10%), by weight. ¹

Therefore, in order to prove the commission of the offense of “Driving Under the Influence by Driver Under Twenty-One Years of Age”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. drove ²
5. a vehicle ³
6. in the State of West Virginia, ⁴
7. while (he/she) had an alcohol concentration in (his/her) blood of two hundredths of one percent (.02%) or more, by weight,
8. but less than ten hundredths of one percent (.10%), by weight.

FOOTNOTES

¹ W.Va. Code, 17C-5-2(h) (2001).

² “To constitute driving of an automobile, within the meaning of [pre-existing section], there must be an intentional movement of the automobile by the defendant.” Syl. Pt. 1, State v. Taft, 143 W.Va. 365, 102 S.E.2d 152 (1958). **But see** Carte v. Cline, 200 W.Va. 162, 488 S.E.2d 437 (1997), which questions the continued applicability of this definition.

- ³ “‘Vehicle’ means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks or wheelchairs.” W.Va. Code, 17C-1-2 (2002).

Compare this definition with the definition of “motor vehicle”: “every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated on rails, except motorized wheelchairs.” W.Va. Code, 17C-1-3 (2002).

- ⁴ “For the purposes of [§ 17C-5-2], the phrase “in this State” shall mean anywhere within the physical boundaries of this State, including, but not limited to, publicly maintained streets and highways, and subdivision streets or other areas not publicly maintained but nonetheless open to the use of the public for purposes of vehicular travel.” W.Va. Code, 17C-5-2a(a) (1983).

COMMENTS

1. See Comments Section for standard Driving Under the Influence offense, page 372, for numerous DUI-related issues.
2. “A person who is charged with a first offense under the provisions of this subsection may move for a continuance of the proceedings from time to time to allow the person to participate in the vehicle alcohol test and lock program as provided for in section three-a [§ 17C-5A-3a], article five of this chapter. Upon successful completion of the program, the Court shall dismiss the charge against the person and expunge the person’s record as it relates to the alleged offense. In the event the person fails to successfully complete the program, the Court shall proceed to an adjudication of the alleged offense.” *W.Va. Code*, 17C-5-2(h) (2001).

DRIVING UNDER THE INFLUENCE
Knowingly Permitting Vehicle to be Driven by Person Under the Influence of
Alcohol, Controlled Substances, or with Alcohol Concentration of .10 or More

The Court instructs the jury that the term “Permitting Driving Under the Influence”, as that term is used in the indictment herein, is committed when any person knowingly permits his or her vehicle to be driven in the State of West Virginia by any other person who is under the influence of alcohol, any controlled substance, any other drug, the combined influence of alcohol or any other controlled substance or drug, or who has an alcohol concentration in his or her blood of ten hundredths of one percent (.10%) or more, by weight. ¹

Therefore, in order to prove the commission of the offense of “Permitting Driving Under the Influence”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. knowingly
5. permitted (his/her) vehicle ²
6. to be driven ³
7. in the State of West Virginia ⁴
8. by _____ (identify driver),
9. while _____ (driver),
10. a. was under the influence of alcohol. ⁵
- b. was under the influence of a controlled substance, ⁶ to-wit: _____.
- c. was under the influence of a drug, to-wit: _____.
- d. was under the combined influence of alcohol and a (controlled substance)(drug), to-wit: _____.
- e. had an alcohol concentration in (his/her) blood of ten hundredths of one percent or more, by weight.

FOOTNOTES

¹ W.Va. Code, 17C-5-2(f) (2001).

² "'Vehicle' means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks or wheelchairs." W.Va. Code, 17C-1-2 (2002).

³ "To constitute driving of an automobile, within the meaning of [pre-existing section], there must be an intentional movement of the automobile by the defendant." Syl. Pt. 1, State v. Taft, 143 W.Va. 365, 102 S.E.2d 152 (1958). **But see** Carte v. Cline, 200 W.Va. 162, 488 S.E.2d 437 (1997), which questions the continued applicability of this definition.

Compare this definition with the definition of "motor vehicle": "every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated on rails, except motorized wheelchairs." W.Va. Code, 17C-1-3 (2002).

⁴ "For the purposes of [§ 17C-5-2], the phrase "in this State" shall mean anywhere within the physical boundaries of this State, including, but not limited to, publicly maintained streets and highways, and subdivision streets or other areas not publicly maintained but nonetheless open to the use of the public for purposes of vehicular travel." W.Va. Code, 17C-5-2a(a) (1983).

⁵ "When used in this Code, the term or phrases "driving under the influence of intoxicating liquor," "driving or operating a motor vehicle while intoxicated," "for any person who is under the influence of any intoxicating liquor to drive any vehicle," or any similar term or phrase shall be construed to mean and be synonymous with the term or phrase "while under the influence of alcohol . . . drives a vehicle" as the latter term or phrase is used in [§ 17C-5-2] of this article." W.Va. Code, 17C-5-2a(b) (1983).

⁶ "For purposes of this section [§ 17C-5-2], the term "controlled substance" shall have the meaning ascribed to it in chapter sixty-a [§§ 60A-1-1 et seq.] of this code." W.Va. Code, 17C-5-2(o) (2001).

"'Controlled substance' means a drug, substance or immediate precursor in Schedules I through V of [§§ 60A-2-1 et seq.]." W.Va. Code, 60A-1-101(d) (1983).

DRIVING UNDER THE INFLUENCE
Knowingly Permitting Vehicle to be Driven by Habitual User of Narcotic Drugs

The Court instructs the jury that the term “Permitting Operation of Vehicle by User of Narcotic Drugs”, as that term is used in the indictment herein, is committed when any person knowingly permits his or her vehicle to be driven in the State of West Virginia by any other person who is an habitual user of narcotic drugs, amphetamine, or any derivative thereof. ¹

Therefore, in order to prove the commission of the offense of “Permitting Operation of Vehicle By User of Narcotic Drugs”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. knowingly
5. permitted (his/her) vehicle ²
6. to be driven ³
7. in the State of West Virginia, ⁴
8. by _____ (identify driver),
9. while _____ (driver),
10. was a habitual user of _____ (specify type of narcotic drug, amphetamine or derivative.) ⁵

FOOTNOTES

¹ W.Va. Code, 17C-5-2(f) (2001).

² “‘Vehicle’ means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks or wheelchairs.” W.Va. Code, 17C-1-2 (2002).

- ³ “To constitute driving of an automobile, within the meaning of [pre-existing section], there must be an intentional movement of the automobile by the defendant.” Syl. Pt. 1, State v. Taft, 143 W.Va. 365, 102 S.E.2d 152 (1958). **But see** Carte v. Cline, 200 W.Va. 162, 488 S.E.2d 437 (1997), which questions the continued applicability of this definition.

Compare this definition with the definition of “motor vehicle”: “every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated on rails, except motorized wheelchairs.” W.Va. Code, 17C-1-3 (2002).

- ⁴ “For the purposes of [§ 17C-5-2], the phrase “in this State” shall mean anywhere within the physical boundaries of this State, including, but not limited to, publicly maintained streets and highways, and subdivision streets or other areas not publicly maintained but nonetheless open to the use of the public for purposes of vehicular travel.” W.Va. Code, 17C-5-2a(a) (1983).
- ⁵ See W.Va. Code, 60A-1-101(p) (1983) for the definition of “narcotic drug”. It is advisable to prepare an appropriate instruction defining this term, so as to avoid speculation by a jury as to its specific meaning.

DRIVING UNDER THE INFLUENCE

Interpretation and Use of Chemical Test

The Court instructs the jury that in a trial for the offense of driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, or upon the trial of any civil or criminal action arising out of acts alleged to have been committed by any person driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, evidence of the amount of alcohol in the person's blood at the time of the arrest or of the acts alleged, as shown by a chemical analysis of his or her blood, breath or urine, is admissible, if the sample or specimen was taken within two hours from and after the time of arrest or of the acts alleged. The evidence gives rise to the following presumptions or has the following effect:

- (1) Evidence that there was, at that time, five hundredths of one percent (.05%) or less, by weight, of alcohol in his or her blood, is *prima facie* evidence that the person was not under the influence of alcohol;
- (2) Evidence that there was, at that time, more than five hundredths of one percent (.05%) and less than ten hundredths of one percent (.10%), by weight, of alcohol in the person's blood is relevant evidence, but it is not to be given *prima facie* effect in indicating whether the person was under the influence of alcohol;
- (3) Evidence that there was, at that time, ten hundredths of one percent (.10%) or more, by weight, of alcohol in his or her blood, shall be admitted as *prima facie* evidence that the person was under the influence of alcohol. ¹

The Court further instructs the jury that in order to give rise to the presumptions or to have the effect I have previously related to you, a chemical analysis of a person's blood, breath or urine must be performed in accordance with methods and standards approved by the state division of health. A chemical analysis of blood or urine to determine the alcoholic content of blood shall be conducted by a qualified laboratory or by the State Police Scientific Laboratory of the Criminal Identification Bureau of the West Virginia State Police.²

FOOTNOTES

1. W.Va. Code, 17C-5-8(a) [2002].
2. W.Va. Code, 17C-5-8(c) [2002].

COMMENTS

1. In order to utilize the *prima facie* instruction herein, the State must present evidence that a Breathalyzer test was performed and administered in accordance with the methods and standards approved by the state department of health. State v. Dyer, 160 W.Va. 166, 233 S.E.2d 309 (1977); State v. Conrad, 187 W.Va. 658, 421 S.E.2d 41 (1992).
2. In State v. Dyer, 177 W.Va. 567, 355 S.E.2d 356 (1987), the appellant was convicted of causing a death while driving under the influence of alcohol. The appellant moved to suppress evidence of the results of blood alcohol test on the grounds that the blood sample was not drawn within two hours of his arrest or of the alleged offense, as required by *W.Va. Code*, 17C-5-8. The trial court determined that the specimen had not been drawn within the two-hour period, but concluded that the results were admissible as long as they were not used as *prima facie* evidence of intoxication.

The Court determined that the admission of the blood test results did not amount to reversible error. The results were not used at trial in conjunction with the statutory presumptions found in § 17C-5-8. The State's expert witness was not questioned, nor did he offer, an opinion as to the appellant's probable blood alcohol level at the time of the alleged offense, or whether the appellant was in fact intoxicated at the time of the incident. Rather, the evidence was deemed relevant because it tended to show that the appellant had consumed alcoholic beverages in substantial amounts on the day in question.

DRIVING UNDER THE INFLUENCE
Refusal to Take Secondary Chemical Test

In this case, the State of West Virginia has offered evidence that the defendant, _____, refused to take a (breath) (blood) (urine) test as directed by the arresting officer.

The Court instructs the jury that such evidence is competent evidence along with other facts and circumstances on the defendant's guilt. However, the jury should consider any evidence of the refusal to take a (breath)(blood)(urine) test with caution, since such evidence has only a slight tendency to prove guilt because the refusal may be attributed to a number of reasons other than the defendant's consciousness of guilt. ¹

FOOTNOTE

- ¹ Footnote 7, State v. Cozart, 177 W.Va. 400, 352 S.E.2d 152 (1986). See also State v. Holland, 178 W.Va. 744, 364 S.E.2d 535 (1987).

COMMENTS

1. *W.Va. Code*, 17C-5-4(a) (2001) states that “[a]ny person who drives a motor vehicle in this state is deemed to have given his or her consent by the operation of the motor vehicle to a preliminary breath analysis and a secondary chemical test of either his or her blood, breath or urine for the purposes of determining the alcohol content of his or her blood.”

In State v. McClead, 211 W.Va. 515, 566 S.E.2d 652 (2002), the Court ruled that a police officer had improperly coerced a defendant into providing a blood sample after the defendant had refused to take a breath test. The officer had advised the defendant, upon his refusal, that officer could obtain a search warrant for a blood sample. The Court held this coercion improper, as § 17C-5-4 does not authorize the issuance of a search warrant under such circumstances.

2. *W. Va. Code*, 17C-5-7 (1986) addresses the ramifications of a defendant's refusal to submit to a secondary chemical test, which include mandatory revocation of the defendant's drivers license.

In Butcher v. Miller, 212 W.Va. 13, 569 S.E.2d 89 (2002), the Court held that an officer must advise a defendant that a refusal to take a designated secondary chemical test “will” result in the revocation of his or her license. The arresting officer had advised the appellant that such refusal “may” result in such a revocation. The Court held that the Commissioner of Motor Vehicles has no discretion in regard to such refusals, and that the officer ‘s language improperly indicated that such discretion existed.

DRIVING UNDER THE INFLUENCE
Driving While License Revoked - DUI Related

The Court instructs the jury that the offense of “Driving While License Revoked - DUI Related”, as the term is used in the indictment herein, is committed when any person drives a motor vehicle on any public highway in this state at a time when he or she knows that his or her privilege to do so has been lawfully revoked for driving under the influence of alcohol, controlled substances or other drugs, or for driving while having an alcoholic concentration in his or her blood of ten hundredths of one percent (.10%) or more, by weight, or for refusing to take a secondary chemical test of blood alcohol content. ¹

Therefore, in order to prove the commission of the offense of “Driving While License Revoked - DUI Related”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. knowingly ² drove a motor vehicle
5. on a public highway in this state
6. at a time when (his/her) license was lawfully revoked for
 - a. driving Under the Influence of Alcohol, Controlled Substances or Drugs.
 - b. driving while having an alcoholic concentration in (his/her) blood of ten hundredths of one percent or more, by weight.
 - c. refusing to take a secondary chemical test of blood alcohol content.

FOOTNOTES

¹ W.Va. Code, 17B-4-3(b) [1999].

² State v. McCraine, ____ W.Va. ____, 588 S.E.2d 177 (2003).

COMMENTS

1. In State v. McCraine, ____ W.Va. ____, 588 S.E.2d 177 (2003), the Court held, in Syllabus Point 10, that, “[k]nowledge of the revocation of a driver’s license is an element of the offense set forth in (§ 17B-4-3(b)) of driving while one’s license is revoked for driving under the influence. *Prima facie* evidence of knowledge of the revocation of a license to drive a motor vehicle is established by the State offering proof of mailing the notice of revocation to the licensee in compliance with (§§ 17C-5A-1 and 17A-2-19). Defendants may rebut the inference of knowledge of the revocation, although lack of knowledge must be the result of something other than a defendant’s wrongful or dilatory conduct.”
2. In order to avoid unfair prejudice, a defendant may request severance of a Driving While License Revoked - DUI Related Charge from a trial of DUI charges.

“When requested by the defendant, the trial of DUI charges and driving while revoked for DUI charges under *W.Va. Code*, 17B-4-3(b) [1999] should ordinarily be severed, when such severance is necessary to avoid unfair prejudice.” Syllabus point 5, State v. Dews, 209 W.Va. 500, 549 S.E.2d 694 (2001).

See also State v. Haden, ____ W.Va. ____, 582 S.E.2d 732 (2003), where the circuit court denied severance after the defendant had stipulated to his prior DUI convictions to avoid the possibility of prejudice arising from a reference to his previous DUI convictions. The Court held that the defendant was prejudiced by the trial court’s refusal to sever his third offense DUI charge from the charge of driving on a revoked license - DUI related. The Court noted that the defendant’s stipulations were “all for naught”, as the State’s reference to the appellant’s license revocation permitted the jury to engage in speculation as to the reason for the revocation. The Court held that the appellant’s predicament was, “exactly the situation that this court sought to preclude” in Dews.

3. In State v. Palmer, 210 W.Va. 372, 557 S.E.2d 779 (2001), the Court held that an indictment for driving on a revoked license for DUI - third offense was fatally defective because it did not include express language indicating that the prior offenses were DUI-related offenses. The Court had noted in State v. Dews, 209 W.Va. 500, 549 S.E.2d 694 (2001) that such prior convictions are status elements of a felony charge of third-offense driving on revoked, DUI-related.

DRIVING UNDER THE INFLUENCE
Fleeing While Driving Under the Influence of Alcohol,
Controlled Substances or Drugs

The Court instructs the jury that the term, “Fleeing While Driving Under the Influence”, as that term is used in the indictment herein, is committed when any person intentionally flees, or attempts to flee, in a vehicle from any law enforcement officer, probation officer or parole officer acting in his or her official capacity, after the officer has given a clear visual or audible signal directing the person to stop, and while such person is under the influence of alcohol, controlled substances or drugs. ¹

Therefore, in order to prove the commission of the offense of “Fleeing While Driving Under the Influence”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4.
 - a. while under the influence of alcohol, ²
 - b. while under the influence of controlled substance, to-wit: _____, ³
 - c. while under the influence of a drug, to-wit: _____,
5. intentionally
6. (fled) (attempted to flee)
7. in a vehicle
8. from _____, a (law enforcement officer) (probation officer) (parole officer),
9. who was acting in (his)(her) official capacity, and
10. who had given a clear visual or audible signal directing the defendant to stop.

FOOTNOTES

¹ W.Va. Code, 61-5-17(i) (2001).

² “When used in this Code, the term or phrases “driving under the influence of intoxicating liquor,” “driving or operating a motor vehicle while intoxicated,” “for any person who is under the influence of any intoxicating liquor to drive any vehicle,” or any similar term or phrase shall be construed to mean and be synonymous with the term or phrase “while under the influence of alcohol . . . drives a vehicle” as the latter term or phrase is used in [§ 17C-5-2] of this article.” W.Va. Code, 17C-5-2a(b) (1983).

³ “For purposes of this section [§ 17C-5-2], the term ‘controlled substance’ shall have the meaning ascribed to it in chapter sixty-a [§§ 60A-1-1 et seq.] of this code.” W.Va. Code, 17C-5-2(o) (2001).

“‘Controlled substance’ means a drug, substance or immediate precursor in Schedules I through V of [§§ 60A-2-1 et seq.].” W.Va. Code, 60A-1-101(d) (1983).

FORGERY

Of a Writing or Other Instrument

The Court instructs the jury that “Forgery”, as that term is used in the indictment in this case, is committed when any person falsely or fraudulently makes or alters a writing or other instrument, which writing or instrument would, if genuine, apparently impose a legal obligation or liability on another or change his or her legal liability to their prejudice. ¹

Therefore, in order to prove the commission of the offense of “Forgery”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did knowingly and falsely
5. and with the intent to defraud
6. a. make
- b. alter
7. a writing or other instrument, to-wit, _____
8. and that the writing or other instrument (made) (altered) is of such a nature that if it were genuine, could prejudice the legal rights or liabilities of _____.

FOOTNOTE

- ¹ W.Va. Code 61-4-5 [1998]; State v. Lotono, 62 W.Va. 310, 58 S.E. 621 (1907).

