

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA,

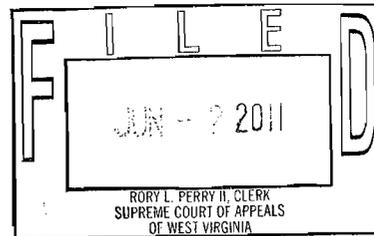
Plaintiff below/Appellee,

v.

Docket No.: 11-0043
(Berkeley County Case No.: 10-F-35)

KENDRA N. SULICK,

Defendant below/Appellant.



**RESPONSE OF STATE OF WEST VIRGINIA
TO PETITION FOR APPEAL**

State of West Virginia,

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I. ASSIGNMENTS OF ERROR.

A. WHETHER THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE APPELLANT'S MOTIONS FOR ACQUITTAL?

B. WHETHER THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE PETITIONER'S MOTION TO DISMISS CHALLENGING THE CONSTITUTIONALITY OF W. VA. CODE § 61-6-21?

C. WHETHER THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE APPELLANT'S MOTION TO ARREST JUDGMENT?

D. WHETHER THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE APPELLANT'S MOTION FOR NEW TRIAL?

II. STATEMENT OF THE CASE.

The State of West Virginia does not dispute the procedural history outlined by the Appellant in that portion of her Petition for Appeal entitled "Statement of the Case." [Petition for Appeal, p. 5-8.] Since the Petitioner is challenging the trial court's denial of her motions for acquittal, the State will take the opportunity here to expand upon the outline of the trial testimony the Appellant provided in her Petition for Appeal under "Statement of Facts." [Petition for Appeal, p. 8-18.]

1. The Appellant was indicted in a twelve count indictment, including nine counts of a felony Civil Rights Violation, in violation of **W. Va. Code** § 61-6-21(b), and three counts of a felony Conspiracy to Commit a Civil Rights Violation, in violation of **W. Va. Code** § 61-10-31.¹ [Indictment, 2/18/10; App., Vol. 1, 354-360.]

2. At trial, the jury received evidence and testimony from various witnesses. [R.,

¹The Conspiracy charges were dismissed by agreement before trial. [Order, 6/9/10; App., Vol. 2, 590-591.]

passim.]

3a. Bettyanne Obiri, who is African-American, testified as follows. [Tr. 6/8/10; App., Vol. 3, 887-951.] She lives with Brian Smith, with whom she has two children, Isaiah, 8, and Adrianna, 3. They have lived in Falling Waters, Berkeley County, since 2005. [Id., 887-891.] The Appellant and [co-defendant] Bruce Poole² live about 80 feet behind them. She was neighborly with them. [Id., 891-893.] The Appellant called her a “black bitch” and called her friends “nigger lovers.” [Id., 895-896.] When Isaiah was in the first grade, she would drive or walk him to the bus stop. One day, with her two children in the car at the bus stop, the Appellant drove up and called she and the children “fucking niggers.” Hers was the only black family at the bus stop. [Id., 916-918.] On another occasion the Appellant drove a car at a high rate of speed past Ms. Obiri’s house, which was concerning to her because Isaiah rides his bike in the yard. The Appellant stopped and revved the car to kick gravel up. When she complained to the Appellant, the Appellant gave her the middle finger. [Id., 918-919.] On another occasion, she was standing in her yard raking leaves and the Appellant swerved a truck towards her. [Id., 920.] In August 2008 the Appellant was at the back of Ms. Obiri’s backyard doing “doughnuts” on an ATV for about 20-25 minutes until the police arrived. [Id., 921-922.] Another incident with the Appellant and a chainsaw that upset her occurred around the same time, very late one evening, when the chainsaw started up and the Appellant said “fucking niggers, if you don’t like it you can

² The Appellant’s male friend, Bruce Poole, was similarly indicted for related events. State v. Bruce Poole, Case No.: 10-F-32. Mr. Poole was convicted at a November 4, 2010, hearing on his *Alford* guilty plea to one felony Civil Rights Offense, as indicted, and his no contest pleas to two misdemeanor Cruelty to Animals offenses, charged by Information. The plea agreement is to seven years on the former conviction and six months each on the latter two, to run concurrently, with the State recommending probation. Sentencing is currently pending, awaiting Mr. Poole’s return from a 60-Day Pre-sentence Diagnostic and Classification Evaluation.

leave, fucking niggers.” [Id., 922-923.] In September 2008, she was in her front yard with her children when the Appellant stopped in a car and gave her the finger and said “you fucking niggers.” [Id., 923-924.] Following that, again at the bus stop, the Appellant drove past at a high rate of speed very near Isaiah and kicked gravel up on Ms. Obiri’s car. Isaiah jumped into the grass. [Id., 924-925.] In October 2008 the Appellant drove by very quickly and swerved the car toward Ms. Obiri as she walked to her mailbox. She felt threatened by this. [Id., 925-926.] She was unnerved by all of these actions for her children, one of whom has medical needs. The Appellant’s constant use of “nigger” was damaging and derogatory to she and her children. [Id., 926-927.] When she asked the Appellant to stop the name-calling the Appellant told her, “I should get out of this car and let you whip my ass so that you know what it feels like to go to jail.” [Id., 927.] She feared for the safety of her children. [Id., 928.]

3b. On cross-examination, Ms. Obiri testified further. She felt threatened [by the Appellant] on several occasions, especially when the Appellant swerved the car towards her at the bus stop and mailbox. [Id., 929-930.] The Appellant’s family, and their guests, would ride ATVs in the woods. Ms. Obiri’s family would cut wood with a chainsaw, but not at night. [Id., 931-932.] She does not know if the Appellant was using the chainsaw at night, but she saw the Appellant there, and knows the Appellant’s voice. The Appellant made the comments. [Id., 933.] The Appellant was on Ms. Obiri’s property when she saw the Appellant drive the ATV. [Id., 933-934.] She agreed that it would be easy to kick gravel up on the gravel road if one were traveling at a high rate of speed. [Id., 935.] She does not recall the actual month when the Appellant called her a “fucking nigger” and gave her the finger. [Id., 936.] She once called the Appellant an “ignorant bitch.” [Id., 938.] When asked if she knew whether her husband Brian Smith

threatened violence, she explained that once, while looking for her dog, the Appellant, the Appellant's friend and the Appellant's son were outside the [Sulick-Poole] home. The Appellant's son asked her if she was looking for her "fucking dog." The Appellant's friend invited her to "lick her crack." She called Animal Control about the dog. When she and Mr. Smith and Mr. Smith's mother resumed looking for the dog, the Appellant's son was filming them and Mr. Smith upbraided the son for speaking to his wife like that and told him to put the camera down. [Id., 942-943.] She agreed that she filed a Human Rights Complaint against the Appellant and Mr. Poole. [Id., 944-948.]

