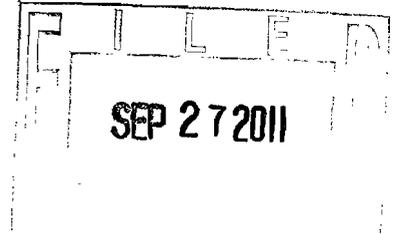


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0410



STATE OF WEST VIRGINIA,

Respondent,

v.

BRENT LEVI VICTOR McGILTON,

Petitioner.

BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

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BRENT LEVI VICTOR McGILTON,

Petitioner.

BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

The January 2010 term of the Ohio County Grand Jury returned a bill of indictment charging Brent Levi Victor McGilton (“Petitioner”) with three counts of malicious wounding¹ (Counts 1-3), and one count of assault during commission of, or attempt to commit, a felony² (Count 4).³ (App., 6.) (Case No. 10-F-20.) The events supporting the indictment occurred on November 22, 2009, at the Petitioner’s home in Wheeling. *Id.* The Petitioner stabbed his wife , Angela McGilton, three times during an argument in their home. (App., 53.)

¹W. Va. Code § 61-2-9(a).

²W. Va. Code § 61-2-10.

³On the first day of trial, the trial court granted defense counsel’s motion to dismiss this count of the indictment on double jeopardy grounds. The Petitioner did not raise any double jeopardy arguments relating to Counts 1-3. (Trial. Tr, 13.)

The Petitioner's three-day trial started on June 22, 2010 (Mazzone, J.) (Trial Tr., 6.) (Case No. 10-F-20.) An Ohio County petit jury found the Petitioner guilty of the remaining three counts of the indictment. Upon Petitioner's conviction, the State filed a Recidivist information pursuant to West Virginia Code § 61-11-19 alleging that the Defendant had one prior felony conviction. The trial court convened a recidivist trial on August 2, 2010. The jury found the Petitioner to be the same person convicted of the felony offense of wanton endangerment in 2005.

The trial court sentenced the Petitioner on November 23, 2010. Defense counsel moved to continue the hearing because his client had not had an opportunity to speak with the probation officer preparing his pre-sentence report before the report was submitted to the court. The trial court denied counsel's motion. It found that the Petitioner had refused to meet with the probation officer on counsel's advice, that the Petitioner could submit an eleven-page letter he had prepared setting forth his version of the events, and could allocute. The Petitioner chose not to submit the letter, but exercised his right of allocution. (App., 11.) During his allocution the Petitioner denied any involvement in the November 23 incident. (App., 12.) Defense counsel requested concurrent sentences on all three counts for a sentence of not less than four nor more than ten years. (App., 12.) Counsel for the State told the court that the Petitioner had threatened the victim during pendency of this action, and was arrested for burglarizing the victim's house in Ohio while out on bond. (App., 10-12.) The State requested the maximum sentence of eight to thirty years. *Id.*

After hearing from the Petitioner, defense counsel, counsel for the State, the victim, and one of the investigating officers, the trial court noted that the Petitioner's convictions were for a crime of violence, that the Petitioner had an extensive and violent criminal history, and had threatened the victim prior to trial. The trial court also noted that the Petitioner was a recidivist. Pursuant to West

Virginia Code § 61-11-18(a), the State moved to double the minimum sentence on his last count of malicious wounding from two to ten to four to ten. The court adopted the State's and Probation Officer's recommendation and sentenced the Petitioner to the maximum penalty -- no less than eight nor more than thirty years in the penitentiary. (App., 13.)

The Petitioner appeals this order.

II.

SUMMARY OF ARGUMENT

The Petitioner contends that the indictment charging him with three counts of malicious wounding is multiplicitous in violation of his federal and state protections against double jeopardy. Although defense counsel moved to have count four of the indictment dismissed prior to trial on double jeopardy grounds, the Petitioner never objected to Counts 1-3 prior to this appeal. He did not raise the issue at the preliminary hearing, prior to trial, during trial, at sentencing, or by post-trial motion. Therefore, he has waived it.

Even if this Court finds that he has not, the outcome is the same. The Petitioner's double jeopardy argument is a Trojan Horse: A question of fact masquerading as a question of law. The issue is not whether the State violated the Petitioner's protection against multiple punishments for the same offense. The plain language of W. Va. Code § 61-2-9(a) makes short work of that argument. The question is whether there was sufficient evidence to support each count of the indictment. A question previously resolved by the jury.⁴ *See State v. Stalaker*, 138 W. Va. 30, 41,

⁴The Petitioner has not appealed the sufficiency of the evidence. It is clear to see why. *See State v. LaRock*, 196 W. Va. 294, 303, 470 S.E.2d 613, 622 (1996):

A convicted defendant who presses a claim of evidentiary insufficiency faces an uphill climb. The defendant fails if the evidence presented, taken in the

76 S.E.2d 906, 912 (1953)(“The presence of criminal intent or purpose is a question of fact to be determined by the jury from all the circumstances proved.”)(citation omitted.)