COMMENTS

1. The forgery of an instrument and the uttering of the same instrument, with the knowledge that it is forged, are separate and distinct offenses. State v. Perry, 101 W.Va. 123, 132 S.E. 368 (1926).

2. "It is not necessary to show actual prejudice to the rights of another to sustain a forgery conviction. It is sufficient if there is intent to defraud and potential prejudice to the rights of another." Syl. pt. 2, State v. Kelly, 183 W.Va. 509, 396 S.E.2d 471 (1990), *cited in* State v. Phalen, 192 W.Va. 267, 452 S.E.2d 70 (1994).
3. "It is a jury question as to whether the requisite intent to commit forgery, pursuant to *W.Va. Code*, 61-4-5 [1961], is present when a person who has given a false name later admits the name given was false. Additionally, a jury may find that giving a false name on a police fingerprint card constitutes forgery since the act prejudices the legal rights of the State by frustrating the State's authority to administer justice." Syl. Pt. 4, State v. Phalen, 192 W.Va. 267, 452 S.E.2d 70 (1994).

UTTERING
Of a Writing or Other Instrument

The Court instructs the jury that “Uttering”, as that term is used in the indictment herein, is committed when any person, knowing that a writing or other instrument is forged, passes or attempts to pass along such writing or other instrument as true, to the prejudice of the rights or liabilities of another person. ¹

Therefore, in order to prove the commission of the offense of “Uttering”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did
 - a. utter
 - b. attempt to utter as true
5. a writing or other instrument, to-wit: _____,
6. which was of such a nature as to prejudice the rights of _____,
7. with the knowledge that said writing or other instrument was forged.

FOOTNOTE

- ¹ W.Va. Code, 61-4-5 [1998]; State v. Nichols, 177 W.Va. 483, 354 S.E.2d 415 (1987).

COMMENTS

1. The forgery of an instrument and the uttering of the same instrument, with the knowledge that it is forged, are separate and distinct offenses. State v. Perry, 101 W.Va. 123, 132 S.E. 368 (1926).

2. In State v. Green, 207 W.Va. 530, 534 S.E.2d 395 (2000), the Court determined that a single act by a defendant of uttering ten separate money order at the same time, to the same bank teller, constituted ten separate offenses. “By its express terms, § 61-4-5(a) clearly and unambiguously provides for separate punishments for each forged document uttered.” Green, 207 W.Va. at 538, 534 S.E.2d at 403.
3. “The passing or uttering of the check alleged to be forged is a strong circumstance to be considered as tending to show intention to defraud, and evidence thereof is clearly admissible.” State v. Austin, 93 W.Va. 704, 117 S.E. 607 (1923).

OBSTRUCTING AN OFFICER

Simple Obstruction

The Court instructs the jury that the offense of “Obstructing an Officer”, as that term is used in the indictment herein, is committed when any person, by threats, menaces, acts or otherwise, forcibly or illegally hinders or obstructs, or attempts to hinder or obstruct, any law enforcement officer, probation officer or parole officer acting in his or her official capacity. ¹

Therefore, in order to prove the commission of the offense of “Obstructing an Officer”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did intentionally
5. by
 - a. threats
 - b. menaces
 - c. acts
 - d. _____ (other manner)
6.
 - a. forcibly hinder (or attempt to forcibly hinder)
 - b. illegally hinder (or attempt to illegally hinder)
 - c. obstruct
7. _____, a (law enforcement officer) (a probation officer) (a parole officer)
8. acting in (his/her) official capacity.

FOOTNOTE

¹ W.Va. Code, 61-5-17(a) [2001].

COMMENTS

1. “Refusal to identify oneself to a law enforcement officer does not, standing alone, form the basis for a charge of obstructing a law enforcement officer in performing official duties in violation of West Virginia Code § 61-5-17(a) (2001) (2002 Supp.). However, the charge of obstructing an officer may be substantiated when a citizen does not supply identification when required to do so by express statutory direction or when the refusal occurs after a law enforcement officer has communicated the reason why the citizen's name is being sought in relation to the officer's official duties”. Syl. Pt. 4, State v. Srnsky, ___ W.Va. ___, 582 S.E.2d 859 (2003).
2. “A person, upon witnessing a police officer issuing a traffic citation to a third party on the person's property, who asks the officer, without the use of fighting or insulting words or other opprobrious language and without forcible or other illegal hindrance, to leave the premises, does not violate *W.Va. Code*, 61-5-17 [1931], because that person has not illegally hindered an officer of this State in the lawful exercise of his or her duty. To hold otherwise would create first amendment implications which may violate the person's right to freedom of speech.” Syllabus, State ex rel. Wilmoth v. Gustke, 179 W.Va. 771, 373 S.E.2d 484 (1988).

OBSTRUCTING AN OFFICER
Providing Materially False Statements

The Court instructs the jury that the offense of “Obstructing an Officer”, as the term is used in the indictment herein, may be committed when any person who, with an intent to impede or obstruct a law-enforcement officer in the conduct of an investigation of a felony offense, knowingly intentionally, and wilfully makes a materially false statement to the said law-enforcement officer. ¹

Therefore, in order to prove the commission of the offense of “Obstructing an Officer”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did knowingly, intentionally and wilfully
5. and with the intent to impede or obstruct
6. make a materially false statement
7. to _____, a law-enforcement officer,
8. who was engaged in the conduct of a felony investigation.

FOOTNOTE

- ¹ W.Va. Code, 61-5-17(c) [2001].

COMMENTS

1. This section excludes statements made by a spouse, parent, stepparent, grandparent, sibling, half-sibling, child, stepchild or grandchild, whether related by blood or marriage, of the person under investigation.

2. The section includes a provision excluding watchmen, college security personnel, and state police officer from the definition of “law-enforcement officer”. (*W. Va. Code*, 15-2-16 [1977] specifically addresses the provision of false information to a member of the Department of Public Safety, including the state police.)

OBSTRUCTING AN OFFICER
Fleeing or Attempting to Flee - No Vehicle

The Court instructs the jury that the offense of “Obstructing an Officer”, as the term is used in the indictment herein, may be committed when any person 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. ¹

Therefore, in order to prove the commission of the offense of “Obstructing an Officer”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____, County, West Virginia;
4. did intentionally
 5. a. flee
 - b. attempt to flee
6. by means other than a vehicle
7. from _____, a (law-enforcement officer) (probation officer) (parole officer),
8. acting in (his/her) official capacity,
9. who was attempting to make a lawful arrest of the defendant, and
10. that the defendant knew or reasonably believed that the officer was attempting to arrest (him/her).

FOOTNOTE

¹ W.Va. Code, 61-5-17(d) [2001].

COMMENTS

1. “Vehicle” is defined to include any motor vehicle, motorcycle, motorboat, all-terrain vehicle or snowmobile, as defined in *W. Va. Code*, 17A-1-1, whether or not the vehicle is being operated on a public highway at the time and whether or not it is licensed by the state. *W. Va. Code*, 61-5-17(j) [2001].
2. *W. Va. Code*, 61-5-17(k) [2001], states that the terms, “flee”, “fleeing” and “flight” do not include a person’s reasonable attempt to travel to a safe place, allowing the pursuing law-enforcement officer to maintain appropriate surveillance, for the purpose of complying with the officer’s direction to stop.

OBSTRUCTING AN OFFICER
Fleeing or Attempting to Flee - By the Use of a Vehicle

The Court instructs the jury that the offense of “Obstructing an Officer”, as the term is used in the indictment herein, may be committed when any person intentionally flees or attempts to flee in a vehicle from any law-enforcement officer, probation officer or parole officer acting in his or her official capacity, after the officer has given a clear visual or audible signal directing the person to stop. ¹

Therefore, in order to prove the commission of the offense of “Obstructing an Officer”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____, County, West Virginia;
4. did intentionally
5. a. flee
- b. attempt to flee
6. by the use of a vehicle
7. from _____, a (law-enforcement officer) (probation officer) (parole officer),
8. acting in (his/her) official capacity,
9. after the officer had given a clear (visual and/audible) directing the defendant to stop.

FOOTNOTE

¹ W.Va. Code, 61-5-17(e) [2001].

COMMENTS

1. “Vehicle” is defined to include any motor vehicle, motorcycle, motorboat, all-terrain vehicle or snowmobile, as defined in *W. Va. Code*, 17A-1-1, whether or not the vehicle is being operated on a public highway at the time and whether or not it is licensed by the state. *W. Va. Code*, 61-5-17(j) [2001].
2. *W. Va. Code*, 61-5-17(k) [2001], states that the terms, “flee”, “fleeing” and “flight” do not include a person’s reasonable attempt to travel to a safe place, allowing the pursuing law-enforcement officer to maintain appropriate surveillance, for the purpose of complying with the officer’s direction to stop.

FIREARM AND DEADLY WEAPON OFFENSES
Carrying a Concealed Deadly Weapon

The Court instructs the jury that the offense of, “Carrying a Concealed Deadly Weapon”, as the term is used in the indictment herein, is committed when any person carries a concealed deadly weapon without a state license or other lawful authorization established under the law. ¹

The Court further instructs the jury that the term “concealed” means that an object is hidden from ordinary observation so as to prevent disclosure or recognition. A “deadly weapon” is concealed when it is carried on or about the person in such a manner that another person in the ordinary course of events would not be placed on notice that the deadly weapon was being carried. ²

In addition, the Court instructs the jury that the term “deadly weapon” means an instrument which is designed to be used to produce serious bodily injury or death, or is readily adaptable to such use. This term includes, but is not limited to, such instruments as blackjacks; knives, including gravity and switchblade knives; nunchukas; metallic or false knuckles; pistols and revolvers. ³

Therefore, in order to prove the commission of the offense of “Carrying a Concealed Deadly Weapon”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. carried
5. a deadly weapon, to-wit: a _____,
6. while such deadly weapon was hidden from ordinary observation so as to prevent disclosure or recognition, and
7. that the defendant did not possess a state license or other lawful authorization to carry the deadly weapon.

FOOTNOTES

- ¹ W.Va. Code, 61-7-3(a) [1989].
- ² W.Va. Code, 61-7-2(10) [2002].
- ³ W.Va. Code, 61-7-2(9) [2002].

COMMENTS

1. “In order for a dangerous weapon to be about the person in violation of *W.Va. Code*, 61-7-1 [now § 61-7-3], the weapon must be located either on the person or in such close proximity that it can be reached without a material change in his position and the weapon must be readily accessible when such person reaches to where it is located.” Syl. Pt. 3, State v. Totten, 169 W.Va. 729, 289 S.E.2d 491 (1982).
2. “The absence of a license is an element of the crime of carrying a dangerous or deadly weapon without a license and the burden of proof as to this element must be borne by the State. To the extent it diverges from this opinion, State v. Merico, 77 W.Va. 314, 87 S.E. 370 (1913) is hereby overruled.” Syl. Pt. 6, State v. Hodges, 172 W.Va. 322, 305 S.E.2d 278 (1983).
3. The enumerated deadly weapons listed in § 61-7-2(1) - (8) are not exclusive, as the language of the statute indicates that any article can be so considered, if in its intended or readily adaptable use it is likely to produce death or serious bodily injury. See Village of Barboursville ex rel. Bates v. Taylor, 115 W.Va. 4, 174 S.E. 485 (1934), *overruled on other grounds*, State v. Choat, 178 W.Va. 607, 363 S.E.2d 493 (1987).

FIREARM AND DEADLY WEAPON OFFENSES
Brandishing a Deadly Weapon

The Court instructs the jury that the offense of “Brandishing a Deadly Weapon”, as that term is used in the indictment herein, is committed when any person, who is armed with a firearm or other deadly weapon, whether licensed to carry the same or not, carries, brandishes or uses such weapon in a way or manner to cause or threaten a breach of the peace. ¹

The Court further instructs the jury that the term “deadly weapon” means an instrument which is designed to be used to produce serious bodily injury or death, or is readily adaptable to such use. This term includes, but is not limited to, such instruments as blackjacks; knives, including gravity and switchblade knives; nunchukas; metallic or false knuckles; pistols and revolvers. ²

Therefore, in order to prove the commission of the offense of “Brandishing a Deadly Weapon”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. while armed with a firearm or other deadly weapon, to-wit: a _____,
5. did carry, brandish or use said firearm or weapon
6. in a manner to cause or threaten a breach of the peace.

FOOTNOTES

¹ W.Va. Code, 61-7-11 (1994).

² W.Va. Code, 61-7-2(9) (2002).

COMMENTS

1. The enumerated deadly weapons listed in § 61-7-2(1) - (8) are not exclusive, as the language of the statute indicates that any article can be so considered, if in its intended or readily adaptable use it is likely to produce death or serious bodily injury. See Village of Barboursville ex rel. Bates v. Taylor, 115 W.Va. 4, 174 S.E. 485 (1934), *overruled on other grounds*, State v. Choat, 178 W.Va. 607, 363 S.E.2d 493 (1987).
2. Brandishing a deadly weapon, as defined herein, is a lesser included offense of the offense of wanton endangerment with a firearm under *W.Va. Code*, 61-7-12 (1994). Syllabus Point 5, State v. Bell, 211 W.Va. 308, 565 S.E.2d 430 (2002).

FIREARM AND DEADLY WEAPON OFFENSES
Wanton Endangerment Involving a Firearm

The Court instructs the jury that the offense of “Wanton Endangerment Involving a Firearm”, as that term is used in the indictment herein, is committed when any person wantonly performs any act with a firearm which creates a substantial risk of death or serious bodily injury to another person. ¹

The Court further instructs the jury that the term “firearm” means any weapon which will expel a projectile by action of an explosion. ²

Therefore, in order to prove the commission of the offense of “Wanton Endangerment with a Firearm”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. wantonly and feloniously,
5. performed an act
6. with a firearm,
7. which created a substantial risk of death or serious bodily injury,
8. to _____.

FOOTNOTES

¹ W.Va. Code, 61-7-12 (1994).

² W.Va. Code, 61-7-2(11) (2002).

COMMENTS

1. “Because the offense of wanton endangerment with a firearm is defined, not in terms of whether the firearm is discharged, but merely with reference to the commission of “any act”, the discharge of a firearm is not an element of West Virginia Code § 61-7-12 (1994) (Repl. Vol. 2000).” Syllabus Point 5, State v. Hulbert, 209 W.Va. 217, 544 S.E.2d 919 (2001).
2. Brandishing a deadly weapon, as defined herein, is a lesser included offense of the offense of wanton endangerment with a firearm under *W.Va. Code*, 61-7-12 (1994). Syllabus Point 5, State v. Bell, 211 W.Va. 308, 565 S.E.2d 430 (2002).

ABUSE AND NEGLECT
Child Abuse Resulting in Injury or Serious Bodily Injury

The Court instructs the jury that the offense of “Child Abuse Resulting in (Serious) Bodily Injury”, as the term is used in the indictment herein, is committed when a parent, guardian, or custodian abuses a child, and by such abuse causes (serious) bodily injury to the child.¹

For the purposes of this instruction, the Court instructs the jury that the following terms are defined as such (use as necessary):

“**Child**” means any person under eighteen years of age not otherwise emancipated by law; ²

“**Parent**” means the biological mother or father of a child, or the adoptive mother or father of a child; ³

“**Guardian**” means a person who has care and custody of a child as the result of any contract, agreement or legal proceeding; ⁴

“**Custodian**” means a person over the age of fourteen years who has or shares actual physical possession or care and custody of a child on a full-time or temporary basis, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceeding; ⁵

“**Abuse**” means the infliction upon a minor of physical injury by other than accidental means; ⁶

“**Bodily injury**” means substantial physical pain, illness or any impairment of physical condition; ⁷ and

“**Serious bodily injury**” means bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ. ⁸

Therefore, in order to prove the commission of the offense of “Child Abuse Resulting in Injury”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. and being the (parent) (guardian) (custodian) of _____, a child,
5. did abuse the said _____,
6. and by such abuse did cause such child (serious) bodily injury.

FOOTNOTES

- ¹ W.Va. Code, 61-8D-3 [1996].
- ² W.Va. Code, 61-8D-1(2) [1988].
- ³ W.Va. Code, 61-8D-1(7) [1988].
- ⁴ W.Va. Code, 61-8D-1(5) [1988].
- ⁵ W.Va. Code, 61-8D-1(4) [1988].
- ⁶ W.Va. Code, 61-8D-1(1) [1988].
- ⁷ W.Va. Code, 61-8B-1(9) [2000].
- ⁸ W.Va. Code, 61-8B-1(10) [2000].

ABUSE AND NEGLECT
Child Neglect Resulting in Injury or Serious Bodily Injury

The Court instructs the jury that the offense of “Child Neglect Resulting in (Serious) Bodily Injury”, as the term is used in the indictment herein, is committed when a parent, guardian, or custodian neglects a child, and by such neglect causes (serious) bodily injury to the child. ¹

For the purposes of this instruction, the Court instructs the jury that the following terms are defined as such (use as necessary):

“**Child**” means any person under eighteen years of age not otherwise emancipated by law; ²

“**Parent**” means the biological mother or father of a child, or the adoptive mother or father of a child; ³

“**Guardian**” means a person who has care and custody of a child as the result of any contract, agreement or legal proceeding; ⁴

“**Custodian**” means a person over the age of fourteen years who has or shares actual physical possession or care and custody of a child on a full-time or temporary basis, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceeding; ⁵

“**Neglect**” means the unreasonable failure by a parent, guardian or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child’s physical safety or health; ⁶

“**Bodily injury**” means substantial physical pain, illness or any impairment of physical condition; ⁷ and

“**Serious bodily injury**” means bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ. ⁸

Therefore, in order to prove the commission of the offense of “Child Neglect Resulting in Injury”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. and being the (parent) (guardian) (custodian) _____, a child,
5. did neglect the said _____,
6. and by such neglect did cause such child (serious) bodily injury.

FOOTNOTES

- ¹ W.Va. Code, 61-8D-4 [1996].
- ² W.Va. Code, 61-8D-1(2) [1988].
- ³ W.Va. Code, 61-8D-1(7) [1988].
- ⁴ W.Va. Code, 61-8D-1(5) [1988].
- ⁵ W.Va. Code, 61-8D-1(4) [1988].
- ⁶ W.Va. Code, 61-8D-1(6) [1988].
- ⁷ W.Va. Code, 61-8B-1(9) [2000].
- ⁸ W.Va. Code, 61-8B-1(10) [2000].

COMMENTS

1. The provisions of § 61-8D-4 do not apply if the neglect by the parent, guardian or custodian is due primarily to a lack of financial means on the part of the parent, guardian or custodian. W.Va. Code, 61-8D-4(c) (1996).
2. Compare with the definition of “Neglected Child” in *W.Va. Code*, 49-1-3(h):
 - (1) “Neglected child” means a child: (a) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or (b) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian;

(2) "Neglected child" does not mean a child whose education is conducted within the provisions of [§ 18-8-1] of this code.