4a. Brian Smith, an African-American, testified as follows. [Id., 951-1001.] He lives with Bettyanne Obiri and their two children in a wooded trailer park in Falling Waters, Berkeley County. [Id., 951-952.] The Appellant and Mr. Poole lived behind them. He did not have a good relationship with the Appellant. [Id., 952-953.] Once after December 2007, the Appellant swerved her car as he was picking his son up at the bus stop. The Appellant spun gravel on them and said, "Nigger, get out of the road." He and his son were the only African-Americans present. He was frightened for his child. [Id., 954-955.] He saw the Appellant once swerve the car toward his wife and child in the yard when she was raking leaves. He was frightened for his family. [Id., 956-957.] The Appellant once was on an ATV behind his house telling them, "Niggers, don't come out of the house." He felt threatened. [Id., 957.] Another time, the Appellant and others were revving chainsaws after dark and the Appellant was saying, "Niggers, come on out, come out now." He was concerned for his children. [Id., 958-959.]

4b. On cross-examination, Mr. Smith testified further. They were neighborly with the Appellant's family when they first moved in in 2005; that deteriorated after Mr. Poole shot their

dogs. [Id., 963-964.] The Appellant kept everything going after the dogs were shot. [Id., 964.] He called the police on Mr. Poole when Mr. Poole blocked the road to keep Mr. Smith's son from riding his bike and called them "niggers." Mr. Poole then pulled a shotgun on him. [Id., 966-967.] Mr. Smith admitted he got angry when the Appellant's son, Joe, called his wife and mother names and had a camera. [Id., 972, 975-982.] He was angry when Joe put a zip tie on six year old Isaiah's ankle and cut off the circulation. [Id., 990-991.] He denied taking tires off the Appellant's property. [Id., 973.] He went to the Berkeley County Planning Commission because of the Appellant's foul septic . [Id., 982.] He filed a complaint with the Human Rights Commission and the attorney general because of his civil rights. [Id., 982-983.] The Public Defender's office [who represents the co-defendant Bruce Poole] called him to try to get him to drop the charges. [Id., 986-987.] Mr. Poole said to him, "I shot your nigger dog, I will kill you, too," and "I will kill you as I killed your nigger dogs." [Id., 988.]

5. Berkeley County Sheriff's Lieutenant Brendan Hall testified as to his investigation of the criminal charges. [Id., 1002-1025.]

6. Constance Smith testified as follows. [Id., 1026-1035.] She is Brian Smith's mother and owns the property where Mr. Smith and Bettyanne Obiri live. [Id., 1026-1028.] She testified generally about making a complaint with the county about the roads or the Appellant's septic and once spoke with a sheriff's deputy. [Id., 1028-1035.]

7. At the beginning of the second day, the State indicated it would rest its case. The trial court then heard argument, and denied, the Appellant's motion for acquittal. [Tr. 6/9/10; App. Vol. 3, 1058-1078.]

8. The Appellant placed on the record that she inquired whether the State would re-open

a plea of no contest to one count, for a sentence of one year suspended for probation.

Notwithstanding the State re-opening that offer, the Appellant rejected it. [Id., 1079-1081.]

9a. The defense called its witnesses. The first defense witness was Robert Brining, who testified as follows. [Id., 1082-1091.] He is a court security officer in the Berkeley County Courthouse. He identified a surveillance video from a court hallway from January 2009 depicting Brian Smith. He was in doorway and heard hollering so he walked over and told them to hold it down and leave. Mr. Smith was there with his mother and the Appellant and Mr. Poole. Mr. Smith was upset and backed down the hall until he turned around and walked away. [Id., 1082-1089.]

9b. On cross-examination, Mr. Brining admitted that he had not seen Mr. Smith before seeing him in the hallway, was not aware that he was a witness in a magistrate court case on that hallway that day, and agreed that the video showed that he went down the hallway initially to retrieve his mother. [Id., 1089-1091.]

10a. Rose Miranda testified for the defense as follows. [Id., 1092-1102.] She is a friend of the Appellant and Mr. Poole. Sometimes the Smiths would park on the road in front of [the Smith] house for convenience. Once she was offended by her perception that Mr. Smith's brother had his hands in his basketball shorts. Once she saw Mr. Smith outside with an elderly white man and woman who took photos of the Appellant's house and talked about building condos. [Id., 1092-1097.]

10b. On cross-examination, Ms. Miranda admitted that the neighborhood is a trailer park with a narrow road. She admitted that at most there would be two cars parked in front of the Smith house, sometimes one was Mr. Smith's elderly parents'. She admitted that the older

gentleman was taking photos of the property line between the Smith's and the Appellants' property. [Id., 1098-1102.]

11. Donna Seiler testified for the defense as follows. [Id., 1102-1120.] She works for the Berkeley County Planning office. [Id., 1102.] She has spoken with Brian Smith and his mother. They complained, and she investigated their complaints, of unlicensed vehicles, trash and debris and failed septic on the Appellant's property. She found unlicensed vehicles and debris but no failed septic. The first complaint came from Mr. Smith's mother in October 2008. Mr. Smith's mother also complained to her about "racial tendencies going on at that time." [Id., 1104-1108.] Several months later, Mr. Smith's mother complained to her that she [Ms. Seiler] wasn't doing her job, possibly because she is white. [Id., 1108.] Mr. Smith and his mother later met with she and County Attorney Norwood Bentley and asked that the property be looked at again. Race was brought up at that meeting. [Id., 1109-1110.] When she met the Appellant on the Appellant's property, the Appellant was initially agitated. The Appellant's friends made racial slurs. [Id., 1111.]

