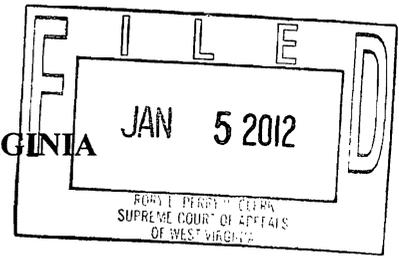


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1123



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

JAMES WILKERSON,

Defendant Below, Petitioner.

BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

JAMES WILKERSON,

Defendant Below, Petitioner.

BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

On November 14, 2008, James Wilkerson, a.k.a. “Juice” (“Petitioner”), and Brandon Myers (“Myers”), in a vicious and violent manner, robbed Stephen Surgent and David Wood. The facts and circumstances of this robbery are as follows:

At the time that they were robbed, November 14, 2008, Stephen Surgent and David Wood were 13 years old, best friends with one another, and living in Wheeling, West Virginia. App. vol. 1, 212-14, 247-49. Prior to the robbery, David called Stephen and the two of them made plans to “hang out” together after school at David’s house. App. vol. 1, 215, 249-50. Stephen arrived at David’s house at approximately 5:00–5:30 p.m. App. vol. 1, 215. There, the two boys sat around talking and playing video games. App. vol. 1, 216, 250. Around 8:00 p.m., Stephen and David walked to a nearby Exxon station to get something to drink—“slushies.” App. vol. 1, 216-17, 250-51. From there, Stephen and David started walking back to David’s house, traversing and “cutting” through several streets. App. vol. 1, 217-18, 251-52; App. vol. 2, 391, 397. On the way, Stephen

and David saw several older boys standing around talking and skateboarding. These older boys were acting rowdy, obnoxious, were drinking and appeared intoxicated. App. vol. 1, 217-19, 252; App. vol. 2, 274-75, 298, 338, 368, 391, 397.¹ Nervous about the older boys, and in order to avoid any confrontation with them, Stephen and David crossed the street and “cut” through a playground area. App. vol. 1, 219-20, 252-53; App. vol. 2, 391, 397.

As they did, Petitioner and Myers “spotted” Stephen and David.² At this point, Petitioner or Myers asked the other boys if anyone knew Stephen and David. App. vol. 2, 277, 300, 372-73. When the other boys responded “[n]o,” Petitioner or Myers said “[o]kay, let’s do this” and began following Stephen and David into the playground. App. vol. 2, 277-78, 285, 288, 301, 309, 338-39, 349, 369-70.³ Once they caught up to them, Myers demanded marijuana from Stephen—Stephen and David, one right after the other, responded that they did not have any marijuana. App. vol. 1, 220, 222, 235, 253, 262; App. vol. 2, 391, 397. Myers then got in Stephen’s face and demanded money from him—again, Stephen and David responded that they did not have any money. App. vol. 1, 220-21, 235, 253, 262; App. vol. 2, 391, 397.

At this moment, Petitioner attacked David, punching him in the face and knocking him to the ground. App. vol. 1, 221, 253-54, 262-63; App. vol. 2, 397-98. Immediately thereafter, Myers attacked Stephen, knocking him to the ground. App. vol. 1, 222, 254; App. vol. 2, 391. As he was

¹ These older boys included, of course, Petitioner and Myers, as well as Zachary Krieger and James Michael Waugh. App. vol. 2, 273, 296-97, 337-38. Also present were Joey Yoho and one female, Devon Emerick. App. vol. 2, 273, 296, 336, 338. Joey and Devon were there waiting on Devon’s boss to arrive and let her back into her workplace, as she had left her cell phone there and did not have a key. App. vol. 2, 272-73, 295-96, 306, 338.

² Petitioner was 20 years old at the time; Myers was 18. App. vol. 2, 423, 450.

