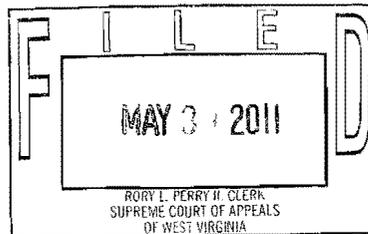


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 110090



STATE OF WEST VIRGINIA,

*Petitioner,*

v.

SAMUEL D. SCARBRO, JR.,

*Respondent.*

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RESPONSE TO PETITION FOR APPEAL

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---

**RESPONSE TO PETITION FOR APPEAL**

---

Comes now the Respondent, the State of West Virginia, by Michele Duncan Bishop, Assistant Attorney General, pursuant to the West Virginia Revised Rule of Appellate Procedure 10(d) and according to an Order of this Honorable Court, dated January 13, 2011, and responds to the Petition for Appeal as follows.

**I.**

**RESPONSE TO ASSIGNMENT OF ERROR**

Petitioner's assignment of error are quoted below. Each is followed by the State's response.

1. *The [c]ourt abused its discretion and committed reversible error when it refused to admit an eight-page, typed prior statement of the State's key witness that substantially contradicted his trial testimony on the grounds that the witness had already testified on the relevant information in the statement and that such statement would unduly complicate and clutter the record.*

The State's Response:

The Rules of Evidence do not require admission of a prior inconsistent statement and the decision to do so or to so decline is within the discretion of the trial court. Here, where the prior statement of James Reid was not clearly inconsistent, where defense counsel was given full opportunity to question Mr. Reid about his prior statement, and where the prior statement would have been presented in transcript form only, the trial court did not abuse its discretion in declining to admit the document.

2. *The [c]ourt erred by failing to give a cautionary instruction to the jury, pursuant to State v. Caudill, 170 W. Va. 74; 289 S.E.2d 748 (1982), regarding the testimony of James Reid, the State's primary witness, who previously entered into a plea agreement with the State, including a charge of fraudulent use of an ATM access device.*

The State's Response:

The Petitioner did not request a cautionary instruction. The plain error doctrine should not apply, and if error was committed, that error was harmless.

3. *The [c]ourt committed error by sentencing Defendant to a determinate sentence of two years in the West Virginia Penitentiary over a \$136.37 ATM card purchase that was not premeditated nor preplanned as such sentence violates Article 3, Section 5 of the West Virginia Constitution, is disproportionate and is cruel and unusual punishment.*

The State's Response:

The Petitioner's sentence was well below the statutory ceiling for the offense he committed, and the sentence is not subject to appellate review. In consideration of the Petitioner's criminal history and the circumstances surrounding his crime, the sentence was not shocking.

## II.

### STATEMENT OF THE CASE

#### **A. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW.**

This is an appeal by Samuel D. Scarbro (“Petitioner”) from the conviction and subsequent January 20, 2011, sentencing and commitment order of the Circuit Court of Fayette County (Blake, J.), sentencing the Petitioner to a determinate term of two years for the felony of fraudulent use of a bank conveyance or access device, W. Va. Code § 61-3C-13(c). (App. 271-273, 299-302.)

#### **B. FACTS.**

On January 5, 2010, Cassie Withrow gave her husband, Earl, her ATM card with instructions to withdraw \$60 from the Bank of Mount Hope. (App. 75.) Mr. Withrow did so, but left both the receipt for the transaction and his wife’s card in the bank’s transaction machine. (App. 81.) The ATM machine would have “captured” Ms. Withrow’s card within sixty seconds of Mr. Withrow’s having completed the transaction. (App. 88.) Ms. Withrow later discovered six or seven unauthorized charges on her account and incurred about seven overdraft fees in the amount of \$28 each. (App. 77.)

Upon discovering that Ms. Withrow’s card had been inappropriately used, Bank of Mount Hope Branch Manager Tom Smith reviewed video surveillance of the ATM machine and contacted the Oak Hill Police Department. (App. 89-90.) Mr. Smith testified that Ms. Withrow’s card was used for six purchases at five locations in the Fayetteville and Oak Hill areas on the evening of January 5<sup>th</sup>: at Co-Mac 4 in the amount of \$12.68 at 7:18 p.m.; twice at Mountaineer Mart in the amounts of \$12.02 and \$9.94 at 7:32 p.m and 7:33 p.m.; at One Stop 7 in the amount of \$10.90 at 7:38 p.m.; at Citgo in the amount of 17.27 at 7:48 p.m.; and at Wal-Mart in the amount of \$153.85

at 8:08 p.m. (App. 91, 93-94.) Only the Mountaineer Mart and Wal-Mart transactions received substantial attention during the trial testimony.

