
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 15-0684

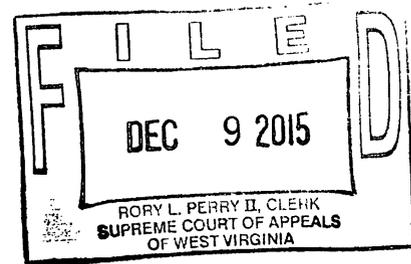
STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

SCOTT A. NEAL,

Defendant Below, Petitioner.



RESPONDENT'S BRIEF

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ASSIGNMENTS OF ERROR

Petitioner claims the following three (3) assignments of error, which the State specifically and generally denies:

- A. The circuit court improperly denied Petitioner's motions for acquittal based upon the State's failure to meet the burden of reasonable doubt:
 - 1. The circuit court misapplied the standard for self-defense as set forth in *State v. Phelps*, 172 W. Va. 797, 310 S.E.2d 863 (1983) by limiting self-defense to those situations where Petitioner would only be in danger of serious bodily injury or death; and
 - 2. The circuit court erroneously found that Petitioner was not a resident of the home in which he was residing.
- B. The circuit court erred in not making a finding that Petitioner "breached the peace" when brandishing the knife in his own home.
- C. The circuit court erred in not permitting Petitioner to call a witness during the trial in this matter.

STATEMENT OF THE CASE

Pursuant to Rule 10(d) of the West Virginia Revised Rules of Appellate Procedure, the State of West Virginia (hereinafter, the “State”),) accepts the procedural posture as stated by Scott A. Neal (hereinafter, “Petitioner”), with the following additions, regarding the evidence and arguments of the State, in contrast with the facts as supplied by Petitioner:

A. Statement of Facts

On February 11, 2015, Susan Showalter (hereinafter, “S. Showalter”),) had a mediation scheduled in the Family Court of Fayette County, West Virginia, regarding the custody and visitation schedule of a minor child shared with Steve Neal (hereinafter, “Mr. Neal”), the child’s father and the brother of Petitioner.¹ (Appendix Volume [hereinafter, “App. Vol.”],] II at 5-6.) After arriving at the mediation, however, S. Showalter was informed that Mr. Neal could not attend due to car problems.² (*Id.* at 7, 28.) S. Showalter then decided that she would go to Mr. Neal’s home in an attempt to take the child, whom she had not seen in approximately two months. (*Id.* at 28.) Ms. Neal did not have an order in place allowing her to take the minor child. (*Id.* at 8.)

Thereafter, Debbie Showalter (hereinafter, “D. Showalter”), S. Showalter’s mother, drove S. Showalter to Mr. Neal’s home in Ansted, Fayette County, West Virginia. (*Id.* at 8-9.) Upon arriving at the home, S. Showalter entered unannounced and attempted to take the minor child. (*Id.* at 10-11.) Mr. Neal, who was walking out of an adjoining room at the time, noticed S. Showalter taking the minor child and immediately blocked S. Showalter’s exit from the home.

¹ At the time of the altercation, no formal custody arrangement was in place regarding the minor child. (App. Vol. II at 26.)

² It was contended by the victims that Mr. Neal did not actually own a car at the time, and that Mr. Neal was simply trying to avoid the family court mediation. (App. Vol. II at 7, 28.)

(*Id.*) S. Showalter and Mr. Neal thereafter began yelling at one another, with Mr. Neal forcefully attempting to pry the minor child away from S. Showalter. (*Id.* at 11-12.)

The confrontation awoke Petitioner, who was staying with Mr. Neal and sleeping in another bedroom. (*Id.* at 11-12.) After stepping in between S. Showalter and Mr. Neal, Petitioner grabbed S. Showalter by the throat and held her against the wall. (*Id.* at 12.) S. Showalter then began yelling to D. Showalter for help. (*Id.*) At one point during the struggle, S. Showalter broke free and head-butted Petitioner in the face. (*Id.* at 24.)