12a. Keith Allison testified for the defense as follows. [Id., 1121-1131.] He works for the Berkeley County Health Department. [Id., 1121.] He investigated Mr. Smith's mother's complaint about the Appellant's septic. He found no odor or leakage but concluded that the tank was an illegal install. [Id., 1122-1123.] Once, Mr. Smith came to his office and got loud, so the director took them back to her office to speak. [Id., 1124.]

12b. On cross-examination, Mr. Allison agreed that it is common for people to complain about odors from their neighbor's septic, and that he understood that Mr. Smith was upset because Mr. Allison did not find the problem. [Id., 1127-1130.]

13a. Over the State's objection, the trial court allowed the defense to call as a rebuttal witness [Public Defender Investigator] Mark Jenkins, who testified as follows. [Id., 1131-1143.] Mr. Jenkins listened to Mr. Smith's trial testimony and denied contacting Mr. Smith "from his telephone" and asserted that Mr. Smith came to his office to intimidate him. [Id., 1137-1139.]

13b. On cross-examination, Mr. Jenkins admitted that his office represented the co-defendant Bruce Poole, and that he [Mr. Jenkins] sent a written memo to Mr. Smith asking him if he would drop the charges and that he [Mr. Jenkins] provided his cellphone number for Mr. Smith to contact him. [Id., 1139-1141.] He told Mr. Poole to give Mr. Smith his cellphone number. [Id., 1142.] When Mr. Smith called his cellphone he had bad reception so he asked Mr. Smith to call him on the office line, which Mr. Smith did. [Id., 1142-1143.]

14a. The Appellant took the stand on her own behalf. [Id., 1143-1158.] On one occasion she said a racial slur to the Smiths. She denied using racial slurs any other time, whether while driving a vehicle or while using a chainsaw or while driving an ATV. She denied ever driving an ATV on the Smith property without permission. The Smiths made disparaging remarks to her all of the time. All of their allegations are false. [Id., 1143-1148.]

14b. On cross-examination, the Appellant denied being neighborly with the Smiths. [Id., 1149.] She asserted that [co-defendant] Bruce Poole was improperly charged with shooting the Smiths' dogs. [Id., 1152.] She asserted that the Smiths and other neighbors conspired to bring her to court. [Id., 1153, 1154, 1157.] She complained about people with firearms, but the police never found anything. [Id., 1153-1154.] She asserted that the witnesses fabricated their testimony. [Id., 1155.] She said she waited for five minutes in her car while Ms. Obiri raked leaves and then went "two and a half maybe three miles an hour" past her. [Id., 1156.]

15. The defense rested. [Id., 1158.]
16. The jury took a view of the property on the defense's prior motion. [Id., 1162-1164.]
17. The court denied the Appellant's motion for acquittal. [Id., 1168.]
18. The jury returned a verdict of guilt on three of the nine felony Civil Rights Violations counts, and acquitted on the remaining six. [Jury Verdict Order, 6/14/10, App. Vol. 2, 652-654; Tr. 6/10/10; App., Vol. 3, 1239-1248.]
19. The court denied the post-trial motions. [Hearing Order on Post-trial Motions, 11/18/10.]
20. The court sentenced the Appellant to the statutory sentence of a determinate two years' incarceration on each of the three convictions, to run consecutively. The sentence was then suspended for a term of probation. [Sentencing Order, 12/16/10.]³
21. It is from these convictions that the Appellant appeals.
22. The State of West Virginia respectfully requests this Court to affirm the judgment of the jury and deny the appeal.

III. SUMMARY OF THE ARGUMENT.

The Appellant fails to prove that the jury did not have before it sufficient evidence upon which they could convict the Appellant of the indicted charges. The Appellant fails to prove that the trial court abused its discretion in denying the Appellant's motions for acquittal.

The Appellant fails to prove that the statute upon which the Appellant was convicted, **W. Va. Code § 61-6-21(b)**, is unconstitutionally vague or unconstitutionally provides a punishment

³ The Appellant's probation was subsequently revoked following her admission to pleading guilty to a Driving Under the Influence offense committed while she was on probation. [Order Revoking Probation, 5/18/11.]

grossly disproportionate to the offense.

The Appellant fails to prove that the trial court abused its discretion in denying the Appellant's motion for arrest of judgment, pursuant to *W.V.R.Cr.P.* 34, where the trial court found that the indictment charged an offense under **W. Va. Code** § 61-6-21(b) and the Appellant made no allegation that the trial court lacked jurisdiction over the matter.

Finally, the Appellant fails to prove that there was any trial error that required the trial court to grant a new trial.

The State of West Virginia respectfully requests this Court to deny the Petition for Appeal.

IV. STATEMENT REGARDING ORAL ARGUMENT.

If this Court were to accept this case for argument, Rule 20 argument is appropriate since this case presents an issue of first impression as there are no cases of this Court interpreting **W. Va. Code** § 61-6-21(b) and the Appellant also challenges the constitutionality of the statute.

V. ARGUMENT.

A. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE APPELLANT'S MOTIONS FOR ACQUITTAL.

1. Standard of Review.

The standard of review utilized by this Court when reviewing the denial of a motion for acquittal is:

“Upon a motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to the prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.’ *State v. West*, 153 W. Va. 325 [168 S.E.2d 716] (1969).” Syllabus Point 1, *State v. Fischer*, 158 W. Va. 72, 211 S.E.2d 666 (1974).

Syl. Pt. 5, *State v. Grimes*, 226 W.Va. 411, 701 S.E.2d 449 (2009); Syl. Pt. 3, *State v. Taylor*, 200 W. Va. 661, 490 S.E.2d 748 (1997).

The standard for reviewing the sufficiency of evidence to support a conviction is :

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 weighted, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled. Syllabus Point 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 9, *State v. Payne*, 225 W.Va. 602, 694 S.E.2d 935 (2010)(quoting *Guthrie* in part); Syl.