Mr. Smith also reviewed ATM records and found that the Petitioner engaged in an ATM transaction at the same machine immediately after Mr. Withrow. (App. 98.) James Reid was with the Petitioner and Mr. Reid's former girlfriend, Christine Lukach—who was the Petitioner's girlfriend at the time of the offense and at the time of trial—on the evening of January 5, 2011. (App. 104.) Mr. Reid testified that when the trio pulled up to the ATM in the Petitioner's Chevrolet pick-up truck, the Petitioner in the driver seat, Ms. Lukach in the middle, and Mr. Reid in the passenger seat, another card was ejected from the ATM machine. (App. 106-107.) He testified that the Petitioner took the card and put it in his truck, then made a transaction using Ms. Lukach's card. (App. 108.) It is not clear from the testimony where the Petitioner then put Ms. Lukach's card.

Mr. Reid testified that the Petitioner instructed him to pay for beer, gas, and cigarettes at Mountaineer Mart using "the card that was laying on the dash", and that Ms. Lukach told him to purchase cigarettes at Wal-Mart using "the card". (App. 110, 113.) Mr. Reid kept the items purchased from Mountaineer Mart, and shared the cigarettes he bought at Wal-Mart between himself, the Petitioner, and Ms. Lukach. (*Id.*) He testified that the Petitioner engaged in a transaction in another convenience store outside of his presence. (App. 111.) The Petitioner testified that Mr. Reid took the ATM card from the dash, that Mr. Reid paid for gas for the Petitioner's truck at Mountaineer Mart, and bought cigarettes for him at Wal-Mart. (App. 191-194.) The Petitioner testified that he was "suspicious" that Mr. Reid used "that card" by the time of the Wal-Mart transaction. (App. 188.)

Ms. Lukach testified that neither she nor the Petitioner instructed Mr. Reid to use Ms. Withrow's card. (App. 168.) At the conclusion of the evening, Mr. Reid left Ms. Withrow's card in the Petitioner's vehicle, according to his testimony, but Ms. Lukach disagreed. (App. 141, 173.) Ms. Lukach also testified on cross-examination that she had no independent recollection of the events surrounding the use of the ATM card, that she often does not remember things, and that she has "mental issues" and takes a lot of medication. (App. 175, 177.) However, Ms. Lukach's sister, Julie Ray, testified that the Petitioner admitted to her that he himself had used the card. (App. 145.)

Mr. Reid testified that he was charged with conspiracy to commit a felony and six counts of fraudulent use of a credit card, and that he pled guilty on two counts, because he had signed Ms. Withrow's name twice at Mountaineer Mart and again at Wal-Mart, but that his plea bargain did not involve an agreement that he testify. (App. 115-116, 120.) On cross-examination, Mr. Reid also testified about a prior statement he had given to the police, and about testimony elicited during his own plea hearing:

Q: All right. And isn't it true, Mr. Reid, that when you were talking to Trooper Milam, that it ends up in this statement that you told Mr. Milam that you were intoxicated and you thought--when you were using this card, you thought it was Christine Lukach's card? Isn't that what you told Trooper Milam?

A: Yes. I told him I was intoxicated. But when the card was thrown on the dash, I thought it was her card that I was using.

Q: So you told Trooper Milam you thought it was Christine's card--

A: Yes.

Q: --that you were using.

A: Now, that wasn't the truth, was it?

A: Yes sir.

Q: Okay. It was? Okay. Isn't it true that you entered a plea of guilty to two felony counts over this matter? Correct?

A: Yes, sir.

Q: And didn't you tell Judge Hatcher that, in fact, you thought--well, at first--you told Judge Hatcher that you were told by [the Petitioner] and Christine Lukach to go use the card. Isn't that what you first told Judge Hatcher?

A: Yes. They told me I could use the card.