Petitioner then twice shoved S. Showalter against the glass storm door to the front door of the home. (*Id.* at 12.) On the second shove, S. Showalter went through the glass storm door, receiving a laceration to her wrist. (*Id.* at 12-13, 15.) D. Showalter, who had climbed the steps to the home, immediately noticed S. Showalter “crashing” out of the glass storm door. (*Id.* at 13, 29-30.) At the time, S. Showalter was still screaming for help. (*Id.* at 29-30.) Seeing that S. Showalter was stuck in the door with Petitioner on the other side, D. Showalter obtained an aluminum mop handle from the front porch and began poking or jabbing at Petitioner in an effort to get him away from S. Showalter. (*Id.* at 30.) Petitioner backed away, grabbing the mop handle and yanking it away from D. Showalter. (*Id.* at 30-31, 34.) D. Showalter also received cuts on her arm from the broken glass while attempting to help her daughter. (*Id.* at 31.)

After freeing her daughter from the glass storm door, D. Showalter retrieved her cellular phone from her daughter and called 9-1-1. (*Id.*) Petitioner simultaneously retreated to the kitchen and grabbed a handful of knives.³ (*Id.*) When picking up the knives, Petitioner stated something to the effect of “[t]his will get you out of here.” (*Id.* at 15.) When D. Showalter vocalized that Petitioner had grabbed knives to the 9-1-1 operator, Petitioner “threw [the knives]

³ The type of knives Petitioner grabbed is in dispute. S. Showalter claims that the knives were steak knives, while D. Showalter simply described them as “a handful of knives.” (App. Vol. II at 14, 34.) Petitioner claims the knives were butter knives. (*Id.* at 54.)

back through the kitchen.” (*Id.* at 31.) Knowing D. Showalter was on the phone with 9-1-1, Petitioner responded about the knives, “[t]here. . . . I put them down[;] I don’t have them.” (*Id.* at 15.) D. Showalter and S. Showalter then exited the house and waited outside until police arrived. (*Id.* at 32.)

Deputy Richie Callison of the Fayette County Sheriff’s Department responded to the emergency call, and was advised of “possibly one subject armed with a knife.” (*Id.* at 37.) After sorting out all of the details of the skirmish, Dep. Callison arrested all four of the individuals involved -- Petitioner, S. Showalter, D. Showalter, and Mr. Neal. (*Id.* at 38.) Dep. Callison noted a laceration and swelling under Petitioner’s left eye, redness on S. Showalter’s neck and arm, and a laceration on S. Showalter’s hand. (*Id.* at 41.)

S. Showalter was charged with trespassing, battery and domestic battery. (*Id.* at 42.) D. Showalter was charged with simple assault for her use of the aluminum mop handle. (*Id.*) Mr. Neal was charged with domestic battery. (*Id.* at 43.) Petitioner, finally, was charged with brandishing, for going into the kitchen when the altercation “was basically over” and grabbing a handful of knives. (*Id.*)

B. Underlying Criminal Proceedings

Petitioner took the matter to trial in the Magistrate Court of Fayette County, West Virginia (hereinafter, “magistrate court”), on May 5, 2015, and was found guilty of Brandishing a Deadly Weapon in violation of W. Va. Code § 61-7-11. (App. Vol. I at 17-21.) As a result, Petitioner was fined Fifty Dollars (\$50.00) and assessed the costs associated with the trial, One Hundred Sixty Dollars and Twenty-Five Cents (\$160.25). (*Id.* at 39.) Importantly, no jail time was imposed. Petitioner appealed the matter to the Circuit Court of Fayette County, West Virginia (hereinafter, “circuit court”), on May 21, 2015. (*Id.* at 21.)

Prior to the appellate hearing before the circuit court, the State noticed potential witnesses Dep. Callison, Sergeant T. N. Mooney of the Fayette County Sheriff's Department, S. Showalter and D. Showalter. (*Id.* at 22.) The State further answered Petitioner's motion for discovery, sending said response to Petitioner's counsel on June 2, 2015. (*Id.* at 23-24.)

