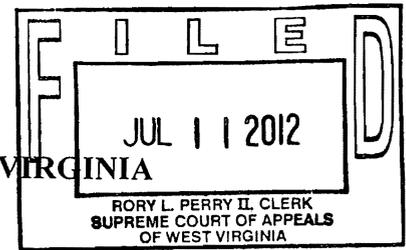


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-0256



STATE OF WEST VIRGINIA,

*Plaintiff Below, Respondent,*

v.

RONALD GOINS,

*Defendant Below, Petitioner.*

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STATE'S SUMMARY RESPONSE

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STATE'S SUMMARY RESPONSE

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I.

FACTS

On July 28, 2010, Ronald Goins (“Petitioner”) and his wife Cynthia Goins were at their home in Rock, West Virginia, when Petitioner began drinking.<sup>1</sup> App. 65. Because Petitioner’s drinking usually caused an argument, Cynthia decided to leave and drive her and Petitioner’s van to her mother’s, Tammy Carver’s, house. *Id.* Cynthia did not make it to her mother’s house, however, as the van overheated during the trip. App. 65-66. At this point, Cynthia called Petitioner several times for help with getting the van fixed or to come get her. App. 66. After first refusing, Petitioner agreed and set out, along with his father, to the location where Cynthia’s van was broken down. *Id.*

In the meantime, Cynthia was able to get the van started, put water in the radiator, and began

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<sup>1</sup> Petitioner and Cynthia are now divorced and Cynthia now goes by her maiden name—Tiller. App. 64-65.

driving back to her and Petitioner's home in Rock. App. 66. On the way, Cynthia passed Petitioner and his father. *Id.* At this point, Petitioner got into the van with Cynthia and the two of them began driving to their home with Petitioner's father following. App. 66-67. During this trip, Petitioner and Cynthia began arguing with one another, during which time Petitioner attempted to jerk the keys out of the van's ignition, which caused the keys to break off in the ignition. App. 66-68. Thereafter, in separate vehicles, Petitioner and Cynthia eventually made it back home. App. 73.

At home, Petitioner began drinking again. App. 74. Because of this, Cynthia indicated to Petitioner that she was going to call her mother and have her come and get her. App. 74. This angered Petitioner to the point that he jerked the phone out of the wall. *Id.* Thereafter, Petitioner went to bed, at which point Cynthia left on foot with her and Petitioner's two children and called her mother, Tammy Carver, from a neighbor's house located approximately ½ to 1 mile away. App. 74, 77-78, 80-81. With her daughter terrified by the situation and her being out-of-town at the time, Ms. Carver called Cynthia's brother Joseph Tiller. App. 81-82.

In this same time period, Cynthia also called her brother Joseph and asked him to come pick her up on an area of the road near her and Petitioner's house, as she and Petitioner had gotten into another argument and she was leaving him. App. 37-38, 82. Joseph agreed and, shortly thereafter, he, his wife Amber Tiller, and his three minor children Megan, Chelsea and Taylor, drove to the area where he was supposed to meet his sister Cynthia.<sup>2</sup> App. 38-39, 57. However, Cynthia was not there when the Tillers arrived at this location. App. 38-39. Not finding her, the Tillers continued

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<sup>2</sup> Joseph was actually driving the vehicle; Amber was seated beside Joseph in the passenger seat; Megan, Chelsea and Taylor were in the back of the vehicle directly behind their parents. App. 39. At the time, Megan was six years old, Chelsea was four years old, and Taylor was around two or three weeks old. App. 39, 56.

driving down the road looking for Cynthia. Again, however, the Tillers did not see Cynthia. *Id.* The Tillers then drove until they reached a point on the road where Cynthia and Petitioner's house could be seen, at which point Joseph pulled the vehicle over and parked. App. 38-39, 57.

Minutes later, Petitioner, who was outside at the time, got out of his and Cynthia's van, walked to the front of the van, raised his arm and began shooting a .40 caliber pistol in the direction of Joseph and his family's vehicle.<sup>3</sup> App. 38, 40, 58, 141. Several shots were fired—as many as four or five.<sup>4</sup> App. 40-41, 59. These shots came very close—as close as 10 to 15 feet—to hitting the Tiller's vehicle. App. 40-41, 43, 58-59. Terrified by this, the Tillers sped out of the area. App. 41, 43, 59. Thereafter, the police were called and Petitioner was arrested.