³ Stephen, and presumably David, did not know and had never seen Petitioner or Myers in their lives. App. vol. 1, 233-34.

trying to get up, Myers kicked Stephen causing him to fall to the ground again. App. vol. 1, 222. Back on the ground, Stephen pulled out his wallet and gave it to Myers. *Id.* Myers responded by kicking Stephen again and demanding money from him. *Id.* Stephen replied to Myers that he had given him his wallet, after which Myers continued beating him. *Id.*

Petitioner and Myers then turned their attention to David, during which time David attempted to give them his cell phone. App. vol. 1, 222, 254. Petitioner and Myers responded to this gesture by telling David that they did not want his phone—they wanted his money—after which they began punching David knocking him to the ground. App. vol. 1, 222-24, 254. Following this attack on David, Myers again continued attacking Stephen. App. vol. 1, 223-24.

Stephen and David sustained significant injuries as a result of this robbery and assault. To begin with, both of them were beaten unconscious during the attack. App. vol. 1, 221, 223-24, 254. Stephen's face was bloodied by the attack, he was vomiting blood, and he suffered a severely broken nose for which he had to undergo plastic/reconstructive surgery. App. vol. 1, 225, 228; App. vol. 2, 388, 398. In fact, Stephen continues to have problems with his nose, which causes him breathing and congestion problems. Due to the attack, Stephen also had lacerations behind his ears and along his chin, his forehead was very swollen, and his eyes were swollen to the point that they look like "softballs." App. vol. 1, 225. Stephen also has a number of residual emotional problems stemming from the attack, including anger problems, depression, hearing things, feelings of apprehension around strangers, as well as a feeling that someone's following or chasing him when it's dark outside. App. vol. 1, 229-30.

After the robbery and attack, David was spitting blood and had to receive stitches in his mouth making it difficult for him to eat, he had a laceration to the left side of his face that also

required stitches, and he could not play basketball for several weeks. App. vol. 1, 255-56, 259; App. vol. 2, 331, 333. David also suffered a concussion due to the attack. App. vol. 1, 254, 258; App. vol. 2, 331. As with Stephen, David also continues to be affected emotionally by the attack—he is more cautious of and/or paranoid about people in general and walking around outside. App. vol. 1, 259.

On January 12, 2009, the Ohio County Grand Jury indicted Petitioner for two counts of first degree robbery (Counts 3 and 4), two counts of assault during the commission of a felony (Counts 7 and 8), and one count of conspiracy to commit first degree robbery (Count 10). App. vol. 1, 2-6.⁴

Petitioner's trial began on April 18, 2011 and ended on April 19, 2011,⁵ with the jury convicting him of two counts of first degree robbery (Counts 3 and 4), one count of assault during the commission of a felony (Count 8), and one count of conspiracy to commit robbery in the first degree (Count 10). App. vol. 2, 550-51. *See also* App. vol. 1, 8-10.⁶

On May 25, 2011, the court sentenced Petitioner to two determinate terms of 40 years in the penitentiary for his convictions of two counts of first degree robbery (Counts 3 and 4), an indeterminate term of 2 to 10 years for his conviction of assault during the commission of a felony (Count 8), and an indeterminate term of 1 to 5 years for his conviction of conspiracy to commit first

⁴ Myers was likewise indicted on these same charges (Counts 1, 2, 5, 6 and 9). App. vol. 1, 1-5.

⁵ Please note that Myers was tried separately in April 2009. App. vol. 2, 424. On April 13, 2009, and prior to the conclusion of his trial, Myers, pursuant to a plea agreement with the prosecution, pled guilty to two counts of second-degree robbery. App. vol. 2, 423-24, 438. In exchange, the prosecution dropped the remaining charges in the Indictment. After pleading guilty, Myers was sentenced to two consecutive terms of 5 to 18 years in the penitentiary. App. vol. 2, 421.