The unambiguous language of W. Va. Code § 61-2-9(a) sets forth a two-pronged “unit of prosecution.” A defendant may be convicted for each “wound” or “bodily injury”⁵ he inflicts if the

light most agreeable to the prosecution, is adequate to permit a rational jury to find the essential elements of the offense of conviction beyond a reasonable doubt. Phrased another way, as long as the aggregate evidence justifies a judgment of conviction, other hypotheses more congenial to a finding of innocence need not be ruled out. We reverse only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Nor has the Defendant appealed the propriety of the trial court’s jury instructions:

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

Syl. Pt. 4, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

⁵The statute does not define the terms “wound” or “bodily injury.” *Cf.* W. Va. Code § 61-6-12 (“[S]erious injury . . . includes injury to property which shall cause damage to the owner thereof, or any injury to the person which shall temporarily or permanently disable the person injured from earning a livelihood.”); W. Va. Code § 61-2-29(a)(2)(“‘Bodily injury’ means substantial physical pain, illness or any impairment of physical condition.”); § 61-2-29(a)(6)(“‘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.”); W. Va. Code § 22-18-16(e)(“serious bodily injury means: (1) bodily injury which involves a substantial risk of death; (2) unconsciousness; Extreme physical pain; Protracted and obvious disfigurement; or; Protracted loss or impairment of the function of a bodily member, organ or mental faculty.”)

In *State v. Daniel*, 144 W. Va. 551, 109 S.E.2d 32 (1959) this Court held that if the State

State can prove beyond a reasonable doubt that the defendant inflicted the wound or bodily injury with the specific intent to “maim⁶, disfigure, disable or kill.” The Court set forth the legislative intent behind the statute in 1932. “The true purpose and meaning of [61-2-9(a)] was doubtless conceived

charged a defendant with inflicting “bodily injury” it must specify how the defendant caused the “bodily injury”, but the victim’s skin need not be broken. *Id.* “To support a finding of unlawful wounding, . . . there must be intent to produce a permanent disability or disfiguration. Syl. pt. 3 *State v. Stalnakar*, 138 W. Va. 30, 76 S.E.2d. 906 (1953)(citation omitted). A bullet wound resulting in a permanent scar is sufficient evidence of bodily injury under the statute. *Id.* See also *McComas v. Warth*, 113 W. Va. 163, 167 S.E. 96 (1932)(“To support a finding of unlawful wounding under our statute, . . . there must be intent to produce a permanent disability or disfiguration.”) In *State v. Bass*, 189 W. Va. 416, 423, 432 S.E.2d 86, 93 (1993)(*per curiam*) the Court found that a knife wound requiring 187 stitches constituted bodily injury under the unlawful wounding statute. The Court also held that the wound, or effect of the wound, must be permanent. *Id.* In *State v. Sacco*, 165 W. Va. 91, 267 S.E.2d 193 (1980)(*per curiam*) the Court held that a heart attack directly related to the assault but suffered nine days later constituted a wound under the unlawful wounding statute. In *State v. Woodson*, 222 W. Va. 607, 671 S.E.2d 438 (2008)(*per curiam*) the victim was repeatedly punched and kicked causing a fractured nose, and his eyes to swell shut. This Court held the evidence sufficient to sustain a conviction for malicious wounding.

⁶The statute does not define “maim, disfigure, disable or kill.” This Court has held, “To support a finding of malicious wounding or unlawful wounding under Code 61-2-9, the intent to produce a permanent disability or disfiguration is an essence of the crimes of malicious wounding or unlawful wounding.” *State v. Stalnakar*, 138 W. Va. 30, 76 S.E.2d 906 (1953). Pursuant to the rules of statutory interpretation announced by this Court, “In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.” Syl. pt. 1 *Miners in General Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941) overruled on other grounds by *Lee-Norse v. Rutledge*, 170 W. Va. 162, 165, 291 S.E.2d 477, 480 (1982).

Merriam Webster’s Third International dictionary defines “maim”, in part, as, “to wound seriously: mutilate, disable, disfigure.” *Webster’s Third New International Dictionary* 1362 (3d ed. 1971). It defines “disfigure”, in part, as, “to make less complete, perfect or beautiful in appearance: Deface, Deform, Mar.” *Id.* at 648. See *State v. Taylor*, 105 W. Va. 298, 142 S.E. 254 (1928)(“The word disfigure in our maiming statute under which this indictment was found, means permanent and not merely temporary and inconsequential disfigurement.”). It defines “disable”, in part, as, “to make incapable or ineffective: Incapacitate.” *Id.* at 642. The definition of the term “kill” is self-evident.

to be to define and punish as felonies those acts which have theretofore been considered misdemeanors only in those cases where it also appeared that there was a *felonious intent to maim, disfigure, disable or kill.*” *McComas v. Warth*, 113 W. Va. 163, 167 S.E. 96 (1932)(citation omitted.)(emphasis added). Whether each wound or injury can be coupled with the intent to “maim, disfigure, disable or kill” is a question of fact which may only be proven by examining the totality of the circumstances, not by woodenly applying the double jeopardy clause.

The Petitioner’s appeal rests upon this Court’s determination of legislative intent. The means for making this determination must not overtake the end. The Court’s determination must not be unduly confined to inflexible, preconceived notions of the time, method, or location of the injury or injuries. To do so would render the phrase, “with the intent to maim, disable, disfigure or kill” a nullity. The legislative branch should not be unduly constrained by an overly-rigid double jeopardy analysis. Under the separation of powers doctrine, this Court should, within constitutional reason, give a wide berth to legislative judgments.