3. Intent is not an element of the offense of child neglect resulting in injury. See Syllabus Point 1, State v. De Berry, 185 W.Va. 512, 408 S.E.2d 91 (1991) ("In order to obtain a conviction under *W.Va. Code*, 61-8D-4(b) [1988], the State must prove that the defendant neglected a minor child within the meaning of the term "neglect," as that term is defined by *W.Va. Code*, 61-8D-1(6) [1988], which definition is "the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child's physical safety or health." Furthermore, the State must prove that such neglect caused serious bodily injury. However, there is no requirement to prove criminal intent in a prosecution under *W.Va. Code*, 61-8D-4(b) [1988].").

ABUSE AND NEGLECT
Child Abuse Creating Substantial Risk Of Serious Bodily Injury or Death

The Court instructs the jury that the offense of “Child Abuse Creating Substantial Risk of Serious Bodily Injury or Death”, as the term is used in the indictment herein, is committed when any person inflicts upon a minor child physical injury by other than accidental means and, by such action, creates a substantial possibility of serious bodily injury or death. ¹

For the purposes of this instruction, the Court instructs the jury that the following terms are defined as such:

“**Child**” means any person under eighteen years of age not otherwise emancipated by law; ²

“**Abuse**” means the infliction upon a minor of physical injury by other than accidental means; ³

“**Serious bodily injury**” means bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ. ⁴

Therefore, in order to prove the commission of the offense of “Child Abuse Creating Risk of Serious Bodily Injury or Death”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. inflicted physical injury upon _____, a child,
5. by other than accidental means,
6. and by such action created a substantial possibility of serious bodily injury or death upon _____.

FOOTNOTES

- ¹ W.Va. Code, 61-8D-3(c) [1996]; State v. Snodgrass, 207 W.Va. 631, 535 S.E.2d 475 (2000).
- ² W.Va. Code, 61-8D-1(2) [1988].
- ³ W.Va. Code, 61-8D-1(1) [1988].
- ⁴ W.Va. Code, 61-8B-1(10) [2000].

ABUSE AND NEGLECT
Child Neglect Creating Substantial Risk Of Serious Bodily Injury or Death

The Court instructs the jury that the offense of “Child Neglect Creating Substantial Risk of Serious Bodily Injury or Death”, as the term is used in the indictment herein, is committed when any person grossly neglects a child and by such gross neglect creates a substantial risk of serious bodily injury or death to a minor child. ¹

For the purposes of this instruction, the Court instructs the jury that the following terms are defined as such:

“**Child**” means any person under eighteen years of age not otherwise emancipated by law; ²

“**Neglect**” means the unreasonable failure by a parent, guardian or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child’s physical safety or health; ³

“**Serious bodily injury**” means bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ. ⁴

Therefore, in order to prove the commission of the offense of “Child Neglect Creating Substantial Risk of Serious Bodily Injury or Death”, the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, _____,
2. on the _____ day of _____, 20____;
3. in _____ County, West Virginia;
4. did grossly neglect _____, a child,
5. and by such gross neglect did create a substantial risk of serious bodily or death to _____.

FOOTNOTES

- ¹ W.Va. Code, 61-8D-4(e) [1996].
- ² W.Va. Code, 61-8D-1(2) [1988].
- ³ W.Va. Code, 61-8D-1(6) [1988].
- ⁴ W.Va. Code, 61-8B-1(10) [2000].

COMMENTS

1. The provisions of § 61-8D-4 do not apply if the neglect by the parent, guardian or custodian is due primarily to a lack of financial means on the part of the parent, guardian or custodian.
2. Compare with the definition of “Neglected Child” in *W.Va. Code*, 49-1-3(h):
 - (1) “Neglected child” means a child: (a) Whose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when such refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian; or (b) Who is presently without necessary food, clothing, shelter, medical care, education or supervision because of the disappearance or absence of the child's parent or custodian;
 - (2) “Neglected child” does not mean a child whose education is conducted within the provisions of [§ 18-8-1] of this code.

DEFENSES ALIBI

The defendant has offered in his defense evidence that he was not present at the place where, and at the time when, the alleged offense was committed. It is not incumbent upon the defendant to establish that he or she was not present at the time and place of the commission of the alleged offense, or that he or she was at some other place. The burden is on the State of West Virginia to prove beyond a reasonable doubt that the defendant was present at the time and place the State claims the alleged offense was committed, and that the defendant committed the offense as charged.

If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time and place the alleged crime was committed, you should find the defendant not guilty.

COMMENTS

1. “Because of the holding in Adkins v. Bordenkircher, 674 F.2d 279 (4th Cir.), *cert. denied*, 459 U.S. 853, 103 S.Ct. 119, 74 L.Ed.2d 104 (1982), State v. Alexander, (161 W.Va. 776), 245 S.E.2d 633 (1978), is overruled to the extent that it permits the giving of an instruction that places the burden upon the defendant to prove his alibi defense sufficiently to create a reasonable doubt in the mind of the jury as to his guilt.” Syllabus point 1, State v. Kopa, 173 W.Va. 43, 311 S.E.2d 412, at 418 (1983).

“The invalidation of the instruction approved in State v. Alexander, (161 W.Va. 776), 245 S.E.2d 633 (1978), that places the burden upon the defendant to prove his alibi defense sufficiently to create a reasonable doubt in the mind of the jury as to his guilt is only applicable to those cases currently in litigation or on appeal where the error has been properly preserved at trial.” Syllabus point 2, State v. Kopa, 173 W.Va. 43, 311 S.E.2d 412 (1983). Syl. pt. 3, State v. Hall, 179 W.Va. 398, 369 S.E.2d 701 (1988).

2. “The so-called Alexander instruction on alibi is unconstitutional as impermissibly burden shifting, but this error is subject to the doctrine of harmless constitutional error.” Syl. pt. 4, Morrison v. Holland, 177 W.Va. 297, 352 S.E.2d 46 (1986).

“Where a burden-shifting alibi instruction has been offered and the question arises as to whether it is harmless constitutional error, courts look to the credibility of the alibi testimony and, if it is not incredible, the error is not harmless.” Syl. pt. 5, Morrison v. Holland, 177 W.Va. 297, 352 S.E.2d 46 (1986).

3. Reversal based on Alexander instruction. State v. Collins, 174 W.Va. 767, 329 S.E.2d 839 (1984).
4. In Acord v. Hedrick, 176 W.Va. 154, 342 S.E.2d 120 (1986), the instruction set forth in footnote 6 did not shift the burden of persuasion to the defendant to prove his alibi.
5. An instruction to the jury that the defendant did not have to prove his alibi beyond a reasonable doubt or even by a preponderance of the evidence, but had only to introduce evidence which when considered with the whole evidence, created a reasonable doubt regarding guilt was not an impermissible shift to defendant of prosecution’s burden of proving every element of the crime charged beyond a reasonable doubt. The Court found the instruction was no more than a comment on the weight of evidence and had nothing to do with burden of proof or introduction of evidence. Frye v. Proconier, 746 F.2d 1011 (4th Cir. Va. 1984).
6. Trial counsel’s failure to look beyond State v. Alexander and discover and apply Adkins v. Bordenkircher, 674 F.2d 279 (4th Cir. 1982), *cert. denied*, 459 U.S. 853, 103 S.Ct. 119, 74 L.Ed.2d 104 (1982), *overruled on other grounds*, Meadows v. Holland, 831 F.2d 493 (4th Cir. 1987), not ineffective assistance of counsel. [*cert. granted* and judgment vacated by Meadows v. Holland, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 575 (1989); on remand to Meadows v. Legursky, 904 F.2d 903 (4th Cir. (W.Va. 1990); *cert. denied*, Meadows v. Legursky, 111 S.Ct. 523, 112 L.Ed.2d 534 (1990)]. State v. Hutchinson, 176 W.Va. 172, 342 S.E.2d 138 (1986).

7. The Court did not recognize plain error in the giving of an Alexander instruction where the giving of the instruction did not substantially impair the truth-finding function of the trial. State v. Hutchinson, 176 W.Va. 172, 342 S.E.2d 138 (1986); State v. Fisher, 179 W.Va. 516, 370 S.E.2d 480 (1988).
8. The Court noted its displeasure with trial counsel's failure to request an alibi instruction, but refrained from determining whether the trial court's failure to give an alibi instruction was error. State v. Davis, 176 W.Va. 454, 345 S.E.2d 549 (1986).
9. Instruction set forth in footnote 10 did not shift the burden of proof to the defendant to prove his alibi. State v. Grubbs, 178 W.Va. 811, 364 S.E.2d 824 (1987).
10. The Alexander instruction could not be recognized as plain error in those cases where it had not been properly preserved at trial. State v. Hutchinson, 176 W.Va. 172, 342 S.E.2d 138 (1986); State v. Hall, 179 W.Va. 398, 369 S.E.2d 701 (1988).
11. Jury instruction that when the defendant relies on the defense of alibi, the burden is on him to prove it by such evidence and to such degree of certainty as will, when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt as to the guilt of the accused, but that the State is not relieved of proving beyond a reasonable doubt the actual presence of the accused at the time and place of the commission of the alleged crime was valid and trial counsel was not ineffective for failing to object to it. State v. England, 180 W.Va. 342, 376 S.E.2d 548 (1988).

**DEFENSES
INSANITY
Burden of Proof**

There exists in the trial of an accused a presumption that the accused was sane at the time of the alleged commission of the alleged offense. If, however, any evidence introduced by the accused or by the State of West Virginia fairly raises doubt upon the issue of the accused's sanity at that time, the presumption of sanity ceases to exist and the State then has the burden to establish the sanity of the accused beyond a reasonable doubt. If the whole proof upon that issue leaves the jury with a reasonable doubt as to the accused's sanity at that time, the jury must accord the accused the benefit of the doubt and acquit him or her.

FOOTNOTE

- ¹ "When an accused is relying upon the defense of insanity at the time of the crime charged, the jury should be instructed (1) that there is a presumption the accused was sane at that time; (2) that the burden is upon him to show that he was then insane; (3) that if any evidence introduced by him or by the State fairly raises doubt upon the issue of his sanity at that time, the presumption of sanity ceases to exist; (4) that the State then has the burden to establish the sanity of the accused beyond a reasonable doubt, and, (5) that if the whole proof upon that issue leaves the jury with a reasonable doubt as to the defendant's sanity at that time the jury must accord him the benefit of the doubt and acquit him." Syl. pt. 3, State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981)

See also, Edwards v. Leverette, 163 W.Va. 571, 258 S.E.2d 436 (1979); State v. Wimer, 168 W.Va. 417, 284 S.E. 890, 895 (1981); State v. Grimm, 165 W.Va. 547, 270 S.E.2d 173 (1980).

COMMENTS

1. **In General** - "There exists in the trial of an accused a presumption of sanity. However, should the accused offer evidence that he was insane, the presumption of sanity disappears and the burden is on the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time of the offense."

Syl. pt. 2, State v. Milam, 163 W.Va. 752, 260 S.E.2d 295 (1979); See also, Syl. pt. 2, State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981); State v. Massey, 178 W.Va. 427, 359 S.E.2d 865, 872 (1987); Syl. pt. 4, State v. Parsons, 181 W.Va. 131, 381 S.E.2d 246 (1989); Syl. pt. 6, State v. McWilliams, 177 W.Va. 369, 352 S.E.2d 120 (1986); Syl. pt. 1, State v. Rowe, 168 W.Va. 678, 285 S.E.2d 445 (1981); Syl. pt. 6, State v. Adkins, 170 W.Va. 46, 289 S.E.2d 720 (1982); Syl. pt. 3, State v. Bias, 171 W.Va. 687, 301 S.E.2d 776 (1983); Syl., State v. Kinney, 169 W.Va. 217, 286 S.E.2d 398 (1982); State v. Boyd, 167 W.Va. 385, 280 S.E.2d 669 (1981); Syl. pt. 3, State v. Wimer, 168 W.Va. 417, 284 S.E.2d 890 (1981); Edwards v. Leverette, 163 W.Va. 571, 258 S.E.2d 436 (1979); State v. Koon, 190 W.Va. 632, 440 S.E.2d 442 (1993); Syl. pt. 2, State v. Walls, 191 W.Va. 332, 445 S.E.2d 515 (1994).

Before an insanity instruction can be given in a criminal case the defendant must present some competent evidence on the subject; the defendant cannot ask the jury simply to consider, as an alternative to guilt or innocence, that the defendant could have been insane at the time of the alleged crime. Syl. pt. 4, State v. Schofield, 175 W.Va. 99, 331 S.E.2d 829 (1985).

2. **Sufficiency of State's Evidence** - See, State v. Parsons, 181 W.Va. 131, 381 S.E.2d 246 (1989); State v. McWilliams, 177 W.Va. 369, 352 S.E.2d 120 (1986); State v. Kinney, 169 W.Va. 217, 286 S.E.2d 398 (1982); State v. Boyd, 167 W.Va. 385, 280 S.E.2d 669 (1981); State v. Wimer, 168 W.Va. 417, 284 S.E.2d 890 (1981); State v. Rowe, 168 W.Va. 678, 285 S.E.2d 445 (1981); State v. Milam, 163 W.Va. 752, 260 S.E.2d 295 (1979); State v. Guthrie, 173 W.Va. 290, 315 S.E.2d 397 (1984); Billotti v. Dodrill, 183 W.Va. 48, 394 S.E.2d 32 (1990); State v. Koon, 190 W.Va. 632, 440 S.E.2d 442 (1993); State v. Walls, 191 W.Va. 332, 445 S.E.2d 515 (1994).

DEFENSES
INSANITY
Test of Responsibility for Act

One of the issues to be determined by you in this case is whether or not the defendant was sane or insane at the time the alleged offense was committed. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks capacity either to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. ¹

If you believe from the evidence beyond a reasonable doubt that the defendant committed all of the elements of the alleged offense, but have a reasonable doubt as to whether or not the defendant, at the time of the commission of the act, was suffering from a mental disease or defect causing him or her to lack the capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law, you should find the defendant not guilty by reason of insanity.

FOOTNOTE

¹ Syl. pt. 2, in part, State v. Myers, 159 W.Va. 353, 222 S.E.2d 300 (1976); Syl. pt. 5, State v. Massey, 178 W.Va. 427, 359 S.E.2d 865 (1987); Syl. pt. 3, State v. Parsons, 181 W.Va. 131, 381 S.E.2d 246 (1989); Syl. pt. 4, State v. Bragg, 160 W.Va. 455, 235 S.E.2d 466 (1977); footnote 4, State v. Samples, 174 W.Va. 584, 328 S.E.2d 191 (1985); State v. Orth, 178 W.Va. 303, 359 S.E.2d 136 (1987).

When a defendant in a criminal case raises the issue of insanity, the test of his responsibility for his act is whether, at the time of the commission of the act, it was the result of a mental disease or defect causing the accused to lack the capacity either to appreciate the wrongfulness of his act or to conform his act to the requirements of the law, and it is error for the trial court to give an instruction on the issue of insanity which imposes a different test or which is not governed by the evidence presented in the case. Syl. pt. 2, State v. Myers, 159 W.Va. 353, 222 S.E.2d 300 (1976). See Municipal Mutual Insurance Company of West Virginia v. Mangus, 191 W.Va. 113, 443 S.E.2d 455 (1994), dissenting opinion by Justice Miller, footnote 7.

COMMENTS

1. **Test to be Applied - Based on Model Penal Code** - “It is appropriate to state here for the guidance of trial courts in this state that the M Naghten Rule has been justifiably criticized by many courts, as has the Durham Rule and the “irresistible impulse” test. We, therefore, suggest a rule or test to be used in this state in future criminal trials involving a plea of insanity which would allow an appropriate balance between cognition and volition to guide the trial courts in their instructions to the jury. We do not adopt any rigid language for the trial courts to use in instructing or charging the jury in such cases, but simply recommend that they adopt an approach based on the Model Penal Code referred to herein and dispense with the more limited test of right and wrong followed in the M Naghten Rule. We would approve of an instruction to the effect that an accused is not responsible for his act if, at the time of the commission of the act, it was the result of a mental disease or defect causing the accused to lack the capacity either to appreciate the wrongfulness of his act, or to conform his act to the requirements of the law. The scope and extent of the instruction in a case will be governed by the evidence in the case. This, we believe, would be in keeping with the modern thinking of both the medical and legal professions with regard to the problem in cases involving the question of the insanity of the accused. State v. Grimm, 156 W.Va. 615, 195 S.E.2d 637, 647 (1973) overruled on other grounds, State v. Nuckolls, 166 W.Va. 259, 273 S.E.2d 87 (1980). State v. Myers, 159 W.Va. 353, 222 S.E.2d 300 (1976).
2. **Substantial Capacity** - **NOTE:** Grimm test - defendant lacks “capacity”; MPC test - defendant lacks “substantial capacity”.

In State v. Duell, 175 W.Va. 233, 332 S.E.2d 246 (1985) an instruction was given in the language of paragraph one of the MPC instruction. The appellant challenged the use of “substantial” capacity as lessening the prosecution’s burden of proof. The Supreme Court found that although the insanity instruction incorrectly stated the law under Grimm, it effectively greatened, and not lessened, the burden of the prosecution to prove the appellant sane at the time of the offense. The instruction was incorrect, but favored the appellant. The Court found no error on this issue.

See State v. Koon, 190 W.Va. 632, 440 S.E.2d 442 (1993). In Koon, a Per Curiam opinion, the Court seems to apply the “substantial capacity” test although the citations for this standard are an incorrect citation to State v. Myers, and a citation to State v. Parsons, 181 W.Va. 131, 381 S.E.2d 246 (1989). Both Myers and Parsons apply the Grimm defendant lacked capacity test.

In Municipal Mutual Insurance Company of West Virginia v. Mangus, 191 W.Va. 113, 443 S.E.2d 455 (1994), the appellant urged the Court to embrace the test for criminal insanity in cases where an insured who is mentally ill at the time he injures another, seeks coverage under a homeowners policy with an intentional acts exclusion clause. Justice Neely, writing for the majority, stated, “[s]pecifically, he [the appellant] argues that if an insured lacks *substantial* capacity to appreciate the wrongfulness of his act and does not possess a *substantial* ability to conform his acts to the requirements of law due to mental illness and in that state causes harm -the test for criminal insanity in West Virginia - the act may not be said to be truly intentional and thus should be insured.” (emphasis in original).