The State filed its own motion for discovery on the same day. (*Id.* at 25-27.) On June 3, 2015, the circuit court was set to hold a bench trial, but ultimately rescheduled the matter when neither Petitioner nor counsel appeared for the hearing. (*Id.* at 30.) In its "Order Re-Scheduling Bench Trial," the circuit court specifically noted that Petitioner may not have received service regarding the matter, as Petitioner "had provided a different address on his *Criminal Bail Agreement: Criminal Appeal Bond* than that to which notice was sent. . . ." (*Id.* (emphasis in original).) As such, the matter was continued until June 16, 2015. (*Id.*) The circuit court further Ordered that such service of the rescheduling order upon Petitioner be done in person. (*Id.* at 31.)

The State again noticed potential witnesses Dep. Callison, Sergeant T. N. Mooney of the Fayette County Sheriff's Department, S. Showalter and D. Showalter for use in the hearing on June 16, 2015. (*Id.* at 35.) The appellate hearing commenced on June 16, 2015. (App. Vol. II at 3.) Therein, the State called as witnesses S. Showalter, D. Showalter, and Dep. Callison, who testified as reported above. (*Id.* at 2.)

Following the testimony of the State witnesses, Petitioner moved to dismiss the matter on the basis of self-defense. (*Id.* at 44-45.) In response, the State noted the size of Petitioner and his brother in comparison to the two women, and the fact that Petitioner brandished a handful of knives at a point when the confrontation had basically ceased. (*Id.* at 46.) The circuit court found as follows:

Based upon the evidence presented, this Court doesn't feel that the evidence shows -- the credible, believable evidence does not show that [Petitioner] was in his home. I don't know whether he was camping out there or what right he had to be in the home, but he was in this home.

There's no evidence that he was in danger of serious bodily injury or death at the hands of this woman. He appears to be a good-sized individual that could have easily handled the witness, Susan Showalter. And so the motion to dismiss is denied.

(*Id.* at 46-47.) Petitioner then attempted to call Mr. Neal as a witness, but he could not be found.

(*Id.* at 47.) Petitioner then testified in his own defense. (*Id.*)

Petitioner testified that he was living at Mr. Neal's home at the time of the confrontation, and that he awoke as a result of the argument between Mr. Neal and S. Showalter. (*Id.* at 49-50.) Petitioner stated that he went into the main room of the house and stepped in between Mr. Neal and S. Showalter, and that S. Showalter fell through the screen door as a result of "beating and banging around." (*Id.* at 50.) Petitioner stated that he would have only grabbed S. Showalter to free the minor child, and that he would have let her go once the child was freed. (*Id.*) Petitioner then testified that D. Showalter was jabbing him and swinging at him with the aluminum mop handle until he was in the kitchen, at which point he grabbed a handful of knives. (*Id.* at 51.) Petitioner admitted that he threw down the knives as soon as D. Showalter screamed into the phone that he was wielding knives. (*Id.* at 52.) Petitioner further testified that the knives were only butter knives, rather than steak knives. (*Id.* at 54.)

Petitioner then called his girlfriend, Ashley Hudson, as a witness. (*Id.*) Before she could testify, however, the State objected on the grounds that it had never received a witness list from Petitioner. (*Id.* at 55.) Counsel for Petitioner identified that he had not provided a witness list because he had received no notice of the hearing. (*Id.*) The circuit court, however, found that

Ms. Hudson's testimony was unnecessary, as she had not testified during the magistrate hearing on the matter. (*Id.*) Petitioner then moved again to dismiss the matter. (*Id.*)

The circuit court found Petitioner's testimony to be inherently incredible. (*Id.*) First, the circuit court found Petitioner's testimony that he was just coming to the aid of the child "a bunch of nonsense." (*Id.*) The circuit court also noted that, due to Petitioner and Mr. Neal's size, they could have easily handled the two women without resorting to brandishing knives. (*Id.*)

Trial counsel identified that S. Showalter and D. Showalter were trespassing on Mr. Neal's property and created the confrontation in the midst of a heated custody dispute. (*Id.* at 57.) Trial counsel further argued that Petitioner could not have breached the peace in his own home, and that he had a right to protect himself under State law. (*Id.* at 58.) The State, however, urged the circuit court to see that, based upon a totality of the circumstances, Petitioner was never at the risk of serious injury, and that Petitioner knew that grabbing the knives was unlawful, as he threw the knives down immediately upon hearing D. Showalter's 9-1-1 call. (*Id.* at 59.)