In *State v. Berry*, 227 W. Va. 221, 230, 707 S.E.2d 831, 840 (2011) this Court recognized a similar two-pronged unit of prosecution in the “lying in wait” provisions of W. Va. Code § 61-2-1:

“Lying in wait” pursuant to W. Va. Code § 61-2-1 has both a physical and mental element. The mental element is the purpose or intent to kill or inflict bodily harm on someone; the physical elements consist of waiting, watching, and secrecy or concealment.

The State always bears the burden of proving both prongs beyond a reasonable doubt. *See State v. Williams*, 210 W. Va. 583, 591, 558 S.E.2d 582, 590 (2001)(“Intent to deliver a controlled substance is a *jury question*, determined by *all the surrounding facts and circumstances*, which must be proven beyond a reasonable doubt.”)(emphasis added.)

The Double Jeopardy Clause of the Fifth Amendment of the Constitution of the United States as applied to the states by the Fourteenth Amendment, and Article III, § 5 of the West Virginia Constitution protect criminal defendants from, *inter alia*, receiving “multiple punishments for the same offense.”⁷ *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989). This prohibition applies to cases in which the defendant has been charged with multiple violations of a single statute based upon a single course of conduct. These cases are known as “unit of prosecution” cases. *See Sanabria v. United States*, 437 U.S. 54, 69-70, n.24 (1978). *See also Bell v. United States*, 349 U.S. 81, 83-84 (1955).

This Court must determine the “appropriate unit of prosecution” by examining the legislative intent behind the statute. *See State v. Gill*, 187 W. Va. 136, 141, 416 S.E.2d 253, 258 (1992) (“Because the substantive power to prescribe crimes and determine punishments is vested with the legislature . . . the question under the Double Jeopardy Clause whether punishments are ‘multiple’ is essentially one of legislative intent[.]’ (citations omitted).”). *Sanabria*, 437 U.S. at 69-70. When the legislature fails to establish the unit of prosecution clearly and without ambiguity any doubts are resolved in favor of the defendant under the Rule of Lenity.⁸ *Bell*, 349 U.S. at 83-84.

The Petitioner was charged with three counts of malicious wounding: the statute reads, in part:

⁷This Court has held that “[o]ur double jeopardy principles have been patterned after the United States Supreme Court’s interpretation of the Double Jeopardy Clause found in the Fifth Amendment to the United States Constitution.” *State v. Rummer*, 189 W. Va. 369, 373, 432 S.E.2d 39, 43 (1993). Therefore, federal precedent interpreting the Fifth Amendment should be persuasive.

⁸The rule of lenity, as articulated in *Bell*, states, “[i]f Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses” *Bell*, 349 U.S. at 84.

If any person maliciously⁹ shoot, stab, cut or wound any person, or by any means cause him bodily injury with intent to maim, disfigure, disable or kill, he shall, except where it is otherwise provided be guilty of a felony and, upon conviction, shall be punished by confinement in the penitentiary not less than two nor more than ten years. . . .

This Court must extract the unit of prosecution by referring to the statutory language. The Petitioner appears to take a temporal approach to the issue. Thus, he would have this Court believe that the faster a defendant stabs a victim, the less charges may be brought against him under the Double Jeopardy Clause. This cannot be what the legislature intended. Nor can the legislature have intended to encourage additional criminal activity by ignoring how many times a defendant injures his victim. Such an inflexible legislative scheme makes no sense. Such prefabricated applications of the double jeopardy clause to a statute which may be violated any number of ways are not constitutionally justified.

The only common-sense way to interpret the plain meaning of the statute is to find that the legislature intended each “wound” or “bodily injury” motivated by an intent to “maim, disfigure, disable or kill” to be the proper unit of prosecution. This does not mean that the victim need be maimed, disfigured, disabled or killed. There is both a physical component - the “wound” or “bodily injury” and a mental component - the specific intent to “maim, disfigure, disable or kill.” When the State can prove both elements beyond a reasonable doubt, it has made out a single unit of prosecution. Petitioner’s focus on the number of wounds misses the point.

⁹This Court has defined malice as, “an action flowing from anger, hatred, revenge or any other wicked or corrupt motive; an act done with wrongful intent, under circumstances that indicate a heart and mind heedless of all social duty and fatally bent on mischief.” Malice may be inferred, “from any deliberate and cruel act done by the defendant without any reasonable provocation or excuse, however sudden.” *State v. Woodson*, 222 W. Va. 607, 619, 671 S.E.2d 438, 450 (2008)(*per curiam*)(citation omitted).

To support his argument, the Petitioner cites to dicta in *State v. Rummer*, 189 W. Va. 369, 379, 432 S.E.2d 39, 49 (1993), in which this Court stated that more than one punch could only result in a single count of misdemeanor battery. See W. Va. Code § 61-2-9©). The *Rummer* case has nothing to do with the legislative intent behind W. Va. Code §61-2-9. The Court had no interest in answering the question. The *Rummer* Court was concerned with the legislative intent behind the First Degree Sexual Abuse statute. The defendant had forcibly rubbed the victim's vagina, and fondled her breasts. He was convicted of two counts of First Degree Sexual Abuse. He claimed that his conduct, which had taken place so quickly, and violated the same statute, should only have given rise to a single count. To convict him of two violated his protections under the double jeopardy clause.