3. **Scope and Extent of Instruction Governed by the Evidence** - In State v. Bragg, 160 W.Va. 455, 235 S.E.2d 466 (1977) instructions containing the language in Grimm were given. The defendant argued there was no issue concerning his appreciation of the wrongfulness of his act and that the instructions should not have included that language. The Court found the instruction approved in State v. Myers, 159 W.Va. 353, 222 S.E.2d 300 (1976) and tacitly approved in State v. Pendry, 159 W.Va. 738, 227 S.E.2d 210 (1976) (overruled in part by Jones v. Warden, 161 W.Va. 168, 241 S.E.2d 914 (1978)); and that there was evidence presented by the State concerning the defendant’s appreciation of the wrongfulness of his act. The Court found no error on this issue.
4. **Mental Disease or Defect** - **NOTE:** Paragraph 2 of the MPC which is cited in Grimm, at 645 (“(2) As used in this Article, the terms mental disease or defect do not include any abnormality manifested only by repeated criminal or otherwise antisocial conduct.”) is not carried forward in subsequent W.Va. cases.

In State v. Milam, 159 W.Va. 691, 226 S.E.2d 433, 440 (1976), the state's instruction no. 7 contained language which advised the jury that a mental disease or defect must amount to more than a delusion in order to constitute the basis of a finding of not guilty by reason of insanity. The appellant argues that the reference to "delusion" is both confusing and constitutes an improper statement of the law governing the insanity defense. It may well be that this reference to a symptom of severe mental disease is confusing and is not within the scope of the definition of mental disease which we approved in State v. Grimm, 156 W.Va. 615, 195 S.E.2d 637 (1973). However, there was no objection by the defendant to this language at the time of trial and we will not consider an objection to instructions in the first instance before this Court. (cites omitted).

In State v. Massey, 178 W.Va. 427, 359 S.E.2d 865 (1987), the defendant offered an instruction which would have defined a mental disease or defect as "any abnormal condition of the mind, regardless of its medical label, which... substantially impairs behavior controls." This instruction, which also misapplied the burden of proof on the issue of insanity, was refused. The Court found the instruction was properly refused since it misapplied the burden of proof and since our cases have never accepted a definition of mental disease or defect which is tied to an impairment of "behavior controls". Instead, the Court applied the test used in syl. pt. 2, State v. Myers, 159 W.Va. 353, 222 S.E.2d 300 (1976), to determine a criminal defendant's responsibility for his act.

In State v. Boyd, 167 W.Va. 385, 280 S.E.2d 669 (1981), Footnote 11, "On appeal the state contends that the insanity defense offered by the appellant is without merit and should be stricken under the proposition that voluntary drug intoxication is no defense to a criminal act. Although we agree that voluntary drug intoxication is no defense to a criminal act, see, Annot., 73 A.L.R.3d 98 (1976) we fail to see how that rule applies to the facts of this case.

"There is a distinction to be made between the criminal responsibility of an individual who is *intoxicated* at the time of the offense, as a result of the voluntary use of drugs, and an individual who is suffering from a *mental disease* at the time of the offense caused by the long-term voluntary use of intoxicating drugs. The law in this State is

that a defendant will not be deemed criminally responsible if, at the time of the offense, he is suffering from a mental disease or defect to such an extent that he cannot appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. State v. Grimm, 156 W.Va. 615, 195 S.E.2d 637 (1973). The origin of the disease or defect is irrelevant for purposes of this rule.”

In State v. Lockhart, 200 W.Va. 479, 490 S.E.2d 298 (1997), the appellant was convicted of sexual assault in the first degree, battery, burglary and assault during the commission of a felony. On appeal he contended the circuit court erred by refusing to permit him to present an insanity defense based upon the theory that at the time of the events in question, he was suffering from a mental impairment known as “dissociative identity disorder” (also known as “multiple personality disorder”) which precluded his criminal responsibility for his actions.

The Court noted that in State v. McCoy, 179 W.Va. 223, 366 S.E.2d 731 (1988), they recognized that the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders is a “widely recognized reference for diagnosing mental disorders”. It was noted that the 4th edition of that Manual sets forth a discussion of Dissociative Identity Disorder. The Court found that they need not give a stamp of approval upon all of the many mental illnesses which could constitute an insanity defense before those illnesses may be presented in a criminal trial and that there was no clear consensus in the legal community concerning the use of the disorder as a legal defense to criminal responsibility.

The Court found that the circuit court, in not permitting the insanity defense to be presented, failed to allow counsel for the appellant to proffer into the record, through the testimony of his principal witness, evidence concerning the nature of Dissociative Identity Disorder and the relevance of that disorder to the appellant. Consequently, the Court found the record was inadequate for review of whether the circuit court acted correctly in disallowing the presentation of the appellant’s insanity defense. The case was remanded to allow defense counsel to make a complete evidentiary proffer on the disorder and its relevance to the appellant.

5. **Voluntary Refusal to Take Prescribed Medication, Resulting in Criminal Insanity**

- “Although the record is scant on this issue, there appears to be some evidence to suggest that the Appellant’s mental health is dependent on his ingestion of prescribed medication. At some point, this court needs to examine whether voluntary refusal to take prescribed medication, resulting in criminal insanity ought to be analogized to the legal effect of an individual choosing to imbibe alcoholic beverages. Voluntary intoxication is not an affirmative defense to criminal conduct but at most can only result in the reduction of the level of intent. Voluntary refusal to take medication perhaps should be treated in a similar fashion.” Footnote 3, dissenting opinion of Justice Workman, State v. Walls, 191 W.Va. 332, 445 S.E.2d 515 (1994).

6. **Unconsciousness/Automatism** - In State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996), the appellant was indicted for the offense of involuntary manslaughter while driving a motor vehicle in an unlawful manner in violation of *W.Va. Code*, 61-2-5 (1923). He was convicted following a jury trial. At issue on appeal was whether the jury was properly instructed as to the defense of unconsciousness. The Court reversed, holding that without an adequate and complete explanation of the unconsciousness defense, the omission in the charge was likely to have created a grave miscarriage of justice.

The Court found that this case required them to harmonize a conflict between the defense of unconsciousness and that of insanity.

Syl. pt. 2 - Unconsciousness (or automatism) is not part of the insanity defense, but is a separate claim which may eliminate the voluntariness of a criminal act. The burden of proof on this issue, once raised by the defense, remains on the State to prove that the act was voluntary beyond a reasonable doubt.

Syl. pt. 3 - An instruction on the defense of unconsciousness is required when there is reasonable evidence that the defendant was unconscious at the time of the commission of the crime.

Syl. pt. 4 - If a defendant is sufficiently appraised and aware of a preexisting condition and previously experienced recurring episodes of loss of consciousness, e.g., epilepsy, then operating a vehicle or other potentially destructive implement, with knowledge of the potential danger, might well amount to reckless disregard for the safety of others. Therefore, the jury should be charged that even if it believes there is a reasonable doubt about the defendant's consciousness at the time of the event, the voluntary operation of a motor vehicle with knowledge of the potential for loss of consciousness can constitute reckless behavior.

7. West Virginia has formally adopted the defense of diminished capacity. See State v. Joseph, ___ W.Va. ___, 590 S.E.2d 718 (2003). See page 448 for separate instruction on diminished capacity.

DEFENSES
INSANITY
Not Guilty by Reason of Insanity ¹

(NOTE: To be given at request of the defendant ² or in response to questions by jurors. ³)

If you return a verdict of “not guilty by reason of insanity”, the law provides that the Court shall determine on the record the offense of which the defendant otherwise would have been convicted, and the maximum sentence he or she could have received. The law further provides the Court shall commit the defendant to a mental health facility under the jurisdiction of the Department of Health, with the Court retaining jurisdiction over the defendant for the maximum sentence period. ⁴ If the defendant is released from an in-patient mental health facility while under the jurisdiction of the Court, the Court may impose such conditions as are necessary to protect the safety of the public. ⁵

No later than thirty days prior to the release of a defendant because of the expiration of the court’s jurisdiction, if the defendant’s supervising physician believes that the defendant’s mental illness or mental retardation or addiction causes the defendant to be dangerous to self or others, the supervising physician shall notify the prosecuting attorney in the county of the Court having jurisdiction of such opinion and the basis therefor. Following this notification, the prosecuting attorney shall file a civil commitment application against the defendant. ⁶

The Court may discharge a mentally ill or addicted defendant from the court’s period of jurisdiction prior to the expiration of the period specified only when the Court finds that the person is no longer mentally ill or addicted and that the person is no longer a danger to self or others. The Court may discharge a mentally retarded defendant from the court’s period of jurisdiction prior to the expiration of the period specified only when the Court finds that the person is no longer a danger to self or others. However, a defendant may not be released from the jurisdiction of the Court when the defendant’s mental illness is in remission solely as a result of medication or hospitalization or other mode of treatment if it can be determined within a reasonable degree of medical certainty that without continued therapy or hospitalization or other mode of treatment, the defendant’s mental illness will make him or her a danger to self or others. ⁷

A person found “not guilty by reason of insanity” may be released or discharged from an in-patient mental health facility only upon entry of an order from the Court which committed the defendant finding that the defendant will not be a danger to self or others if so released based upon evidence introduced at a hearing.⁸

The Court shall promptly conduct a hearing after receipt of the physicians notification. The prosecuting attorney and the victim or next of kin of the victim of the offense for which the defendant was committed shall be notified of the hearing.⁹

FOOTNOTES

¹ An instruction which attempts to explain under what circumstances a criminal defendant who has been involuntarily committed to a mental institution subsequent to a verdict of not guilty by reason of insanity may be discharged from the mental institution must include an adequate and accurate explanation of the law relating to commitment and discharge of involuntary patients at state mental institutions. Syl. pt. 6, State v. Boyd, 167 W.Va. 385, 280 S.E.2d 669 (1981).

“...Boyd requires that any instruction on the disposition of a defendant after a verdict of not guilty by reason of insanity include a complete explanation of the procedure for involuntary commitment and discharge as given in the Code.” State v. McWilliams, 177 W.Va. 369, 352 S.E.2d 120, at 127 (1986).

The instruction offered in State v. Boyd, 167 W.Va. 385, 280 S.E.2d 669, 683-685 (1981) was patterned after the law in effect at that time. W.Va. Code, 27-6A-3 and 27-6A-4 were revised during the 1995 regular session of the legislature. The statutory revisions and State v. Boyd should be reviewed carefully to be certain that no pertinent material has been omitted from this instruction.

² In any case where the defendant relies upon the defense of insanity, the defendant is entitled to any instruction which advises the jury about the further disposition of the defendant in the event of a finding of not guilty by reason of insanity which correctly states the law; however, when the Court gives an instruction on this subject which correctly states the law and to which the defendant does not object, the defendant may not later assign such instruction as error. Syl. pt. 2, State v. Nuckolls, 166 W.Va. 259, 273 S.E.2d 87 (1980); Syl. pt. 4, State v. Jackson, 171 W.Va. 329, 298 S.E.2d 866 (1982); Syl. pt. 4, State v. Bias, 171 W.Va. 687, 301 S.E.2d 776 (1983); Syl. pt. 1, State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981); Syl. pt. 1, State v. Lutz, 183 W.Va. 234, 395 S.E.2d 478 (1988); State v. McWilliams, 177 W.Va. 369, 352 S.E.2d 120 (1986).

“In order to prevent this problem in the future, we hold that defense counsel is entitled to argue the consequences of finding a defendant not guilty by reason of insanity. In this regard counsel should be granted the same freedom to draw an instruction on insanity dispositions which we have accorded for parole eligibility. Consequently, as

we stated in State v. Wayne, 162 W.Va. 41, 245 S.E.2d 838, 843 (1978) ‘we hold that any instruction on this issue is very much a question of trial tactics and that the defendant is entitled to any instruction on the subject which correctly states the law and which he deems will present the proposition in its most favorable light.’ Once the Court has given an instruction on this subject which correctly states the law, the defendant is precluded from later assigning such instruction as error unless he objects. Therefore, syllabus point six of State v. Grimm, 156 W.Va. 615, 195 S.E.2d 637 (1973) which says ‘(a)n instruction telling the jury the procedure to be followed if it returned a verdict of not guilty by reason of insanity is not a proper instruction, because this procedure is a matter for the Court and not the jury’, is expressly overruled.” State v. Nuckolls, 166 W.Va. 259, 273 S.E.2d 87, 90 (1980).

“A party is not entitled to his own instruction when the trial court’s instruction accurately and adequately covers the issue and when the party makes no specific objection to the trial court’s instruction.” Syl. pt. 3, State v. McWilliams, 177 W.Va. 369, 352 S.E.2d 120 (1986).

In State v. Lutz, 183 W.Va. 234, 395 S.E.2d 478 (1988) Syl. pt. 2, “Where it clearly and objectively appears in a criminal case from statements of the jurors that the jury has failed to comprehend an instruction on a critical element of the crime or a constitutionally protected right, the trial court must, on request of defense counsel, reinstruct the jury.” Syllabus Point 2, State v. McClure, 163 W.Va. 33, 253 S.E.2d 555 (1979). (In Lutz, the Court found that although the question of disposition on a verdict of not guilty by reason of insanity was not technically a “critical element of the crime”, resolution of that issue was clearly critical to the jury in reaching its verdict. The Court found it was reversible error for the judge to deny defendant’s motion orally to reinstruct the jury in light of the jury’s evident confusion over the law.)

In State v. Boyd, 167 W.Va. 385, 280 S.E.2d 669, 685 (1981) “We recently held that a criminal defendant, as a matter of right, is entitled to an instruction which advises the jury about his further disposition in the event of a finding of not guilty by reason of insanity. State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981); State v. Nuckolls, 166 W.Va. 259, 273 S.E.2d 87 (1980). However, the Court below failed to provide defense counsel with an opportunity to offer an instruction of his own in response to the jury’s question, or to object to the court’s instruction before it was given, a right which we find implicit in the holdings of Daggett and Nuckolls. Therefore, we must agree with the appellant’s contention that the giving of this instruction, especially in light of its inaccuracy and prejudicial effect, constituted reversible error.”

³ See, State v. Nuckolls, 166 W.Va. 259, 273 S.E.2d 87 (1980); State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981).

⁴ W.Va. Code, 27-6A-3(a) (1995).

⁵ W.Va. Code, 27-6A-3(b) (1995).

⁶ W.Va. Code, 27-6A-4(a) (1998).

⁷ W.Va. Code, 27-6A-4(b) (1998).

⁸ W.Va. Code, 27-6A-4(c) (1998).

⁹ W.Va. Code, 27-6A-4(d) (1998).

COMMENT

1. In State v. Smith, 198 W.Va. 702, 482 S.E.2d 687 (1996), the appellant was charged with murder and found by the circuit court to be not guilty by reason of mental illness. The circuit court determined that, but for her mental illness, the appellant would be guilty of murder of the second degree and stated it would maintain jurisdiction over appellant for the maximum sentence appellant could receive for that offense. The Court further ordered appellant committed to Weston State Hospital or other facility selected by the Division of Health for that time period or until the Division of Health makes a report that the appellant “is no longer a danger to herself or others and/or that her condition can be treated outside of a mental health facility with a plan of treatment and viable monitoring plan for such treatment”. Additionally, the circuit court directed that a report be filed with the Court on appellant every six months by either the Division of Health or the commitment facility.

On appeal, the appellant contended the circuit court abused its discretion by continuing her case until after the amended version of West Virginia Code § 27-6A-3(1992&Supp.1996), took effect, that the circuit court violated the *ex post facto* provisions of Article I, Section 10 of the United States Constitution and Article III, Section 4 of the West Virginia Constitution by applying the amended statute, and that the amended version of West Virginia Code § 27-6A-3 is unconstitutional. The Supreme Court affirmed.

Syl. pt. 1 - Pursuant to West Virginia Code § 27-6A-3 (Supp.1996), to calculate the length of time a court may retain its jurisdiction in cases of acquittal by reason of mental illness, the Court first must decide on the record what offense the acquittee otherwise would have been convicted and, then, determine the maximum sentence the acquittee could have received for that offense. Next, the Court shall commit the acquittee to a mental health facility under the jurisdiction of the Division of Health, with the Court retaining jurisdiction over the defendant for the maximum sentence period.

Syl. pt. 2 - West Virginia Code §§ 27-6A-3 and -4 (Supp. 1996) read in pari materia, generally provide a court flexibility in exercising and retaining its jurisdiction up to the maximum sentence period, with consideration given to the current mental state and dangerousness of a person found not guilty by reason of mental illness. If not sooner terminated by the Court, its jurisdiction automatically will expire at the end of the maximum sentence period.

Syl. pt. 4 - The purpose of West Virginia Code § 27-6A-3 (Supp. 1996) is not to punish someone suffering a mental illness; rather it is to treat the illness and protect society. If someone is found not guilty by reason of mental illness, there is no conviction to warrant a punishment. Consequently, ex post facto principles typically are not invoked by the commitment of an insanity acquitted.

DEFENSES DIMINISHED CAPACITY ¹

The Court instructs the jury that you may consider any evidence, whether in the form of expert testimony or otherwise, which may show that the defendant, at the time of the offense alleged herein, was suffering from a mental disease or defect which rendered the defendant incapable of forming a mental state which is an element of the offense alleged herein. If a defendant, due to a mental disease or defect, is unable to formulate a specific state of mind at the time of an alleged offense, it may be said that the defendant is suffering from a “diminished capacity”. Such a finding means that the defendant is not guilty of the offense charged, because this finding negates an essential element of the offense.

In other words, the State has alleged in this case that the defendant, at the time of the offense herein, acted with [*specify particular mental state, i.e., premeditation, specific intent, malice, etc.*]. You may consider, in light of all of the evidence presented in this case, whether the defendant was, at the time of the alleged commission of the act herein, incapable of forming a mental state which is an element of the offense alleged in the indictment herein.

[*If applicable*] Because such a finding means that one of the essential elements of the offense charged cannot be proven, you may still find that the defendant guilty of [*state lesser included offense*].

FOOTNOTE

¹ State v. Joseph, ____ W.Va. ____, 590 S.E.2d 718 (2003).

COMMENTS

1. Prior to Joseph, *supra*, the Court had recognized diminished capacity, but had not expressly adopted the defense. See State v. Keeton, 166 W.Va. 77, 272 S.E.2d 817 (1980) (whether voluntary intoxication can reduce the degree of a crime or negate specific intent); State v. Simmons, 172 W.Va. 590, 309 S.E.2d 89 (1983).

