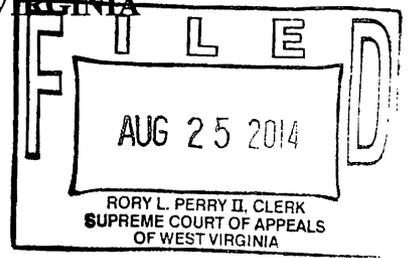


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0339



STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

ROBERT LEE LEWIS,

*Defendant Below,
Petitioner.*

RESPONDENT'S BRIEF

**PATRICK MORRISEY
ATTORNEY GENERAL**

**DEREK A. KNOPP
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: (304) 558-5830
State Bar No. 12294
Email: derek.a.knopp@wvago.gov
*Counsel for Respondent***

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Comes now the Respondent, by counsel, Derek A. Knopp, Assistant Attorney General, pursuant to an amended scheduling order from this Honorable Court entered on August 5, 2014, and files the within brief in response. By way of explanation, Respondent did not receive proper service of Petitioner's Brief in accordance with Rule 37 of the Revised Rules of Appellate Procedure. After receiving this Court's August 5, 2014, amended scheduling order, Respondent located Petitioner's Brief in electronic format on a Compact Disc which contained the Appendix record. The Compact Disc was provided along with a paper copy of Petitioner's Motion to Seal Volume III of the Appendix Record.

STATEMENT OF THE CASE

On July 31, 2009, an indictment was returned in the Circuit Court of Kanawha County, West Virginia, charging Robert Lee Lewis ("Petitioner") with one count of Burglary by Breaking and Entering, an alternative count of Burglary by Entering Without Breaking, one count of Kidnapping, two counts of Sexual Assault in the Second Degree, and one count of Violating a Domestic Violence Protective Order. (App. at 18-21.) Before trial, Petitioner pleaded guilty to the count regarding the Violation of a Domestic Violence Protective Order. (*Id.* at 238, 312.) Beginning on November 2, 2009, Petitioner received a four day jury trial with regard to the other counts contained within the indictment. (*Id.* at 254, 345, 557, 647.)

At trial the victim testified that on the night of March 26, 2009, she was in bed with her boyfriend at her home on 406 Russell Street. (*Id.* at 436, 438.) While she was in bed, there was a knock on the door. (*Id.* at 439.) The victim testified that the individual identified himself as a friend of hers named George, but when she cracked the door she recognized the individual was Petitioner. (*Id.*) Petitioner was her former boyfriend in which she had obtained a domestic violence protective order against in February of 2009. (*Id.* at 436-37.)

The victim testified that when she saw that it was Petitioner at her door she attempted to shut the door but was unable to keep Petitioner from entering. (*Id.* at 440.) The victim then ran to her bedroom, and Petitioner pursued. (*Id.*) Petitioner then picked her up and carried her out of her apartment and down the street to another residence on 1000 Grant Street. (*Id.* at 440-41.) The victim's current boyfriend testified that when Petitioner entered the residence, he ran to another room to grab his phone. (*Id.* at 503.) He testified that he called the police and attempted to see where Petitioner was taking the victim, but did not chase after them because he did not have his clothes on at the time. (*Id.* at 504.) The victim testified that she attempted to fight Petitioner while he was carrying her, but was unsuccessful. (*Id.* at 440-41.) Once Petitioner had the victim inside the Grant Street residence, he had sexual intercourse with her; the victim testified that she continued to fight with Petitioner to attempt to get him off of her. (*Id.* at 442.) The victim testified that she was unsure how long she was at the residence on Grant Street. (*Id.* at 443.) She testified that after Petitioner sexually assaulted her, she was able to escape and ran back to her apartment where she subsequently called the police. (*Id.* at 443.) After the police arrived, she was then taken to the hospital. (*Id.* at 444.)

Petitioner was convicted of one count of Burglary by Entering without Breaking, one count of Abduction with the Intent to Defile, and one count of Second Degree Sexual Assault. (*Id.* at 648.) Before sentencing, the State filed a recidivist information against Petitioner alleging that Petitioner had been previously convicted in the Circuit Court of Pittsylvania County, Virginia for the felony offense of Voluntary Manslaughter in 1994. (*Id.* at 177-78.) On March 29, 2010, recidivist proceedings were held wherein Petitioner was found guilty of having been previously convicted of a felony offense in violation of W. Va. Code § 61-11-18(a). (*Id.* at 822-23.)