This Court summarily rejected the defendant's temporal double jeopardy argument. "[The defendant's] conclusion is based upon the premise that the touching of the victim's breasts and her sex organ occurred within a brief period of time and should be considered one act." *Rummer*, 189 W. Va. at 372-73, 432 S.E.2d at 42-43. Instead, it held:

Applying the *Blockburger/Zaccagnini* test to the instant case, we find that the principle element of W. Va. Code 61-8B-7, which defines sexual abuse in the first degree, involves "sexual contact" with another person.¹⁰ The term "sexual contact" is defined in W. Va. Code § 61-8B-1(6), 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.

¹⁰West Virginia Code § 61-8B-1(6) defines Sexual Contact as:

"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 any female or intentional touching of any part of another person's body by the actor's sex organs, 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."

The Court held that the disjunctive language evinced a legislative intent to punish alternate means of committing the same offense. The time between acts, the victim's identity, or the manner in which the acts were performed was irrelevant. Thus, the defendant could be charged with two counts of sexual abuse: one for touching the victim's breasts, and one for rubbing her vagina.

In this case, the record shows that the Petitioner left the victim's presence after an argument, returned armed with a deadly weapon - a knife, cornered the victim in a bedroom, repeatedly stabbed her around her throat and the back of her head, physically prevented her from protecting herself, and then pursued her, trying to gain entry into the bathroom where the victim sought shelter. There is nothing in either the state or federal double jeopardy clauses which would prohibit charging the Petitioner for each wound inflicted. *See Ratliff v. Commonwealth*, 194 S.W.3d 258, 273-274 (Ky. 2006) (statute which defines abuse as, *inter alia*, the infliction of an "injury" evinces a legislative intent to make each individual injury a separate unit of prosecution).

Nor is Petitioner's battery argument convincing. First, because the language is dicta it has little persuasive value. *See State v. Sacco*, 165 W. Va. 91, 93, 267 S.E.2d 193, 195 (1980) (dicta cited by defendant not dispositive). The *Rummer* Court was not addressing the "unit of prosecution" of the State's battery statute. It was addressing whether a defendant could be convicted of two violations of the same statute despite the temporal proximity of the acts, and their similar nature, when the methods used by the defendant were separately prohibited by the language of the statute.

More importantly, the wording of West Virginia Code § 61-2-9©) is not the same as § 61-2-9(a). The subsections must be construed *in pari materia*. Under subsection 61-2-9©) the State does not have to prove the presence of an injury. A defendant may make contact of an "insulting or provoking" nature without injuring the victim. *See Commonwealth v. Gregory*, 1 A.2d 507 (Pa. Supr.

1938) (“The least touching of another’s person willfully or in anger, is a battery.”) (citation omitted). Indeed, a defendant need not make physical contact with a victim to cause physical harm. In some instances deception will substitute for force. *See State v. Smith*, 9 S.E.2d 584, 590 (S.C. 1940) (“Thus, a battery is where one person administers a drug to another by inducing the other voluntarily to take the drug in some otherwise harmless substance and inducing the other to take such substance without knowledge that it contains a drug.”); *United States v. Masel*, 563 F.2d 322 (7th Cir. 1977) (spitting in Senator’s face constitutes battery and established intent to injure). Whereas a defendant who makes contact with another that results in bodily injury with an intent to maim, disfigure, disable or kill is guilty of malicious assault. W. Va. Code § 61-2-9(a). One is far more serious than the other.

The State will concede that infliction of “physical harm” to the victim may also result in a battery conviction, but “physical harm” need not be a discreet physical act. The use of the term “physical harm” demonstrates a legislative intent to define the crime broadly. Indeed, the term “physical harm” is subsumed by the overarching term “insulting or provoking contact” under § 61-2-9©). “[A]ny unlawful, offensive touching is a physical injury to the person and therefore actionable as a battery.” 6 Am. Jur. 2d *Assault and Battery* § 5 (2008). A defendant may inflict physical harm with one punch or four. It may be described as the sum total of the physical harm suffered by a single victim. As stated above, the terms “bodily injury” and “physical harm” are fundamentally different in degree. *See, e.g.*, W. Va. Code § 30-30-24(a)(4) (social worker may disclose privileged communications “to protect any person from clear, imminent risk of serious mental or physical harm or injury, or to forestall a serious threat to the public.”) (emphasis added.). Thus, the legislature’s decision to make each “bodily injury” the unit of prosecution is wholly rational.

In the past, the legislature has used the infliction of bodily harm to distinguish two different grades of the same offense. *See* W. Va. Code § 61-3-7(a) (statute that enhances penalty for commission of arson which results in serious bodily injury evinces a legislative intent to prohibit the infliction of bodily injury by arson). *See also* *People v. Daniels*, 770 N.E.2d 1143, 1149 (II. App. 2002) (aggravated criminal sexual assault resulting in bodily harm requires a more culpable mental state than aggravated criminal sexual assault based on display of dangerous weapon).