2. The precise degree and extent of this defense remains uncertain. In Joseph, *supra*, the Court formally adopted the “defense” of diminished capacity, while simultaneously noting that “it is somewhat confusing to refer to diminished capacity as a ‘defense’”. The Court addressed the general belief that diminished capacity acts primarily to negate specific elements of an offense, such as premeditation and deliberate intent. The Court observed in syllabus Point 3 of Joseph that:

“[t]his defense is asserted ordinarily when the offense charged is a crime for which there is a lesser included offense. This is so because the successful use of this defense renders the defendant not guilty of the particular crime charged, but does not preclude a conviction for a lesser included offense.”

DEFENSES

SELF-DEFENSE ¹

If the defendant was not the aggressor, and had reasonable grounds to believe and actually did believe that he or she was in imminent danger of death or serious bodily harm from which he or she could save him or herself only by using deadly force against his or her assailant, he or she had the right to employ deadly force in order to defend him or herself. By 'deadly force' is meant force which is likely to cause death or serious bodily harm.

In order for the defendant to have been justified in the use of deadly force in self-defense, he or she must not have provoked the assault on him or her or have been the aggressor. Mere words, without more, do not constitute provocation or aggression. ²

The circumstances under which he acted must have been such as to produce in the mind of a reasonably prudent person, similarly situated, the reasonable belief that the other person was then about to kill him or her or to do him or her serious bodily harm. ³ In addition, the defendant must have actually believed that he or she was in imminent danger of death or serious bodily harm ³ and that deadly force must be used to repel it. ⁴

If evidence of self-defense is present, the State of West Virginia must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find that the State has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty. ⁵ In other words, if you have a reasonable doubt whether or not the defendant acted in self-defense, your verdict must be not guilty.

FOOTNOTES

¹ E. Devitt and C. Blackmar, Federal Jury Practice and Instructions §§ 41.19 (3rd ed. 1977). Set forth in footnote 8, State v. Kirtley, 162 W.Va. 249, 252 S.E.2d 374 (1978). Noted with approval in State v. Duncan, 168 W.Va. 225, 283 S.E.2d 855 (1981). See Syl. pt. 1, State v. Knotts, 187 W.Va. 795, 421 S.E.2d 917 (1992); State v. Beegle, 188 W.Va. 681, 425 S.E.2d 823 (1992); State v. Headley, 210 W.Va. 524, 558 S.E.2d 324 (2001).

- ² In any case, the necessity relied on to excuse the killing must not have arisen out of the defendant's own misconduct. State v. Ashcraft, 172 W.Va. 640, 309 S.E.2d 600 (1983).

"The general rule is that a person accused of an assault does not lose his right to assert self-defense, unless he said or did something calculated to induce an attack upon himself." Syl. pt., State v. Smith, 170 W.Va. 654, 295 S.E.2d 820 (1982).

The general rule is broadly stated in 6A C.J.S. Assault and Battery § 91 (1975):

The provoking act on the part of accused, depriving him of the right of self-defense, need not be such as would give the party attacking him such right; but, before one accused of assault can be deprived of his right of self-defense on the ground of provoking the difficulty, he must have said or done something, for the purpose of inducing an attack upon him, which was calculated to bring about that result. (Footnote references omitted.)

"Our cases recognize the general common law rule that one who is at fault or who is the physical aggressor can not rely on self-defense; but we have not located a discussion about particular language that may result in forfeiture of the right to claim self-defense."

"Courts elsewhere have seldom discussed this point; but the Supreme Court of Iowa, reversing a second-degree murder conviction, stated the rule as follows:

'Defamation or opprobrious epithets, not uttered for the purpose of bringing about opportunity to kill or do great bodily harm do not constitute such an act of aggression or provocation as to deprive the defendant of the right to claim self-defense.' State v. Davis, 209 Iowa 524, 528, 228 N.W. 37, 39 (1929).

State v. Smith, *supra*, at 821, 822; State v. Asbury, 187 W.Va. 87, 415 S.E.2d 891 (1992); State v. Knotts, 187 W.Va. 795, 421 S.E.2d 917 (1992).

Instruction which told the jury the defendant could not justify the killing if he had brought on or begun the difficulty, although with no intent to kill or do bodily injury to the deceased, should have been refused. A man does not lose his right of self-defense unless he has done some wrongful act. Mere innocent or accidental cause of difficulty or combat, permitted by this instruction, is not enough. State v. Taylor, 57 W.Va. 228 at 240, 50 S.E. 247 (1905).

- ³ "Imminent danger of serious bodily injury or death is a basic requirement of the law of self-defense." We stated in State v. W.J.B., 166 W.Va. 602, 276 S.E.2d 550, 553 (1981), that:

'[A] defendant who is not the aggressor and has reasonable grounds to believe, and actually does believe, that he is in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force against his assailant has the right to employ deadly force in order to defend himself.' (cites omitted).

State v. Clark, 175 W.Va. 58, 331 S.E.2d 496, 500 (1985).

“Apprehension of danger, to justify a homicide, must not be based alone on surmises, but there must be coupled therewith some aid on the part of the party, from whom danger was apprehended, evidencing an immediate intention to carry into execution his threats or designs, and the jury are to judge of the reasonable grounds for such apprehension on the part of the defendant from all the facts and circumstances, as they existed at the time of the killing.” Footnote 10, State v. Ashcraft, 172 W.Va. 640, 309 S.E.2d 600, 612 (1983).

See, State v. Plumley, 184 W.Va. 536, 401 S.E.2d 469 (1990); State v. Gibson, 186 W.Va. 465, 413 S.E.2d 120 (1991); State v. Asbury, 187 W.Va. 87, 415 S.E.2d 891 (1992).

“Once the danger has passed and the defendant can no longer reasonably believe that he is in danger, the law does not excuse the taking of a human life.” State v. Clark, 175 W.Va. 58, 331 S.E.2d 496, 500 (1985).

“No apprehension of danger previously entertained will justify the commission of the homicide; it must be an apprehension existing at the time the defendant fired the fatal shot.” Syl. pt. 6, State v. McMillion, 104 W.Va. 1, 138 S.E. 732 (1927). (See also, State v. Collins, 154 W.Va. 771, 781, 180 S.E.2d 54, 61 (1971).

A person is not justified in shooting or employing a deadly weapon after the adversary has been disarmed or disabled. People v. McBride, 130 Ill. App.2d 201, 264 N.E.2d 446 (1970); 40 C.J.S. Homicide § 131(b) (1944); State v. Clark, 175 W.Va. 58, 331 S.E.2d 496 (1985).

“...The question of the sufficiency of an overt act or hostile demonstration to show a design real or apparent to do him great bodily harm, which would warrant the defendant acting in self-defense, was purely a question for the jury. (In determining this the jury were told) it was their duty to view the whole case from the standpoint of the prisoner and that he had the right to act upon appearances, and if those appearances afforded him reasonable grounds to believe that and that he did believe that he was in danger of death or great bodily harm, and that at the time he fired the shot ...he believed such an act necessary to avoid the apparent danger, to acquit him, although it might afterward turn out that the appearances were false, and that there was neither design to do him serious injury or danger that it would be done.” State v. McMillion, 104 W.Va. 1, at 10, 138 S.E. 732 (1927).

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“The amount of force that can be used in self-defense is that normally one can return deadly force only if he reasonably believes that the assailant is about to inflict death or serious bodily harm; otherwise, where he is threatened only with non-deadly force, he may use only non-deadly force in return.” Syl. pt. 1, State v. Baker, 177 W.Va. 769, 356 S.E.2d 862 (1987); State v. W.J.B., 166 W.Va. 602, 276 S.E.2d 550, 554 (1981); State v. Bongalis, 180 W.Va. 584, 378 S.E.2d 449 (1989); Syl. pt. 1, State v. Asbury, 187 W.Va. 87, 415 S.E.2d 891 (1992).

A person has a right to repel force by force in the defense of his person, and if in so doing he used only such force as the necessity, or apparent necessity, of the case required, he is not guilty of any offense, though he kills his assailant in so doing.

Footnote 10, State v. Ashcraft, 172 W.Va. 640, 309 S.E.2d 600 (1983); State v. W.J.B., 166 W.Va. 602, 276 S.E.2d 550 (1981); State v. Bowman, 155 W.Va. 562, 184 S.E.2d 314 (1971).

“The foregoing rule on the use of force, however, is merely a bland statement of the general rule that the amount of force which (a defendant) may justifiably use must be reasonably related to the threatened harm which he seeks to avoid. W. LaFave and Scott, *Criminal Law* 392 (1972). The more particular statement as to the amount of force that can be used in self-defense is that normally one can return deadly force only if he reasonably believes that the assailant is about to inflict death or serious bodily harm; otherwise, where he is threatened only with non-deadly force, he may use only non-deadly force in return.” (cites omitted). State v. W.J.B., 166 W.Va. 602, 276 S.E.2d 550, 554 (1981). (See syl. pt. 2, State W.J.B., *supra*, for amount of force occupant of a dwelling may use).

See, State v. Gibson, 186 W.Va. 465, 413 S.E.2d 120 (1991); State v. Beegle, 188 W.Va. 681, 425 S.E.2d 823 (1992).

- 5 “Once there is sufficient evidence to create a reasonable doubt that the killing resulted from the defendant acting in self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense.” Syl. pt. 4, State v. Kirtley, 162 W.Va. 249, 252 S.E.2d 374 (1978); State v. Stalnaker, 279 S.E.2d 416 (1981); Syl. pt. 1, State v. Matney, 176 W.Va. 667, 346 S.E.2d 818 (1986); State v. Baker, 177 W.Va. 769, 356 S.E.2d 862 (1987); State v. Schaefer, 170 W.Va. 649, 295 S.E.2d 814 (1982); State v. Mullins, 171 W.Va. 542, 301 S.E.2d 173 (1982); State v. Thayer, 172 W.Va. 356, 305 S.E.2d 313 (1983); State v. Bates, 181 W.Va. 36, 380 S.E.2d 203 (1989); see footnote 14, State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990).

In State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990), the appellant contended it was error for the state to offer a self-defense instruction even though self-defense was not asserted by the appellant at trial. He also argued even if the instruction was appropriate, it was erroneous as a matter of law since it required the defense to prove self-defense by “credible evidence”, an impermissible burden. In footnote 14, the Court found they did not condone the use of the instruction given without a Kirtley instruction also, but since a Kirtley instruction was not offered by the defendant at trial and no objection was made to the one given, the issue was waived.

“In State v. Kirtley we adopted the majority rule in America that the defendant need not prove self-defense by a preponderance of the evidence in order to place the burden of proof on the prosecution, but merely must produce sufficient evidence to create a reasonable doubt on the issue.” State v. Clark, 171 W.Va. 74, 297 S.E.2d 849, 851 (1982).

“Once the defendant meets his initial burden of producing some evidence of self-defense, the State is required to disprove the defense of self-defense beyond a reasonable doubt.” Syl. pt. 6, State v. McKinney, 178 W.Va. 200, 358 S.E.2d 596 (1987); Syl. pt. 8, State v. Gibson, 181 W.Va. 747, 384 S.E.2d 358 (1989); See, State v. Mullins, 171 W.Va. 542, 301 S.E.2d 173, 176 (1982); See, State v. Thayer, 172 W.Va. 356, 305 S.E.2d 313, 316 (1983); State v. Daniel, 182 W.Va. 643, 391 S.E.2d 90 (1990); State v. Wykle, 208 W.Va. 369, 540 S.E.2d 586 (2000).

In State v. McClanahan, 193 W.Va. 70, 454 S.E.2d 115 (1994) it appeared to the Court the appellant was arguing that where a defendant has reasonably raised the issue of self-defense, the State has an affirmative burden of advancing rebuttal evidence to rebut the defendant's evidence. The appellant appeared to argue that because the State did not adduce rebuttal evidence, her conviction for unlawful wounding could not stand. The Court found "[t]he real thrust of the holding in State v. Kirtley [162 W.Va. 249, 252 S.E.2d 374 (1978)] . . . is that the overall evidence adduced when viewed in the light most favorable to the State, must be sufficient to persuade a jury beyond a reasonable doubt that the defendant did not act in self defense. . . . The State's burden is one of proof and not one of the introduction of formal rebuttal evidence." See also, State v. Headley, 210 W.Va. 524, 558 S.E.2d 586 (2001).

"In this Court's view, the State in the present case presented evidence suggesting that the defendant did not act under an apprehension of danger existing at the time she shot her husband, but rather as the result of some pre-existing resentment over his prior behavior. This evidence, if believed by the jury, could, in this court's view, reasonably have persuaded the jury that the defendant did not act in self-defense. In essence, the State did advance evidence which, if persuasive, could have proven, and apparently did prove to the jury beyond a reasonable doubt, that the defendant did not act in self-defense."

The appellant's assignment of error was found to be without merit.

COMMENTS

1. **In General** - In State v. Smith, 198 W.Va. 441, 481 S.E.2d 747 (1996), the appellant was convicted of second degree murder. She contends on appeal, among other things, that the trial court erred in refusing to give instructions to the jury concerning self-defense and voluntary manslaughter. In that regard, the appellant contends the trial court erred in refusing to admit evidence concerning the victim's prior acts of misconduct or violence toward the appellant or her children. In particular, she contends the trial court erred in refusing to allow the appellant's expert to testify that, although the appellant did not meet the criteria of the battered woman syndrome, she feared the decedent. On the facts of this case where the victim was sleeping while the appellant held the rifle and the appellant's son pulled the trigger, the Court was of the opinion that the circuit court did not commit error in refusing to instruct the jury on self-defense. The Court also held that the trial court did not abuse its discretion in refusing to instruct the jury upon voluntary manslaughter. The Court again noted that the victim was asleep at the time of the killing and that although the evidence

indicated the victim struck the appellant earlier in the day, the record did not indicate that any physical altercation took place between the appellant and the victim the evening of the killing. The Court concluded the evidence did not warrant the giving of a voluntary manslaughter instruction.

In State v. Wade, 200 W.Va. 637, 490 S.E.2d 724 (1997), the appellant was convicted of felony-murder with mercy. He contends the circuit court erred in refusing to instruct the jury regarding self-defense and provocation. The appellant also argued that the trial judge erred in refusing to instruct the jury on second-degree murder, voluntary manslaughter, and involuntary manslaughter as lesser included offenses of felony-murder. The Court found the circuit court properly denied the appellant's request for such instructions.

Syl. pt. 2 - Self-defense and provocation instructions are not available in response to a charge of felony-murder where the predicate felony is the delivery of a controlled substance.

Syl. pt. 4 - As a matter of law, second-degree murder, voluntary manslaughter, and involuntary manslaughter are not lesser included offenses of felony-murder.

After setting forth the elements of involuntary manslaughter, the Court noted they had previously indicated that involuntary manslaughter is not a lesser included offense to felony-murder in State v. Humphrey, 177 W.Va. 264, 270, 351 S.E.2d 613, 619 (1986). Moreover, the Court perceived a difference between felony-murder and involuntary manslaughter is found in the degree of the unlawful act in which the defendant is engaged at the time of the killing. The Court found that if the unlawful act is one of the felonies enumerated in W.Va. Code, 61-2-1 (1991)(Repl.Vol. 1992) then the defendant would be guilty of felony-murder. If, on the other hand, the defendant is engaged in an unlawful act other than those designated as predicates to felony-murder, then he or she would be guilty of involuntary manslaughter, so long as the killing was unintentional. Thus, the Court concluded that involuntary manslaughter is not a lesser included offense of felony-murder.

Evaluating the appellant's sufficiency of the evidence contention, the Court found that they could not say that the evidence was insufficient for the jury to find beyond a reasonable doubt that the offense of the delivery of a controlled substance had occurred, that the appellant had participated in such offense as a principal in the second degree, that a death had occurred and that the felony offense and the homicide were parts of one continuous transaction. The Court found the verdict was supported by the evidence.

2. **Self-defense as a Matter of Law** - Ordinarily the use of self-defense is a jury question, nevertheless, if the jury's verdict is manifestly against the weight of the evidence, then it must be set aside. Syl. pt. 5, State v. McMillion, 104 W.Va. 1, 138 S.E. 732 (1927).

This is particularly true where the State bears the burden of proving the lack of self-defense beyond a reasonable doubt. State v. Baker, 177 W.Va. 769, 356 S.E.2d 862 (1987). See also, State v. Gialdella, 163 W.Va. 60, 254 S.E.2d 685 (1979); State v. W.J.B., 166 W.Va. 602, 276 S.E.2d 550 (1981).

3. **Duty to Retreat** - See footnote 2, "A man may repel force by force, in defense of his person or his property (home), against one who manifestly endeavors by violence or surprise to commit a known felony upon either, and in these cases is not obliged to retreat, but may pursue his adversary until he has freed himself from all danger. Stoneham v. Commonwealth, 86 Va. 523, 10 S.E. 238 (1889)." State v. Phelps, 172 W.Va. 797, 310 S.E.2d 863 (1983).

"What one may lawfully do in defense of himself - when threatened with death or great bodily harm, he may do in behalf of a brother; but if the brother was in fault in provoking an assault, that brother must retreat as far as he safely can, before his brother would be justified in taking the life of his assailant in his defense of the brother. But if the brother was so drunk as not to be mentally able to know his duty to retreat, or was physically unable to retreat, a brother is not bound to stand by and see him killed or suffer great bodily harm, because he does not under such circumstances retreat. It is only the faultless, who are exempt from the necessity of

retreating while acting in self-defense. Those in fault must retreat, if able to do so, or for other reasons they are unable to retreat, they will be excused by the law for not doing so.” State v. Greer, 22 W.Va. 800, at 819 (1883), quoted in State v. Saunders, 175 W.Va. 16, 330 S.E.2d 674 (1985).

The duty to retreat arises only in the event the defendant was the original aggressor. A person is not required to risk a retreat from an unjustified threatened attack. State v. Cain, 20 W.Va. 679 (1882); Syl., State v. McCallister, 111 W.Va. 440, 162 S.E. 484 (1932); State v. Zannino, 129 W.Va. 775, 41 S.E.2d 641 (1947).

A person in his own home who is subject to an unlawful intrusion and placed in immediate danger of serious bodily harm or death has no duty to retreat but may remain in place and employ deadly force to defend himself. State v. Preece, 116 W.Va. 176, 179 S.E. 524 (1935); State v. Thornhill, 111 W.Va. 258, 161 S.E. 431 (1931); State v. W.J.B., 166 W.Va. 602, 276 S.E.2d 550 (1981); State v. Phelps, 172 W.Va. 797, 310 S.E.2d 863 (1983).

This right of a person to defend himself in his home without retreating exists even if at the time of the attack the defendant is engaged in an illegal business in his home. State v. Bates, 181 W.Va. 36, 380 S.E.2d 203, 206 (1989).