⁶ Petitioner was acquitted on one of the counts (Count 7) of the Indictment charging him with assault during the commission of a felony. App. vol. 2, 550-51. *See also* App. vol. 1, 9.

degree robbery (Count 10). App. vol. 2, 582. *See also* App. vol. 1, 13-14. The court further ordered that Petitioner's sentences for first degree robbery (Counts 3 and 4) run consecutive to one another, and that his sentences for assault during the commission of a felony (Count 8) and conspiracy to commit first degree robbery (Count 10) run concurrent to each other and concurrent to his sentences for first degree robbery. App. vol. 2, 582-83. *See also* App. vol. 1, 14. Thereafter, Petitioner brought the current appeal.

II.

SUMMARY OF ARGUMENT

The court correctly denied Petitioner's proposed jury instructions on assault and battery as lesser included offenses of first degree robbery, as the vicious and violent actions of Petitioner and Brandon Myers in robbing Stephen Surgent and David Wood did not warrant the giving of such instructions.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The State does not believe that oral argument is necessary in this case, as the "facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument." Rev. R.A.P. 18(a)(4). However, it appearing that Petitioner has requested oral argument, *see* Pet'r's Br. 8, and if so ordered by the Court, the State will be there to respond. Should the Court order oral argument, the State believes that this case is appropriate for a Rule 19 argument and memorandum decision. Finally, the State defers to the discretion and wisdom of the Court on all these points.

IV.

ARGUMENT

THE TRIAL COURT DID NOT ERR OR ABUSE ITS DISCRETION WHEN IT REFUSED TO GIVE THE JURY INSTRUCTIONS ON ASSAULT AND/OR BATTERY AS LESSER INCLUDED OFFENSES OF FIRST DEGREE ROBBERY, AS THE EVIDENCE PRESENTED AT TRIAL DID NOT SUPPORT THE GIVING OF SUCH INSTRUCTIONS.

A. Standard of Review

“As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*.” Syl. pt. 1, *State v. Shingleton*, 222 W. Va. 647, 671 S.E.2d 478 (2008) (quoting Syl. pt. 1, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996)).

“A trial court’s refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant’s ability to effectively present a given defense.”

Syl. pt. 3, *State v. Blankenship*, 208 W. Va. 612, 542 S.E.2d 433 (2000) (quoting Syl. pt. 11, *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994)).

B. Due to the Vicious and Violent Actions of Petitioner and Brandon Myers in Robbing Stephen Surgent and David Wood, Instructions on Assault and/or Battery as Lesser Included Offenses of First Degree Robbery Were Not, as Properly Found by the Court, Warranted.

On appeal, Petitioner asserts that the court committed error in refusing his proposed jury instructions on the charges of assault and/or battery. *See generally* Pet’r’s Br. 3, 7-8, 9-13. In support of this assertion, Petitioner first argues that assault and battery are lesser included offenses of first-degree robbery. *See generally* Pet’r’s Br. 9-11. Next, Petitioner argues that there was

sufficient evidence presented at trial to support a verdict of the lesser included offenses of assault and/or battery. *See generally* Pet'r's Br. 11-13. The State disagrees.⁷

To begin with, as the Court is well aware,

“[t]he question of whether a defendant is entitled to an instruction on a lesser included offense involves a two-part inquiry. The first inquiry is a legal one having to do with whether the lesser offense is by virtue of its legal elements or definition included in the greater offense. The second inquiry is a factual one which involves a determination by the trial court of whether there is evidence which would tend to prove such lesser included offense.”

Syl. pt. 4, *Blankenship, supra* (quoting Syl. pt. 1, *State v. Jones*, 174 W. Va. 700, 329 S.E.2d 65 (1985)).