The State's action was in conformity with both the state and federal double jeopardy clauses.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case presents no issues of first impression. Nor does it require a complex analysis of already existing case law. Oral argument is not necessary. *See* W. Va. R. App. P. 18(a)(1).

IV.

STATEMENT OF FACTS

A reasonable juror could have found that the Petitioner stabbed his wife, Angela McGilton, several times, causing several discreet wounds to her throat and the back of her head. The event occurred in the early morning hours of November 22, 2009, at their home on Wheeling Island, Ohio County, West Virginia. (App., 75, 155, 225, 227.) The Petitioner stabbed the victim twice in the neck, once in the back of her head, once in the leg, and once in her ankle. (App., 56.) According to the first officer to arrive at the scene, Wheeling City Officer Kenneth Parker, the Petitioner attempted to flee after he made eye contact with the officer. Officer Parker also testified that the Petitioner

appeared intoxicated.¹¹ (App., 154-56, 158, 162, 209-10.) According to the investigating officer the Petitioner and the victim were arguing over their pending divorce when the attack occurred. After the attack, the victim moved in with her aunt in Ohio. (App., 53-54, 166.) After questioning the Petitioner and the victim, the officer arrested the Petitioner and charged him with malicious wounding. (App., 156.)

At the first listing of the preliminary hearing, the victim recanted. She told counsel for the State that the stab wounds were self-inflicted. (App., 59, 78-79.) During a pre-trial hearing she testified that she had recanted the allegations because the Defendant had threatened her. (App., 78-79.) The Petitioner, and his mother told her to say that she had stabbed herself. (App., 78.) The victim had good cause to be afraid. That morning, shortly after bonding out, the victim awoke to the Petitioner standing over her bed. He told her, "Next time I will do it right and move to Iowa." (App., 75-76.) On another occasion the Petitioner broke into the victim's house and hid in her closet. (App., 69.) This incident occurred on December 30, 2009, after the victim had recanted. Because of this incident, the Petitioner was arrested in Ohio and charged with burglary. (App. 76-77.) He also phoned and texted her on numerous occasions.

The victim was the State's first witness. She testified that on the day of the incident, she had returned home from work, and visited some friends in another apartment. While she was in this apartment, she snorted a line of cocaine. (Trial Tr., 130.) The Petitioner, who had been at a bar all day, returned home in an agitated and intoxicated state.¹² He was angry because he also wanted some

¹¹Officer Parker testified that the Petitioner was slurring his speech, had glassy eyes, was having trouble standing up, and had a strong odor of alcohol coming from his person. (Trial Tr., 210-11.)

¹²The victim worked in a bar and had been drinking that night. (*Id.* at 164.)

coke. The victim threw some money at him and returned to her apartment. (Trial Tr., 130.) Before she arrived, she met Dejah Jeffers. Ms. Jeffers had been carrying on an affair with the Petitioner. (*Id.* at 129.) After an argument which included the Petitioner, the victim, Ms. Jeffers and her boyfriend, the Petitioner stormed out of Ms. Jeffers' apartment. (*Id.* at 132-33.) A few minutes later he returned and demanded the victim give him the keys to their apartment. (*Id.* at 133, 241-42.)

The victim was sitting on a bed in a small bedroom, while the Petitioner was standing in front of her. (*Id.* at 133.) He pulled out what the victim described as a penknife and began stabbing her. (*Id.* at 135.) The Petitioner stabbed the victim once near her Adam's Apple, once on the right side of her neck behind the ear, once on her ankle, once on the backside of her leg, and multiple times to the back of her head, including one at the base.¹³ (*Id.* at 135-36, 144-45, 191, 200, 201, 225.) While he was stabbing her, the Petitioner yelled, "I'm gonna fucking kill you." (*Id.* at 135.) The victim raised her feet and tried to kick him away from her. (*Id.* at 139.) The victim rushed from the bedroom to the bathroom, where she managed to keep the Petitioner from entering. While she was in the bathroom, she called 911. (*Id.* at 142.)¹⁴

Once the police arrived, the victim was transported to the Ohio Valley Medical Center's emergency room where the injuries to her neck, and the injury at the base of the back of her head were stitched. (*Id.* at 147.) Once her medical treatment was completed, the victim went back to her apartment and fell asleep. She was awoken by two phone calls: one from the Petitioner from jail,¹⁵

¹³During his cross-examination Officer Parker testified that he observed four wounds. (*Id.* at 228.)

¹⁴The record contains a transcript of the victim's 911 call. (*Id.* at 142.)

¹⁵She did not accept the call.

and another from the Petitioner's mother. (*Id.* at 147-48.) The following afternoon she woke to find the Petitioner standing over her bed.¹⁶ (*Id.* at 167.) He told her that he did not want to go back to jail, and that next time he would "do it right" and then go to Iowa. (*Id.* at 149.)

The Petitioner claimed that the victim, a psychologically troubled person, inflicted the stab wounds to her neck, the back of her head, and her Adam's Apple herself. The trial court afforded defense counsel every opportunity to examine the victim about the circumstances surrounding her recantation. Counsel also examined her regarding both her pre- and post-stabbing suicide attempts. (*Id.* at 158-59.)