The circuit court identified that the two women should not have been at Mr. Neal's home without a court order, and that the women's actions were the catalyst to the confrontation. (*Id.* at 60.) The court found, however, that Petitioner did not simply attempt to protect the child and de-escalate the situation, as Petitioner's testimony suggested, but that based upon credible testimony Petitioner got "right in the middle of it" and began "assaulting Susan Showalter." (*Id.*) Further, the court found:

This claim of his that he was being the white knight on the white horse, protecting this little baby, that's a bunch of nonsense. He was in there trying to show how macho he is or whatever, trying to help his brother, who really didn't -- wouldn't need any help. For heaven's sake, he's well, if he's 300 pounds, you know, he could have handled this woman.

(*Id.*) The circuit court continued:

And to be, you know, candid with the parties, up until your client testified, I was leaning toward dismissal of this matter. But when your client got on the stand and testified that the only thing he picked up was a butter knife, which is not a dangerous and deadly weapon, -- up until that point, I was leaning toward dismissal.

But his testimony, I find it not to be credible, I find not to be believable. He was not in fear of death or serious bodily injury from [Susan] Showalter or her mother. The evidence appears to be that he grabbed the mop handle from her and threw it away. And the comment was made, "I'll get you folks out of her," and grabbed this steak knife or steak knives or whatever, had the desired effect of getting them out of the house. They were frightened enough that they did leave. And then, of course, once he is informed that 9-1-1 is on the way, he throws the knives down.

So it's a close case. I can see why the magistrate in this situation didn't impose a jail sentence in this matter. It appears that [Petitioner] realized what he was doing shortly after he brandished one of these knives, but that doesn't excuse the fact that he did, in fact, brandish the knife.

(*Id.* at 61-62.) The circuit court then affirmed Petitioner's conviction in the magistrate court and further assessed Petitioner the costs of the appeal. (*Id.* at 62-63.)

The circuit court released its Conviction and Sentencing Order on June 25, 2015. (App. Vol. I at 38.) Therein, the court found Petitioner's testimony to not be credible, and found that the State "has proven beyond a reasonable doubt that [Petitioner] committed the misdemeanor offense of brandishing a deadly weapon on February 11, 2015, and he is adjudged guilty of the same." (*Id.* at 39.) Thus, the court Ordered Petitioner to pay a fine of Fifty Dollars (\$50.00) plus court costs, payable in six (6) equal payments on the fifth (5th) day of each month. (*Id.*) Petitioner noticed his appeal to this Honorable Court on July 16, 2015, and perfected said appeal on October 26, 2015. The State now issues the following response.

SUMMARY OF THE ARGUMENT

The facts of the underlying matter clearly establish that, while Petitioner did not start the altercation between S. Showalter and Mr. Neal, Petitioner was clearly the aggressor once he became involved. Further, the underlying facts indicate that the confrontation had basically ceased at the point Petitioner decided to brandish a handful of steak knives. As such, the magistrate court was correct in finding, and the circuit court was correct in affirming, Petitioner guilty of the misdemeanor offense of brandishing in violation of W. Va. Code § § 61-7-11.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State contends, based upon the completeness of the underlying record and the issues of law at hand, that oral argument in this matter is unnecessary. This matter may be properly settled via Memorandum Decision pursuant to Rule 21 of the West Virginia Revised Rules of Appellate Procedure through application of current and longstanding West Virginia law.