Q: All right. In fact, you told Judge Hatcher that you were told to use the card by them, didn't you, at first?

A: I was told I could use the card, yes.

....

Q: And didn't you say this: "I got it from"--"I was with some people at the time, accompanying at the time. They are the ones that handed me the card and said, 'Here, go ahead and pay for the gas and get some beer while you are in there, and cigarettes,' and I did. And I thought, apparently,"--"at the time, I thought it was their card"?

A: Yes.

Q: Isn't that what you told Judge Hatcher?

A: Yes, sir.

(App. 128-131.) As this line of questioning continued, the court intervened:

Well, you know, this -- hold on here just a minute. I think the State's counsel has a point about using a transcript of things that -- the first thing that you ought to do, the first -- is give the witness the opportunity to say what he said or did. Then if you have something that you believe is inconsistent, then you can ask him, "Well, did you not say this or do that?" We're sort of going at this backwards, it seems to me.

And it's somewhat confusing for the witness because he did testify, evidently under oath, at some point before the other judge that he was given the card by these

people and now you're saying the opposite, and that's not what -- that's not what this man is testifying to. So try to focus it, if you would. Go ahead.

(App. 133-134.) Shortly thereafter, the Petitioner's counsel attempted to have Mr. Reid's statement to the police admitted into evidence. That statement read, in pertinent part:

JLM: Okay. All this time you're under the impression that it was, from what you're telling me, you were under the impression that it was your ex-girlfriend's card, right?

JR: Yes.

....

JLM: So did she know you were using that credit card?

JR: I'm, I'm not really sure about that. I mean, I mean I, I was the drunk one.

JLM: Did you ask her to use that credit card?

JR: I asked to use her credit card.

JLM: Okay. Now, when I talk to her, is she going to say that she gave you permission to use her credit card or?

JR: She should, I, I wouldn't see why she wouldn't.

(App. 288.) The court denied the motion, stating:

... Looking at the Defendant's Exhibits No. 2, which is the witness's statement to the authorities, and No. 3, which is this witness's charging document to which he entered pleas of guilty to, the [c]ourt feels that the relevant information about those statements has been elicited from this witness. It would unduly complicate the record and clutter the record up in this matter to have those admitted into evidence.

There may also be something in that No. 2 or something in No. 3 that may be improper to have before the jury in this particular case.

(App. 139-140.) The jury was given a general instruction about witness credibility. (App. 214.)

At the conclusion of the trial, the Petitioner was found guilty by the jury of the third count of the indictment, fraudulent use of a bank conveyance or access device, for the Wal-Mart transaction. (App. 272, 277.) The Petitioner, an unemployed 46-year-old with criminal history of two convictions for domestic battery and a conviction for felony possession of a firearm, was sentenced to the West Virginia State Penitentiary for a determinate sentence of two years. (App. 300.) The court noted on its sentencing and commitment order that the Petitioner had not accepted responsibility. (*Id.*)

### III.

#### SUMMARY OF ARGUMENT

The evidence presented in this case shows that the Petitioner knowingly engaged in an hour-long spending spree using an ATM card he appropriated from a machine, then continued to possess the card, ultimately receiving at least a carton of cigarettes purchased using the card. Petitioner argues that the trial court failed to admit evidence in the form of a prior inconsistent statement, but fails to show precisely how the statement is inconsistent or that the jury would have learned anything from its admission that was not learned through the testimony of the witness or defense trial counsel's cross-examination of the witness. He argues that the trial court failed to give a cautionary instruction about the testimony of that witness, but he did not request such an instruction, and the court did not err in not, *sua sponte*, offering the instruction because the error, if any, was harmless. Finally, the Petitioner argues that his two-year sentence was cruel and unusual, but the sentence is not subject to appellate review.

IV.

**STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The State does not believe this case requires oral argument. If, however, the Court requires oral argument, the State requests that argument be set according to Rule 19, W. Va. Rev. R.A.P., inasmuch as the applicable law is settled.<sup>1</sup> This matter is appropriate for disposition by memorandum order.

V.