After closing argument the jury retired for deliberation. During deliberation they asked to hear the 911 call again, and wanted to know who had opened the knife, who had the knife in their hand, and where the victim was found when the police first arrived. (*Id.* at 515-16.) The trial court declined to answer any of these questions. (*Id.*) The jury returned with its verdict after deliberating for approximately one and one-half hours. (*Id.* at 515, 518.)

The jury found the Petitioner guilty on all three counts. (*Id.* at 520.) Shortly after the verdict, counsel for the State filed a recidivist information alleging the Petitioner had previously been convicted of one count of wanton endangerment in 2005. (*Id.* at 524.)

The trial court convened Petitioner's recidivist proceeding on August 2, 2010. At the close of the proceeding, the jury found that the Petitioner was the same person named in the wanton endangerment indictment. (Recidivist Proceeding, 117.) The trial court sentenced the Petitioner to two terms of not less than two nor more than ten years on Counts 1 and 2; and, pursuant to West

¹⁶The Petitioner had bonded out earlier that day. The magistrate prohibited the Petitioner from having any contact with the victim before releasing him. (*Id.* at 149.)

Virginia Code § 61-11-18, not less than four years nor more than ten years on Count 3. Each sentence to be served consecutively. (Sent. Hr'g, 17.)

V.

ARGUMENT

A. THE PETITIONER'S DOUBLE JEOPARDY RIGHTS WERE NOT VIOLATED.

1. The Standard of Review.

Claims involving double jeopardy are reviewed by this Court *de novo*. Syl. pt. 1 *State v. Sears*, 196 W. Va. 71, 468 S.E.2d 324 (1996).

2. The Appropriate "Unit of Prosecution" In This Case Is The Number Of The Victim's Wounds.

The Petitioner's double jeopardy argument misses the point. If the Petitioner wounded or injured the victim with the intent to maim, or disfigure her, by repeatedly stabbing her he should only have been convicted of one offense. If the Petitioner intended to maim, or disfigure the victim each time he stabbed her, the verdict must stand. The appropriate unit of prosecution is not mechanically tied to the number of wounds, or the time between the wounds, or even the similarity in method. The unambiguous language of W. Va. Code § 61-2-9(a) describes a legislative intent to punish violent conduct motivated by a malicious intent.

In his brief to this Court the Petitioner relies upon case law involving interpretation of the legislative intent behind different statutes to support his argument. Citation to different statutes designed to protect different interests is not persuasive. There are no general rules applicable to all situations. This Court must limit its analysis to what the legislature intended when it drafted this particular statute.

The statute states that any person who maliciously injures another “by any means” with the “intent to maim, disfigure, disable or kill” shall be guilty of malicious wounding. The statute does not seek to prohibit the use of a specific weapon, or a specific means of inflicting an injury. Nor does the statute proscribe any specific result. The terms “maim, disfigure, disable or kill” do not describe the seriousness of the actual injury suffered. The plain language of the statute reads, “[A]ny person [who] maliciously . . . stab . . . any person . . . [resulting in] *bodily injury* . . . with *intent* to maim, disfigure, disable or kill “ is guilty of malicious wounding. (emphasis added). Both the course of conduct (stabbing) and the result of that conduct (bodily injury) are phrased as singular terms. This evinces a legislative intent to punish each wound motivated by any of a number of specific purposes. If the legislature intended to punish a course of conduct, it would have used the term “bodily injuries.”

Nor is it relevant whether the Petitioner’s conduct was part of the same criminal transaction. There is nothing in the Double Jeopardy Clause which prohibits acts forming a single criminal transaction from being punished separately. In *State v. Johnson*, 197 W. Va. 575, 476 S.E.2d 522 (1996), this Court held,

[t]he same transaction test for double jeopardy purposes is a procedural rule that is not mandated by either the State or federal constitutions but is in furtherance of the general policy enunciated in the double jeopardy clauses. We, therefore, implicitly held that when confronted with a multiple prosecution double jeopardy question the ‘same evidence’ test is the only one that applies.

Johnson, 197 W. Va. at 584, 476 S.E.2d at 532, quoting Syl. pt. 2, *Gilkerson v. Lilly*, 169 W. Va. 412, 413, 288 S.E.2d 164, 165 (1982). The Petitioner’s claim is a constitutional one brought under the State and Federal Double Jeopardy Clauses. The same transaction test has no constitutional underpinnings. Therefore, it is not relevant to this case.

Nor does the plain language of the statute evince a legislative intent to designate the unit of prosecution temporally. Although this Court has considered the “elapsed time” between incidents as a factor, it is not the only factor. *See State v. Woodall*, 182 W. Va. 15, 385 S.E.2d 253 (1989). In this case the stab wounds came one after the other. But that, standing alone, does not render it a single offense. This Court rejected a similar argument in *Rummer*, 189 W. Va. at 372-73, 432 S.E.2d at 42-43 (rejecting argument that touching of victim’s breast and sex organ should be considered a single act because they occurred within brief period of time).¹⁷

The Petitioner cites this Court to *People v. Wilson*, 417 N.E.2d 146, 147 (Ill. App. 1981). Justice Neeley cited this case in his lengthy dissent in *Rummer*, 189 W. Va. at 393, 432 S.E.2d at 63. In *Wilson* the defendant broke into his ex-wife’s home and repeatedly struck her with an object he held in his fist. He was charged with a single count of attempted murder, a single count of aggravated battery, and a single count of witness intimidation. After a jury trial, the defendant was conviction of both the attempted murder, and aggravated battery counts. He later pled to the witness intimidation charge. The court ran each of his sentences concurrently. The court held that the multiple blows constituted a single course of conduct and, therefore, a single offense.