West Virginia's first degree robbery statute, W. Va. Code § 61-2-12(a), in pertinent part, provides as follows:

Any person who commits or attempts to commit robbery by: (1) [c]ommitting violence to the person, including, but not limited to, partial strangulation or suffocation or by striking or beating; or (2) uses the threat of deadly force by the

⁷ Rather than directly addressing the question of whether assault and/or battery are lesser included offenses of first degree robbery, the State's argument will center on the sufficiency, or insufficiency as it turns out, of the evidence in this case to support the giving of such instructions by the court. Having said that, it should be noted that other courts across the country seem somewhat split on the question of whether assault and/or battery are lesser included offenses of first degree robbery. In other words, “some say yes—some say no.” As Petitioner has cited some of the “yeses,” *see generally* Pet'r's Br. 10, 12-13, here are some of the “noes:” *Givens v. State*, 361 S.E.2d 830, 832 (Ga. App. 1987) (“[A]ssault and battery are not included, as a matter of law, within the offense of armed robbery.”); *Young v. State*, 454 So.2d 586 (Fla. App. 4 Dist. 1984) (Aggravated battery was not a lesser included offense of armed robbery.); *State v. Warwick*, 654 P.2d 403, 406 (Kan. 1982) (“[T]he crimes of battery and aggravated battery are not lesser included offenses of the crimes of robbery or aggravated robbery and, therefore, it is not necessary for a trial court to instruct on those crimes as lesser included offenses.”); *N.H.M. v. State*, 974 So.2d 484, 486 (Fla. App. 2 Dist. 2008) (“Battery is not a necessarily lesser-included offense of robbery.”); *People v. Evans*, 409 N.E.2d 562 (Ill. App. 1 Dist. 1980) (Holding that assault is not a lesser included offense of robbery.); Syl. pt. 4, *Thoreson v. State*, 100 P.2d 896 (Okla. Crim. App. 1940) (“Assault is not necessarily included in the offense of robbery under our statute.”).

presenting of a firearm or other deadly weapon, is guilty of robbery in the first degree

On its face, this statute does not actually define robbery. Robbery is, however, defined by the common law. “At common law, the definition of robbery was (1) the unlawful taking and carrying away, (2) of money or goods, (3) from the person of another or in his presence, (4) by force or putting him in fear, (5) with intent to steal the money or goods.” Syl. pt. 1, *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988) (quoting Syl. pt. 1, *State v. Harless*, 168 W. Va. 707, 285 S.E.2d 461 (1981)). See *State v. Fulks*, 114 W. Va. 785, ___, 173 S.E. 888, 889 (1934) (“[Robbery] is the felonious and forcible taking from the person of another, of goods or money of any value, by violence or by putting him in fear.”). See also *State ex rel. Mundy v. Boles*, 148 W. Va. 752, 137 S.E.2d 240 (1964) (Robbery by striking or by beating or by other violence of the person is “armed robbery.”).

West Virginia’s assault statute, W. Va. Code § 61-2-9(b), in relevant part, provides the following:

If any person unlawfully attempts to commit a violent injury to the person of another or unlawfully commits an act which places another in reasonable apprehension of immediately receiving a violent injury, he shall be guilty of a misdemeanor

Our battery statute, W. Va. Code § 61-2-9(c), again in pertinent part, provides as follows:

If any person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally causes physical harm to another person, he shall be guilty of a misdemeanor

Simply put, and in the words of the court, the evidence in “this case does not support a case of a lesser included,” whether it be assault or battery or both. App. vol. 2, 481. The vicious and violent actions of Petitioner and Brandon Myers amounted to nothing less than first degree robbery, and not, as Petitioner would have the Court believe, assault and/or battery. In simpler terms, the

actions of Petitioner and Myers went “way-way” beyond any misdemeanor assault and/or battery charge. The victims in this case, Stephen Surgent and David Wood, were guilty of nothing, other than acting like 13-year-old kids walking down the street drinking a “slushy.” “For their trouble,” Stephen and David were robbed and brutalized by Petitioner and Myers.

