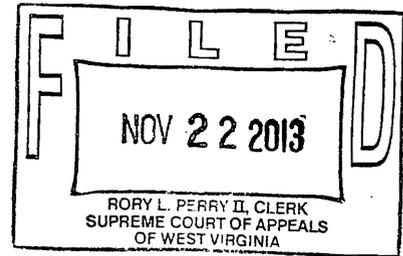


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0713



GINA MARIE JERROME,

*Plaintiff Below, Respondent,*

v.

STATE OF WEST VIRGINIA,

*Defendant Below, Petitioner.*

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**RESPONDENT'S BRIEF**

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**TABLE OF CONTENTS**

	<b>Page</b>
I. ASSIGNMENT OF ERROR .....	1
II. STATEMENT OF THE CASE .....	1
III. SUMMARY OF ARGUMENT .....	3
IV. ARGUMENT .....	3
A. Standard of Review .....	3
B. Petitioner’s actions constituted a single occurrence .....	4
C. The trial court did not err by allowing the victims to testify as to what they believed was the value of their stolen property .....	6
V. CONCLUSION .....	8

**TABLE OF AUTHORITIES**

**CASES**

**Page**

*Graham v. Wallace*, 214 W. Va. 178, 588 S.E.2d 167 (2003) ..... 3-4

*Jenkins v. CSX Transportation, Inc.*, 220 W. Va. 721, 649 S.E.2d 294 (2007) ..... 3

*Reynolds v. City Hospital, Inc.*, 207 W. Va. 101, 529 S.E.2d 341 (2000) ..... 3

*State v. Bradshaw*, 193 W. Va. 519, 457 S.E.2d 456 (1995) ..... 4

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

*State v. Hall*, 171 W. Va. 212, 298 S.E.2d 246 (1982) ..... 5, 7

*State v. Rogers*, 209 W. Va. 348, 547 S.E.2d 910 (2001) ..... 5

*Wells v. Key Commc 'ns, L.L.C.*, 226 W. Va. 547, 703 S.E.2d 518 (2010) ..... 3

**STATUTES**

50 Am. Jur. 2d Larceny § 5 ..... 5

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STATE OF WEST VIRGINIA,

*Respondent.*

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RESPONDENT'S BRIEF

---

Comes now the Respondent, the State of West Virginia, by Julie A. Warren, Assistant Attorney General, pursuant to the West Virginia Revised Rule of Appellate Procedure 10(d) and according to an Order of this Honorable Court, dated July 19, 2013, and responds to the petition for appeal as follows.

**I. ASSIGNMENT OF ERROR**

Petitioner's assignments of error are set forth as follows:

1. In permitting a grand larceny jury instruction and trial, the trial court erred, when it concluded that the Defendant's "alleged crime arose out of a single occurrence," and allowed aggregation or combining of values of several petit larcenies, despite the fact that the crimes involved multiple victims, involving three (3) different purses which were located on two (2) different tables.
2. The trial court erred when it failed to exclude valuation evidence and permitted the jury to consider the victims' current subjective replacement cost value of stolen cell phones and not current fair market value, when replacing stolen property pursuant to the larceny statute.

**II. STATEMENT OF THE CASE**

On January 14, 2013, the Petitioner, and her co-defendant, were indicted in the Circuit Court of Ohio County with one count of Grand Larceny, W.Va. Code § 61-3-13(a), and one

count of Conspiracy, W.Va. Code § 61-10-31. (App. vol. I at 3-4.) The charges stem from an incident that took place on December 8, 2012, where the Petitioner and her co-defendant, Jacob Patrick Christopher, stole property from different individuals while at a bar called Generations, located in Wheeling, West Virginia. (*Id.* at 23.) Amongst the property stolen was an iPod, iPhone 4, a Kyocera Rise cell phone, a Razor Maxx cell phone, three purses, an inhaler, numerous credit and debit cards issued to the four individuals, and keys, amounting to a total value of over \$1,000.00. (*Id.* at 3, App. vol. III at 40.)

