

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NOV - 7 2011

STATE OF WEST VIRGINIA
Plaintiff-Respondent

Vs.

CASE NO: 11-1123
Ohio County Case No. 09-F-10

JAMES WILKERSON aka "JUICE",
Defendant-Petitioner

PETITION FOR APPEAL

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ASSIGNMENT OF ERROR

[1] The trial court committed reversible error when it refused to give a lesser included instruction for battery and/or assault on the charge of robbery in the first degree where sufficient evidence was presented to the jury to support said lesser included offense.

STATEMENT OF THE CASE

James Wilkerson (“Petitioner”), petitioner and defendant below, seeks to appeal the conviction from a jury trial and the resulting sentence of eighty (80) years imprisonment. Petitioner was indicted by the Grand Jury of Ohio County on January 12, 2009 on two (2) counts of Robbery in the First Degree, two (2) counts of Assault During the Commission of a Felony, and one (1) count of Conspiracy to commit Robbery which offenses are alleged to have occurred on or about November 14, 2008. A two-day jury trial was conducted and after all evidence was presented, the trial court addressed Petitioner’s proposed jury instructions. App. vol. 1, p. 46, 52.

After having reviewed the Petitioner’s proposed instructions the trial court denied Petitioner’s request to have a lesser included charge of battery to the felony offense of robbery in the first degree. App. Vol. 2, p.480. Petitioner’s counsel attempted to place upon the record the reasons sufficient evidence existed to support a potential verdict for assault and battery and Petitioner’s objection was noted and preserved on the record. App. Vol. 2, p.481-482.

During closing arguments Petitioner’s counsel attempted to argue that at most, the State had provided evidence to support something less than robbery. App.vol. 2, p. 523-525. The jury subsequently returned a verdict of guilty as to both counts of Robbery in the First Degree, guilty as to one count of Assault During the Commission of a Felony and guilty as to the Conspiracy count. The jury found the Respondent not guilty of one count of Assault During the Commission of a Felony. Petitioner filed a notice of intent to appeal on July 29, 2011. Petitioner’s appeal is filed timely as it has been filed on November 7, 2011.

Evidence in the subject trial consisted primarily of eye witness testimony with witnesses presented by both the State of West Virginia and the Petitioner. On November 14, 2008 Petitioner and Brandon Myers (“Myers”), who was the co-defendant named in the same

indictment, traveled from their residence to a parking lot outside of a beauty salon located in Wheeling, West Virginia. The beauty salon was located across the street from a public playground. Both Petitioner and Myers were 20 years old at the time of the alleged offense. Petitioner and Myers traveled to the parking lot of the aforesaid salon for the purpose of skateboarding.

While Petitioner Wilkerson and Brandon Myers were skating with a couple other individuals, the two alleged victims, Stephen Sergent and David Wood, were walking across the street from where Petitioner, Myers and the others were skating. App. vol. 1, p. 218. The alleged victims continued on into an unlit playground area containing a basketball court and tennis court. *Id.* Prior to the alleged victims entering into the playground, Brandon Myers had recognized one of the individuals as someone he believed to have been “fronted” marijuana from one of his friends and never paid for it. App. vol. 2, p. 430. At that point, Brandon Myers tapped Petitioner on the shoulder and told Petitioner to follow him over to the playground area. Myers confronted the alleged victims without informing Petitioner of the reason Myers was going over. *Id.*

Myers confronted the alleged victims and asked “where’s the weed at” to which each of the alleged victims replied that they did not have any weed. App. vol. 1, p. 233; vol. 2 p. 431. The alleged victim, Stephen Sergent, stated that Myers then asked him “where’s the money at” to which he replied that they did not have any money. App. vol. 1, p. 221, 235. Testimony from both the victims and Myers showed that subsequent to their response, Myers became enraged, punched the alleged victim, Stephen Sergent, and hit him several times. App. vol. 1, p. 223, 235; vol. 2 pg 432. Myers testified that he did not intend to rob either of the alleged victims, but rather collect a debt that was owed. App. vol. 2, p. 433-434. Myers also testified that Petitioner did not hit either victim. App. vol. 2, p. 432. Petitioner testified that he had no idea what was

going to happen or why Myers wanted him to follow. App. vol. 2, p. 458. Petitioner testified that he was trailing behind Myers on the way over so he could not hear exactly what Myers was saying to the alleged victims. App. vol. 2, p. 460. However, when Petitioner saw Myers start the attack, Petitioner attempted to pull Myers off the alleged victim. App. vol. 2, p. 432, 460. Once Myers was pulled off the alleged victim Myers immediately turned and hit the other victim who instantly fell to the ground. App. vol. 2, p. 433. Both Petitioner and Myers retrieved their skateboards and ran back to their residence located approximately two blocks away from the scene of the crime. App. vol. 2, p. 435. All witnesses who were at the scene of the alleged crime also ran or drove away immediately after the incident occurred.