Pt. 1, State v. Miller, 204 W. Va. 374, 513 S.E.2d 147 (1998); Syl. Pt. 3, State v. Williams, 198 W. Va. 274, 480 S.E.2d 162 (1996); Syl. Pt. 2, State v. Hughes, 197 W. Va. 518, 476 S.E.2d 189 (1996).

The specific inquiry of the appellate court in reviewing the sufficiency of the evidence is whether any rational trier of fact could have found the essential elements of a crime proved beyond a reasonable doubt:

The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. Syl. Pt. 1, *State v. Guthrie*, [*supra*].

State v. Berry, — W. Va. —, 707 S.E.2d 831 (2011); Syl. Pt. 2, State v. Edmonds, 226 W. Va. 464, 702 S.E.2d 408 (2010); Syl. Pt. 1, State v. Hughes, *supra*.

2. Discussion.

The circuit court properly exercised its discretion in denying the Appellant's motions for acquittal on the nine counts of a felony civil rights offense, based on the evidence presented at trial, as viewed in a light most favorable to the State.

The statute under which the Appellant was charged and convicted, **W. Va. Code** § 61-6-21(b), reads:

If any person does by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the state of West Virginia or by

the Constitution or laws of the United States, because of such other person's race, color, religion, ancestry, national origin, political affiliation or sex, he or she shall be guilty of a felony, and, upon conviction, shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both.

A simple reading of **W. Va. Code § 61-6-21(b)** makes plain that the significant elements of the criminal offense are: 1) any person; 2) by force or threat of force; 3) willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person; 4) in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the state of West Virginia or by the Constitution or laws of the United States; 5) because of such other person's race, color, religion, ancestry, national origin, political affiliation or sex. Each of these terms are words of common usage that persons of ordinary intelligence understand. In sum, the statute proscribes any person from the conduct of using force, or the threat of force, in a willful manner to impose on another person's legal or constitutional rights because of that other person's race, color, religion, ancestry, national origin, political affiliation or sex.

All nine counts of the Indictment charged violation of the same statute, **W. Va. Code § 61-6-21(b)**. Counts One, Six and Eight of the Indictment, the three counts for which the jury convicted the Appellants read:

COUNT ONE

Civil Rights Violation

That KENDRA N. SULICK between the ___ day of December 2007 and the ___ day of June 2008, in the County of Berkeley, State of West Virginia, did unlawfully, intentionally, willfully and feloniously, by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate

or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the state of West Virginia or by the Constitution or laws of the United States, because of such other person's race, color, religion, ancestry, national origin, political affiliation or sex, to wit: did harass and attempt to intimidate Brian Smith and Betty Ann Obiri's and their six year old child, I. S., while they walked to, or waited for, the school bus, by the use of racial slurs, profanities and obscene gestures, because of Mr. Smith's and Ms. Obiri's race or color, in violation of Chapter 61, Article 6, Section 21(b) of the Code of West Virginia, as amended, against the peace and dignity of the State.

COUNT SIX

Civil Rights Violation

That KENDRA N. SULICK on or about the ___ day of September 2008, in the County of Berkeley, State of West Virginia, did unlawfully, intentionally, willfully and feloniously, by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the state of West Virginia or by the Constitution or laws of the United States, because of such other person's race, color, religion, ancestry, national origin, political affiliation or sex, to wit: called Betty Ann Obiri a racial slur and made obscene, hostile and threatening gestures toward Ms. Obiri as she sat on the steps of her home with her children, because of Ms. Obiri's race or color, in violation of Chapter 61, Article 6, Section 21(b) of the Code of West Virginia, as amended, against the peace and dignity of the State.

COUNT EIGHT

Civil Rights Violation

That KENDRA N. SULICK on or about the ___ day of October 2008, in the County of Berkeley, State of West Virginia, did unlawfully, intentionally, willfully and feloniously, by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the state of West Virginia or by the Constitution or laws of the United States, because of such other person's race, color, religion,

ancestry, national origin, political affiliation or sex, to wit: called Betty Ann Obiri a racial slur as Ms. Obiri walked to her mailbox, because of Ms. Obiri's race or color, in violation of Chapter 61, Article 6, Section 21(b) of the Code of West Virginia, as amended, against the peace and dignity of the State.

[Indictment, in part, 2/18/10; App., vol. 1, 354-360.]

Each count of the Indictment was constitutionally sufficient as each "(1) states the elements of the offense charged; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy." State v. Wallace, 205 W. Va. 155, 517 S.E.2d 20 (1999). Each of these three counts is constitutionally sufficient.

The evidence, summarized in the Statement of Facts, *supra*, is plainly sufficient upon which the jury could, and did, find beyond a reasonable doubt the Appellant guilty of these three counts of a felony civil rights offense, in violation of **W. Va. Code** § 61-6-21(b), while acquitting her of six other counts under the same statute.⁴

Although the jury heard from several witnesses, the primary witness the jury heard from was the victim Ms. Obiri. The jury is the sole decider of a witness' credibility. State v. Payne, *supra*. That testimony included the following events that transpired over the course of nearly a year. One day, with Ms. Obiri and her two children in the car at the bus stop, the Appellant drove up and called Ms. Obiri and the children "fucking niggers." Hers was the only black family at the bus stop. [Tr., 6/8/10, App., Vol. 3, 916-918.] On another occasion the Appellant

⁴ The Appellant acknowledges in her procedural history of the case that the Grand Jury returned the Indictment in the case *sub judice* charging nine separate counts of a felony civil rights violation only after the Appellant was successful in moving to dismiss, as factually non-specific, the single count returned by the Grand Jury the previous year under that statute State v. Kendra Sulick, Case No.: 09-F-26.

drove a car at a high rate of speed past Ms. Obiri's house, which was concerning to her because Isaiah rides his bike in the yard. The Appellant stopped and revved the car to kick gravel up. When she complained to the Appellant, the Appellant gave her the middle finger. [Id., 918-919.] On another occasion, she was standing in her yard raking leaves and the Appellant swerved a truck towards her. [Id., 920.] In August 2008 the Appellant was at the back of Ms. Obiri's backyard doing "doughnuts" on an ATV for about 20-25 minutes until the police arrived. [Id., 921-922.] Another incident with the Appellant and a chainsaw that upset her occurred around the same time, very late one evening, when the chainsaw started up and the Appellant said "fucking niggers, if you don't like it you can leave, fucking niggers." [Id., 922-923.] In September 2008, she was in her front yard with her children when the Appellant stopped in a car and gave her the finger and said "you fucking niggers." [Id., 923-924.] Following that, again at the bus stop, the Appellant drove past at a high rate of speed very near Isaiah and kicked gravel up on Ms. Obiri's car. Isaiah jumped into the grass. [Id., 924-925.] In October 2008 the Appellant drove by very quickly and swerved the car toward Ms. Obiri as she walked to her mailbox. She felt threatened by this. [Id., 925-926.]