At pre-trial, Petitioner filed a Motion to Strike Surplusage, Amend, and/or Dismiss the Indictment Pursuant to Rule 7 and Rule 12, claiming there were unidentified “fatal errors” in the Indictment. (App. vol. I at 8.) Following a hearing on the Petitioner’s pre-trial motions, the trial court entered an Order on March 15, 2013, denying the Petitioner’s Motion to Strike. (*Id.* at 23-31, App. vol. II.) In its Order, the trial court acknowledged the Petitioner’s argument that the State could not aggregate the value of the stolen property belonging to different victims to support the grand larceny charge against her. (*Id.* at 25.) However, the court ruled the aggregation in this instance was proper since the Petitioner was charged “with stealing various items from several different persons within a small, finite span of time at one location: Generations in Wheeling, WV,” and “within a small window of time,” with the items being “within close proximity.” (*Id.*) The Petitioner then filed a pre-trial motion requesting the trial court compel the State to submit a Bill of Particulars outlining each item stolen and its assessed value. (*Id.* at 16-21.) This issue was taken up by the court just before trial and resolved on the basis that it was assumed the State was not withholding information related to the value of the stolen items that it intended to present at trial. (App. vol. III at 15-22.)

After the State presented its case, the trial court dismissed the conspiracy charge. (*Id.* at 24.) The jury ultimately found the Petitioner guilty on the charge of grand larceny, and she was sentenced to 1 to 10 years in the custody of the Department of Corrections. (App. vol. I at 70-76.)

### III. SUMMARY OF THE ARGUMENT

The trial court was correct in finding that the Petitioner's "crime arose out of a single occurrence." The State presented undisputed evidence that showed the Petitioner's "actions occurred (1) at one location, i.e., Generations in Wheeling, WV; (2) within a small and finite window of time; and (3) in a confined area of physical proximity." Therefore, the trial court did not err by denying the Petitioner's Motion to Strike Surplusage, Amend, and/or Dismiss the Indictment Pursuant to Rule 7 and Rule 12, and submitting an instruction to the jury on the grand larceny charge. (App. vol. I at 23-28, 35-67.)

Moreover, the trial court did not err by permitting the jury to entertain testimony from the victims concerning what it would cost them to replace the property the Petitioner stole from them.

### IV. ARGUMENT

#### A. Standard of Review.

When reviewing a trial court's evidentiary rulings on appeal, the West Virginia Supreme Court applies an abuse of discretion standard. *Reynolds v. City Hosp., Inc.*, 207 W.Va. 101, 108-9, 529 S.E.2d 341, 348-9 (2000); *see also Jenkins v. CSX Transportation, Inc.*, 220 W.Va. 721, 649 S.E.2d 294 (2007). *Wells v. Key Commc'ns, L.L.C.*, 226 W. Va. 547, 551, 703 S.E.2d 518, 522 (2010). When reviewing an order from trial court under an abuse of discretion standard, this Court has held that "we will not disturb a circuit court's decision unless the circuit

court makes a clear error of judgment or exceeds the bound of permissible choices in the circumstances.” *Graham v. Wallace*, 214 W.Va. 178, 182, 588 S.E.2d 167, 171 (2003) (quoting *Hensley v. WV DHHR*, 203 W.Va. 456, 461, 508 S.E.2d 616, 621 (1998)).

Jury instructions are reviewed under a deferential standard. “A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy.” *State v. Bradshaw*, 193 W.Va. 519, 543, 457 S.E.2d 456, 480 (1995). This Court “review[s] jury instructions to determine whether, taken as a whole and in light of the evidence, they mislead the jury or state the law incorrectly to the prejudice of the objecting party.” *State v. Guthrie*, 194 W. Va. 657, 671-72, 461 S.E.2d 163, 177-78 (1995). “So long as they do not,” this Court “review[s] the formulation of the instructions and the choice of language for an abuse of discretion” and “will reverse only if the instructions are incorrect as a matter of law or capable of confusing and thereby misleading the jury.” *Id.* (footnotes omitted).