See, State v. Gibson, 186 W.Va. 465, 413 S.E.2d 120 (1991).

“[W]hen there is a quarrel between two or more persons and both or all are in fault, and a combat as a result of such quarrel takes place and death ensues as a result; in order to reduce the offense to killing in self-defense, two things must appear from the evidence and circumstances in the case: first, that before the mortal shot was fired the person firing the shot declined further combat, and retreated as far as he could with safety; second, that he necessarily killed the deceased in order to preserve his own life or to protect himself from great bodily harm....” Syl. pt. 6, in part, State v. Foley, 131 W.Va. 326, 47 S.E.2d 40 (1948). Syl. pt. 1, State v. Knotts, 187 W.Va. 795, 421 S.E.2d 917 (1992).

4. **Defense of Another** - “The right of self-defense may be exercised in behalf of a brother or a stranger. Syl. pt. 15, State v. Greer, 22 W.Va. 800 (1883).” Syl. pt. 1, State v. Saunders, 175 W.Va. 16, 330 S.E.2d 674 (1985).

“The validity of a claim of defense of another, like the question of self-defense, is properly a matter for the jury’s determination.” Syl. pt. 3, State v. Saunders, 175 W.Va. 16, 330 S.E.2d 674 (1985).

See also, State v. Schaefer, 170 W.Va. 649, 295 S.E.2d 814 (1982); State v. Wisman, 93 W.Va. 183, 116 S.E. 698 (1923); State v. Collins, 154 W.Va. 771, 180 S.E.2d 54 (1971); State v. Banks, 99 W.Va. 711, 129 S.E. 715 (1925); State v. Whitt, 96 W.Va. 268, 122 S.E. 742 (1924); State v. Waldron, 71 W.Va. 1, 75 S.E. 558 (1912); State v. Wilson, 145 W.Va. 261, 114 S.E.2d 465 (1960); State v. Zannino, 129 W.Va. 775, 41 S.E.2d 641 (1947).

The Court found no error in reference to the following instruction which was given in State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996):

The right of self-defense may be exercised on behalf of another. What the defendant may lawfully do in defense of herself, when threatened with death or great bodily harm, she may do in behalf of another; but if the other person was at fault in provoking an assault, the other person must retreat as far as she or he safely can, before the defendant would be justified in taking the life of the assailant in defense of another person. It is only the faultless who are exempt from the necessity of retreating while acting in self-defense. Those at fault must retreat, if able to do so; if from the fierceness of the attack or for other reasons they are unable to retreat, they will be excused by the law for not doing so.

In State v. McKenzie, 197 W.Va. 429, 475 S.E.2d 521 (1996), the appellant was convicted of second degree murder. He contended on appeal that the trial court erred in refusing his jury instruction in which it was stated that mere evidence of a coverup does not indicate that the absolute defense of self-defense of another is not applicable. By Per Curiam opinion, the Court found there was no error in refusing the appellant’s offered instruction since defense of another was covered by the charge given by the Court. The trial court instructed the jury:

The Court instructs the jury that when a person reasonably apprehends that another intends to attack him or another for the purpose of killing or doing serious bodily harm to him or another, then such person has a right to arm himself for his own necessary self-protection, or the protection of another, and in such case, no inference of malice, willfulness, deliberation and intent can be drawn from the fact. If Patricia Jones was not the aggressor, and the defendant Timothy Mark McKenzie, had reasonable grounds to believe and actually did believe that she was in imminent danger of death or serious bodily harm from which he could save her only by using deadly force against Stephanie Cain, the defendant, Timothy Mark McKenzie, had the right to employ deadly force in order to defend Patricia Jones.

5. **Defense of Habitation** - “The occupant of a dwelling is not limited in using deadly force against an unlawful intruder to the situation where the occupant is threatened with serious bodily injury or death, but he may use deadly force if the unlawful intruder threatens imminent physical violence or the commission of a felony and the occupant reasonably believes deadly force is necessary.” Syl. pt. 2, State v. W.J.B., 166 W.Va. 602, 276 S.E.2d 550 (1981).

“The reasonableness of the occupant’s belief and actions in using deadly force must be judged in the light of the circumstances in which he acted at the time and is not measured by subsequently developed facts.” Syl. pt. 3, State v. W.J.B., 166 W.Va. 602, 276 S.E.2d 550 (1981).

See also, State v. Schaefer, 170 W.Va. 649, 295 S.E.2d 814 (1982); State v. Hughes, 197 W.Va. 518, 476 S.E.2d 189 (1996).

An instruction given by the Court was erroneous in that it failed to fully inform the jury on the law with respect to crime prevention in one’s home as a justifiable defense to homicide. The Court noted one of the trial court’s instructions failed to mention the alternative justification for the use of deadly force, i.e. prevention or termination of a felony in one’s home. State v. Phelps, 172 W.Va. 797, 310 S.E.2d 863 (1983).

The defendant did not urge below nor on appeal that as the co-owner of the bar she had a special standing to utilize self-defense similar to the occupant of a home, so the issue was not addressed by the Court. See syllabus point 7, State v. Laura, 93 W.Va.

250, 116 S.E. 251 (1923). See also State v. Sharpe, 18 N.C. App. 136, 196 S.E.2d 371 (1973); Commonwealth v. Johnston, 438 Pa. 485, 263 A.2d 376 (1970); Annot., 41 A.L.R.3d 584 (1972). Footnote 2, State v. Baker, 177 W.Va. 769, 356 S.E.2d 862 (1987).

6. **Multiple Assailants** - “Where, in a trial for murder, there is competent evidence tending to show that the accused believed, and had reasonable grounds to believe, that he was in danger of losing his life or suffering great bodily harm at the hands of several assailants acting together, he may defend against any or all of said assailants, and it is reversible error for the trial court to refuse to instruct the jury to that effect. Syl. pt. 4, State v. Foley, 128 W.Va. 166, 35 S.E.2d 854 (1945).” Syl., State v. Green, 157 W.Va. 1031, 206 S.E.2d 923 (1974).
7. **Unintentional Killing of Third Party** - “If the circumstances are such that they would excuse the killing of an assailant in self-defense, the emergency will be held to excuse the person assailed from culpability, if in attempting to defend himself he unintentionally kills or injures a third person.” 40 Am.Jur.2d Homicide § 144. State v. Green, 157 W.Va. 1031, 206 S.E.2d 923, 926 (1974).

See, State v. Cobb, 166 W.Va. 65, 272 S.E.2d 467 (1980).

8. **Resisting Arrest** - “In making a lawful arrest of a misdemeanor, or in preventing the escape of one under arrest, an officer is justified in taking the life of the misdemeanor, when he is resisted by him in such manner that the officer believes, upon reasonable grounds, that he is in danger of death or great bodily harm.” Syl., State v. Murphy, 106 W.Va. 216, 145 S.E. 275 (1928). State v. Reppert, 132 W.Va. 675, 52 S.E.2d 820, 830 (1949).
9. **Voluntary Manslaughter vs. Self-defense** - “The relationship between voluntary manslaughter and a claim of self-defense is based on the degree of provocation, as we stated in State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219, 225 n.7 (1978): ‘The term “provocation” as it is used to reduce murder to voluntary manslaughter, consists of certain types of acts committed against the defendant which would cause a reasonable man to kill.... One of the most common types of provocation is an

unprovoked assault on the defendant who responds in the heat of passion by killing the assailant. This ordinarily limits the degree of culpability to voluntary manslaughter. State v. Morris, 142 W.Va. 303, 95 S.E.2d 401 (1956). This situation is to be distinguished from the occurrence where the assault is not only unprovoked, but so extreme that the defendant reasonably views that his life will be taken or that great bodily harm will be done him, and he kills the assailant. Here self-defense, if found, will result in his acquittal. State v. Cain, 20 W.Va. 679, 700 (1882); see also State v. Green, 157 W.Va. 1031, 206 S.E.2d 923, 926 (1974).” Footnote 2, State v. Clayton, 166 W.Va. 782, 277 S.E.2d 619 (1981).

10. **Self-defense as a Defense to Assault** - “The general rule is that a person accused of an assault does not lose his right to assert self-defense, unless he said or did something calculated to induce an attack upon himself.” Syl. pt., State v. Smith, 170 W.Va. 654, 295 S.E.2d 820 (1982); State v. Brooks, ___ W.Va. ___, 591 S.E.2d 120 (2003).

“The general rule is broadly stated in 6A C.J.S. Assault and Battery § 91 (1975)”:

The provoking act on the part of accused, depriving him of the right of self-defense, need not be such as would give the party attacking him such right; but, before one accused of assault can be deprived of his right of self-defense on the ground of provoking the difficulty, he must have said or done something, for the purpose of inducing an attack upon him, which was calculated to bring about that result. (Footnote references omitted.)

“Our cases recognize the general common law rule that one who is at fault or who is the physical aggressor can not rely on self-defense; but we have not located a discussion about particular language that may result in forfeiture of the right to claim self-defense.”

“Courts elsewhere have seldom discussed this point; but the Supreme Court of Iowa, reversing a second-degree murder conviction, stated the rule as follows:

‘Defamation or opprobrious epithets, not uttered for the purpose of bringing about opportunity to kill or do great bodily harm, do not constitute such an act of aggression or provocation as to deprive the defendant of the right to claim self-defense.’” State v. Davis, 209 Iowa 524, 528 N.W. 37, 39 (1929).

State v. Smith, *supra*, at 821, 822.

The following instruction, given in Bowman v. Leverette, 169 W.Va. 589, 289 S.E.2d 435 (1982) was found not to use or create any presumptions:

“The Court instructs the jury that mere words, however insulting or opprobrious they may be, communicated directly or indirectly to the defendant, will neither justify or (sic) excuse he defendant from the commission of an assault upon a person, and as a matter of law, where the defendant has committed such an assault with a deadly weapon, proof that the victim or his wife uttered such words is not sufficient provocation to justify such an assault.”

In State v. Brooks, ___ W.Va. ___, 591 S.E.2d 120 (2003), the Court held that the trial court properly refused a proffered instruction which informed the jury that an initial aggressor can become a victim during the course of an altercation and may thus rely on self-defense. The Court reaffirmed the holdings of Smith, *supra*, and State v. Wykle, 208 W.Va. 369, 540 S.E.2d 586 (2000), holding that a person accused of an assault does not lose his or her right to assert self-defense, unless he or she said or did something calculated to induce an attack.

11. **Evidence of Character and Reputation of Victim** - In State v. Mitchell, ___ W.Va. ___, 590 S.E.2d 709 (2003), the Court, citing Syllabus Point 3, Dietz v. Legursky, 188 W.Va. 526, 425 S.E.2d 202 (1992), noted:

“In a homicide case, malicious wounding, or assault where the defendant relies on self-defense or provocation, under Rule 404(a)(2) and Rule 405(a) of the West Virginia Rules of Evidence, character evidence in the form of opinion testimony may be admitted to show that the victim was the aggressor if the probative value of such evidence is not outweighed by the concerns set forth in the balancing test of Rule 403.”

DEFENSES ENTRAPMENT ¹

The Court instructs the jury that the defendant is relying upon the defense of “Entrapment”. A person is entrapped when the person has no previous intention to violate the law and is persuaded to commit a crime by agents of the State of West Virginia. On the other hand, where a person is predisposed to commit the offense when first contacted by state agents, the fact that the State afforded him or her the opportunity to do so does not constitute entrapment. Once the defense of entrapment is raised, the burden is on the State to prove beyond a reasonable doubt that the defendant was not entrapped. ²

There are two elements to the defense of entrapment: (1) an inducement by the State of West Virginia to commit the crime, and (2) the absence of predisposition on the part of the defendant.

The second part of the defense of entrapment concerns predisposition of the defendant at the time when he or she is first approached by state agents. Predisposition is a state of mind which readily responded to the opportunity furnished by the officer or his or her agent to commit the offense charged.

If the evidence in this case leaves you with a reasonable doubt whether the defendant had any intent to commit the crime except for the inducement or persuasion on the part of some state officer or agent, then it is your duty to find the defendant not guilty.

FOOTNOTES

¹ In footnote 4 of his concurring opinion in State v. Houston, 197 W.Va. 215, 475 S.E.2d 307 (1996) Justice Cleckley suggests a simple instruction such as the one set forth above. He notes, however, that this instruction is incomplete.

Carefully read State v. Houston, 197 W.Va. 215, 475 S.E.2d 307 (1996) before offering an instruction on the defense of entrapment.

² But see, Syl. pt. 4, State v. Houston, 197 W.Va. 215, 475 S.E.2d 307 (1996):

When a defendant invokes entrapment as a defense to the commission of a crime, the defendant has the burden of offering some competent evidence that the government induced the defendant into committing that crime. Once the defendant has met this burden of offering some competent evidence of inducement, the burden then shifts to the prosecution to prove beyond a reasonable doubt that the defendant was otherwise predisposed to commit the offense.

COMMENTS

1. Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provided what appears to be a favorable opportunity is not entrapment...² If, then you should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit crimes such as are charged in the indictment, whenever opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then you should find that the defendant is not a victim of entrapment.

On the other-hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find him not guilty.

Footnote, State v. Taylor, 175 W.Va. 685, 337 S.E.2d 923, at 925 (1985). The Court notes this instruction appears to be widely accepted as a correct and complete statement of the law - See I F. Cleckley, Handbook on West Virginia Criminal procedure. I-409 (1985).

2. State v. Houston, 197 W.Va. 215, 475 S.E.2d 307 (1996) contains the following key provisions:

Syl. pt. 1 - “The unconscionable government conduct doctrine is separate and distinct from the defense of entrapment. We specifically overrule State v. Knight, 159 W.Va. 924, 230 S.E.2d 732 (1976) and its progeny to the extent that Knight holds that a trial court can apply both the subjective and objective tests as part of an entrapment defense, and instead hold that the defense of entrapment is fully contained within the subjective test standard. Any inquiry into the outrageous or unconscionable conduct of the police, which was previously considered under our two-tiered analysis, is now considered under a separate constitutional due process analysis.”

Syl. pt. 2 - “The exclusive entrapment defense to criminal prosecution in West Virginia is the subjective standard, which occurs where the design or inspiration for the offense originates with law enforcement officers who procure its commission by an accused who would not have otherwise perpetrated it except for the instigation or inducement by the law enforcement officers. To the extent that State v. Knight, 159 W.Va. 924, 230 S.E.2d 732 (1976) and its progeny are inconsistent with this position, they are expressly overruled.”

Syl. pt. 3 - “The significance of the distinction between outrageous government conduct and entrapment is that the existence of a predisposition on the part of the accused to commit a crime, while possibly fatal to a claim of entrapment, does not serve to eradicate a due process claim based on outrageous government conduct.”

Syl. pt. 4 - “When a defendant invokes entrapment as a defense to the commission of a crime, the defendant has the burden of offering some competent evidence that the government induced the defendant into committing that crime. Once the defendant has met this burden of offering some competent evidence of inducement, the burden then shifts to the prosecution to prove beyond a reasonable doubt that the defendant was otherwise predisposed to commit the offense.”

Syl. pt. 5 - “While the issue of the defendant’s predisposition to commit the crime is usually reserved for the jury, a trial court may enter a judgment of acquittal if the State fails to rebut the defendant’s evidence of inducement, or fails to prove the defendant’s predisposition to commit the offense beyond a reasonable doubt. Syllabus, State v. Hinkle, 169 W.Va. 271, 286 S.E.2d 699 (1982).”

Syl. pt. 6 - “Upon review of a trial court’s refusal to enter a judgment of acquittal based on the defense of entrapment, we will examine the evidence in the light most favorable to the prosecution, and will reverse only if no rational trier of fact could have found predisposition to exist beyond a reasonable doubt.”

Syl. pt. 7 - “The formula for proving the separate and distinct claim of outrageous government conduct shall be that the defendant must show that the conduct of the government in inciting the defendant to commit the crime was so egregious and reprehensible that it violates notions of fundamental fairness, shocking to the universal sense of justice, as mandated by the due process clauses of the Fifth Amendment of the United States Constitution and article three, section ten of the West Virginia Constitution. If outrageous government conduct rising to a due process violation is proven, the State shall be barred from any prosecution relating to a crime resulting from that conduct.”

Syl. pt. 8 - “In determining whether government or its agents engaged in outrageous conduct rising to the level of a due process violation, the following factors shall be considered: 1) whether the government’s conduct went beyond that of mere inducement, such that the government must have “created” or “manufactured” the crime solely for the purpose of generating criminal charges and without any motive to prevent further crime or protect the public at large; 2) whether the government, in procuring the defendant’s commission of the crime, engaged in criminal or improper conduct repugnant to our sense of justice; and 3) whether the government appealed to humanitarian instincts such as sympathy, past friendship, or temptation by exorbitant gain to overcome the defendant’s reluctance to commit the offense.”

Syl. pt. 9 - “When a defendant appeals a trial court’s refusal to find as a matter of law that the government acted outrageously in violation of the defendant’s due process rights, we will review that decision *de novo* to the extent that if there is insufficient evidence of outrageous government conduct so as to violate notions of fundamental fairness, shocking to the universal sense of justice, the ruling of the trial court will not be reversed. Any factual determinations made by the trial court in issuing its ruling on the claim of outrageous government conduct will be reviewed under a clearly erroneous standard.”

3. See Jacobson v. U.S., 503 U.S. 540, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992).
4. Entrapment, as a defense to criminal prosecution, occurs where the design or inspiration for the offense originates with law enforcement officers who procure its commission by an accused who would not have otherwise perpetrated it except for the instigation or inducement by the law enforcement officers. Syl. pt. 3, State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976); Syl. pt. 1, State v. Maynard, 170 W.Va. 40, 289 S.E.2d 714 (1982); Syl. pt. 1, State v. Taylor, 175 W.Va. 685, 337 S.E.2d 923 (1985); Syl. pt. 3, State v. Harshbarger, 170 W.Va. 401, 294 S.E.2d 254 (1982); Syl. pt. 1, State v. Knight, 159 W.Va. 924, 230 S.E.2d 732 (1976); Syl. pt. 1, State v. Ashworth, 170 W.Va. 205, 292 S.E.2d 615 (1982).
5. By traditional definition, entrapment occurs when police officers induce a person to commit a crime not contemplated by such person, for the mere purpose of prosecuting him. The defense may be asserted where the criminal design originates in the mind of the police rather than in that of the accused. State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976).
6. Entrapment may be defined as the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting criminal prosecution against him. In order for a defendant to successfully invoke this doctrine, it must appear that the criminal intent - ‘the genesis of the idea’ - was conceived by the entrapping person, and that the accused, without prior intention to commit the crime, was inveigled into its commission by the entrapper. State v. Jarvis, 105 W.Va. 499, 143 S.E. 235 (1928); quoted in State v. Basham, *supra*, at 58.