On February 15, 2011, the Mercer County Grand Jury returned a seven count Indictment against Petitioner. *See generally* App. 1-2. This Indictment specifically charged Petitioner with one count of domestic battery (Count 1), one count of domestic assault (Count 2), and five counts of wanton endangerment (Counts 3, 4, 5, 6 and 7).<sup>5</sup> *Id.*

Petitioner's one day trial took place on December 20, 2011, and concluded with the jury convicting him of five counts of brandishing (Counts 3, 4, 5, 6 and 7), a lesser included offense of

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<sup>3</sup> The distance between the Tiller's vehicle and Petitioner was approximately 153 to 207 yards; however, the view was clear and the Tillers could see Petitioner and Petitioner could likewise see the Tillers. App. 39-40, 47, 52-53, 57-59, 99-100.

<sup>4</sup> It should be noted that the police later found numerous freshly expended .40 caliber shell casings, 14 to be exact, on the ground in the area where Petitioner was standing when he shot in the direction of the Tiller's vehicle. *See generally* App. 94-97, 110, 112.

<sup>5</sup> The victims for these charges included Cynthia Goins (Counts 1 and 2), Amber Tiller (Count 3), Joseph Tiller (Count 4), as well as Joseph and Amber's three minor children—Megan (Count 5), Chelsea (Count 6) and Taylor (Count 7). App. 1-2.

wanton endangerment.<sup>6</sup> App. 206, 212-13, 215-16.

On January 18, 2012, the circuit court (“court”) sentenced Petitioner to five consecutive terms of one year in jail for his convictions of five counts of brandishing. The court further ordered that this sentence be suspended and Petitioner be placed on probation for five years. App. 248-49, 260-62.

On April 17, 2012, the court revoked Petitioner’s probation for using a controlled substance. The court further ordered that Petitioner be confined in jail for one year, that his original sentence of five consecutive one-year terms in jail continue to run consecutively, and that, after he served his one-year jail sentence, the remainder of Petitioner’s sentence be suspended and that he be placed on probation for four years. App. 263-64. Thereafter, Petitioner brought the current appeal.

## II.

### ARGUMENT

As this Court has made clear, a “double jeopardy claim is reviewed *de novo*.” Syl. Pt. 1, in part, *State v. McGilton*, 2012 WL 2368894 (W. Va. June 19, 2012) (quoting Syl. Pt. 1, in part, *State v. Sears*, 196 W. Va. 71, 468 S.E.2d 324 (1996)). The Court has also make clear that the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Article III, Section 5 of the West Virginia Constitution are comprised of three distinct constitutional protections. In this regard, the Court has stated as follows:

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second

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<sup>6</sup> Please note that the jury acquitted Petitioner of Count 1 (domestic battery). Please also note that the prosecution dismissed Count 2 (domestic assault) prior to Petitioner’s trial. App. 30, 206, 212, 215-16.

prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

*State ex rel. Franklin v. McBride*, 226 W. Va. 375, 383, 701 S.E.2d 97, 105 (2009) (quoting Syl. Pt. 1, *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253 (1992)).

The Double Jeopardy Clause in Article III, Section 5 of the West Virginia Constitution, provides immunity from further prosecution where a court having jurisdiction has acquitted the accused. It protects against a second prosecution for the same offense after conviction. It also prohibits multiple punishments for the same offense.

*Franklin*, 226 W. Va. at 383, 701 S.E.2d at 105 (quoting Syl. Pt. 1, *Conner v. Griffith*, 160 W. Va. 680, 238 S.E.2d 529 (1977)).

With this “backdrop” in place, Petitioner stands convicted of five counts of brandishing.<sup>7</sup> For these convictions, the court sentenced Petitioner on all five of these counts. On appeal, Petitioner asserts that the court, in sentencing him on all five counts, violated his rights against double jeopardy in violation of the Fifth Amendment to the United States Constitution, as well as Article III, Section 5 of the West Virginia Constitution. In support of this assertion, Petitioner argues that the brandishing statute, W. Va. Code § 61-7-11, is a per event crime as opposed to a per person crime. Petitioner further argues that the prosecution only proved a single act of brandishing, as only one breach of the peace occurred when he fired his gun in the direction of the Tiller family’s vehicle, which was occupied at the time by five people—Joseph Tiller, Joseph’s wife Amber, as well as Joseph and Amber’s three minor children Megan, Chelsea and Taylor. The State disagrees.

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<sup>7</sup> Among other crimes that are irrelevant to this appeal, Petitioner was originally indicted for five counts of wanton endangerment. The jury acquitted Petitioner of these five charges and, instead, convicted him of five counts of brandishing, which, as the Court is well aware, is a lesser included offense of wanton endangerment. “The offense of brandishing as defined by West Virginia Code § 61-7-11 is a lesser included offense within the definition of wanton endangerment under West Virginia Code § 61-7-12.” Syl. Pt. 5, *State v. Bell*, 211 W. Va. 308, 565 S.E.2d 430 (2002).