¹⁷The Petitioner cites this Court to language in footnote 16 of *Rummer*, which states that a defendant touching both of his victim’s breasts *at the same time* might have a valid double jeopardy claim if he was charged with two counts of First Degree Sexual Abuse by sexual contact. Sexual contact is defined, in part, as the unwanted touching of a female’s *breasts*. *See* W. Va. Code § 61-8B-1(6). Thus, the conduct would fall within the unit of prosecution. The legislature obviously views a woman’s breasts as a single entity for purposes of the statute.

The same cannot be said for West Virginia Code § 61-2-9(a). There is no suggestion that the legislature intended the term “bodily injury” to represent more than one injury. Nor are the facts of this case the same as those postulated in *Rummer*. The defendant did not inflict the victim’s injuries at the same time. Even if he had, the proper unit of prosecution is the number of injuries.

Because the *Wilson* case approaches “unit of prosecution” issues from a wholly different direction, its influence on this case is minimal. Indeed, the court’s approach is not consistent with later rulings by its state supreme court. Unlike this Court, the *Wilson* court does not address issues of legislative intent, and its role in determining the “unit of prosecution.” The court fails to conduct any sort of legal analysis; instead, reaching an unsupported conclusion and choosing to call the prosecutor’s separate acts theory “inane.” *Wilson*, 417 N.E.2d at 147.¹⁸

In *People v. Crespo*, 788 N.E.2d 1117 (Ill. 2001), the Illinois Supreme Court ruled that multiple charges under the same statute do not violate the double jeopardy clause. *Crespo*, 788 N.E.2d at 1122. In *Crespo* the defendant stabbed the victim three times in rapid succession. The court held that each stab wound could constitute a separate offense under the state’s aggravated battery statute. The unit of prosecution was “great bodily harm.” The court ruled that whether the State proved “great bodily harm” was a question of fact reserved for the jury. *Id.* at 1122. Because the state made no effort to differentiate each stab wound or argue to the jury that each separate wound resulted in “great bodily harm,” the jury could have found that “great bodily harm” was the result of all three stab wounds. *Id.* Had the state done so, a conviction for each wound would have been appropriate. *Id.* See also *People v. Dixon*, 438 N.E.2d 180, 185 (Ill. 1982) (multiple blows with a mop handle in quick succession, although closely related, do not constitute one physical act).

The State’s indictment charged the Petitioner with three counts of malicious wounding. (App., 6.) The first count specifies the location of the wound as “the throat area.” The second count states, “the right neck area.” The third count states that the third wound was to the back of her head.

¹⁸Illinois’ approach to this issue has been anything but consistent. See *People v. Segara*, 533 N.E.2d 802, 804-05 (Ill. 1988) (discussion of the evolution of the court’s approach to unit of prosecution cases).

(App., 7.) Unlike *Crespo*, the indictment charges the Petitioner with three specific bodily injuries.

At trial, the State distinguished the effect and location of each stab wound. During his summation counsel for State argued:

You heard that it escalated. And that [the Petitioner] grabbed this knife, and plunged it into her body. Not once, not twice, not three times, but multiple times.

And you got to see all the photographs of all the injuries. She had a stab wound to her – right above her Adam’s apple, right side of her neck, on the back of her head. She had a small wound on her arm. And she had that long wound on her leg, her left leg, which ultimately ended up in a puncture wound around her ankle. The photographs are here. You’ll get to look at them when you go back.

(Trial Tr., 495.)

Later counsel argued:

Three different charges of malicious assault is what he’s charged with. At least three separate wounds – the Adam’s apple, the neck, and the back of the head – each required medical attention. That’s what [the Petitioner] is charged with, that’s what he’s guilty of.

(*Id.* at 505.)

The State called emergency room physician, Dr. Randy Engleman, of the Ohio Valley Medical Center. (*Id.* at 359.) Dr. Engleman testified that the victim had three wounds to her neck ranging from one to three centimeters each. These wounds required a small number of stitches.¹⁹ (*Id.* at 361.) The injury to the victim’s leg did not require stitches. Dr. Engleman opined the wounds would lead to permanent scarring. (T.T. at 363.)

Unlike *Crespo*, the State made it clear that they considered each wound a separate bodily injury.

¹⁹Two of the wounds each required a single stitch. The third wound required three stitches. (T.T. at 361.) Because the Petitioner does not raise a “sufficiency of the evidence” claim, the nature or seriousness of the victim’s wounds is not at issue.

B. THE PETITIONER WAIVED ANY DOUBLE JEOPARDY ARGUMENT BY FAILING TO RAISE IT BELOW.

1. Standard Of Review.

“We have previously held that claims involving double jeopardy are reviewed *de novo*.” Syl. pt. 1, *State v. Sears*, 196 W. Va. 71, 73, 468 S.E.2d 324, 326 (1996).