**B. Petitioner’s actions constituted a single occurrence.**

The trial court was correct when it denied the Petitioner’s pretrial Motion to Strike Surplusage, Amend, and/or Dismiss the Indictment on the basis that the Petitioner’s “crime arose out of a single occurrence.” The State presented undisputed evidence that showed the Petitioner’s “actions occurred (1) at one location, i.e., Generations in Wheeling, WV; (2) within a small and finite window of time; and (3) in a confined area of physical proximity,” thus, denying the Petitioner’s Motion to Strike Surplusage, Amend, and/or Dismiss the Indictment Pursuant to Rule 7 and Rule 12, and submitting an instruction to the jury on the grand larceny charge. (App. vol. I at 23-28, 35-67.)

The facts of this case invoke the application of the “single larceny doctrine,” which, according to 50 Am. Jur. 2d Larceny § 5, is described and applied as follows:

the taking of property belonging to different owners at the same time and place constitutes but one larceny, at least when it is one continuous act or transaction, or when actual control over the subjects of the larceny is exercised simultaneously.<sup>1</sup> Generally, the single-larceny doctrine arises in three principal contexts:

....

(3) when the property of different persons is stolen at the same time, so that the values of the separate items of property may be aggregated to raise the grade of the offense or the severity of the punishment, to the extent that either is dependent on the value of the property taken.

This Court has recognized the “‘single larceny doctrine’ in the context of the offense of receiving, concealing or transferring stolen property.” *State v. Rogers*, 209 W. Va. 348, 362, 547 S.E.2d 910, 924 (2001). In *State v. Hall*, the Court applied the “single larceny doctrine” and held that “where the State proves that a defendant received or aided in the concealment of property which was stolen from *different owners on different occasions*, but does not prove that the defendant received or aided in the concealment of the property at different times or different places then such defendant may be convicted of only one offense of receiving or aiding in the concealment of stolen property.” *State v. Hall*, 171 W. Va. 212, 215, 298 S.E.2d 246, 248 (1982). This Court declined to apply the doctrine to the facts presented in *Rogers*, where the Petitioner, who was convicted on two counts of larceny, argued there should only be charged with one count of larceny despite the fact that “there was proof adduced at trial that the property of each victim, i.e., the beer company and the software company, was taken at different times and at different places.” *Rogers*, 209 W. Va. 348, 362, (2001).

Here, it is undisputed that all four acts of larceny occurred within a couple hours on the same night, December 8, 2012, at the same location, a Wheeling bar called Generations, against

four victims, three of whom arrived and congregated together following an office Christmas party, and the fourth victim was within 20 to 30 feet from the other three victims while at the bar.

(App. vol. III generally.) The facts presented here are more like the facts in *Hall* where the Court held only one act of one offense of receiving or aiding in the concealment of stolen property occurred, the Petitioner's acts of larceny were proven to have been perpetrated on different patrons of the same bar within a very finite window of time in the course of one evening. The *Hall* Court noted the lack of evidence to indicate the acts occurred in different places, which undermined the multiple occurrence argument. *Hall*, 171 W. Va. at 215. Here, there is no dispute that the Petitioner's acts of larceny occurred at the same location, Generations bar in Wheeling, West Virginia.

*Rogers* is distinguishable from the case at bar, since unlike the facts in that case, here the Petitioner took advantage of an opportunity to steal property, i.e., purses and items contained therein, from four patrons congregated at the same time, and at the same place.

Given the undisputed facts presented in this case, the trial court did not abuse its discretion by ruling that the Petitioner's actions constituted a single occurrence. As a single occurrence the State was permitted to present evidence that the total value of the items stolen exceeded the \$1,000.00, which is threshold required for a grand larceny charge. Moreover, because the Petitioner's acts constituted a single occurrence and evidence was presented to show that the value of the items exceeded the \$1,000.00 threshold, the trial court was correct in submitting a jury instruction related to the grand larceny charge.