As this Court has found, when dealing with multiple charges under the same statutory provision, such as our brandishing statute, to determine whether a double jeopardy violation has occurred, the question is how far the statute will permit the conduct at issue to be divided into separate criminal offenses, or in other words, what the legislature has made an allowable *unit of prosecution*. See generally *State v. Green*, 207 W. Va. 530, 535-36, 534 S.E.2d 395, 400-01 (2000).

West Virginia's brandishing statute, W. Va. Code § 61-7-11, in pertinent part, provides as follows:

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

(Emphasis added). The unit of prosecution for this statute is “a breach of the peace,” which is brought about by a firearm or other deadly weapon being carried, brandished, or used in a way or manner that causes, or threatens, the same. Furthermore, as “[t]his Court long ago explained[,] . . . ‘[t]he phrase “breach of the peace” is generic and includes *every act of violence of which tends to disturb that sense of security which every person feels necessary to his comfort* and to secure [that for] which the government is instituted and maintained.’” *State ex rel. State v. Gustke*, 205 W. Va. 72, 80, 516 S.E.2d 283, 291 (1999) (emphasis added) (quoting *State v. Mills*, 108 W. Va. 31, 35-36, 150 S.E. 142, 144 (1929)).<sup>8</sup>

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<sup>8</sup> See also *Gustke*, 205 W. Va. at 81, 516 S.E.2d at 292 (quoting Syl. Pt. 7, *State v. Long*, 88 W. Va. 669, 108 S.E. 279 (1921)) (“A ‘breach of the peace’ includes all violations of the public peace, order or decorum, such as to make an affray; threaten to beat, wound, or kill another, or commit violence against the person or property; contend with angry words to the disturbance of the peace; appear in a state of gross intoxication in a public place; recklessly flourish a loaded pistol in a public place while intoxicated; and the like.”).

Here, the prosecution put on evidence at trial showing that Petitioner, with a clear line of sight, raised his arm and fired his .40 caliber pistol in the direction of the Tiller family's vehicle, with five people on board, and that these shots came within 10 to 15 feet of striking their vehicle. The evidence also showed Petitioner fired his pistol as many as four or five times. In fact, 14 freshly "spent" shell casings from Petitioner's gun were found on the ground in the area where Petitioner was standing when he shot in the direction of the Tiller's vehicle. The evidence also showed that the Tillers were absolutely terrified by Petitioner's "crazed" actions.

With each "pull of the trigger," Petitioner committed a breach of the peace and thus violated our brandishing statute. Each shot Petitioner fired constituted a separate act of violence that disturbed the sense of security necessary to the comfort of each member of the Tiller family, as recognized and protected by our government, both individually, as well as collectively. In the context of other crimes, other courts have found likewise. *See Edwards v. State*, 462 So.2d 581, 582 (Fla. App. 4 Dist. 1985) (emphasis added) ("We cannot think of a more apt illustration of such *breach of the individual and collective peace of the people* . . . than to have a drunk driver at the wheel of a killing machine that is going all over the road and scaring oncoming drivers to death rather than killing them.")<sup>9</sup>

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<sup>9</sup> Petitioner points out on appeal that two of the people in the Tiller's vehicle were asleep at the time of the incident. These two people, of course, were two of Joseph and Amber Tiller's three children. Presumably, in pointing this out, Petitioner is arguing that he cannot be guilty of brandishing when it comes to these two children, as they were asleep and did not witness his actions and, thus, were not victimized by the same. With no offense intended, this argument is absolute nonsense. The fact that these two children were asleep does nothing to defeat Petitioner's criminal liability in this case. Imagine, hypothetically, person "A" standing behind person "B" with a gun. Imagine further "A" shooting in the direction of "B" and that "B" does not see or hear the shots being fired. Would not "A" still be guilty of brandishing, even though "B" did not see or hear these shots being fired? Of course he would and other courts have found likewise. In fact, these other  
(continued...)

In short, every time Petitioner fired his pistol in the direction of the Tiller's vehicle constituted a separate act of brandishing, as each shot was a separate breach of the peace, for which he could be convicted and sentenced.<sup>10</sup> This is true despite the fact that Petitioner fired these shots one right after the other. This Court, in the context of other crimes, has found likewise.

A defendant may be convicted of multiple offenses of malicious assault under West Virginia Code § 61-2-9(a) (2004) against the same victim *even when the offenses were a part of the same course of conduct*. Such convictions do not violate the double jeopardy provisions contained in either the United States Constitution or the West Virginia Constitution as long as the facts demonstrate separate and distinct violations of the statute.