The trial court thereafter sentenced Petitioner to one to fifteen years for Burglary by Entering Without Breaking, three to ten years for Abduction With the Intent to File, twenty to twenty-five years for Second Degree Sexual Assault, and one year for the Violation of a Domestic Violence Protective Order. (*Id.* at 238-39.) The minimum term of the sentence for Second Degree Sexual Assault was enhanced to twenty years pursuant to the provisions of W. Va. Code § 61-11-18(a). (*Id.*) Petitioner's sentences for Burglary, Abduction, and Sexual Assault were ran consecutive to one another, and his sentence for Violating a Protective Order was ordered to run concurrently to the other sentences. (*Id.*) Petitioner now takes the instant appeal.

SUMMARY OF THE ARGUMENT

Petitioner raises eight assignments of error in the instant appeal. Petitioner first argues that his convictions of Abduction with the Intent to Defile and Second Degree Sexual Assault run afoul of the prohibition against double jeopardy because Petitioner's abduction of the victim in this case was merely incidental to the commission of the sexual assault. This claim must be rejected because the facts of this case demonstrate that the abduction was not merely incidental to the commission of the sexual assault. To the contrary, forcibly removing the victim from her residence and carrying her against her will to a different residence are exactly the harms the abduction statute was meant to protect against, separate and apart from the harms intended to be protected against by the sexual assault statute. Moreover, Petitioner waived this argument as the issue of double jeopardy was first raised in this appeal.

Petitioner also asserts that the trial court erred by failing to include the essential element of "sexual purpose and motivation" within its jury instructions regarding Abduction with the Intent to Defile. This claim must also be rejected as the trial court expressly instructed the jury, consistent with West Virginia law, that the term "defile" means having a "sexual purpose or motivation." Petitioner alleges in his third assignment of error that West Virginia's abduction statute is impermissibly vague because it is uncertain what actions Petitioner took to "defile" the victim in this case. As previously held by this Court, the meaning of the term defile in the abduction context was settled long ago, and the abduction statute is not impermissibly vague as it is sufficiently definite to give a person of ordinary intelligence fair notice of the prohibited conduct.

Petitioner additionally argues that it was impossible to convict him of Burglary since he was still on the rental agreement at 406 Russell Street and thus could not have entered the

dwelling “of another.” The offense of Burglary, however, is not concerned with the ownership of a dwelling, but rather, possession. In this case, the protective order awarded temporary possession of the residence at 406 Russell Street to the victim, and said order was still in effect at the time Petitioner committed the offense. Therefore, Petitioner’s claim in this regard must be rejected as the victim’s possession of 406 Russell Street was sufficient to convict Petitioner of Burglary.

Petitioner also argues that the trial court improperly enhanced the minimum term of his sentence for Second Degree Sexual Assault. The circuit court properly enhanced one of Petitioner’s present convictions by doubling the minimum term thereof as required by West Virginia law. There is no requirement that the trial court must choose the most lenient sentence upon which to enhance, and Petitioner’s claim in this regard must also be rejected. Petitioner additionally argues that there was insufficient evidence to support a conviction for Second Degree Sexual Assault. However, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found that Petitioner engaged in sexual intercourse with the victim without her consent, and that the lack of consent was the result of forcible compulsion.

In Petitioner’s seventh assignment of error, he argues that the trial court erred when it allowed the State to admit evidence of Petitioner’s 1994 Virginia conviction because the evidence was silent as to whether Petitioner entered a knowing, voluntary, and intelligent plea to the offense as required by the United States Supreme Court. However, the United States Supreme Court has additionally found that to import this presumption of invalidity into the context of a recidivism proceeding would improperly ignore the presumption of regularity that attaches to final judgments, even when the question is waiver of constitutional rights. Therefore,

in this context of a collateral attack on a previous conviction in a recidivism proceeding, the United States Supreme Court found that nothing prohibits a state court from initially presuming that a final judgment of conviction was validly obtained for recidivist purposes. Therefore the trial court did not err in this regard as Petitioner can point to no evidence, other than a silent record, that his plea to the offense of voluntary manslaughter was illegally obtained.