7. It is perfectly proper for police officers to afford opportunities for the commission of crime without thereby prejudicing the subsequent prosecution of the person who commits the offense. “Artifice and stratagem may be employed to catch those engaged in criminal enterprises.” But when the limits of proper crime detection are exceeded and the inspiration for an unlawful scheme originates with police officers themselves who then persuade an otherwise innocent person to commit crime or to participate in its commission, the State is estopped by public policy from pursuing a prosecution for the conduct so induced by its own agents. Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed 413 (1932). Quoted in State v. Basham, 159 W.Va. 404, 223 S.E.2d 53, at 58(1976); See, State v. Nelson, 189 W.Va. 778, 434 S.E.2d 697 (1993).

8. In State v. Nelson, 189 W.Va. 778, 434 S.E.2d 697 (1993), the jury was instructed as follows:

The Court instructs the jury that there is nothing improper in the use, by the Sheriff’s Department, of decoys, undercover agents and informants to invite the exposure of willing criminals and to present an opportunity to one willing to commit a crime. If you believe the Sheriff’s Department did nothing more than afford an opportunity for the commission of the crime charged against (the defendant) entrapment has not occurred.

The Court found this instruction was consistent with the teaching of State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976) and with general principles of the law on entrapment. In addition, the Court found the Court also gave instructions to the jury which set forth the defense of entrapment and the burden of proof for entrapment. The Court found no error.

Entrapment occurs only when the criminal conduct was ‘the product of the creative activity’ of law-enforcement officials. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). Quoted in State v. Basham, 159 W.Va. 404, 223 S.E.2d 53, at 58 (1976).

In State v. Nelson, 189 W.Va. 778, 434 S.E.2d 697 (1993), the defense proposed the following instruction:

The Court instructs the jury that a law enforcement agent or informant's appeal to sympathy may constitute entrapment where it generates a motive for committing the offense other than ordinary intent. Therefore, if you should find that (the defendant s) motive for committing the offense alleged was generated by a law enforcement agent or informant's appeal to her sympathy, then it is your duty to find her not guilty.

The trial court amended the instruction by deleting the second sentence and giving only the first portion. The Court found no error in such modification.

9. **Inconsistent Defenses** - "In a criminal case, even though the defendant denies the commission of the offense, he is still entitled to rely on the defense of entrapment if the State injects evidence of entrapment into the case." Syl. pt. 2, State v. Knight, 159 W.Va. 924, 230 S.E.2d 732 (1976).

The general rule is that entrapment is not available as a defense when the accused denies the essential elements of the offense. The Court limited the above exception to cases in which the State's case in chief injects evidence of entrapment into the case.

"Under his pleas of not guilty, a defendant in a criminal case is entitled to have the jury consider, under proper instructions, every theory of defense to which the evidence or the reasonable inferences to be drawn therefrom may entitle him. There is no need to treat the defense of entrapment as an exception requiring the application of a different rule." Syl. pt. 1, State v. Adkins, 167 W.Va. 626, 280 S.E.2d 293 (1981).

See Mathews v. U.S., 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988).

DEFENSES INTOXICATION / DRUG USE ¹

Voluntary intoxication is generally never an excuse for a crime. However, where a certain state of mind or intent is an essential element of the crime, an accused is not guilty if, at the time of the commission of the alleged criminal act, he was so intoxicated that he was unable to form the essential intent or have the essential mental state.

In this case, the defendant is charged with _____. One of the essential elements of _____ is _____ (e.g. specific intent to kill, acting with malice, premeditation, or deliberation). The defendant contends at the time of the alleged offense, he was unable to _____, because he was intoxicated.

If you find the defendant was incapable of _____ because he was intoxicated, then you must find the defendant not guilty of _____.

If you have any reasonable doubt as to whether or not the defendant was so intoxicated that he was unable to _____, you must find the defendant not guilty of _____.

FOOTNOTES

¹ In State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990), the following instructions on intoxication were given:

Footnote 7 - State's instruction number 7 states the intoxication defense as set out in State v. Brant, 162 W.Va. 762, 766-67, 252 S.E.2d 901, 903-04 (1979): The Court instructs the jury that it is no defense to a criminal act that the defendant's intoxication or use of drugs reduced his or her inhibitions, making the commission of a criminal act more likely. Further, a defendant's claim of intoxication or drug use can never be used as a defense when the defendant claims that his or her capacity to control his or her actions were diminished, but can only be used when there is demonstrated a total lack of capacity so that the defendant's bodily machine completely failed. Furthermore, for intoxication to be used as a defense where a weapon is used, it must affirmatively appear that the defendant had no predisposition to commit the crime or to engage in aggressive anti-social conduct which the intoxication merely brought to the forefront. (emphasis in original).

Footnote 8 - The defendant's instruction number 11 given to the jury concerning the intoxication defense stated the law according to State v. Keeton, 166 W.Va. 77, 272 S.E.2d 817 (1980) and was as follows: "The Court instructs the jury that if you believe from the evidence that Johnny Miller killed Lorelei Reed as charged in the indictment, and at the time of such killing Johnny Miller was under the influence of alcohol voluntarily taken by him, then such intoxication is in law no excuse for the act done by Johnny Miller unless you believe from the evidence that such intoxication was such as did, in fact, deprive him at the time of the killing of the element of premeditation, in which event you can find Johnny Miller guilty of no greater offense than murder in the second degree."

The Court found both instructions were correct statements of law, but cautioned that the law set forth in Brant was limited to the facts of that case which revealed a total absence of malice on the part of the defendant and demonstrated appellant's total lack of capacity due to intoxication. Although the Court found no error in giving the Brant instruction, they found courts should normally give this type of instruction only when faced with facts similar to the facts in that case. The preferable instruction was found in defendant's instruction 11 based on syl. pt. 2 of Keeton. See COMMENTS, number 1, below.

COMMENTS

1. As a practical matter, there appears to be little distinction between the defense of voluntary intoxication and the defense of diminished capacity. (See page 448 for an instruction on diminished capacity). Each addresses specific factors which may affect a defendant's ability to form a requisite state-of-mind, such as premeditation or malice, at the time of the commission of an offense.

In State v. Joseph, ____ W.Va. ____, 590 S.E.2d 718 (2003), the Court formally adopted the defense of diminished capacity. Syllabus Point 3 of this opinion contains an interesting caveat, where the Court observes that, "[t]his defense is asserted ordinarily when the offense charged is a crime for which there is a lesser included offense." While the court's opinion does not limit this defense to such cases, it does present a potential strategic challenge to the attorney regarding the use of a lesser included offense instruction.

2. “Voluntary drunkenness is generally never an excuse for a crime, but where a defendant is charged with murder, and it appears that the defendant was too drunk to be capable of deliberating and premeditating, in that instance intoxication may reduce murder in the first degree to murder in the second degree, as long as the specific intent did not antedate the intoxication.’ Syllabus Point 2, State v. Keeton, 166 W.Va. 77, 272 S.E.2d 817 (1980).” Syl. pt. 8, State v. Hickman, 175 W.Va. 709, 338 S.E.2d 188 (1985). State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990). Syl. pt. 2, State v. Bush, 191 W.Va. 8, 442 S.E.2d 437 (1994).

“Intoxication to reduce an unlawful homicide from murder in the first degree, must be such as to render the accused incapable of forming an intent to kill, or of acting with malice, premeditation or deliberation.’ Syl. pt. 4, State v. Burdette, 135 W.Va. 312, 63 S.E.2d 69 (1950).” Syl. pt. 3, State v. Keeton, 166 W.Va. 77, 272 S.E.2d 817 (1980).

“Where there is evidence in a murder case to support the defendant’s theory that his intoxication at the time of the crime was such that he was unable to formulate the requisite intent to kill, it is error for the trial court to refuse to give a proper instruction presenting such a theory when requested to do so.” Syl. pt. 4, State v. Keeton, 166 W.Va. 77, 272 S.E.2d 817 (1980).

The Court found the instruction offered by the defendant on intoxication was incorrect, but the court’s failure to give some instruction on intoxication when it was the defendant’s primary defense was plain error.

“While it is true that voluntary drunkenness does not ordinarily excuse a crime, State v. Robinson, 20 W.Va. 713 (1882) it may reduce the degree of the crime or negate a specific intent. Wheatley v. U.S., 159 F.2d 599 (4th Cir. 1946). The trial court’s denial of the requested instruction regarding the defendant’s ability to form the proper intent for first degree murder erased the possibility of a charge of second degree murder. Our Court has stated that, ‘if a sane man, not having voluntarily made himself drunk for the purpose of committing crime, does, while in a state of such

gross intoxication as to render him incapable of deliberation, commit a homicide, he is guilty of no higher offense than murder in the second degree.’ State v. Kidwell, 62 W.Va. 466, 471, 59 S.E. 494, 496 (1907).”

“...As a general rule we have held that the level of intoxication must be ‘such as to render the accused incapable of forming an intent to kill, or of acting with malice, premeditation or deliberation’, syl. pt. 1, State v. Davis, 52 W.Va. 224, 43 S.E. 99 (1903); however, where the weapon was non-deadly, namely, an automobile rather than a knife or a gun the conclusion that homicide was intended is not as readily reached.” State v. Keeton, at 820, 821.

3. In State v. Brant, 162 W.Va. 762, 252 S.E.2d 901 (1979), the Court made the following observations and statements regarding voluntary intoxication:

“...In effect, on the record before us, we must conclude that the human machine broke down so completely that no malice could be inferred notwithstanding the use of a deadly weapon.”

“We do not in any way imply by the holding of this case that we are departing from our traditional rule which denies the legitimacy of intoxication as a defense or mitigating circumstance in a criminal case. That rule is founded on the wise recognition that in most cases voluntary intoxication reduces the individual’s inhibitions to anti-social activity making the commission of a criminal act more likely. A rule which permits a defendant to plead that because of his intoxication his capacity to control himself or to form a specific intent was diminished would provide every would-be malefactor with a convenient excuse which would appear sufficiently reasonable to confuse any jury. Heretofore, however, we have permitted intoxication to be considered by the jury to reduce first degree murder to second degree murder because it can negate the element of premeditation and deliberation required for a conviction of first degree murder, State v. Robinson, 20 W.Va. 713 (1882) and that rule will continue to apply. Furthermore, it has generally been held that intoxication will serve as a defense to a specific intent crime such as burglary, when it appears that the defendant was so

incapacitated that he could not formulate the intent to commit a felony after breaking and entering. State v. Phillips, 80 W.Va. 748, 93 S.E. 828 (1917). Total incapacitation is what confronts us in this case...”.

“What makes the case before us different from almost every other case in which intoxication is raised is that in the case before us there was no evidence of malice apart from the use of a deadly weapon and there was affirmative evidence of absence of malice presented by the State’s own witnesses; therefore, the intoxication did not have the effect of reducing the appellant’s inhibitions so that preexisting malice or disposition to anti-social conduct could rise to the surface and be acted upon, as is the usual case with intoxication.”

“...intoxication can never be used as a defense where it is alleged that there was *diminished capacity* except where previous exceptions apply, but can only be used when there is demonstrated a *total* lack of capacity such that the bodily machine completely fails. Furthermore, where a weapon is involved it must affirmatively appear that the defendant had no predisposition to commit the crime or to engage in aggressive anti-social conduct which the voluntary intoxication brought to the forefront.”

4. “...The law seems clearly to be that only where the defendant is intoxicated to such a degree as to be thereby rendered incapable of forming an intent to kill, or willful premeditation and deliberation, will the degree of homicide be reduced from murder in the first degree, because of such intoxication...” State v. Burdette, 135 W.Va. 312, 63 S.E.2d 69 (1950).
5. In State v. Vance, 168 W.Va. 666, 285 S.E.2d 437 (1981), defendant’s instruction number 16 was given. The instruction stated, “although intoxication or drunkenness will never provide a legal excuse for the commission of a crime, the fact that a person may have been intoxicated at the time of the commission of a crime may negate the finding of specific intent. So evidence that a defendant acted while in a state of intoxication is to be considered in determining whether or not the defendant acted with specific intent as charged. If the evidence in the case leaves the jury with a reasonable doubt whether, because of the degree of intoxication, or the use of

medication or a combination of both, the mind of the accused was capable of forming, or did form, specific intent to commit the crime charged, the jury should acquit the accused.”

6. “The Court instructs the jury that if you believe from the evidence, that John A. A. M. Greer, the brother of the prisoner, provoked the deceased to make an assault upon him, the said John A. A. M. Greer, then said John A. A. M. Greer was bound to retreat, as far as possible, consistent with his own safety at the time, before the prisoner, James A. Greer, was justifiable in killing the deceased to save the life of said John A. A. M. Greer, or to protect him, said John A. A. M. Greer, from great bodily harm,...unless the jury believe from the evidence, that the said John A. A. M. Greer was so drunk as to be mentally incapable of knowing that it was his duty to retreat, or physically unable to retreat.” State v. Greer, 22 W.Va. 800, 818 (1883).
7. “In a case in which specific intent to do a forbidden act is essential to the commission of the offense, intoxication to the extent of deprivation of reason and will power constitutes a defense, if the act forbidden has not been completely performed so as legally to warrant an inference of such intent from the actual perpetration thereof.” Syl. pt. 1, State v. Phillips, 80 W.Va. 748, 93 S.E. 828 (1917).

“Such intoxication, if established by proof, precludes a finding of guilt of the breaking and entering of a building with intent to steal, when the proof shows only a breaking and entering, but not an actual taking nor any attempt to take.” Syl. pt. 2, State v. Phillips, 80 W.Va. 748, 93 S.E. 828 (1917).

“If, in such case, the proof of temporary dementia occasioned by intoxication is so full, clear, and decisive as to leave no room for a reasonable opinion to the guilty, contrary, the trial court should direct the jury to find the defendant not if requested to do so, and, if it has failed in that respect, it should sustain a motion, made in due time, to set aside the verdict and grant a new trial.” Syl. pt. 3, State v. Phillips, 80 W.Va. 748, 93 S.E. 828 (1917).

Offenses in which specific intent to do the forbidden act is not an essential element were never excused, at common law, by mere drunkenness of the perpetrator of the

act, even though it was so extreme as to wholly deprive him of his reason. (cites omitted) State v. Phillips, 80 W.Va. 748, 93 S.E. 828, 829 (1917).

8. “A person, who is intoxicated, may yet be capable of deliberation and premeditation; and if the jury believe from all the evidence in the case, that the prisoner willfully maliciously, deliberately and premeditatedly killed the deceased, they should find him guilty of murder in the first degree, although he was intoxicated at the time of the killing.” Syl. pt. 3, State v. Robinson, 20 W.Va. 713 (1882).

“A person who has formed a willful, deliberate and premeditated design to kill another, and in pursuance of such design voluntarily makes himself drunk for the purpose of nerving his animal courage for the accomplishment of design, and then meets the subject of his malice, when he is so drunk as not then to be able to deliberate on and premeditate the murder, and kills the person, it is murder in the first degree.” Syl. pt. 4, State v. Robinson, 20 W.Va. 713 (1882).

“A person, whether he be an habitual drinker or not, cannot voluntarily make himself so drunk as to become on that account irresponsible for his conduct during such drunkenness. He may be perfectly unconscious of what he does; and yet he is responsible. He may be incapable of express malice; but the law implies malice in such a case from the nature of the instrument used, the absence of provocation and other circumstances, under which the act is done.” Syl. pt. 5, State v. Robinson, 20 W.Va. 713 (1882).

“If a person kills another without provocation and through reckless wickedness of heart, but at the time of so doing his condition from intoxication is such as to render him incapable of doing a willful, deliberate and premeditated act, he is guilty of murder in the second degree.” Syl. pt. 6, State v. Robinson, 20 W.Va. 713 (1882).

“Where a statute establishes degrees of the crime of murder, and provides, that all willful, deliberate and premeditated, killing shall be murder in the first degree, evidence, that the accused was intoxicated at the time of the killing, is competent for

the consideration of the jury upon the question, whether the accused was in such a condition of mind as to be capable of deliberation and premeditation.” Syl. pt. 7, State v. Robinson, 20 W.Va. 713 (1882).

“As between the two offenses of murder in the second degree and manslaughter the drunkenness of the offender can form no legitimate matter of enquiry; the killing being voluntary, the offense is necessarily murder in the second degree, unless the provocation was of such a character, as would at common law reduce the crime to manslaughter; for which latter offense a drunken man is equally responsible as a sober one.” Syl. pt. 8, State v. Robinson, 20 W.Va. 713 (1882).

“An act done in accordance with a purpose previously formed is not necessarily an act done in pursuance of such previously formed purpose.” Syl. pt. 9, State v. Robinson, 20 W.Va. 713 (1882).

“If a man is temporarily insane from the effect of intoxication, then existing, of course it is impossible for him while in such a mental condition to deliberate and premeditate; and being in such a condition of mind, not having formed a previous purpose to kill his victim and in pursuance of such purpose, made himself voluntarily drunk to accomplish his design, he could not be convicted of murder in the first degree.” Syl. pt. 10, State v. Robinson, 20 W.Va. 713 (1882).

“...We think we are fully authorized under the authorities to say, that drunkenness is no excuse for crime; at common law the implied malice from his act would doom him to the scaffold, although he was too drunk, when he committed the deed, to harbor express malice. Now the only change made in the stringent rule of the common law is, that where under a statute, in order to constitute murder in the first degree, deliberation and premeditation are required upon the question of whether there was on the part of the prisoner deliberation and premeditation, the jury may consider the fact, that he was intoxicated at the time of the killing. The change goes no further. Upon the question of whether the prisoner is guilty of murder in the second degree or manslaughter, the jury are not permitted to consider the drunkenness of the prisoner at all.” State v. Robinson, 20 W.Va. 713, 740 (1882).

“The third instruction is: ‘If the jury believe from the evidence beyond a reasonable doubt, that the prisoner, though intoxicated at the time of firing the shot, which caused the death of the deceased, was capable of knowing the nature and consequences of his act, and if he did know, then that he knew he was doing wrong, and that so knowing he fired the shot at the deceased with the willful, deliberate and premeditated purpose of killing him, they will find the prisoner guilty of murder in the first degree.’ This instruction is correct as we have already seen...”