Given this pattern and practice and the specific incidents recounted in support of Counts One, Six and Eight, this evidence clearly demonstrates the jury could find beyond a reasonable doubt that the elements of **W. Va. Code** § 61-6-21(b) were met. 1) The Appellant is "any person." 2) The Appellant's personal actions demonstrated "force or threat of force." 3) The Appellant's actions were "willful" and were intended to "injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person," those persons being Ms. Obiri and her children. Ms. Obiri testified that she felt threatened by the

Appellant's conduct. 4) Ms. Obiri's, and her children's, right to peacefully reside in her home and to be free from threats of violence is "the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the state of West Virginia or by the Constitution or laws of the United States." 5) The Appellant's constant use of the word "nigger" in a demeaning and derogatory manner clearly evinced her actions as having been motivated by Ms. Obiri's "race, color [...] ancestry, national origin[.]"

Despite all of the testimony from Ms. Obiri that is recounted above, the Appellant asserts that there was "absolutely no evidence" to support the three convictions. To the contrary, Ms. Obiri specifically testified to the day, with her two children in the car at the bus stop, the Appellant drove up and called she and the children "fucking niggers." Hers was the only black family at the bus stop. [Tr., 6/8/10, App., Vol. 3, 916-918.] This conduct was alleged in Count One. Ms. Obiri also testified to another day when she was in her front yard with her children when the Appellant stopped in a car and gave her the finger and said "you fucking niggers." [Id., 923-924.] This conduct was alleged in Count Six. Ms. Obiri also testified to the Appellant driving by very quickly and swerving the car toward Ms. Obiri as she walked to her mailbox and that she felt threatened by this. [Id., 925-926.] Similar conduct was alleged in Count Eight.

The Appellant focuses on her assertion that the State did not prove the statute's use of the terms "force" and "threat of force." Those terms are not found by the State to be defined in either West Virginia statute or case law. But they are words of common usage that persons of ordinary intelligence understand in this context as physical violence or the implication of future physical violence. By dictionary usage, "force" means "to compel by physical means." *Black's Law Dictionary*, 8th ed. A "threat" is "a communicated intent to inflict harm or loss on another or

on another's property." *Id.*

This Court frequently uses these terms, "force" and "threat of force": State v. Slater, 222 W. Va. 499, 665 S.E.2d 674, 680 (2008) (consent to enter is not a defense to burglary where the consent is obtained through fraud or *threat of force.*"); State v. Dennis, 216 W. Va. 331, 607 S.E.2d 437, 450 (2004) (venue for a sex assault prosecution may lie "where the defendant caused the victim to become fearful through *force or threats of force.*"); Belcher v. Wal-Mart Stores, Inc., 211 W. Va. 72, 568 S.E.2d 19, 30 (2002) ("*exercise of force, or express or implied threat of force*" in the context of a false imprisonment accusation); State v. Tharp, 184 W. Va. 292, 400 S.E.2d 300, 304 (1990) (same as Slater); Syl. Pt. 1, State v. Plumley, 181 W. Va. 685, 384 S.E.2d 130 (1989) (same); and State v. Coulter, 169 W.Va. 526, 288 S.E.2d 819 (1982) (robbery by *force and by fear of force* discussed).

The use of the terms "force" and "threat of force" are plainly definite in prohibiting the use of violence, or communicated intent to use violence, in the context of **W. Va. Code** § 61-6-21(b). Viewing the evidence in the light most favorable to the State, the jury found that the Appellant's actions constituted "force" and the "threat of force."

The Appellant asserts that the evidence of her continual use of racial slurs against Ms. Obiri and her family did not provide the jury with a basis to find that her actions were racially motivated. While the Appellant testified to her belief that the criminal charges were the result of some unidentified conspiracy against her by the Smiths and other unnamed neighbors, the Appellant offered no evidence to suggest a non-discriminatory motivation for her conduct toward Ms. Obiri and her family. In Arizona it is recognized that the use of the word "nigger" addressed to an African-American woman is a personal attack likely to provoke a violent reaction as "few

words convey such an inflammatory message of racial hatred and bigotry as the term ‘nigger.’” In re John M., 201 Ariz. 424, 428, 36 P.3d 772 (Ct. App., Div. 1, 2001). The North Carolina Supreme Court holds that “No fact is more generally known than that a white man who calls a black man a ‘nigger’ within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate. The trial court was free to judicially note this fact.” In re Spivey, 345 N.C. 404, 480 S.E.2d 693, 699 (1997). Viewing the evidence in the light most favorable to the State, the jury found that the Appellant’s constant use of the word “nigger” in a demeaning and derogatory manner clearly evinced her actions as having been motivated by Ms. Obiri’s “race, color [...] ancestry, national origin[.]”

The Appellant fails to prove that the trial court abused its discretion in denying the motions for acquittal. State v. Grimes, *supra*. The State respectfully request this Court to affirm the judgment of the jury and of the trial court and deny the appeal.

B. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE PETITIONER’S MOTION TO DISMISS CHALLENGING THE CONSTITUTIONALITY OF W. VA. CODE § 61-6-21.

1. Standard of Review.

This Court provides the following guidance for reviewing criminal statutes for sufficient definiteness of the conduct criminally proscribed:

1. “A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication.” Syllabus Point 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

2. “Statutes involving a criminal penalty, which govern potential First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by

interpreting their meaning from the face of the statute.” Syllabus Point 2, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

3. “Criminal statutes, which do not impinge upon First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by construing the statute in light of the conduct to which it is applied.” Syllabus Point 3, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

4. “ ‘When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment.’ Point 3 Syllabus, *Willis v. O'Brien*, 151 W.Va. 628, 153 S.E.2d 178 [1967].” Syllabus Point 4, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974).