Petitioner asserts in his final assignment of error that the cumulative effect of the errors at Petitioner's trial requires the reversal of his conviction. As revealed by the foregoing, Petitioner has failed to demonstrate that any error has occurred below. Therefore, this claim must also be rejected and the judgment of the Circuit Court of Kanawha County affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary in this case as the dispositive issues have been decided. The briefs and records on appeal adequately present the facts and legal arguments. Oral argument would not significantly aid the decisional process, and a memorandum decision would be appropriate.

ARGUMENT

I. Petitioner's Convictions of Abduction with Intent to Defile and Second Degree Sexual Assault Do Not Violate the Prohibition Against Double Jeopardy.

“[T]he principles of double jeopardy prohibit the imposition of multiple punishments for the same offense.” *State v. Davis*, 180 W. Va. 357, 360, 376 S.E.2d 563, 566 (1988). “[F]rom a purely double jeopardy standpoint, where two statutes are involved, the *Blockburger* test provides the analytical framework.” *State v. Miller*, 175 W. Va. 616, 619, 336 S.E.2d 910, 913 (1985). This Court summarized the *Blockburger* test as follows: “[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.” Syl. Pt. 8, *State v. Zaccagnini*, 172 W. Va. 491, 308 S.E.2d 131 (1983).

Applying *Blockburger* to the present case, Abduction with Intent to Defile and Second Degree Sexual Assault are separate offenses for Double Jeopardy purposes since each requires proof of essential elements that the other does not. *See State v. Davis*, 180 W. Va. 357, 360, 376 S.E.2d 563, 566 (1988); W. Va. Code § 61-2-14; W. Va. Code § 61-8B-4. However, in *State v. Weaver* this Court found that a strict application of the *Blockburger* test when dealing with the abduction statute was not entirely helpful as the restraint employed in the commission of abduction may not be separate and apart from the commission of another crime. *State v. Weaver*, 181 W. Va. 274, 278-79, 382 S.E.2d 327, 331-32 (1989). Thus, the Court in *Weaver* concluded that “a defendant cannot be convicted of abduction . . . if the movement or detention of the victim is merely incidental to the commission of another crime. *Id.* at 279, 382 S.E.2d at 332. In order to determine whether the abduction is incidental to the commission of another crime, the following factors are to be considered: “the length of time the victim was held or moved, the

distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm.” *Id.*

Petitioner argues that his abduction conviction should be reversed since the abduction was merely incidental to the commission of sexual assault. (Pet’r’s Br. at 6.) However, when the above factors are applied to this case, the abduction is separate and apart from the restraint used in committing sexual assault, and Petitioner’s claim in this regard should be denied. First, Petitioner cites this Court’s decision in *State v. Davis*, 180 W. Va. 357, 376 S.E.2d 563 (1988) (per curiam), in support of his claim. (Pet’r’s Br. at 5.) In *Davis*, this Court found that the detention and movement of the victim was merely intended to facilitate the commission of sexual assault. However, the facts in *Davis* are to be distinguished from the case at hand.

In *Davis*, the victim went to the defendant’s home to retrieve laundry she had left there earlier that day. *Id.* at 358, 376 S.E.2d at 564. The defendant followed the victim into the laundry room and asked her to come to his bedroom. *Id.* at 359, 376 S.E.2d at 565. When the victim refused, a struggle ensued whereby the defendant eventually pulled the victim into his bedroom, threw her on the bed, and proceeded to have vaginal intercourse. *Id.* In determining that the abduction was incidental to the commission of sexual assault, the Court reasoned that the entire encounter took no more than fifteen to thirty minutes, the victim was only moved a short distance within the defendant’s home, and that moving the victim to the bedroom did not expose her to increased harm beyond the harm inherent in sexual assault. *Id.* at 361, 376 S.E.2d at 567.