Syl. Pt. 9, *McGilton, supra* (emphasis added).

As a final matter on this particular issue, Petitioner likens the current case to a previous case decided by this Court—*State v. Kendall*, 219 W. Va. 686, 639 S.E.2d 778 (2006). In *Kendall*, the defendant, a police officer, got out of his police cruiser with his service gun drawn and requested

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<sup>9</sup>(...continued)

courts have found that a victim of brandishing does not even have to be aware that the defendant possesses a weapon. *See In re Peter F.*, 34 Cal. Rptr.3d 52, 55 (Cal. App. 4 Dist. 2005) (“[T]he victim of the crime of brandishing need not even be aware the defendant possesses a weapon.”). The same holds true here—the fact that two of Joseph and Amber’s children were asleep in the vehicle at the time of the incident does not reduce Petitioner’s criminal culpability one “iota.”

<sup>10</sup> In his quest to convince this Court that his actions only amounted to one breach of the peace, Petitioner analogizes this case to a hypothetical situation where a person draws a gun or other deadly weapon in the middle of a football stadium with 50,000 onlookers. Because brandishing, argues Petitioner, is a per event, rather than a per person, crime, this situation would only give rise to one breach of the peace and thus one charge of brandishing, as opposed to 50,000 charges of the same. Simply put, this Court, in most instances, takes cases one at a time on a case-by-case basis. In other words, “let’s cross that bridge, God forbid, when we come to it.” Beyond that, the State believes that Petitioner’s football hypothetical would be, more so than brandishing, a terrorist act under state, and probably federal, law. *See* W. Va. Code § 61-6-24(a)(3) (“‘Terrorist act’ means an act that is . . . [l]ikely to result in serious bodily injury . . . and [i]ntended to . . . [i]ntimidate or coerce the civilian population . . .”).

a suspect, a drunk driver, to exit his vehicle. The suspect then drove his vehicle towards the defendant and the defendant fired his gun at the suspect's vehicle. Thereafter, the defendant went to the suspect's home. There, the defendant, with his gun drawn, entered the suspect's house where four other people were sitting in the living room. Among other things, the defendant was convicted of three counts of brandishing. *See generally Kendall*, 219 W. Va. at 689-90, 639 S.E.2d at 781-82. The *Kendall* Court found that the prosecution's evidence indicated only one act of brandishing a weapon, despite the presence of multiple witnesses, and that one act of brandishing should produce a conviction for only one count of brandishing, as there did not appear to be any evidence of multiple acts of brandishing or specific instances of threats against separate individuals. *Kendall*, 219 W. Va. at 696, 639 S.E.2d at 788.<sup>11</sup>

Obviously, the facts of the current case are distinguishable from the facts in *Kendall*. In fact, the facts of the current case and *Kendall* are in absolute disharmony with each other, such that *Kendall* is wholly inapplicable to the current case. In *Kendall*, the defendant, a police officer, on one occasion, simply entered the premises of a suspect, where four other people were sitting, with his pistol drawn. At no time did the defendant threaten any of these four people, "let alone" fire his gun in their direction. This situation is vastly different than what occurred in the current case. Here,

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<sup>11</sup> Please note that, in coming to this decision, the *Kendall* Court cited and applied a California case—*In re Peter F.*, *supra*. *See generally Kendall*, 219 W. Va. at 695-96, 639 S.E.2d at 787-88. In that case, at two separate times, the defendant waived a knife and/or a box cutter in a threatening manner; on each of these two occasions, at least two people were present. Among other things, the defendant was convicted of four counts of brandishing. *See generally In re Peter F.*, 34 Cal. Rptr.3d at 53. The California Court of Appeals reversed this conviction and remanded the case back to the lower court with instructions to strike two of the four brandishing counts. In doing so, the appellate court found the defendant could properly be charged with only one count of brandishing a deadly weapon in connection with each separate incident, for a total of two counts, no matter how many individuals were present and witnessed his actions. *Id.* For the same reasons explained above, as with *Kendall*, the State believes this case is not applicable to the current case.

Petitioner actually fired his gun in the direction of the Tiller's vehicle. Again, as argued above, each time Petitioner fired his pistol, which occurred at least 4 to 5 times, at the Tiller's vehicle constituted a separate incident of Petitioner using his gun in such a way or manner that caused a breach of the peace of each member of the Tiller family individually, as well as collectively.

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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*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

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

Syl. Pt. 3, in part, *Guthrie, supra*.