Police were eventually notified and arrived on the scene where they took photos of the crime scene and observed that nothing was taken from the alleged victims. App. vol. 2, p. 402-403. The alleged victim's cell phone was found on the ground along with one of the victim's wallets, which still had all the money inside of it. *Id.*

There were four witnesses for the State who saw the altercation from across the street. Although the witnesses stated that the altercation transpired in a "pitch black" area of the playground, each state witness, with the exception of one, stated that the Petitioner took part in hitting at least one of the alleged victims. App. vol. 2, p. 278, 292, 303. One of the State's witnesses testified that it was too dark to see anything. App. vol. 2, p. 350. None of the state's four witnesses heard either of the defendants say anything to the alleged victims let alone demand anything from them. Because of the darkness, the alleged victims were unable to identify who actually hit them other than the victim, Stephen Sergent, being sure that Myers actually struck them. App. vol. 1, p. 239-241. One victim, David Wood, did not know the race of the defendants when he was standing only a few feet away due to the darkness of the

playground. App. vol. 1, p. 263-264, 266. Stephen Sergent, an alleged victim, testified that Petitioner hit his friend, but that he only came to this conclusion after having dreams of the incident for two years after the incident. App. vol. 1, p. 237, 241, 245. In fact, the alleged victim, Mr. Sergent, provided a statement to the police officers at the hospital that specifically referred to only being aware of a “white guy” who hit either of them. App. vol. 1, p. 239. The victims also testified that they tried to hand the assailant their phone and wallet while being hit, but the assailant responded by saying he did not want their phone. App. vol. 1, p. 223, 254. There was no property missing from either of the alleged victims after the incident.

SUMMARY OF THE ARGUMENT

The trial court abused its discretion and committed reversible error when it denied Petitioner’s request to present the charge of battery and/or assault to the jury as a lesser included offense to robbery as it related to both victims.

West Virginia law states that an instruction for a lesser included offense should be given if said lesser offense is included within the elements of the greater offense and that sufficient evidence existed to support a potential verdict of the lesser offense. In the instant case, witnesses for the State testified that they saw the Petitioner strike at least one of the victims. No definitive evidence was presented to suggest that the Petitioner planned to rob or take anything from the alleged victims. The co-defendant testified that he did not intend to take anything from the victims and that he was the only one who assaulted the victims. Petitioner testified that he did not know why the co-defendant began assaulting the victims and further testified that he did not participate in the assault. State evidence also established that nothing was taken from the alleged

victims. Petitioner argued, based on the aforementioned facts, that instructions on both assault and battery should be provided to the jury as a lesser included offense to robbery, but the trial court denied said motion despite supporting evidence. As a result, Petitioner was severely prejudiced and limited as to his defense where no argument could be offered to even suggest that something less than robbery occurred given the fact that nothing was taken from the victims coupled with testimony from the co-defendant who stated that he did not intend to take anything from the victims. This Honorable Court should reverse the jury verdict in the instant matter and remand this case for a new trial as to all counts with instructions to include battery as a lesser included charge for robbery.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests that oral argument be scheduled in the instant matter pursuant to Rule 20(a)(1) of the West Virginia Rules of Appellate Procedure being that the issue raised herein is a matter of first impression.

ARGUMENT

I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT REFUSED TO GIVE AN INSTRUCTION ON THE LESSER INCLUDED OFFENSE OF BATTERY OR ASSAULT ON THE CHARGE OF ROBBERY WHERE SUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT AN ASSAULT AND BATTERY VERDICT.