2. The Petitioner Waived This Assignment of Error By Failing to Raise it Below.

It is axiomatic that a defendant who does not preserve an objection below has waived it for purposes of appeal. See *State v. Proctor*, 709 S.E.2d 549 (2011), quoting *State v. Grimer*, 162 W. Va. 588, 595, 251 S.E.2d 780, 785 (1979). Cf. *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (“A guilty plea . . . renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established.”).

The United States Supreme Court has recognized that defendants may waive several fundamental constitutional rights:

In fact, double jeopardy rights may be waived by failing to preserve the issue for appeal. *Peretz v. United States*, 501 U.S. 923, 936, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991) (citing with approval *United States v. Bascaro*, 742 F.2d 1335, 1364-65 (11th Cir.1984) (holding that failure to raise the issue of double jeopardy at trial results in a waiver of that claim)). Here, when Gomez entered his plea, he did not preserve the double jeopardy issue for appeal. Rather, he entered an unconditional plea of no contest. His double jeopardy claim was waived.

Gomez v. Berge, 434 F.3d 940, 943 (7th Cir. 2006).²⁰

²⁰In *Menna v. New York*, 423 U.S. 61, 63 n.2 (1975), the Supreme Court held that a guilty plea did not waive a double jeopardy challenge to an indictment when the face of the indictment demonstrated that the state may not constitutionally pursue the charges. If the court can only judge the defendant’s double jeopardy claim by looking outside the record, the waiver is valid. *United States v. Broce*, 488 U.S. 563, 575 (1989). Thus, this Court’s statement in footnote 5 of *State v.*

The most basic rights of criminal defendants are . . . subject to waiver. *Peretz v. United States*, 501 U.S. 923, 936, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991). Accord *United States v. Mezzanatto*, 513 U.S. 196, 201, 115 S.Ct. 797, 130 L.Ed.2d 697 (1995). *Waivable constitutional rights include protection against double-jeopardy, Ricketts v. Adamson*, 483 U.S. 1, 10, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987); the privilege against compulsory self-incrimination, *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); the right to jury trial, *id.*; the right to confront one's accusers, *id.*; and the Sixth Amendment right to counsel, *Johnson v. Zerbst*, 304 U.S. 458, 465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

United States v. Teague, 443 F.3d 1310, 1316 (10th Cir. 2006) (emphasis added).

The court in *Teague* further observed: “Nonwaivable rights are rare.” *Id.* “When waiver has not been allowed, it has been because of the need to protect a public interest beyond that of the defendant or because of concern that undue, and unprovable, pressure may have been brought to bear on the defendant.” *Id.* In this instance, the Petitioner cannot demonstrate that the conduct of his trial, and his sentences for repeatedly stabbing his girlfriend, are a violation of the public’s best interest or undermined the integrity of the system in violation of public interest.

Likewise, double jeopardy is not considered a jurisdictional issue when placed in the context of challenging the legality of a sentence. A jurisdictional claim implicates the trial court’s “statutory or constitutional power to hear a case.” *United States v. Cotton*, 535 U.S. at 630. The Petitioner does not claim that the trial court did not have jurisdiction to impose the sentence.

Sears, 196 W. Va. at 71 n.5, 468 S.E.2d at 324 n.5, is not as categorical as the Petitioner argues. It states *most*, not all, double jeopardy claims may be raised for the first time on appeal. That phrase must be read *in pari materia* with the Supreme Court’s holdings in *Menna* and *Broce*.

In this case, the Petitioner does not contend that the charges on the face of the indictment, except for Count 4, could not be constitutionally prosecuted under the Double Jeopardy Clause. *Broce*, 488 U.S. at 575-76. He claims that the trial court violated his double jeopardy rights by sentencing him to three consecutive sentences. Thus, pursuant to *Menna* and *Broce* he has waived this issue.

Therefore, because double jeopardy rights are waivable, and because the trial court had jurisdiction to impose the sentence, the Petitioner's sentence cannot be held to be illegal under any analysis as applied to the set of facts in the instant case. The Petitioner cannot manipulate constitutional principles to overcome his plea and waiver.

"The Double Jeopardy Clause does not relieve a defendant from the consequences of his voluntary choices." *Ricketts v. Adamson*, 483 U.S. 1, 11 (1987). "Where, as here, the defendant fully 'understands the nature of the right [being waived] and how it would apply in general in the circumstances,' he may knowingly and intelligently waive that right 'even though [he] may not know the specific detailed consequences of invoking it.'" *Taylor v. Horn*, 504 F.3d 416, 447 (3d Cir. 2007), quoting *United States v. Ruiz*, 536 U.S. 622, 629 (2002).

VI.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Ohio County should be affirmed by this Honorable Court.

Respectfully submitted,
STATE OF WEST VIRGINIA,
Respondent, SCOTT R. SMITH
OHIO COUNTY PROSECUTING ATTORNEY

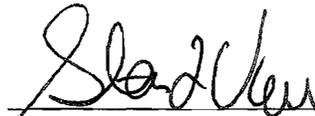


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CERTIFICATE OF SERVICE

I, Stephen L. Vogrin, Assistant Prosecuting Attorney for Ohio County and counsel for the Respondent, do hereby verify that I have served a true copy of the Brief of Respondent State of West Virginia upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 2nd day of September, 2011, addressed as follows:

To: Robert C. Catlett
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