When they “spotted” Stephen and David, Petitioner or Myers asked the other boys, who happened to be standing around, if they knew Stephen and David. Once they found that no one knew them, Petitioner or Myers stated “let’s do this” and began following Stephen and David. After catching up to them, Myers, with Petitioner “right along side” of him, demanded marijuana and money from Stephen. Stephen and David both responded that they did not have any marijuana or money. Apparently disbelieving them, Petitioner and Myers decided to beat it out of Stephen and David and proceeded to do “just that.”

Petitioner attacked first by hitting David and knocking him to the ground. Myers immediately “followed suit” by attacking Stephen, also knocking him to the ground. While he was trying to get up, Myers kicked Stephen, again causing him to fall to the ground. In an attempt to “stave off” this attack, Stephen offered Myers his wallet. This offering, however, accomplished nothing for Stephen, as Myers responded to it by kicking Stephen again and demanding his money. David, unfortunately, did not “fair” any better. When David attempted to give them his cell phone, Petitioner and Myers responded that they did not want his phone—they wanted his money. Getting none, Petitioner and Myers continued beating David, knocking him to the ground again.

It is obvious on these facts alone why the court denied Petitioner’s proposed jury instructions on assault and/or battery. However, there is more. Namely, there are the injuries sustained by Stephen and David at the hands of Petitioner and Myers, which, to put it mildly, were severe. Both

boys were beaten unconscious and “shed” their blood as a result of the robbery and assault. Stephen, for his part, suffered a severely broken nose that required plastic/reconstructive surgery to correct. Stephen also suffered numerous lacerations to his head and face, “not to mention” the severe swelling to these areas that ensued. Again, David did not “fair” any better in the, if you will, “injury department”—he suffered a concussion and had to have his face and mouth stitched up. If all of this were not enough, both Stephen and David suffered, and continue to suffer, emotional and psychological problems as a result of Petitioner’s and Myers’ actions.

In short, the competent evidence in this case clearly shows that Petitioner, along with Myers, committed first degree robbery—not assault and/or battery—and the court properly so found. In doing so, the court did not commit error or abuse its discretion in denying Petitioner’s proposed jury instructions of assault and/or battery as lesser included offenses of first degree robbery.

Whether facts are sufficient to justify the delivery of a particular instruction is reviewed by this Court under an abuse of discretion standard. In criminal cases where a conviction results, the evidence and any reasonable inferences are considered in the light most favorable to the prosecution.

Syl. pt. 12, *Derr, supra*. “Where the evidence warrants the conviction of the crime charged and there is no independent evidence that would warrant a conviction of lesser offenses an instruction relative to lesser offenses need not be given.” Syl. pt. 3, *State v. Hudson*, 157 W. Va. 939, 206 S.E.2d 415 (1974).

[A]ssignment of error to the effect that instruction number 1, offered by the state, should have included the lesser crimes of grand larceny, petit larceny and assault and battery, is not well taken. It is generally held that in a prosecution for robbery where the evidence warrants the conviction of the crime charged and there is no independent evidence that would warrant a conviction of lesser offenses an instruction relative to lesser offenses need not be given.

Hudson, 157 W. Va. 945, 206 S.E.2d 419-20.

In his quest to convince the Court that there was sufficient evidence in this case to justify instructions on assault and/or battery, Petitioner argues “nothing was taken from the alleged victims before, during or subsequent to the assault.” Pet’r’s Br. 11. This argument has little, if any, merit. To begin with, the first degree robbery statute, W. Va. Code § 61-2-12(a), makes no distinction between and punishes in the same manner “[a]ny person who commits or attempts to commit robbery by . . . [c]ommitting violence to the person[.]” Additionally, “Under . . . [W. Va. Code, 61-2-12 [1961]], making robbery, and the attempt to commit robbery, a crime, and prescribing the penalties therefor, the attempt to commit robbery is a crime in itself” Syl. pt. 1, *State v. Coulter*, 169 W. Va. 526, 288 S.E.2d 819 (1982) (quoting Syl. pt. 4, in part, *State ex rel. Vascovich v. Skeen*, 138 W. Va. 417, 76 S.E.2d 283 (1953)).