**ARGUMENT**

**A. THE PRIOR STATEMENT OF JAMES REID WAS NOT ON ITS FACE INCONSISTENT WITH HIS TRIAL TESTIMONY AND ADMISSION OF THE STATEMENT TRANSCRIPT WAS NOT REQUIRED.**

**1. Standard of Review**

“Concerning our standard of review of the circuit court’s exclusion of the evidence at issue, we note that “[r]ulings on the admissibility of evidence are largely within a trial court’s sound discretion and should not be disturbed unless there has been an abuse of discretion.” *State v. Guthrie*, 205 W. Va. 326, 332, 518 S.E.2d 83, 89 (1999), quoting *State v. Louk*, 171 W. Va. 639, [643,] 301 S.E.2d 596, 599, (1983), citing Syl. pt. 2, *State v. Peyatt*, 173 W. Va. 317, 315 S.E.2d 574 (1983).

**2. Argument**

The Petitioner avers that reversible error was committed when the trial court denied his motion to admit the transcript of the prior statement of Mr. Reid (App. 285-293), which statement the Petitioner argues is inconsistent, stating that Mr. Reid told the trooper to whom he gave that

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<sup>1</sup>The question of whether it is plain error for the court to omit a cautionary instruction regarding accessory testimony is not settled; however, even if it were plain error for the court to do so, the error would be harmless under these circumstances.

statement that he believed he was using Ms. Lukach's ATM card for the transactions in question at the trial. The Petitioner cites the following:

Three requirements must be satisfied before admission at trial of a prior inconsistent statement allegedly made by a witness: (1) The statement actually must be inconsistent, but there is no requirement that the statement be diametrically opposed; (2) If the statement comes in the form of extrinsic evidence as opposed to oral cross-examination of the witness to be impeached, the area of impeachment must pertain to a matter of sufficient relevancy and the explicit requirements of Rule 613(b) of the West Virginia Rules of Evidence-notice and an opportunity to explain or deny-must be met; and, finally, (3) The jury must be instructed that the evidence is admissible only to impeach the witness and not as an evidence of material fact.

Syl. Pt. 1, *State v. Blake*, 197 W. Va. 700, 478 S.E.2d 550 (1996). The State notes that the existence of the *Blake* factors, together with a reading of West Virginia Rule of Evidence 613(b), shows that the admission of extrinsic evidence of a prior inconsistent statement is not automatic. Rule 613(b) provides:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

As to the first point of *Blake*, it is not clear that the earlier statement was inconsistent with Mr. Reid's trial testimony. The Petitioner argues that the earlier statement was inconsistent with Mr. Reid's trial testimony because at trial "Mr. Reid did not state one time during direct examination that he thought he was using Christine Lukach's card. To the contrary, Mr. Reid testified that he knew he was using Cassie Withrow's card and that Defendant outright told him to use the card to go purchase gasoline and cigarettes." (Pet. for Appeal, 10-11.) In the trial transcript passages on which the Petitioner relies, Mr. Reid testified using unclear terminology such as "that card" and "the card

that was lying on the dash”.<sup>2</sup> “The card” at neither point during trial testimony was identified as being either Ms. Withrow’s or Ms. Lukach’s.

Even during the points in testimony where Mr. Reid refers to the use of Ms. Withrow’s card, it is not clear whether he was testifying that he knew at the time of the commission of the offense that the card he used belonged to Ms. Withrow, or whether he was testifying as if he had since learned. Importantly, when Mr. Reid was cross-examined, he testified that he had told Trooper Milam, during the earlier statement, that he had believed at the time he was using Ms. Lukach’s card, and that the statement was the truth:

Q: All right. And isn’t it true, Mr. Reid, that when you were talking to Trooper Milam, that it ends up in this statement that you told Mr. Milam that you were intoxicated and you thought--when you were using this card, you thought it was Christine Lukach’s card? Isn’t that what you told Trooper Milam?

A: Yes. I told him I was intoxicated. But when the card was throwed on the dash, I thought it was her card that I was using.

Q: So you told Trooper Milam you thought it was Christine’s card--

A: Yes.

Q: --that you were using.

A: Now, that wasn’t the truth, was it?

A: Yes sir.