"As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion." *State v. Bell*, 211 W.Va. 308, 565 S.E.2d 430 (2002) citing Syl. Pt. 1, in part, *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996). A trial court's refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense. *State v. Bell*, 211 W.Va. 308, 565 S.E.2d 430 (2002) citing Syllabus pt. 11 of *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

In the instant case, the trial court abused its discretion and committed reversible error when it denied Petitioner's motion to include battery and or assault as a lesser included offense for robbery despite the fact that sufficient evidence existed to support a battery verdict, which extremely prejudiced and hindered the Petitioner's defense. It is reversible error when a trial court denies proposed instructions on a lesser included offense for a crime where sufficient evidence was presented to support a potential verdict of the lesser included offense. *State v. Bell*, 211 W.Va. 308, 565 S.E.2d 430 (2002). The question of whether a defendant is entitled to an instruction on a lesser included offense involves a two-part inquiry. *Id.* The first inquiry is whether the lesser offense is by virtue of its legal elements or definition included in the greater offense. *Id.* The second inquiry is a factual one which involves a determination by the trial court of whether there is evidence which would tend to prove such lesser included offense. *Id.*

The first prong enunciated in *Bell* is satisfied in the instant matter. Battery would be a

lesser included offense as to robbery due to the fact that battery makes up one of the elements of robbery, specifically the element of committing violence. One of the elements of robbery that the State would have to prove beyond a reasonable doubt is that the Petitioner committed “violence” against the victims or in other words, battered the alleged victims. App. Vol. 1 p. 49, 52. The state presented four eye witnesses that testified that they saw the Petitioner strike at least one of the victims to satisfy that element of the offense. App. Vol. 1, p. 278, 292, 303. The Petitioner denied striking the victims and co-defendant Myers testified that he was the only one who hit both victims. App. Vol. 2, p.432, 460. Nevertheless, evidence presented by the state indicated that Petitioner was seen physically assaulting at least one of the victims. App. Vol. 1.

Although no cases in West Virginia address the issue of whether battery is a lesser included offense to Robbery, other jurisdictions have determined that battery can be a lesser included offense of robbery when there is some kind of actual force used in the alleged crime. See generally *McFarland v. State*, 384 N.E.2d 1104, 179 Ind. App. 143 (1979) (the court reversed a conviction of battery when the defendant was convicted of both battery and robbery stating that battery was a lesser included crime); *People v. Fuentes*, G030438 (Cal. App. 2/26/2004) (Cal. App., 2004) (after an extensive analysis the court determined that battery should be presented as a lesser included instruction for robbery, but cautioned that said instruction should be determined on a case by case basis).

In West Virginia, one of the elements for robbery includes the use of violence against a person, which Petitioner contends would be the same kind of violence that can be used to commit a battery. Battery is generally defined as an “intentional and wrongful physical contact with a person without his or her consent that entails **some injury** or offensive touching.”

(emphasis added) *Black's Law Dictionary* 152 (Centennial ed., 6th ed., West 1990). Violence is defined as “the exertion of any **physical force so as to injure**, damage or abuse.” (emphasis added) *Id.* at 1570. In the instant case, there is no dispute that injury was caused to the alleged victims as well as there being no dispute that nothing was taken from the victims. Therefore, the first prong of *Bell* would be satisfied in that the State would need to prove the same kind of “violence” needed to satisfy the element in an instruction for battery as it would in order to satisfy the element of “violence” needed to prove the commission of a robbery.

The second prong of *Bell* would also be satisfied where sufficient evidence was presented at trial that would support a potential verdict of the lesser included offense of assault and/or battery. As previously stated, nothing was taken from the alleged victims before, during or subsequent to the assault. App. vol. 2, p. 402-403. The State offered no evidence of a plan to rob or take anything from the victims other than two of the state witnesses hearing someone say “let’s do this” or “let’s get em”, but that no further evidence was offered to define what “this” meant. App. Vol. 2, p.301. Petitioner testified that he did not know why Myers physically assaulted the victims and that Petitioner was simply present during the incident and tried to help the victims by pulling Myers off of them. App. Vol. 2, p.460. Myers testified that he did not intend to take anything from the victims and that he assaulted the victims because he was drunk and upset with the way they responded to him. App. Vol. 1, p.223. Furthermore, one of the victims testified that when he tried to hand Myers his cell phone and wallet Myers stated that he did not want that. App. vol. 1, p. 223, 254. After all the evidence was presented, Petitioner requested that the charge of battery be presented to the jury and the trial judge denied said request simply stating that there was insufficient evidence presented to support a battery instruction. App. Vol. 2, p. 480.