ARGUMENT

This Honorable Court has previously set forth that the findings of fact and conclusions of the underlying circuit court are subject to a two-pronged deferential standard of review. Syl. Pt. 1, *State v. Mechling*, 219 W. Va. 366, 633 S.E.2d 311 (2006) (citing Syl. Pt. 1, *Pub. Citizen, Inc. v. First Nat'l Bank in Fairmont*, 198 W. Va. 329, 480 S.E.2d 538 (1996)). “The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court’s underlying factual findings are reviewed under a clearly erroneous standard.” *Id.* “Questions of law are subject to a *de novo* review.” *Id.*

A. The Circuit Court Found, Based Upon a Credibility Determination, That the State Had Proven Petitioner’s Guilt Beyond a Reasonable Doubt

The State asserts that it proffered sufficient evidence to warrant Petitioner’s conviction in the underlying matter, and further contends that the circuit court correctly found that Petitioner

was not entitled to the affirmative defense of self-defense in the matter, as Petitioner could not reasonably believe he was at risk of imminent harm, or in danger of serious bodily injury or death. In *State v. Guthrie*, this Honorable Court set forth the applicable standard for challenges to the sufficiency of the evidence by a convicted criminal defendant upon appeal:

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

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

Further, “a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state’s evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt.” Syl. Pt. 1, *State v. Phelps*, 172 W. Va. 797, 310 S.E.2d 863 (1983) (citing Syl. Pt. 1, *State v. Starkey*, 161 W. Va. 517, 244 S.E.2d 219 (1978)). “The evidence is to be viewed in the light most favorable to the prosecution.” *Id.* “To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that the consequent injustice has been done.” *Id.*

When a question of self-defense is presented at trial, “[i]t is peculiarly within the province of the jury to weigh the evidence upon the question of self-defense, and the verdict of a jury adverse to that defense will not be set aside unless it is manifestly against the weight of the

evidence.” Syl. Pt. 2, *Phelps* (citing Syl. Pt. 5, *State v. McMillion*, 104 W. Va. 1, 138 S.E. 732 (1927); Syl. Pt. 1, *State v. Schaefer*, 170 W. Va. 649, 295 S.E.2d 8144 (1982)). Further, West Virginia permits a theory of self-defense under the “castle doctrine,” which means that “[a] man attacked in his own home by an intruder may invoke the law of self-defense without retreating.” Syl. Pt. 4, *Phelps* (citing Syl. Pt. 4, *State v. Preece*, 116 W. Va. 176, 179 S.E. 524 (1935); Syl. Pt. 1, *State v. W.J.B.*, 166 W. Va. 602, 276 S.E.2d 500 (1981)). As such, “[t]he 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. 5, *Phelps* (citing Syl. Pt. 2, *W.J.B.*).

Here, Petitioner was not charged with a violent crime necessitating the use of self-defense. Rather, Petitioner was charged with “Brandishing,” a misdemeanor crime under W. Va. Code § 61-7-11, for brandishing a handful of steak knives to threaten S. Showalter and D. Showalter after the confrontation at Mr. Neal’s had ceased and a 9-1-1 call had been placed. (App. Vol. II at 31.) West Virginia’s “Brandishing” statute states as follows:

It shall be unlawful for any person armed with a firearm or other deadly weapon, whether licensed to carry the same or not, to carry, brandish or use such weapon in a way or manner to cause, or threaten, a breach of the peace. Any person violating this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than one thousand dollars, or shall be confined in the county jail not less than ninety days nor more than one year, or both.

W. Va. Code § 61-7-11. Therefore, the question posed to the circuit court in this instance, at base, is whether Petitioner had reason to brandish a handful of steak knives to purposefully scare

S. Showalter and D. Showalter. Looking at the evidence in a light most favorable to the State, Petitioner did not.

Here, the State set forth evidence that Petitioner, upon walking into the room and seeing the altercation between S. Showalter and Mr. Neal, became the aggressor in the fight. (App. Vol. II at 12, 61-62.) S. Showalter began screaming for help after Petitioner grabbed her by the throat and shoved her through a glass storm door. (*Id.* at 12-15, 29-30.) D. Showalter heard her daughter screaming for help, saw her crash through the glass storm door, and rushed up to Mr. Neal's house to help. (*Id.* at 29-30.) After climbing the steps to Mr. Neal's house and identifying that S. Showalter was still hanging out of the glass storm door with Petitioner directly on the other side, D. Showalter grabbed an aluminum mop handle and started jabbing at Petitioner so as to free S. Showalter from the door. (*Id.* at 30-31.) Petitioner then grabbed the mop handle and stripped it away from D. Showalter, who then helped free her daughter from the door. (*Id.*) After freeing her daughter from the glass storm door and receiving injuries in the process, D. Showalter obtained her cellular phone from S. Showalter and called 9-1-1. (*Id.* at 31.) While on the call, Petitioner retreated to the kitchen and grabbed a handful of steak knives in an effort to threaten the two women. (*Id.*) After Petitioner's actions were reported during the call, Petitioner threw down the knives and the two women exited the home, waiting outside for police to arrive. (*Id.* at 31-32.)