(App. 128-129)

The Petitioner, then, has not met the first requirement of the *Blake* test. Nevertheless, the Petitioner was given an opportunity to use the statement for impeachment purposes. The relevant

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<sup>2</sup>As noted in the statement of facts, it was unclear what became of Ms. Lukach’s card after the Petitioner made a transaction using it.

testimony that transpired in that regard is quoted above. Shortly thereafter, it appears that defense trial counsel began asking Mr. Reid questions about his plea hearing, but it is not clear that the trial court “shut down” that line of questioning as he asserts. (See Pet. of Appeal, 11.) In the portion of the trial transcript cited by the Petitioner, the trial court directed:

Well, you know, this -- hold on here just a minute. I think the State’s counsel has a point about using a transcript of things that -- the first thing that you ought to do, the first -- is give the witness the opportunity to say what he said or did. Then if you have something that you believe is inconsistent, then you can ask him, “Well, did you not say this or do that?” We’re sort of going at this backwards it seems to me.

And it’s somewhat confusing for the witness because he did testify, evidently under oath, at some point before the other judge that he was given the card by these people, and now you’re saying just the opposite, and that’s not what – that’s not what this man is testifying to. *So try to focus it, if you would. Go ahead.*

(App. 133-34, emphasis added.)

In further support of his argument, the Petitioner relies, in large part, on *State v. Barnett*, 226 W. Va. 422, 701 S.E.2d 460 (2010)(per curiam) and *State v. King*, 183 W. Va. 440, 396 S.E.2d 402 (1990). *Barnett* and *King* present scenarios very different from the instant one. In *Barnett*, the court declined to admit an audiotaped prior inconsistent statement into evidence after the witness acknowledged his prior statement was inconsistent. This Court found the trial court had abused its discretion, but was particularly motivated by the nature of the evidence; that is, that it was contained on audiotape:

We note the similarity between the videotaped evidence introduced in *King*, and the audiotaped evidence sought to be introduced by the appellants herein. Both types of recordings allow the jury to examine and assess voice inflection and other auditory factors bearing on credibility, with the videotaped evidence providing additional opportunities for visual observations. The precautions in *King* relating to the admissibility of videotaped evidence are worth noting:

“A videotaped interview containing a prior inconsistent statement of a witness who claims to have been under duress when making such a statement or coerced into making such a statement is admissible into evidence if: (1) the contents thereon will assist the jury in deciding the witness’ credibility with respect to whether the witness was under duress when making such statement; (2) the trial court instructs the jury that the videotaped interview is to be considered only for the purposes of deciding the witness’ credibility on the issue of duress or coercion and not as substantive evidence; and (3) the probative value of the videotaped interview is not outweighed by the danger of unfair prejudice.”

*Barnett*, 226 W. Va. 422, \_\_\_, 701 S.E.2d 460, 469-70.) (Citation omitted.).

Here, however, the Petitioner simply sought the admission of the typed transcript of a prior statement, which would allow no opportunity for examination of the factors described above.

The Petitioner has not shown that Mr. Reid’s trial testimony was inconsistent with his earlier statement to Trooper Milam, or that the trial court committed an abuse of discretion in declining to admit the extrinsic statement. Defense trial counsel was given wide latitude to use the statement for impeachment purposes and, in the end, the testimony elicited from Mr. Reid declared that he told the truth when giving the earlier statement.

**B. THE TRIAL COURT WAS NOT REQUIRED TO GIVE A LIMITING INSTRUCTION TO THE JURY WHERE NONE WAS REQUESTED, AND THERE WAS NO PLAIN ERROR IN THE OMISSION.**

**1. Standard of Review**

This Court describes the standard of review for assignments of error related to jury instructions as follows:

The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court’s giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given are accurate and fair to both parties.

Syl. Pt. 6, *Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 459 S.E.2d 374 (1995) accord *State v. Blankenship*, 208 W. Va. 612, 617, 542 S.E.2d 433, 438 (2000) (per curiam). The review is *de novo*. *Blankenship*, 208 W. Va. at 617, 542 S.E.2d at 438 citing *Skaggs v. Elk Run Coal Co., Inc.*, 198, W. Va. 51, 63, 479 S.E.2d. 561, 573 (1996).

## 2. Argument

The Petitioner never requested a limiting instruction to address the testimony of Mr. Reid. Nevertheless, he relies on *State v. Caudill*, 170 W. Va. 74, 289 S.E.2d 749 (1982) to suggest that reversible error was committed. According to *Caudill*:

In a criminal trial an accomplice may testify as a witness on behalf of the State to having entered a plea of guilty to the crime charged against a defendant where such testimony is not for the purpose of proving the guilt of the defendant and is relevant to the issue of the witness-accomplice's credibility. The failure by a trial judge to give a jury instruction so limiting such testimony is, however, reversible error.