Although West Virginia has not addressed the issue of whether battery should be a lesser included offense for robbery, other jurisdictions with similar statutes have cases directly on point with strikingly similar facts where the trial court committed reversible error by not including battery as a lesser included instruction to robbery. For example, in *State v. Hill*, 16 Kan.App.2d 432, 825 P.2d 1141 (1991), the defendant was charged with aggravated robbery. Defendant and his companion were accused of taking a wallet from the victim "by force" and by "inflicting great bodily harm" upon the victim. 16 Kan.App.2d at 435, 825 P.2d 1141. The evidence indicated defendant helped his companion beat up the victim. Defendant denied any knowledge of or taking of the wallet. He was convicted of aggravated robbery. On appeal, he contended that he was entitled to an instruction on battery. Reversing, the Court of Appeals agreed, finding that, under the *Fike* test, battery was charged and proven as part of the original charge. 16 Kan.App.2d at 437, 825 P.2d 1141. In so doing, however, the court cautioned:

"There may be individual cases where battery is an appropriate lesser included offense for aggravated robbery and there will be cases where it is not, depending on the charging document and the evidence produced. To maintain that we ignore the individual facts, notwithstanding that they are set out in the charging document ... is contrary to *Fike*...." 16 Kan.App.2d at 436, 825 P.2d 1141.

Another similar example of facts exists in *State v. Clardy*, 252 Kan., 847 P.2d 694 (1993), where the defendant was charged and convicted of one count of aggravated robbery. The defendant contended on appeal that he was entitled to a jury instruction on battery as a lesser included offense of aggravated robbery. Defendant denied any intent to rob the victim and denied seeing the victim robbed by defendant's companions. The evidence showed that defendant struck the victim. There was no evidence that defendant took any money from the victim. 252 Kan. at 541-45, 847 P.2d 694. The Supreme Court of Kansas reversed, reasoning:

"Under K.S.A. 21-3107(3), the defendant in a criminal prosecution has a right to have the court instruct the jury on all lesser included offenses established by substantial evidence. Where there is no substantial testimony applicable to the lesser degrees of the offense charged, and all of the evidence taken together shows that the offense, if committed, was clearly of the higher degree, instructions relating to the lesser degrees of the offense are not necessary. *State v. Deavers*, 843 P.2d 695 (1992).

"When an information alleges a robbery was accomplished by force and that bodily harm was inflicted in the course of the robbery, battery will not be a lesser included offense of aggravated robbery unless there is substantial evidence to prove the lesser offense of battery has been committed. Under the particular circumstances of this case, there is substantial evidence that the lesser degree of the offense charged had been committed, and an instruction on battery as a lesser included offense was required." 252 Kan. at 547, 847 P.2d 694.

The facts in the instant case are analogous to those in both *Clardy* and *Hill*. In short, the evidence in the instant matter consisted of victims who were physically assaulted and the issue arose as to whether there was any intent to rob the victims when the evidence was clear that nothing was taken. If the trial court in the instant matter allowed the instructions of assault and/or battery, the outcome of the trial could have been dramatically affected by said lesser included offenses. Based on the entire body of supporting evidence, a jury could reasonably infer that a battery had taken place rather than a robbery. However, because the trial court denied Petitioner's proposed instructions, Petitioner's defense was severely prejudiced.

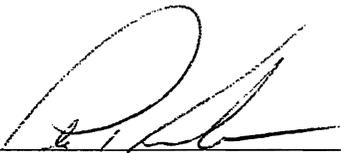
In the instant case, evidence presented by the defense coupled with evidence presented by the state acts to satisfy the standard set forth in *Bell* to vindicate the inclusion of a lesser included charge of battery and/or assault as to the crime of robbery in the first degree. Despite the fact that the record supports a possible verdict for assault and/or battery, the trial court in the instant case abused its discretion by eliminating a valid charge for the jury to consider which unduly prejudiced the Petitioner's defense.

RELIEF PRAYED FOR

For the foregoing reasons, Petitioner prays this Honorable Court reverse the trial court's jury verdict, grant him a new trial as to all counts in the original indictment and to direct the trial court to include instructions on the lesser included offense of assault and battery for robbery in the first degree.

JAMES WILKERSON

Defendant/Petitioner, by Counsel

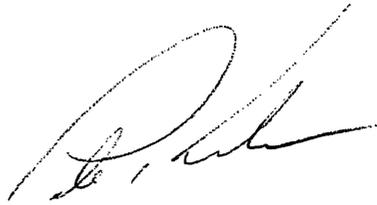


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CERTIFICATE OF SERVICE

I, Peter P. Kurelac, III, counsel for the Petitioner/Defendant, James Wilkerson, hereby certifies that a true and accurate copy of this PETITION FOR APPEAL, has been served upon all counsel of record, by mailing postage pre-paid, on this 7th day of November, 2011 to the following:

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