Imputing Petitioner's actions to W. Va. Code § 61-7-11, and looking at the evidence in a light most favorable to the State, the State has proven that Petitioner brandished steak knives in an effort to threaten D. Showalter and S. Showalter at a point after any form of physical threat was removed and the confrontation had ceased. Petitioner's actions as the aggressor reignited and could have potentially escalated the dispute, rendering a finding of self-defense

impracticable. The circuit court agreed with the State's witnesses on the matter, as the finder of fact, finding Petitioner's own testimony to be inherently incredible.

As such, Petitioner's claim of insufficient evidence fails under *Guthrie*, as the State has proffered insurmountable proof of Petitioner's guilt after viewing such evidence in a light most favorable to the State. The circuit court had deference to weigh the credibility of the witnesses, and as the trier of fact, should not be reversed by this Honorable Court. Petitioner, as the aggressor in the underlying matter, should not be entitled to self-defense, as he himself ripped the aluminum mop handle out of D. Showalter's hands, and the evidence indicated that Petitioner and Mr. Neal enjoyed a severe size and physical advantage over the two women. Petitioner's actions as the aggressor therefore satisfied the elements of W. Va. Code § 61-7-11, and this Honorable Court should affirm the circuit court's affirmance of Petitioner's magistrate conviction below.

B. Petitioner Clearly "Breached the Peace" by Brandishing a Handful of Steak Knives at a Point at Which the Confrontation Had Ceased

For the foregoing reasons, Petitioner's breach of peace is also evident from the underlying record. As Petitioner himself identifies:

The term 'breach of the peace' is generic, and includes all violations of the public peace or order, or decorum; in other words, it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community; a disturbance of the public tranquility by an act or conduct inciting to violence or tending to provoke or excite others to break the peace; a disturbance of the public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community. By 'peace' as used in this connection is meant the tranquility enjoyed by the citizens of a municipality or a community where good order reigns among its members. Breach of the peace is a common-law offense.

State v. Long, 88 W. Va. 669, 108 S.E. 279, 285 (1921). In the same case, however, this Honorable Court further simplified the definition to include “all violations of the public peace, order, or decorum, such as to make an affray; [or] threaten to beat, wound, or kill another, or commit violence against his person or property. . . .” Syl., *Long*.

As identified above, Petitioner chose to brandish a handful of steak knives after the altercation had ceased and a 9-1-1 call was placed, despite being the aggressor in the situation and having a noticeable size advantage over the two women. Petitioner attempts to place the aluminum mop handle into the hands of D. Showalter when he retrieved the knives, but credible testimony shows that Petitioner had disarmed D. Showalter, who was in the process of both helping her daughter out of a glass storm door and calling 9-1-1.

In seeking a favorable review of the “breach of peace” requirement of W. Va. Code § 61-7-11, Petitioner also requests that this Honorable Court impute to criminal law its requirement for “breach of peace” espoused in *General Elec. Corp. v. Timbrook*, 170 W. Va. 143, 291 S.E.2d 383 (1982). Despite existing for over thirty years, *Timbrook* has never been applied to criminal proceedings and is inapplicable to the present matter. Further, the State contends that it would be improper to assign to the present matter a finding of a “breach of peace” requirement derived from debtor/creditor relations in a civil matter, concerning application of consumer protection laws and conformity with the U.C.C.