Furthermore, when it comes to robbery, the gravamen of the offense is the violence or intimidation employed—not the property taken.

In larceny, the gravaman of the offense is the taking of a thing of value without the consent of the owner and with the intent on the part of the taker to convert it to his use.

The character and value of the thing taken is of prime importance, for, by such means, the identification of the article is made certain and the grade of the offense established. . . . Larceny is an offense against property.

In robbery, the situation is different. It is an offense against the person. It is the felonious and forcible taking from the person of another, of goods or money of any value, by violence or by putting him in fear. The gravamen is the attack or assault upon the person--the force employed and terror caused.

Fulks, 114 W. Va. ___, 173 S.E. 889 (citing *State v. McAllister*, 65 W. Va. 97, 63 S.E. 758 (1909)).

Equally important, Petitioner and Myers demanded marijuana from the victims—Stephen Surgent and David Wood—and they were told that they had none. When this did not work, Petitioner and Myers demanded money from Stephen and David—again, they were told that they had none.

When this did not work, Petitioner and Myers commenced to brutally beating Stephen and David to obtain marijuana and/or money. The fact that Petitioner and Myers did not “walk away” with anything “matters not,” as the intent to permanently deprive Stephen and David of their property is clearly present from Petitioner’s and Myers’ actions. *See generally State v. Woodson*, 222 W. Va. 607, 671 S.E.2d 438 (2008) (In trial of defendant for first degree robbery, evidence was sufficient to establish that defendant intended to take and receive the victim’s money after brutally beating him up to get it.). *See State v. Kelly*, 175 W. Va. 804, 809, 338 S.E.2d 405, 410 (1985) (“The intent to steal, being a state of mind, ordinarily must be proven circumstantially by inferences drawn from the defendant’s conduct and the circumstances surrounding such conduct.”). *See also State v. Mayle*, 136 W. Va. 936, 940, 69 S.E.2d 212, 214 (1952) (“The intent to commit crime may be implied from established facts.”).

On appeal, Petitioner further argues that there was “no evidence of a plan to rob or take anything from the victims other than two of the state witnesses hearing someone say ‘let’s do this’ or ‘let’s get em’, but that no further evidence was offered to define what ‘this’ meant.” Pet’r’s Br. 11. First, there was no time for any so-called plan, as Petitioner and Myers had just “spotted” Stephen and David seconds before robbing and attacking him. Secondly, what was meant by Petitioner or Myers when they stated “let’s do this” or “let’s get em” is clearly evident from what they did next, which was to chase down Stephen and David, demand marijuana and money from them, followed by brutally attacking them.

As the Court is well aware,

[i]n order for the State to prove a conspiracy under W. Va. Code, 61-10-31(1), it must show that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy.

Syl. pt. 10, *State v. White*, 227 W. Va. 231, 707 S.E.2d 841 (2011) (internal quotations omitted).

Furthermore,

[t]he agreement to commit an offense is the essential element of the crime of conspiracy--it is the conduct prohibited by the statute. The agreement may be inferred from the words and actions of the conspirators, or other circumstantial evidence, and the State is not required to show the formalities of an agreement.

White, 227 W. Va. ___, 707 S.E.2d 853-54 (quoting *State v. Less*, 170 W. Va. 259, 265, 294 S.E.2d 62, 67 (1981)). *White* demonstrates that an elaborate plan and/or formal agreement is not necessary for a conspiracy to occur. All that is really required is a tacit understanding between the conspirators, which is present in this case, as the actions of Petitioner and Myers make clear.

On appeal, Petitioner also argues the following:

Petitioner testified that he did not know why Myers physically assaulted the victims and that Petitioner was simply present during the incident and tried to help the victims by pulling Myers off of them. Myers testified that he did not intend to take anything from the victims and that he assaulted the victims because he was drunk and upset with the way they responded to him. Furthermore, one of the victims testified that when he tried to hand Myers his cell phone and wallet Myers stated that he did not want that.