The facts of this case are more analogous to those found in *State v. Trail*, wherein the Court found that the commission of abduction was more than incidental to the sexual offense. *State v. Trail*, 174 W. Va. 656, 659, 328 S.E.2d 671, 674 (1985). In *Trail*, the defendant met the two victims in a wooded area when the victims decided to skip school. *Id.* at 657, 328 S.E.2d at

672. While sitting around a campfire, the defendant hit the male victim over the head with a stick and then led the female victim through the woods to a wooded area approximately three miles away. *Id.* The defendant then had sexual intercourse with the victim and subsequently led her on another path representing to her that he would take her home. *Id.* They were later spotted by the victim's grandfather and law enforcement. *Id.* The Court found that the abduction in *Trail* was more than incidental to the sexual offense because the circumstances demonstrated that the defendant exposed the victim to an increased risk of harm and diminished the possibility of rescue. *Id.* at 659, 328 S.E.2d at 674.

In this case, Petitioner went to the victim's apartment on 406 Russell Street at around 10:00 p.m. (App. at 438-39; 497.) When the victim answered the door and saw it was Petitioner, she testified that she attempted to close the door but could not prevent Petitioner from entering. (*Id.* at 440.) The victim then ran to her bedroom, and Petitioner pursued. (*Id.*) Petitioner then picked the victim up and carried her out of her apartment. (*Id.*) The victim testified that she tried to fight him off but that Petitioner was much bigger than she was. (*Id.* at 441.) Petitioner carried the victim out of her apartment and down the street to 1000 Grant Street. (*Id.*) Petitioner then proceeded to have sexual intercourse with the victim. (*Id.* at 441-42.) The victim could not remember how long the sexual assault occurred, but testified that she ran home when she had an opportunity to escape and called the police when she arrived. (*Id.* at 443.) Once the police arrived, the victim was transported to the hospital around midnight. (*Id.* at 444, 452.)

When the factors in *Weaver* are applied to the instant case, the abduction was not merely incidental to the sexual assault. First, while the victim could not recall how long she was kept at 1000 Grant Street, she did remember calling the police and being taken to the hospital once they

arrived. Petitioner arrived at the victim's home around 10:00 p.m., and the victim arrived at the hospital around midnight. Second, Petitioner forcibly removed the victim from her home and carried her down the street to another residence. Forcibly carrying the victim from her residence to the inside of another residence exposes the victim to an increased risk of harm and diminishes the possibility of her rescue. These are exactly the type of harms the abduction statute was meant to protect against, separate and apart from the harms intended to be protected by the sexual assault statute. *See State v. Woodall*, 182 W. Va. 15, 24, 385 S.E.2d 253, 262 (1989). Accordingly, as in *Trail*, *supra*, Petitioner's abduction of the victim in this case was not incidental to the commission of the sexual assault, and Petitioner's claim in this regard should be rejected.

Moreover, Petitioner waived this argument as the issue of double jeopardy was first raised in this appeal. "[T]he defense of double jeopardy may be waived and the failure to properly raise it in the trial court operates as a waiver." *State v. McGilton*, 229 W. Va. 554, 558, 729 S.E.2d 876, 880 (2012) (quoting *State v. Carroll*, 150 W.Va. 765, 769, 149 S.E.2d 309, 312 (1966)). Petitioner not only failed to raise an objection, but actually requested the inclusion of the abduction charge in the jury instructions to the objection of the State. (App. at 573-76.) *See State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996). ("There is also an equally salutary justification for the raise or waive rule: It prevents a party from making a tactical decision to refrain from objecting and, subsequently, should the case turn sour, assigning error (or even worse, planting an error and nurturing the seed as a guarantee against a bad result). In the end, the contemporaneous objection requirement serves an important purpose in promoting the balanced and orderly functioning of our adversarial system of justice.")

II. The Trial Court Properly Instructed the Jury Regarding the Elements of Abduction with Intent to Defile.

“A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.” Syl. pt. 4, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 4, *State v. Surbaugh*, 230 W. Va. 212, 737 S.E.2d 240, 243-44 (2012). The trial court properly instructed the jury as to all of the required elements of Abduction with Intent to Defile. Petitioner argues that the trial court improperly omitted the element of “sexual purpose and motivation” from the jury instructions. (Pet’r’s Br. at 7.) The record belies Petitioner’s claim.