With these standards in place, Petitioner asserts on appeal that the jury's verdict is contrary to the law and evidence in this case. In making this assertion, Petitioner argues that it was impossible for him to breach the peace given the distance and obstacles between himself and the Tillers when he shot in the direction of their vehicle. In making this argument, Petitioner relies on the following, what he terms, undisputed facts:

It was undisputed that at the time, Ronald Goins, discharged the weapon that,

(1) Cynthia Tiller Goins had been gone for over one hour; (2) That the petitioner was alone in the middle of a twenty-acre tract of land that he owns; (3) that the “victims” were at least 150 yards distant on a roadway largely obscured by brushes and trees; (4) that two of the “victims” were asleep, and unaware that they had been “brandished” at;[<sup>12</sup>] (5) that there was one field, one railroad track, one creek/river, and two tree lines between the petitioner, and the Tiller’s. Given the distance and the obstacles between the petitioner and the Tiller’s at the time the weapon was discharged, it leaves impossibility for a breach of the peace to occur.

Pet’r’s Br. 8.<sup>13</sup>

To begin with, as this Court has found “time and time again,” for purposes of determining whether a jury’s verdict should be overturned, it does not matter whether the facts are disputed or undisputed, as the jury is the sole determiner of the weight and credibility of evidence. “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.” *Guthrie*, 194 W. Va. at 669, 461 S.E.2d at 175 (footnote omitted). Furthermore, and more to the point, there was more than sufficient evidence presented at his trial for the jury to find, beyond a reasonable doubt, that Petitioner was guilty of all five counts of brandishing.

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<sup>12</sup> Please note that Petitioner’s so-called “sleeping victims argument” has already been fully addressed above.

<sup>13</sup> Petitioner also points out on appeal that the outdoor firing ranges for two police agencies –i.e., the Bluefield, West Virginia, Police Department and the West Virginia State Police in Institute, West Virginia—are within pistol shot of a greater number of people than were endangered by Petitioner in this case. Based on this, Petitioner argues that permitting his conviction in this case to stand would potentially result in a multitude of police officers being subjected to criminal liability every time they used a firing range. As with his “sleeping victims argument,” this argument is absolutely absurd. Needless to say, there are critical differences between the situation of police officers, trained in the use of firearms, shooting at targets and the situation where, as here, an individual, who is in a state of anger fueled by alcohol, shoots at a vehicle occupied by a husband and wife and their three minor children.

This evidence, in a “nutshell,” is as follows:

1. On the day of the incident, July 28, 2010, Petitioner was drinking at his and his wife’s, Cynthia Goins’, house. Petitioner’s drinking caused him and Cynthia to get into an argument, which caused Cynthia to leave the house on two separate occasions.

2. The first time she left, Cynthia’s van broke down, Petitioner came to help out, they eventually “met up,” during which time they continued arguing with one another. During this argument, Petitioner attempted to jerk the key out of the van’s ignition, which caused the key to break off in the ignition. Eventually thereafter, Petitioner and Cynthia ended back up at their house.

3. Back at the house, Petitioner began drinking again. Because of this, Cynthia indicated to Petitioner that she was going to call her mother, Tammy Carver, and have her come and get her. Enraged by this, Petitioner jerked the phone out of the wall. Cynthia then left the house on foot with her two children and called her brother Joseph Tiller for help from a neighbor’s phone.

4. In turn, Joseph and his wife Amber Tiller, along with Joseph and Amber’s three minor children Megan, Chelsea and Taylor, drove to the location where Joseph was to meet Cynthia. Not finding Cynthia in this location, Joseph and his family then drove to and pulled over on the side of the road adjacent to Petitioner and Cynthia’s house.

5. Minutes later, Petitioner got out of his and Cynthia’s van and began shooting his .40 caliber pistol in the direction of the Tiller family’s vehicle. Petitioner fired as many as four or five shots, which came as close as 10 to 15 feet of hitting the Tiller’s vehicle. Terrified by this, the Tillers sped out of the area.

Again, and contrary to his contention on appeal, this was more than enough evidence for the jury to find, beyond a reasonable doubt, that Petitioner was guilty of all five counts of brandishing.

III.

CONCLUSION

Petitioner's conviction and sentence should be affirmed.

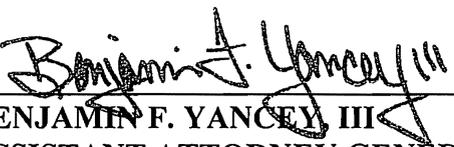
Respectfully submitted,

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RONALD GOINS,

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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent hereby certifies that a true and correct copy of the foregoing **STATE'S SUMMARY RESPONSE** was mailed to counsel for the Petitioner by depositing it in the United States mail, first-class postage prepaid, on this 11th day of July, 2012, addressed as follows:

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