9. “[O]ne who has voluntarily become intoxicated and then, while in his drunken state, committed a crime, may not ordinarily raise his voluntary intoxication as a defense to criminal liability. State v. Bailey, 159 W.Va. 167, 220 S.E.2d 432 (1975).” In Re Matherly, 177 W.Va. 507, 354 S.E.2d 603, at 605 (1987).
10. “Chronic alcoholism is a defense to a charge of public intoxication. Upon a showing that an accused is a chronic alcoholic he is to be accorded all of the procedural safeguards that surround those with mental disabilities who are accused of crime.” Syl. Pt. 5,. State ex rel. Harper v. Zegeer, 170 W.Va. 743, 296 S.E.2d 873 (1982).
11. In State v. Boyd, 167 W.Va. 385, 280 S.E.2d 669 (1981), the Court noted in Footnote 11, “on appeal the state contends that the insanity defense offered by the appellant is without merit and should be stricken under the proposition that voluntary drug intoxication is no defense to a criminal act. Although we agree that voluntary drug intoxication is no defense to a criminal act, see Annot. 73 A.L.R.3d 98 (1976) we fail to see how that rule applies to the facts of this case.”

“There is a distinction to be made between the criminal responsibility of an individual who is intoxicated at the time of the offense, as a result of the voluntary use of drugs, and an individual who is suffering from a mental disease at the time of the offense caused by the long-term voluntary use of intoxicating drugs. The law in this State is that a defendant will not be deemed criminally responsible if, at the time of the offense, he is suffering from a mental disease or defect to such an extent that he cannot appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. State v. Grimm, 156 W.Va. 615, 195 S.E.2d 637 (1973). The origin of the disease or defect is irrelevant for purposes of this rule.”

12. “It was clearly not error for the trial court to refuse the defendant’s instruction number five which instructs the jury that to find the defendant guilty, the State must prove that the defendant must not have been so drunk, or otherwise incapacitated, as to have been incapable of formulating an intent to steal. Voluntary drunkenness will not ordinarily excuse a crime. Syllabus Point 8, State v. Bailey, 159 W.Va. 167, 220 S.E.2d 432 (1975).” State v. Vance, 168 W.Va. 666, 285 S.E.2d 437, 444 (1981).
13. See State v. Rowe, 168 W.Va. 678, 285 S.E.2d 445, 447 (1981),“(… In this State voluntary intoxication has never been allowed as a defense of diminished capacity: it will only reduce first-degree murder to second-degree murder.”).
14. In State v. Less, 170 W.Va. 259, 294 S.E.2d 62, 69 (1981) “The appellant also assigns as error the giving of the following instruction: ‘The Court instructs the jury that a person cannot voluntarily make himself drunk, intending to commit a crime, then claim immunity from punishment because of his condition when he committed the crime, the law not permitting a man to avail himself of the excuse of his own vice as a shelter from the legal consequences of such crime.’

It was not error for the trial judge in this case to give an instruction that correctly incorporates the law that a person ... cannot voluntarily make himself so drunk as to become on that account irresponsible for his conduct during such drunkenness: Syl. pt. 5, State v. Robinson, 20 W.Va. 713 (1882). See also State v. Brant, 162 W.Va. 762, 252 S.E.2d 901 (1979); State v. Bailey, 159 W.Va. 167, 220 S.E.2d 432 (1975) overruled on other grounds, State ex rel. D.D.H. v. Dostert, 165 W.Va. 448, 269 S.E.2d 401 (1980).”

15. “[W]e held in State v. Brant, 162 W.Va. 762, 252 S.E.2d 901 (1979), that intoxication can only be used as a defense when it is shown that the intoxicated person had such a total lack of capacity that his bodily machine completely fails. We reached this holding on the rational that a rule which permits a defendant to plead that because of his intoxication his capacity to control himself or to form a specific intent was diminished would provide every would-be malefactor with a convenient excuse which would appear sufficiently reasonable to confuse any jury. Allowing insurance

coverage under an intentional acts exclusion clause for any insured who claims he lacked capacity to control his actions presents the same problem.” Footnote 2, Municipal Mutual Insurance Company of West Virginia v. Mangus, 191 W.Va. 113, 443 S.E.2d 455 (1994).

16. “Although the record is scant on this issue, there appears to be some evidence to suggest that the Appellant’s mental health is dependent on his ingestion of prescribed medication. At some point, this Court needs to examine whether voluntary refusal to take prescribed medication, resulting in criminal insanity ought to be analogized to the legal effect of an individual choosing to imbibe alcoholic beverages. Voluntary intoxication is not an affirmative defense to criminal conduct but at most can only result in the reduction of the level of intent. Voluntary refusal to take medication perhaps should be treated in a similar fashion.” Footnote 3, dissenting opinion of Justice Workman, State v. Walls, 191 W.Va. 332, 445 S.E.2d 515 (1994).
17. In State v. Phalen, 192 W.Va. 267, 452 S.E.2d 70 (1994), the appellant contended he was too intoxicated to form the intent to defraud on a forgery charge. The Court noted that:

‘[v]oluntary drunkenness does not ordinarily excuse a crime.’ Syl. pt. 8, State v. Bailey, 159 W.Va. 167, 220 S.E.2d 432 (1975) overruled on other grounds, State ex rel. D.D.H. v. Dostert, 165 W.Va. 448, 269 S.E.2d 401 (1980). However, in State v. Keeton, 166 W.Va. 77, 272 S.E.2d 817 (1980), this court noted that voluntary drunkenness may reduce the degree of crime or negate a specific intent. Additionally, this court pointed out that this is a jury question. Id. at 82-84, 272 S.E.2d at 820-21.

In the case before us, the trial court gave the following instruction to the jury:

The jury is instructed that criminal intent is a necessary and essential element of the crime of forgery and, like every other element of the crime, must be proved beyond a reasonable doubt. If the jury believes from the evidence at the time of the alleged forgery the defendant was in a state of intoxication and that while in such condition he did not know what he was doing, he is not capable of exercising criminal intent and then the jury should acquit the defendant.

The Court concluded:

Therefore, the jury did properly consider whether or not the appellant's intoxication negated the specific intent of committing forgery.

18. In State ex rel. Bailey v. Legursky, 200 W.Va. 770, 490 S.E.2d 858 (1997), the trial court denied the appellant habeas corpus relief with regard to his conviction of first degree murder without a recommendation of mercy. The order of the circuit court was affirmed. The Court noted in footnote 1, in part, that:

. . . . [T]he appellant asserts that State's instruction number 5, concerning the use of a deadly weapon in this case, should have been tempered by language to the effect that the appellant claims to have been under the influence of alcohol and drugs at the time of the shooting. As syllabus point 6 of State v. Jenkins, 191 W.Va. 87, 443 S.E.2d 244 (1994) states in part:

It is erroneous in a first degree murder case to instruct the jury that if the defendant killed the deceased with the use of a deadly weapon, then intent, malice, willfulness, deliberation, and premeditation may be inferred from that fact, where there is evidence that the defendant's actions were based on some legal excuse, justification, or provocation.

Nevertheless, considering State's instruction number 5, which stated that "[t]he Court instructs the jury that malice, wilfulness, and deliberation, which are elements of the crime of first degree murder, may be inferred from the intentional use of a deadly weapon in the commission of said offense", the circuit court during the habeas proceeding, referring to other jury instructions, found that the jury was "properly and fully instructed on his diminished capacity defense as excuse or justification for commission of the act."

In particular, State's instruction no. 6, given at trial, allowed the jury to consider the appellant's evidence of intoxication in connection with the evidence of the State. As this court held in syllabus point 6 of State v. Milam, 159 W.Va. 691, 226 S.E.2d 433 (1976): "When instructions are read as a whole and adequately advise the jury of all necessary elements for their consideration, the fact that a single instruction is incomplete or lacks a particular element will not constitute grounds for disturbing a jury verdict."

19. In State ex rel. Wimmer v. Trent, 199 W.Va. 644, 487 S.E.2d 302 (1997), the appellant was convicted of the first degree murders of his son and daughter. His claim that he was denied effective assistance of counsel during his trial for the murder of his son was rejected by the circuit court. On appeal from the denial of habeas corpus relief, the appellant contended, among other things, that his attorney was ineffective in failing to offer jury instructions on the effect of intoxication on the appellant's capacity to commit the crime charged. The Court found there was substantial evidence adduced during the appellant's trial supporting the conclusion that the appellant premeditated the killings and that they were not the simple result of intoxication. Under the circumstances of this case, the Court believed that even if the instruction had been given, it is not reasonably probable that the jury would have found differently given the overall evidence in the case.

The appellant also argued that his attorney failed to seek an independent mental evaluation to support a possible defense of diminished capacity. The Court found that during his habeas corpus hearing the appellant failed to introduce any expert testimony or any other meaningful evidence that any sort of diminished capacity claims could be supported by medical evidence. The Court found there was ample evidence that the appellant was fully aware of what was going on and was in charge of his faculties just prior to trial. There was no evidence presented tending to show that a reasonably competent defense attorney would have pursued a diminished capacity defense under the circumstances of this case. The judgment of the circuit court was affirmed.

DEFENSES DURESS OR COERCION

The Court instructs the jury that, in general, an act that would otherwise be a crime may be excused if it was done under compulsion or duress, because there is then no criminal intent. The compulsion or coercion that will excuse an otherwise criminal act must be present, imminent, and impending, and such as would induce a well-grounded apprehension of death or serious bodily harm if the criminal act is not done; it must be continuous; and there must be no reasonable opportunity to escape the compulsion without committing the crime. A threat of future injury is not enough. ¹

If the evidence in the case leaves you with a reasonable doubt that the defendant acted willfully and voluntarily, and not as a result of coercion, compulsion or duress as just explained, then it is your duty to find the defendant not guilty. ²

FOOTNOTES

¹ Syl. pt. 1, State v. Tanner, 171 W.Va. 529, 301 S.E.2d 160 (1982); State v. Lambert, 173 W.Va. 60, 312 S.E.2d 31 (1984).

² State v. Tanner, *supra*.

COMMENTS

1. “At common law, duress was generally recognized as a defense, except against charges involving taking the life of an innocent person. This is, of course, consistent with a fundamental premise of our criminal law that a person cannot be criminally punished for acts not done voluntarily...”

“...If the evidence raised a reasonable doubt about his criminal intent to commit the offense charged, it would be a valid legal defense.” State v. Tanner, *supra*, at 163.

2. See also State v. Allen, 208 W.Va. 144, 539 S.E.2d 87 (1999), where the defendant’s failure to object to the Court’s refusal to give this instruction constituted a waiver of any error.

DEFENSES
BONA FIDE CLAIM OF RIGHT
Robbery/Larceny

The Court instructs the jury that one who takes property in good faith under fair color or claim of title, honestly believing he or she is the owner and has a right to take it, is not guilty of larceny, even though he or she may be mistaken in such belief, since in such case the felonious intent is lacking. ¹

If you have a reasonable doubt whether or not the defendant had a bona fide claim of ownership to the specific property and therefore, had no intent to steal, you must find the defendant not guilty.

FOOTNOTE

- ¹ State v. Kelly, 175 W.Va. 804, 338 S.E.2d 405 (1985).

COMMENTS

1. A defendant may assert as a defense to a robbery or larceny charge, that he had a bona fide claim of ownership to the specific property and therefore, that he had no intent to steal. However, this defense is not available where the defendant took money or other property, to which he did not have a specific ownership claim, in satisfaction of a debt.

Syllabus point 2, State v. Winston, 170 W.Va. 555, 295 S.E.2d 46, 49 (1982)

In Winston, the Court notes the defense of “bona fide claim of right” used in State v. Bailey, 63 W.Va. 668, 60 S.E. 785 (1908) and State v. Flanagan, 48 W.Va. 115, 35 S.E. 862 (1900) involved the recovery of specific property to which the owner claimed title. A taking in satisfaction of a debt, as in Winston, is not a claim of ownership to any specific property and therefore does not defeat a robbery conviction.

2. “Under the circumstances of this case, if the defendant in good faith believed that the goods with the larceny of which he is charged were the property of Mary J. Hedrick, he did not enter the milk house with the intent to steal the goods, and therefore could not be convicted of the charge.” State v. Flanagan, 48 W.Va. 115, 35 S.E. 862 (1900).
3. “A number of jurisdictions have adopted such a rule (that a ‘bona fide claim of right’ to property can defeat a charge of robbery) on the theory that the *animus furandi* or intent to steal does not exist when a person takes property under the belief that he has a bona fide claim to it. This is upon the theory that the intent to steal is an essential element of the crime of robbery.” State v. Winston, 170 W.Va. 555, 295 S.E.2d 46, 49 (1982).
4. “If a person takes property of another under an honest belief of right in himself to do so, he is not guilty of larceny thereof, even though he took it with knowledge of the adverse claim of such other person, and his own claim ultimately prove to be untenable.” Syllabus Point 2, State v. Bailey, 63 W.Va. 668, 60 S.E. 785 (1908). Syl. pt. 1, State v. Kelly, 175 W.Va. 804, 338 S.E.2d 405 (1985).
5. “Facts and circumstances indicating lack of confidence in the claim of right under which property has been taken and carried away, and determination to defeat the adverse claim by putting the property beyond the reach of legal process, such as concealment, disposition or destruction thereof, tend to prove lack of good faith on the part of the taker.” Syllabus point 4, State v. Bailey, 63 W.Va. 668, 60 S.E. 785 (1908).
6. “Whether a claim of right under which property has been so taken was bona fide or only pretended is generally a question of fact for the jury.” Syl. pt. 3, State v. Bailey, 63 W.Va. 668, 60 S.E. 785 (1908).

DEFENSES UNCONSCIOUSNESS OR AUTOMATISM

COMMENT

1. One who engages in what would otherwise be criminal conduct is not guilty of a crime if he does so in a state of unconsciousness or semi-consciousness.

“Unconsciousness (or automatism) is not part of the insanity defense, but is a separate claim which may eliminate the voluntariness of a criminal act. The burden of proof on this issue, once raised by the defense, remains on the State to prove that the act was voluntary beyond a reasonable doubt.” Syl. pt. 2, State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996).

“An instruction on the defense of unconsciousness is required when there is reasonable evidence that the defendant was unconscious at the time of the commission of the crime.” Syl. pt. 3, Hinkle, *supra*.

“If a defendant is sufficiently appraised and aware of a preexisting condition and previously experienced recurring episodes of loss of consciousness, e.g., epilepsy, then operating a vehicle or other potentially destructive implement, with knowledge of the potential danger, might well amount to reckless disregard for the safety of others. Therefore, the jury should be charged that even if it believes there is a reasonable doubt about the defendant’s consciousness at the time of the event, the voluntary operation of a motor vehicle with knowledge of the potential for loss of consciousness can constitute reckless behavior.” Syl. pt. 4, Hinkle, *supra*.

DEFENSES ACCIDENTAL DEATH

Accidental killing may provide a legal excuse for the crime charged in the indictment. ¹

If the evidence in this case raises a reasonable doubt in your minds as to whether the death was accidental or intentional, it is your duty to find the defendant not guilty. ²

FOOTNOTES

¹ State v. Daniel, 182 W.Va. 643, 391 S.E.2d 90 (1990); State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990).

A defendant is required to present evidence on the affirmative defenses asserted as long as the State does not shift to the defendant the burden of disproving any element of the State's case. Syl. pt. 5, State v. Daniel, 182 W.Va. 643, 391 S.E.2d 90 (1990); State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990).

"...Accidental killing is not such matter of defense as throws on the accused the burden of proving it by a preponderance of evidence. It is the duty of the state to allege and prove that the killing, though done with a deadly weapon, was intentional or willful...(W)hen the evidence, taken as a whole, raises a reasonable doubt in the minds of the jury as to whether the killing was accidental or intentional, they must acquit the accused, for the reason that the state has failed to sustain its case. In other words, 'if, on the whole evidence, the jury are left in reasonable doubt as to the intent of the defendant, they can not convict of the crime.' Whart.Cr.Ev. § 764, and note 1... (T)he claim that the killing was accidental goes to the very gist of the charge, and denies all criminal intent, and throws on the prosecution the burden of proving such intent beyond a reasonable doubt." State v. Cross, 42 W.Va. 253, at 258, 24 S.E. 996 (1896).

"Where accidental killing is relied upon as a defense, the accused is not required to prove such defense by a preponderance of the evidence, because there is a denial of intentional killing, and the burden is upon the state to show that it was intentional, and if, from a consideration of all the evidence, both that for the state and the prisoner, there is a reasonable doubt as to whether or not the killing was accidental or intentional, the jury should acquit... (W)here accidental killing is relied upon, the prisoner admits the killing, but denies that it was intentional. Therefore, the state must show that it was intentional, and it is clearly error to instruct the jury that the defendant must show that it was an accident by a preponderance of the testimony..." State v. Legg, 59 W.Va. 315, 53 S.E. 545, at 550 (1906).

- ² “Where one, upon an indictment for murder, relies upon accidental killing as a defense, and there is evidence tending in an appreciable degree, to establish such defense, it is error to refuse to instruct the jury that if they believe from the evidence that the killing was the result of an accident, they should find the defendant not guilty. Syl. pt. 10, State v. Legg, 59 W.Va. 315, 53 S.E. 545 (1906).” Syl. pt. 4, State v. Evans, 172 W.Va. 810, 310 S.E.2d 877 (1983).

COMMENTS

1. **Accidental Death / Felony-murder** - “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.” Syl. pt. 7, State v. Sims, 162 W.Va. 212, 248 S.E.2d 834 (1978).
2. **Accidental Death / Involuntary Manslaughter** - “An instruction on accidental killing does not preclude a verdict of guilty of involuntary manslaughter since involuntary manslaughter requires an act, or the performance of an act, that is ‘unlawful and culpable and something more than the simple negligence, so common in everyday life, in which there is no claim that anyone has been guilty of wrong-doing.’ State v. Lawson, 128 W.Va. 136, at 148, 36 S.E.2d 26 at 32 (1945).” State v. Evans, 172 W.Va. 810, 310 S.E.2d 877, at 881 (1983).
3. **Accidental Death / Self-defense** - See, State v. Cobb, 166 W.Va. 65, 272 S.E.2d 467 (1980); State v. Green, 157 W.Va. 1031, 206 S.E.2d 923 (1974).
4. **In General** - “‘Where, upon a trial for murder, the killing is shown to have been done with a deadly weapon, and the defendant relies upon accidental killing as an excuse, it is a question for the determination of the jury as to whether the killing was intentional, or the result of an accident. And when the evidence tends, in an appreciable degree, to establish both theories, it is the duty of the Court to instruct the jury presenting both, if asked to do so.’ State v. Legg, 59 W.Va. 315, 53 S.E. 545, 3 L.R.A.N.S., 1152.” State v. Shaffer, 138 W.Va. 197, 75 S.E.2d 217 (1953).

See, State v. White, 171 W.Va. 658, 301 S.E.2d 615 (1983).

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