Syl. Pts. 1-4, *State v. Bull*, 204 W. Va. 255, 512 S.E.2d 177 (1998).

2. Discussion.

The analysis for this case starts with the type of conduct proscribed as criminal. Although set out above, for convenience the State cites again **W. Va. Code § 61-6-21(b)**, which reads:

If any person does by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the state of West Virginia or by the Constitution or laws of the United States, because of such other person's race, color, religion, ancestry, national origin, political affiliation or sex, he or she shall be guilty of a felony, and, upon conviction, shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both.

The elements of **W. Va. Code § 61-6-21(b)**, again, are: 1) any person; 2) by force or threat of force; 3) willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person; 4) in the free exercise or enjoyment of any

right or privilege secured to him or her by the Constitution or laws of the state of West Virginia or by the Constitution or laws of the United States; 5) because of such other person's race, color, religion, ancestry, national origin, political affiliation or sex. Each of these terms are words of common usage that persons of ordinary intelligence understand. In sum, the statute proscribes any person from the conduct of using force, or the threat of force, in a willful manner to impose on another person's legal or constitutional rights because of that other person's race, color, religion, ancestry, national origin, political affiliation or sex.

The Appellant highlights the bias crime statute from Delaware as a model for how she thinks West Virginia's statute should read. However, Delaware's statute is not West Virginia's. That the Delaware legislature may have seen fit to identify specific criminal acts of violence or threatened violence otherwise codified as the predicate for its hate or bias crime law does not render **W. Va. Code** § 61-6-21(b) unconstitutionally vague. States are free to craft their statutes as they deem best suited for the needs of their state. West Virginia has properly chosen to proscribe the use of force or threat of force in this context without finding a necessity of tying the unlawful bias motivation to any otherwise specifically delineated crime.

As referenced above, **W. Va. Code** § 61-6-21(b)'s use of the terms "force" and "threat of force" are not found by the State to be defined in either West Virginia statute or case law. But they are words of common usage that persons of ordinary intelligence understand in this context as physical violence or the implication of future physical violence. By dictionary usage, "force" means "to compel by physical means." *Black's Law Dictionary*, 8th ed. A "threat" is "a communicated intent to inflict harm or loss on another or on another's property." *Id.*

This State cited earlier to where this Court has used these terms, "force" and "threat of

force”: State v. Slater, *supra*, 222 W. Va. 499, 665 S.E.2d 674, 680 (2008) (burglary); State v. Dennis, *supra*, 216 W. Va. 331, 607 S.E.2d 437, 450 (2004) (sex assault); Belcher v. Wal-Mart Stores, Inc., *supra*, 211 W. Va. 72, 568 S.E.2d 19, 30 (2002) (false imprisonment; State v. Tharp, *supra*, 184 W. Va. 292, 400 S.E.2d 300, 304 (1990) (same as Slater); Syl. Pt. 1, State v. Plumley, *supra*, 181 W. Va. 685, 384 S.E.2d 130 (1989) (same); and State v. Coulter, *supra*, 169 W. Va. 526, 288 S.E.2d 819 (1982) (robbery).

The use of the terms “force” and “threat of force” are plainly definite in prohibiting the use of violence, or communicated intent to use violence, in the context of **W. Va. Code § 61-6-21(b)**. The United States Supreme Court holds that violence is not constitutionally protected by the First Amendment. In Wisconsin v. Mitchell, 508 U.S. 476, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993), that Court upheld the constitutionality against First Amendment speech challenges of Wisconsin’s penalty enhancement statute where a criminal offense was motivated by bias against a protected group. In Mitchell, the race of the victim was the motivation for an unlawful beating. Pursuant to the Wisconsin statute, the appellant received a more severe sentence than he may have had race not been the motivation. Mitchell addressed a sentence enhancement statute, which similar provision of the West Virginia statute is not in play in the case *sub judice*. However, the United States Supreme Court began its First Amendment analysis by noting that the First Amendment does not protect a “limitless variety of conduct”:

a physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment. See Roberts v. United States Jaycees, 468 U.S. 609, 628, 104 S.Ct. 3244, 3255, 82 L.Ed.2d 462 (1984) (“[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact ... are entitled to no constitutional protection”); NAACP v. Claiborne Hardware Co., 458 U.S. 886,

916, 102 S.Ct. 3409, 3427, 73 L.Ed.2d 1215 (1982) (“The First Amendment does not protect violence”).

Mitchell, 508 U.S. 476, 484.

The Appellant does not challenge that, consistent with Mitchell, **W. Va. Code** § 61-6-21(b) may constitutionally proscribe conduct of violence and threats of violence without impinging upon any First Amendment right of free speech. **W. Va. Code** § 61-6-21(b) proscribes “force” and “threat of force.” The Appellant’s “vagueness” argument fails precisely because **W. Va. Code** § 61-6-21(b) proscribes such conduct in a manner that provides both sufficient definiteness as to what conduct is prohibited and the adequate standards for adjudication.

The constitutionality of California’s Civil Rights Bias statute, which reads remarkably similar to **W. Va. Code** § 61-6-21(b) in the conduct it proscribes, was upheld against vagueness and First Amendment challenges by the California Supreme Court in In re M.S., 10 Cal. 4th 698, 896 P.2d 1365, 42 Cal. Rptr. 3rd 355 (1995). That California statute reads:

No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55 [disability, gender, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of these actual or perceived characteristics].

West's Ann. Cal. Penal Code § 422.6(a) [2004].⁵

⁵ The amendments to California’s statute since 1995 do not affect the issue presented.