- C. The trial court did not err by allowing the victims to testify as to what they believed was the value of their stolen property.**

The trial court did not err by allowing the jury to weigh the victims' testimony related to the value of the property stolen by the Petitioner while they were at the Generations bar on December 8, 2012.

In *State v. Hall*, this Court confirmed its previous holdings that "the owner of stolen property may normally testify as to its value because he is deemed qualified to give an opinion concerning the value of the things which he owns." *State v. Hall*, 171 W. Va. 212, 220 (1982). Again, the facts in this case are analogous to the facts in *Hall*, where "the facts indicate that in order to determine whether a felony or misdemeanor had been committed by the appellant the sole testimony concerning the value of the stolen property offered by the State was given by the owners of the property." *Id.*, 171 W. Va. at 219. Just like in *Hall*, "each owner testified when he [or she] purchased the property, what condition it was in, both when purchased and when stolen, and what he [or she] paid for it when purchased, and its value when stolen [in this case the replacement value]." *Id.*, (App. vol. III at 102-200.) Furthermore, like in *Hall*, "the owners of the stolen items used their respective property every day, whether at home or work." *Id.*, (*Id.* at 102-200.) Therefore, the court clearly did not abuse its discretion by permitting the victims' testimony related to what they believed to be the value of their stolen property.

In affirming an owner's right to testify as to the value of his property, the *Hall* court also made a point to note that "an owner's testimony concerning the value of his stolen property is not the sole determinative factor but rather is but one piece of evidence which the jury may consider when establishing the property's value." *Hall*, 171 W. Va. at 220. In the case at bar, even though the trial court permitted the victims' testimony as to replacement value, it also emphasized that each victim would be "subject to full examination as to the difference between replacement and market, like depreciation..." which the Petitioner's counsel took full advantage

of. (App. vol. III at 119.) The jury also weighed the testimony from the Petitioner's expert witness, who represented himself as a cell phone retailer, who opined as to what he believed the value of used cell phones, iPod, iPhone and a Blackberry similar to the ones stolen by the Petitioner. (*Id.* at 252-295.)

It was not error to allow the victims to testify as to what they believed to be the value of their stolen property. The jury was permitted to weigh all of the evidence presented at trial related to the value of the items stolen, and determined that the value of those items met the \$1,000.00 threshold required to convict the Petitioner of grand larceny.

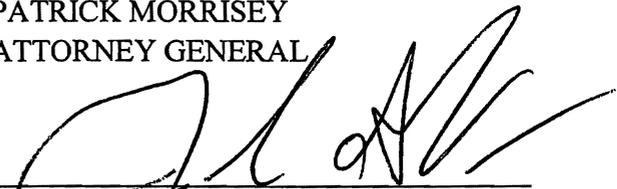
#### V. CONCLUSION

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

Respectfully submitted,

STATE OF WEST VIRGINIA  
*Respondent,*  
By Counsel

PATRICK MORRISEY  
ATTORNEY GENERAL



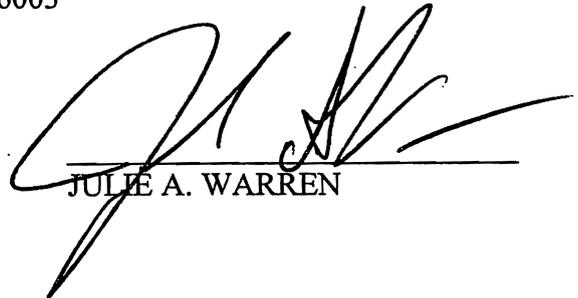
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**CERTIFICATE OF SERVICE**

I, JULIE A. WARREN, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the “*RESPONDENT’S BRIEF*” upon Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 22nd day of November 2013, addressed as follows:

To: Mark D. Panepinto, Esq.  
Panepinto Law Offices  
955 National Road  
Wheeling, WV 26003



JULIE A. WARREN