In *State v. Hannah*, this Court discussed the meaning of the term “intent to defile” as it is contained in the crime of abduction. *State v. Hanna*, 180 W. Va. 598, 605, 378 S.E.2d 640, 647 (1989). In explaining the meaning of the intent element, this Court stated that “sexual purpose or motivation is commonly understood to be an essential element of the offense of abduction with intent to defile.” *Id.* (quoting *State v. Hatfield*, 181 W. Va. 106, 380 S.E.2d 670 (1988)).

The trial court instructed the jury that “[a]bduction is committed when any person takes away or detains another person against such person’s will with the intent to defile such person.” (App. at 605.) The court further instructed the jury that “the term defile means having a sexual purpose or motivation.” (*Id.*) Accordingly, the trial court did not abuse its discretion in formulating its charge to the jury as all required elements of the offense of Abduction with Intent to Defile were included. Thus, Petitioner’s claim in this regard must also be denied.

III. The Term “Defile” in W. Va. Code § 61-2-14(a) is Sufficiently Definite to Give a Person of Ordinary Intelligence Fair Notice of the Prohibited Conduct.

“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.” Syl. Pt. 1, *State v. Reed*, 166 W. Va. 558, 276 S.E.2d 313, 315 (1981) (citing Syl. pt. 1, *State v. Flinn*, W. Va., 208 S.E.2d 538 (1974)). Petitioner argues that W. Va. Code § 61-2-14(a) is impermissibly vague because it is not clear from the record what action Petitioner took to “defile” the victim. (Pet’r’s Br. at 8.) This claim must also be rejected.

In *State v. Hatfield*, 181 W. Va. 106, 108, 380 S.E.2d 670, 672 (1988), this Court found that the term “defile” as contained within W. Va. Code § 61-2-14(a) was not unconstitutionally vague as it was “evident that the meaning of the term ‘defile’ in this context was settled long ago.” As stated in the previous assignment of error, “[a] sexual purpose or motivation is commonly understood to be an essential element of the offense of abduction with intent to defile.” *Id.* Moreover, as in *Hatfield* “the record . . . shows that [Petitioner] was well aware of the meaning of the term at trial.” *Id.*

In arguing for the inclusion of the jury instruction regarding the offense of abduction, Petitioner’s trial counsel defined the term “defile” as being “for a sexual purpose.” (App. at 574.) Petitioner’s counsel went further explaining “[t]he concession in this case being the sexual assault, being the sexual purpose.” (*Id.*) Thus, the term “defile” as contained within W. Va. Code § 61-2-14(a) is not impermissibly vague as to Petitioner, because, as previously held by this Court, W. Va. Code § 61-2-14(a) is sufficiently definite to give a person of ordinary intelligence fair notice of the prohibited conduct. *Hatfield*, 181 W. Va. at 108, 380 S.E.2d at 672.

IV. There was Sufficient Evidence to Convict Petitioner of Burglary.

“If any person shall, in the nighttime, break and enter, or enter without breaking, or shall, in the daytime, break and enter, the dwelling house, or an outhouse adjoining thereto or occupied therewith, of another, with intent to commit a crime therein, he shall be deemed guilty of burglary.” W. Va. Code § 61-3-11. Petitioner asserts that since Petitioner remained on the rental agreement of 406 Russell Street, he could not be deemed to have entered the premises “of another” and therefore could not be convicted of Burglary. (Pet’r’s Br. at 9.) First and foremost, Petitioner did not have the right of possession of the property as a Domestic Violence Protective Order against Petitioner awarded temporary possession of the residence to the victim. (App. at 855.) Furthermore, this order was still in effect at the time Petitioner entered the victim’s home on 406 Russell Street.

Petitioner argues that the protective order is of no consequence as W. Va. Code § 48-27-506 provides that “[n]o order entered pursuant to this article may in any manner affect title to any real property.” (Pet’r’s Br. at 9.) However, “the specific ownership of a building involved in the crime of burglary is not an essential element of the offense, and title, as far as the law of burglary is concerned, follows the possession, and possession constitutes sufficient ownership as against the burglar.” *Newcomb v. Coiner*, 154 W. Va. 653, 657, 178 S.E.2d 155, 157 (1970). Thus, while the protective order certainly did not affect the title to the property on 406 Russell Street, it did affect possession awarding temporary possession to the victim. Thus, because possession constitutes sufficient ownership for burglary purposes, the evidence was sufficient to conviction Petitioner of Burglary.