Rejecting the appellant's vagueness argument in M.S. that the proscribed conduct was not sufficiently definite, the California Supreme Court wrote:

Inasmuch as "[w]ords inevitably contain germs of uncertainty," mathematical precision in the language of a penal statute is not a sine qua non of constitutionality. (*U.S. v. Gilbert*, supra, 813 F.2d at p. 1530, quoting *Broadrick v. Oklahoma*, supra, 413 U.S. at p. 608, 93 S.Ct. at p. 2914.) One who willfully threatens violence against another, motivated by the victim's protected characteristic, cannot later be heard to complain he or she was unaware such conduct might violate sections 422.6 and 422.7.

In re M.S., supra, 10 Cal. 4th 698, 718.

The Appellant in the case *sub judice*, like the appellant in M.S., charged with willfully committing acts of violence and threatening acts of violence against the victims because of the victims' race or color cannot now complain that she was unaware that her conduct might be unlawful under **W. Va. Code** § 61-6-21(b). The statute is not shown by the Appellant to be unconstitutionally vague. State v. Bull, supra.

Because the use of words in this case not only proved the racial motivation for the Appellant's conduct but also her threat of force, it is worth noting that words are not *per se* accorded First Amendment protections. "Fighting words," which are given no constitutional protection, are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L.Ed. 1031 (1942). Fighting words are also described as "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." Cohen v. California, 403 U.S. 15, 20, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). See In re John M., supra, 201 Ariz. 424, 428, 36 P.3d 772 (Ct. App., Div. 1, 2001)

(“few words convey such an inflammatory message of racial hatred and bigotry as the term ‘nigger.’”); and In re Spivey, *supra*, 345 N.C. 404, 480 S.E.2d 693, 699 (1997) (court could take judicial notice of the effect of a white man calling a black man a ‘nigger’ within his hearing.)

Likewise, certain obscenities are likewise found to be “fighting words” which would cause the average person to react violently. See In the Interest of S.J.n-K., 647 N.W.2d 707, 711-712 (S.D. 2002), *citing* State v. Hammersley, 134 Idaho 816, 10 P.3d 1285 (2000) (“shut your fucking mouth, you bitch”); State v. Groves, 219 Neb. 382, 363 N.W.2d 507 (1985) (“fuckhead” and “mother fucker”); State v. Wood, 112 Ohio App.3d 621, 679 N.E.2d 735 (1996) (“fuck you” either verbally or via gesture, may be considered fighting words); C.J.R. v. State, 429 So.2d 753 (Fla.Dist.Ct.App.1983) (unprovoked use of “fuck this shit” and “mother fucker”).

Given the highly inflammatory nature of the use of certain racial slurs to convey hatred and bigotry and the use of obscenities which would cause a person to act violently, the jury was able to properly determine the context and circumstance of the Appellant’s conduct as constituting “force” or “threat of force” for the purposes of **W. Va. Code § 61-6-21(b)**. The California Supreme Court recognizes that this context is crucial to factually determining whether there is a reasonable apprehension of the victims to believe that he or she will be subjected to physical violence:

“A threat is an “expression of an intent to inflict evil, injury, or damage on another.” (*U.S. v. Orozco-Santillan* (9th Cir. 1990) 903 F.2d 1262, 1265.) When a reasonable person would foresee that the context and import of the words will cause the listener to believe he or she will be subjected to physical violence, the threat falls outside First Amendment protection. (*Id.* at pp. 1265-1266; *In re Steven S.* (1994) 25 Cal.App.4th 598, 607 [31 Cal.Rptr.2d 644]; *Wurtz v. Risley*, *supra*, 719 F.2d at p. 1441 [“It is true that threats have traditionally been punishable without violation of the [F]irst

[A]mendment, but implicit in the nature of such punishable threats is a reasonable tendency to produce in the victim a fear that the threat will be carried out.”)

In re M.S., *supra*, 10 Cal. 4th 698, 711.

The West Virginia statute is not shown by the Appellant to be unconstitutionally vague. State v. Bull, *supra*. Any doubt after applying every reasonable construction in favor of constitutionality must be resolved in favor of the constitutionality of **W. Va. Code** § 61-6-21(b). State v. Bull, *id*. The trial court ruled properly when it denied the Appellant’s Motion to Dismiss.

Nor is there anything in the language of **W. Va. Code** § 61-6-21 that suggests that the statutory sentence is cruel and unusual or is disproportionate to the criminal conduct the statute seeks to proscribe. The sentence allowed for a conviction under **W. Va. Code** § 61-6-21(b) is a fine of not more than five thousand dollars, or imprisonment for a definite term of up to ten years, or both. When the Appellant was sentenced, she was sentenced to the lower end of the statutory sentence to a definite term of two years for each conviction, which sentence was then suspended for a term of probation.

In Mitchell, *supra*, that appellant’s sentence was enhanced from two years’ imprisonment to four years because of his race-based motivation for personal violence. The United States Supreme Court noted the arguments supporting enhanced sentencing as: “bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.” Mitchell, 508 U.S. 476, 488. The Mitchell Court then held:

The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or

biases. As Blackstone said long ago, “it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness.” 4 W. Blackstone, Commentaries *16.

Mitchell, *id.*

There can be no doubt that the nature of the bias-motivated conduct that **W. Va. Code § 61-6-21(b)** proscribes is highly destructive of the public safety and happiness. See In re John M., *supra*, 201 Ariz. 424, 428, 36 P.3d 772 (Ct. App., Div. 1, 2001); and In re Spivey, *supra*, 345 N.C. 404, 480 S.E.2d 693, 699 (1997).

That the trial court ran the sentences consecutively does not bolster the Appellant’s argument, since the trial court possessed the authority to run the sentences consecutively: “‘When a defendant has been convicted of two separate crimes, before sentence is pronounced for either, the trial court may, in its discretion, provide that the sentences run concurrently, and unless it does so provide, the sentences will run consecutively.’ Syllabus point 3, Keith v. Leverette, 163 W.Va. 98, 254 S.E.2d 700 (1979).” Syl. Pt. 3, State v. Allen, 208 W.Va. 144, 539 S.E.2d 87 (1999). **W. Va. Code § 61-11-21** provides that sentences for two or more convictions shall be consecutive unless the sentencing court orders them to run concurrently.