*Id.*, Syl. Pt. 3.

Lengthy discussion was conducted by the trial judge about the charge to the jury. (App. 198-210.) In the extensive exchange, however, the Petitioner's counsel never requested an instruction like the one described in *Caudill*. In fact, at no point was discussion even had as to the nature of the relationship between the Petitioner and Mr. Reid for the purpose of jury instructions.

The Petitioner having failed to request the instruction about which he now complains, this argument is tenable only if the error is plain.

To trigger application of the "plain error" doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

Under the "plain error" doctrine, "waiver" must be distinguished from "forfeiture" of a right. A deviation from a rule of law is error unless there is a

waiver. Where there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right—the failure to make timely assertion of the right—does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is “plain.” To be “plain,” the error must be “clear” or “obvious.”

Assuming that an error is “plain,” the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome in the proceedings of the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.

Syl. Pts. 7, 8, and 9, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

This Court recently noted that *Caudill* suggests that a limiting instruction may be required in a circumstance such as this one. *Barnett*, 226 W. Va. 422, \_\_\_, 701 S.E.2d 460, 467. Courts in other jurisdictions have declined to find that the failure to give such an instruction, unrequested, is plain error. See, *Hoskins v. State*, 14 A.3d 554 (Del. 2011) (Defense counsel’s failure to request accomplice instruction does not create prejudice *per se*); *State v. Adams*, 943 A.2d 851 (N.J. 2007) (Court “satisfied that ‘the error did not have the clear capacity to produce an unjust result and that it had minimal effect on the outcome of trial’ where defense had opportunity to cross-examine witness on credibility and standard witness credibility instruction given). The State submits that the determination of whether plain error is present requires consideration of the totality of the circumstances. In this case, a general credibility instruction was given and defense trial counsel was given ample opportunity to address the witness’s credibility. Defense counsel also was able to spend a significant portion of his closing argument addressing the credibility of Mr. Reid. (App. 234-236.)

If the absence of a *Caudill* instruction was plain error, the error must be deemed harmless.

According to this Court:

Where improper evidence of a nonconstitutional nature is introduced by the State in a criminal trial, the test to determine if the error is harmless is: (1) the inadmissible evidence must be removed from the State's case and a determination made as to whether the remaining evidence is sufficient to convince impartial minds of the defendant's guilt beyond a reasonable doubt; (2) if the remaining evidence is found to be insufficient, the error is not harmless; (3) if the remaining evidence is sufficient to support the conviction, an analysis must then be made to determine whether the error had any prejudicial effect on the jury.

Syl. Pt. 2, *State v. Atkins*, 163 W. Va. 502, 261 S.E.2d 55 (1979); Syl. pt., 4, *State v. Ferrell*, 184 W. Va. 123, 399 S.E.2d 834 (1990).

Removing the testimony of Mr. Reid from consideration, sufficient evidence was presented to allow the jury to conclude guilt on the part of the Petitioner. The State had to prove that the Petitioner:

- (1) knowingly, willfully and with intent to defraud;
  - (2) possessed a counterfeit or unauthorized access device, such as a bank card
- or
- (1) knowingly, willfully and with intent to defraud;
  - (2) used, produced, or trafficked a counterfeit or unauthorized access device

*See* W. Va. Code § 61-3C-13(c). "Traffic" simply means transfer to another. W. Va. Code § 61-3C-13(a)(5).

These elements are evident, and the State could have proven either combination. The evidence in this case shows that the Petitioner admitted to removing Ms. Withrow's card from the ATM machine and putting it on the dashboard of his vehicle, rather than a more secure location. The Petitioner's testimony indicates that he saw Mr. Reid take the card from the dashboard, but he

continued to drive Mr. Reid to a number of stores. The Petitioner's own testimony shows that he questioned Mr. Reid about having used the card at Wal-Mart- after having gone into Wal-Mart with him-but that he accepted the fifty-dollar carton of cigarettes that Mr. Reid purchase there. Even before that the Petitioner, at the least, allowed Mr. Reid to put gas in his automobile knowing that he had given Mr. Reid access to the card. In addition, Ms. Ray testified that the Petitioner admitted to her that he had used Ms. Withrow's ATM card. This testimony could allow any reasonable trier of fact to determine that the Petitioner developed the intent upon removing Mr. Withrow's card from the machine, and that he benefitted both by possessing the card and by transferring it to Mr. Reid. This evidence was more than sufficient, even absent the testimony of Mr. Reid, to support the Petitioner's conviction.