V. The Circuit Court Properly Enhanced Petitioner’s Recidivist Sentence.

“‘The Supreme Court of Appeals reviews sentencing orders ... under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.’ Syl. Pt. 1,

in part, *State v. Lucas*, 201 W. Va. 271, 496 S.E.2d 221 (1997).” Syl. Pt. 1, *State v. James*, 227 W. Va. 407, 710 S.E.2d 98 (2011). Furthermore, “[s]entences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.’ Syllabus Point 4, *State v. Goodnight*, 169 W. Va. 366, 287 S.E.2d 504 (1982).” Syl. Pt. 3, *State v. Georgius*, 225 W. Va. 716, 696 S.E.2d 18 (2010). The trial court properly enhanced Petitioner’s Recidivist Sentence by doubling the lower end of Petitioner’s Second Degree Sexual Assault conviction. (App. at 239.)

W. Va. Code § 61-11-18(a) delineates the punishment for a second felony offense, providing that the minimum term of an indeterminate sentence shall be twice the term of years otherwise provided for. In *Turner v. Holland*, this Court held that the enhancement could only be imposed on one of the convictions returned. *Turner v. Holland*, 175 W. Va. 202, 204, 332 S.E.2d 164, 166 (1985). In this case, the trial court properly doubled the minimum term of one of Petitioner’s convictions in accordance with the recidivist statute. There is no requirement, statutory or otherwise, that the trial court must pick the most lenient sentence to enhance. Accordingly, the sentence imposed by the trial court in this case was within statutory limits and not based on any other impermissible factor, and therefore, not subject to appellate review.

VI. There was Sufficient Evidence to Convict Petitioner of Second Degree Sexual Assault.

“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. To the extent that our prior cases are inconsistent, they are expressly overruled.”

Id., Syl. Pt. 3.

In order to find Petitioner guilty of Sexual Assault in the Second Degree the jury had to find that Petitioner engaged in sexual intercourse with the victim without her consent, and that the lack of consent was the result of forcible compulsion. W. Va. Code § 61-8B-4. Petitioner argues that the evidence presented to the jury was insufficient for the jury to conclude that forcible compulsion occurred. (Pet’r’s Br. at 12.) This claim is without merit.

The victim testified at trial that Petitioner removed her from her home, took her to another residence and had sexual intercourse with her. The victim testified that she attempted to fight Petitioner off while he was carrying her but was unable to escape. The victim further testified that she was fighting Petitioner to get him off her during the sexual assault. (App. at 442.) Given the victim’s testimony, and viewing the evidence in the light most favorable to the State, any rational trier of fact could have found that Petitioner engaged in sexual intercourse with the victim without her consent, and that the lack of consent was the result of forcible compulsion. Therefore, this claim must also be rejected.

VII. The Trial Court Properly Admitted Evidence of Petitioner’s 1994 Virginia Conviction of Voluntary Manslaughter.

At Petitioner’s recidivist trial, he moved to exclude the State’s use of a 1994 Virginia conviction in which Petitioner pleaded guilty to Voluntary Manslaughter. (App. at 194-96, 664-67.) Petitioner specifically argued that the conviction was not valid for recidivist purposes

because the documents the State intended to use in support of his Virginia conviction neither indicated that Petitioner was advised of his rights before pleading guilty nor did they indicate that Petitioner made a knowing and voluntary plea as required by the United States Supreme Court in *Boykin v. Alabama*. (*Id.* at 664-67.) The trial court properly denied Petitioner's motion, finding that if Petitioner was going to raise this issue, then he had to come forward with some sort of evidence that his plea was not valid. (*Id.* at 680.)

Petitioner argues similarly on appeal that the recidivist conviction cannot be upheld upon the Virginia records since those records are silent as to whether Petitioner knowingly, intelligently, and voluntarily waived his Constitutional rights before pleading guilty. (Pet'r's Br. at 13-15.) The Supreme Court stated in *Boykin* that a proper guilty plea by a defendant could not be ascertained from a silent record. *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712 (1969). However, the Supreme Court in *Boykin* was not faced with the situation such as that in the present case in which Petitioner is attempting to attack the validity of his previous conviction during a recidivist proceeding.