Upon reviewing the record below in a light most favorable to the State, the facts show that Petitioner brandished knives against unarmed women over whom he held a significant size advantage. Assuming, *arguendo*, the circuit court failed in its responsibility to specifically find that a breach of the peace occurred, such an error is harmless given a clear indication from the underlying record that Petitioner breached the peace. Therefore, this Honorable Court must

affirm the circuit court's affirmance of Petitioner's misdemeanor conviction in the magistrate court below.

C. The Circuit Court Correctly Denied Petitioner an Opportunity to Present a Witness on Appeal That Had Not Been Presented During the Underlying Bench Trial in Magistrate Court

Finally, Petitioner claims that the circuit court erred by refusing to allow the testimony of Petitioner's girlfriend, Ashley Hudson, during the circuit court's review of Petitioner's magistrate court conviction, despite the fact that Ms. Hudson did not testify in the underlying magistrate court bench trial. Petitioner's claim is without merit. W. Va. Code § 50-5-13 identifies that "[i]n the case of an appeal of a criminal proceeding tried without a jury, the party seeking the appeal shall file with the circuit court a petition for appeal and trial de novo. The exhibits, together with all papers and requests filed in the proceeding, constitute the exclusive record for appeal and shall be made available to the parties."

This Honorable Court has previously observed that, upon an appeal of a conviction in magistrate court, "the circuit court takes on the role of a reviewing court, not unlike this Court, rather than a trial court. . . ." *State ex rel. Collins v. Bedell*, 194 W. Va. 390, 395, 460 S.E.2d 636, 641 (1995). For purposes of an appeal to this Honorable Court, "[a]nything not filed with the lower tribunal shall not be included in the record on appeal unless the Court grants a motion for leave to supplement the record on appeal for good cause shown." W. Va. Rev. R.A.P. 6(b) (in part).

Following Petitioner's own testimony, Petitioner attempted to call Ms. Hudson as a witness. (App. Vol. II at 54.) The State objected on the grounds that Ms. Hudson was not revealed in any witness list provided by Petitioner.⁴ (*Id.* at 55.) The circuit court agreed with the

⁴ As Petitioner was convicted of a misdemeanor and received no jail time, the circuit court concluded counsel's representation of Petitioner upon motion by the prosecutor, *ex parte*. (See App. Vol. II at 4.) Counsel was therefore

State, further recognizing that Ms. Hudson “didn’t testify down in magistrate court. . . .” (*Id.*) Counsel for Petitioner replied, “[n]o sir[,] [s]he was not able to be present that day.” (*Id.*)

As Petitioner’s hearing before the circuit court was one of appellate review of his magistrate court misdemeanor conviction, Petitioner’s Sixth Amendment rights were not affected. Petitioner failed to secure Ms. Hudson’s presence as a witness for the defense in the underlying criminal trial, and her new, previously unheard testimony is improper for purposes of appellate review, regardless Petitioner furnishing a witness list. Petitioner’s Sixth Amendment analysis relies upon this Honorable Court treating the circuit court appeal as a criminal *trial*, when under W. Va. Code § 50-5-13 and *State ex rel. Collins*, the circuit court is clearly operating in an appellate capacity, rather than acting as a trial court. Therefore, this Honorable Court must affirm the circuit court’s affirmance of Petitioner’s misdemeanor conviction in the magistrate court below.

CONCLUSION

WHEREFORE, for the foregoing reasons, the State of West Virginia respectfully directs this Honorable Court to the circuit court’s affirmance of Petitioner’s misdemeanor conviction in the magistrate court below.

Respectfully Submitted,

STATE OF WEST VIRGINIA,

Respondent, By Counsel,

not informed of the pending appeal of Petitioner until the day prior to the June 16, 2015, appeal hearing. (*Id.*) Petitioner uses this lack of notice as a basis for not furnishing a witness list. (*Id.* at 55.)

**PATRICK MORRISEY
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CERTIFICATE OF SERVICE

I, Shannon Frederick Kiser, Assistant Attorney General and counsel for the Respondent State of West Virginia hereby verify that I have served a true copy of “**RESPONDENT’S BRIEF**” upon counsel for Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 9th day of December, 2015, addressed as follows:

Brandon S. Steele
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