**C. PETITIONER'S SENTENCE IS NOT SUBJECT TO APPELLATE REVIEW BECAUSE THE SENTENCE WAS SUBJECT TO A STATUTORY MAXIMUM AND THE SENTENCE WAS WELL WITHIN STATUTORY LIMITS.**

**1. Standard of Review**

The Court "reviews sentencing orders . . . under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands." Syl. Pt. 1, in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997). "Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syl. Pt. 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982).

**2. Argument**

The Petitioner was found guilty of W. Va. Code § 61-3C-13(c), which provides:

Any person who knowingly, willfully and with intent to defraud possesses a counterfeit or unauthorized access device or who knowingly, willfully and with intent to defraud, uses, produces or traffics in any counterfeit or unauthorized access device

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than ten thousand dollars or *imprisoned in the penitentiary not more than ten years, or both*.

(Emphasis added.) The Petitioner received only a two-year determinate sentence for violation of a statute under which he could have been sentenced up to ten years, and for which he could have been assessed a fine in addition. Inasmuch as the statute provides a ceiling for sentencing, the sentence is not one traditionally subject to appellate review, as explained in *Goodnight*. See also Syl. Pt. 4, *Wanstreet v. Bordenkircher*, 166, W. Va. 523, 276 S.E.2d 205 (1981) (“While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence.”)

Despite having received only two years on a potential ten-year sentence, the Petitioner argues that the punishment is disproportionate to the crime committed. He describes his crime as “a \$136.37 purchase of cigarettes from an unplanned and unpremeditated use of an ATM card. . . .” (Pet. 14.) This is an over-simplified description of the crime, and it ignores the aggravation caused to Ms. Withrow, who initially incurred the charges and fees resulting from the Petitioner’s spending spree, the necessary time spent by both the bank and Ms. Withrow to reorder her account, and the societal interest in preventing identity theft.

The Petitioner removed Ms. Withrow’s card from the ATM machine and put it on his dashboard. The Petitioner saw Mr. Reid take the card and, at a minimum, continued to take Mr. Reid to various stores in the Fayetteville area. He likely even directed Mr. Reid to use the card. And though he testified that he had become suspicious of Mr. Reid’s use of the card, he ultimately accepted a carton of cigarettes purchased at Wal-Mart. But the Petitioner has not accepted

responsibility for his actions. See *State v. Jones*, 216 W. Va. 666, 671-72, 610 S.E.2d 1, 6-7 (2004)(per curiam) (“...[A] trial judge may take into account a defendant’s remorse, or the lack thereof . . . when determining his or her sentence.”) The circuit court had all this information before it at the time of sentencing, as well as the knowledge that the Petitioner—who was well into adulthood at the time of the crime—had been convicted of three prior felonies.

In consideration of all these facts, there was nothing shocking about the Petitioner’s sentence, and the court did not abuse its discretion on this matter.

VI.

CONCLUSION

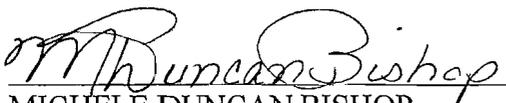
For all the reasons set forth in this brief and apparent on the face of the record, this Court should affirm the judgment of the Circuit Court of Fayette County.

*Respectfully submitted,*

State of West Virginia,  
*Plaintiff Below, Respondent,*

By counsel,

DARRELL V. McGRAW, JR.  
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**CERTIFICATE OF SERVICE**

I, MICHELE DUNCAN BISHOP, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the Response to Petition for Appeal upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 31st day of May, 2011, addressed as follows:

To: Mr. Thomas K. Fast, Esquire  
Fast Law office, L.C.  
P.O. Box 420  
Fayetteville, WV 25840

  
MICHELE DUNCAN BISHOP