The U.S. Supreme Court addressed this situation in *Parke v. Raley*. In *Parke*, a defendant in a Kentucky recidivism proceeding challenged the validity of his previous conviction alleging that his previous conviction was presumptively invalid since the records did not demonstrate an informed guilty plea as required in *Boykin*. *Parke v. Raley*, 506 U.S. 20, 29, 113 S. Ct. 517, 523 (1992). In Kentucky, however, once the State proves the existence of a judgment in a recidivism proceeding, the burden shifts to the defendant to produce evidence that some irregularity occurred in the earlier proceedings. *Id.* at 24, 113 S. Ct. at 520.

The Court in *Parke* found that there was no tension in the Kentucky scheme and *Boykin*. *Id.* at 29, 113 S. Ct. at 523. The Court reasoned that to "import *Boykin's* presumption of

invalidity into this very different context would, in our view, improperly ignore another presumption deeply rooted in our jurisprudence: the ‘presumption of regularity’ that attaches to final judgments, even when the question is waiver of constitutional rights.” *Id.* The Court persuasively pointed out that

“[t]he circumstance of a missing or nonexistent record is, we suspect, not atypical, particularly when the prior conviction is several years old. But *Boykin* colloquies have been required for nearly a quarter century. On collateral review, we think it defies logic to presume from the mere unavailability of a transcript (assuming no allegation that the unavailability is due to governmental misconduct) that the defendant was not advised of his rights.”

Id. at 30, 113 S. Ct. at 524. The Court went on to find that “[i]n this situation, *Boykin* does not prohibit a state court from presuming, at least initially, that a final judgment of conviction offered for purposes of sentence enhancement was validly obtained.” *Id.*

Given the foregoing, the trial court did not err when it denied Petitioner’s motion to exclude the records of Petitioner’s 1994 Virginia conviction. The trial court’s decision is consistent with both federal and state law. *See State ex rel. Scott v. Boles*, 150 W. Va. 453, 147 S.E.2d 486, 487 (1966) (“It will be presumed, where the record is silent, that a court of competent jurisdiction performed its duties in all respects as required by law. There is, however, an exception with regard to this presumption relating to the right to the assistance of counsel which is a fundamental constitutional right provided in both the State and Federal Constitutions.”)

Petitioner also argues within this assignment of error that the Virginia records do not necessarily establish that Petitioner was convicted of a prior felony and that an out-of-state conviction must be classified as a felony within West Virginia. (Pet’r’s Br. at 15.) Petitioner argues that without such a determination, the Virginia “voluntary manslaughter” offense cannot be used to support a recidivist sentence. (Pet’r’s Br. at 15.) In as much as Petitioner argues that

no determination was made, the circuit court did make a finding that the voluntary manslaughter conviction was consistent with a felony under the laws of our State. (App. at 682-83.) Therefore this claim must also be rejected.

VIII. Petitioner Has Not Demonstrated That Any Error Occurred and Therefore Cannot Invoke the Cumulative Error Doctrine.

Under the cumulative-error doctrine, numerous ordinary trial errors--taken as a whole--can defeat a defendant's right to a fair trial. In *State v. Foster*, the Court explained:

“Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.’ Syllabus Point 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972).”

Syl. Pt. 14, *State v. Foster*, 221 W. Va. 629, 656 S.E.2d 74 (2007).

The cumulative effect doctrine only applies to reverse a conviction if “the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial.” Syl. Pt. 14, in part, *State v. Foster*, 221 W. Va. 629, 656 S.E.2d 74 (2007). Here, as demonstrated by the foregoing, Petitioner has failed to demonstrate any error occurred. Therefore this claim must be denied.

CONCLUSION

For the reasons stated above, the judgment of the Circuit Court of Kanawha County must be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read 'D.A. Knopp', is written over a horizontal line.

DEREK A. KNOFF
ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: (304) 558-5830
State Bar No. 12294
Email: derek.a.knopp@wvago.gov
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Derek A. Knopp, Assistant Attorney General and counsel for the State of West Virginia, hereby verify that I have served a true copy of "Respondent's Brief" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 25th day of August, 2014, addressed as follows:

Matthew A. Victor
VICTOR VICTOR & HELGOE LLP
P.O. Box 5160
Charleston, WV 25361


DEREK A. KNOPP