Pet'r's Br. 11 (citations omitted).

“First off,” the believability of this testimony is for the jury to decide. “As we have cautioned before, appellate review is not a device for this Court to replace a jury’s finding with our own conclusion. On review, we will not weigh evidence or determine credibility. Credibility determinations are for a jury and not an appellate court.” *State v. Guthrie*, 194 W. Va. 657, 669, 461 S.E.2d 163, 175 (1995) (footnote omitted). Furthermore, the jury did not “buy” these arguments and with good reason—they are self-serving and the bulk of the competent evidence shows otherwise.

Myers’, as well as Petitioner’s, physical assault of Stephen and David occurred because they told Petitioner and Myers that they did not have any marijuana or money. Disbelieving them,

Petitioner and Myers then assaulted Stephen and David. Petitioner's assertion that he was simply present during the incident and tried to help the victims is at complete odds with the testimony of the victims, Stephen and David, as well as other witnesses at the trial who testified that both Petitioner and Myers attacked Stephen and David. Myers' assertion that he did not intend to take anything from Stephen and David and assaulted them because he was drunk and upset with the way they responded to him is, of course, no excuse or justification for his actions. *See generally State v. Baker*, 169 W. Va. 357, 287 S.E.2d 497 (1982) (In prosecution for armed robbery, evidence was sufficient from which the jury could properly infer that defendant had requisite intent necessary for crime of armed robbery despite uncontested evidence of the defendant's intoxication.). *See also* Syl. pt. 2, in part, *State v. Bush*, 191 W. Va. 8, 442 S.E.2d 437 (1994) (internal quotations omitted) ("Voluntary drunkenness is generally never an excuse for a crime[.]"). In pointing out that when the victims tried to hand Myers his cell phone and wallet, Myers stated that he did not want the same, Petitioner fails to inform the Court that Myers made a further demand for money followed by striking the victims. The same holds true for Petitioner, as he continued beating at least one of the victims, David, after David offered his cell phone to Petitioner and Myers.

As a final note, which may be a little astray from the issue before the Court, it is the State's position that Petitioner was a principal in the first degree, or at a minimum an aider and abettor, in the first degree robbery of Stephen and David. Either way, begging the Court's pardon, Petitioner is "on the hook." *See generally State v. Audia*, 171 W. Va. 568, 301 S.E.2d 199 (1983) (In prosecution for armed robbery, evidence that defendant was active and willing participant in crime which coindictee initiated was sufficient to sustain conviction as principal in first degree rather than merely aider and abettor.). *See State v. Legg*, 218 W. Va. 519, 523, 625 S.E.2d 281, 285 (2005)

("[T]here is no legal distinction between a conviction as a principal in the first degree and a conviction as an aider and abettor; the punishment is the same for each."). *See also* Syl. pt. 1, *State v. C. J. S.*, 164 W. Va. 473, 263 S.E.2d 899 (1980) *overruled on other grounds*, *State v. Petry*, 166 W. Va. 153, 273 S.E.2d 346 (1980) ("An aider and abettor is as criminally responsible for a crime as the principal actor.").

V.

CONCLUSION

Petitioner's conviction should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,

Respondent,

By counsel

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-1123

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

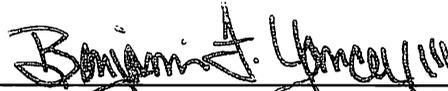
JAMES WILKERSON,

Defendant Below, Petitioner.

CERTIFICATE OF SERVICE

The undersigned counsel for Respondent hereby certifies that a true and correct copy of the foregoing **BRIEF OF RESPONDENT STATE OF WEST VIRGINIA** was mailed to counsel for the Petitioner by depositing it in the United States mail, first-class postage prepaid, on this 5th day of January, 2012, addressed as follows:

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Moundsville, West Virginia 26041


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