The sentencing court is given broad discretion in imposing sentence, as long as it is within the statutory limits and not based on an impermissible factor. State ex rel. Massey v. Hun, 197 W. Va. 729, 478 S.E.2d 579 (1996). The trial court imposed the statutory sentence and the Appellant makes no allegation that it was based on an impermissible factor.

Any doubt after applying every reasonable construction in favor of constitutionality must be resolved in favor of the constitutionality of **W. Va. Code § 61-6-21(b)**. State v. Bull, *supra*.

The statute is not shown by the Appellant to be unconstitutional in its sentencing plan. State v. Bull, *id.* The trial court ruled properly when it denied the Appellant's Motion to Dismiss based on constitutionality allegations.

The State respectfully requests this Court to deny the Petition for Appeal.

C. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE APPELLANT'S MOTION TO ARREST JUDGMENT.

1. Standard of review.

Regarding a motion for arrest of judgment, this Court holds:

When the sufficiency of an indictment or information is first challenged by a motion in arrest of judgment, the sufficiency of the allegations will be construed with less strictness than when raised by demurrer. In other words, an indictment is liberally construed on a motion in arrest of judgment.

State v. Stone, 127 W.Va. 429, 33 S.E.2d 144, 148 (1945) [citations omitted.]

2. Discussion.

The Appellant was charged with multiple felony counts of civil rights violations inflicted upon her African-American neighbors, the Smith and Obiri family, in violation of **W. Va. Code** § 61-6-21(b). She was convicted at jury trial of three of those counts. Each of those indicted counts state the elements of the offense charged, including "force or threat of force," track the statutory language, and identify the statute under which she is charged. That is plain when comparing the language of the indictment counts with the language of the statute. Each count is constitutionally sufficient as each "(1) states the elements of the offense charged; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a

defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy.” State v. Wallace, *supra*, 205 W. Va. 155, 517 S.E.2d 20 (1999). There is no defect proven by the Appellant in these counts of the Indictment.

A motion for arrest of judgment may be made, pursuant to *W.V.R.Cr.P.* 34, “if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged.” The counts for which the Appellant was indicted and upon which she was convicted plainly charge the offense of felony civil rights violations, in violation of **W. Va. Code § 61-6-21(b)**. The Appellant cites no legal authority in support of her proposition that an indictment for this offense is required to allege more than was alleged. “[A]n indictment is liberally construed on a motion in arrest of judgment.” State v. Stone, *supra*.

State v. Stone, *id.*, decided before the adoption of *W.V.R.Cr.P.* 34, is factually distinguished from the case *sub judice*. Stone rejected an Indictment purporting to charge Burglary of a building which did not meet the elemental definition of the type of building qualifying for a Burglary. The counts of the Indictment in the case *sub judice*, however, contain all of the elements of, and properly charge, the offense of of felony civil rights violations, in violation of **W. Va. Code § 61-6-21(b)**.

Distinguished also is the case of State v. Johnson, 219 W.Va. 697, 639 S.E.2d 789 (2006). Applying *W.V.R.Cr.P.* 34 in Johnson, this Court held a Robbery in the First Degree indictment defective for an offense occurring in 2002 because it did not reflect the 2000 statutory amendment that changed a significant element of the offense. The counts of the Indictment in the case *sub judice*, however, contain all of the elements of, and properly charge, the offense of

of felony civil rights violations, in violation of **W. Va. Code** § 61-6-21(b).

The Appellant fails to prove that the trial court erred in denying the motion to arrest judgment. State v. Stone, *supra*.

The State respectfully requests this Court to deny the Petition for Appeal.

D. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING THE APPELLANT’S MOTION FOR NEW TRIAL.

1. Standard of Review.

This Court holds: “The question of whether a new trial should be granted is within the discretion of the trial court and is reviewable only in the case of abuse. *State v. King*, 173 W.Va. 164, 313 S.E.2d 440 (1984).” State v. Crouch, 191 W.Va. 272, 445 S.E.2d 213, 216 (1994).

2. Discussion.

The trial court did not abuse its discretion in denying the Appellant’s motion for new trial.

The Appellant first claims that the State referenced the Appellant’s use of racial slurs and vulgarities in it’s opening remarks to the jury. Such reference was appropriate in the case where the Appellant’s bias against the victims’ race or color was required to be proved as her motivation. The trial was rife with evidence from Ms. Obiri and Mr. Smith of the Appellant using these slurs and vulgarities against them. Even were such the State’s opening remarks improper, “[a] judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice.” Syl. pt. 5, State v. Ocheltree, 170 W.Va. 68, 289 S.E.2d 742 (1982).” State v. Bell,

189 W.Va. 448, 432 S.E.2d 532 (1993). The Appellant does not assert that she objected to the remarks, nor does she demonstrate prejudice or manifest injustice.

The Court sustained the Appellant's objections to certain evidence that the State contended was *res gestae* and material to the alleged offenses. Aside from sweeping generalizations, the Appellant fails to identify any specific piece of excluded evidence that she claims prejudiced her.

Finally, and with no factual basis, the Appellant casts aspersions on the jury asserting that there may have been juror misconduct.

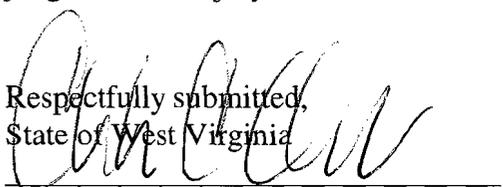
The Appellant makes no showing that the trial court abused its discretion in denying the motion for new trial. State v. Crouch, *supra*.

The State respectfully requests the Court to deny the Petition for Appeal.

VI. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm the judgment of the jury and of the trial court and deny the appeal.

Respectfully submitted,
State of West Virginia

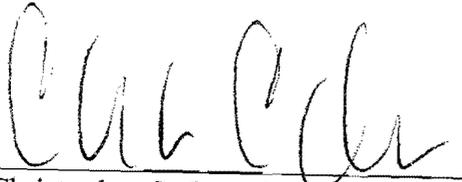


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the foregoing **RESPONSE OF STATE OF WEST VIRGINIA TO PETITION FOR APPEAL** on this the 31st day of May, 2011, by hand-delivery, first-class mail, postage prepaid, facsimile:

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