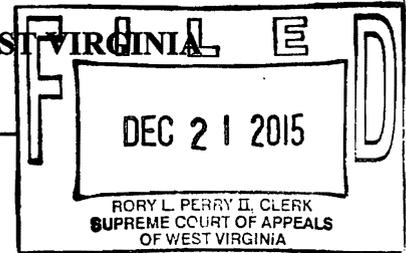


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



CHARLESTON, WEST VIRGINIA

NO. 15-0854

STATE OF WEST VIRGINIA

Plaintiff/Respondent

v.

Appeal from a final order
of the Circuit Court of
Harrison County (15-F-114-3)

DARIUS HENNING

Defendant/Petitioner

PETITIONER'S BRIEF

Counsel For Petitioner:

Jason T. Gain (WV Bar #12353)
Gain Law Offices
103 E. Main Street
Bridgeport, WV 26330
Phone: (304) 842-0842
Fax: (304) 842-0844
jason.gain@gainlawoffices.com

TABLE OF CONTENTS

Table of Contents..... i

Table of Authorities ii

Assignments of Error1

Statement of the Case.....1

Summary of Argument3

Statement Regarding Oral Argument and Decision.....3

Argument4

 1. The trial court erred by allowing the jury to consider the purported lesser included offense of misdemeanor assault when the Petitioner was indicted for malicious assault.....1

Conclusion.....10

TABLE OF AUTHORITIES

Page(s)

CASES

State v. Craft, Syl. Pt. 1, 47 S.E.2d 681 (W.Va. 1948).....6

State v. Dixon, 10-4019 (W.Va. Sup. Ct., November 15, 2011).....10

State v. Hinkle, Syl. Pt. 1, 489 S.E.2d 257 (1996).....4

State v. King, Syl. Pt. 2, 84 S.E.2d 313 (W.Va. 1954).....7

State v. Louk, Syl. Pt. 1, 285 S.E.2d 432 (W.Va. 1981).....4

State v. Lutz, 101 S.E. 434 (W.Va. 1919).....8

State v. Neider, 295 S.E.2d 902 (W.Va. 1982).....4

State v. Neider, 295 S.E.2d 902, 906 (W.Va. 1982).....9

State v. Vance, Syl. Pt. 1, 285 S.E.2d 437 (W.Va. 1981).....5

State v. Wallace, 377 S.E.2d 321 (W. Va. 1985).....3,4,10

State v. Wilkerson, 738 S.E.2d 32 (W. Va. 2014).....3,4,8

State v. Wilkerson, 738 S.E.2d at 36-7.....6

STATUTES, REGULATIONS, AND RULES

W.Va. Code §61-2-9 (1976).....7

W.Va. Code §61-2-9 (1979).....7

W.Va. Code §61-2-9(a).....1,3,5,6

W. Va. Code §61-2-9 (c).....3

ASSIGNMENT OF ERROR

The trial court erred by allowing the jury to consider the purported lesser included offense of misdemeanor assault when the Petitioner was indicted for malicious assault.

STATEMENT OF THE CASE

During the early morning hours of December 19, 2014, Skilor Purdue reported to the United Hospital Center in Bridgeport, Harrison County, West Virginia for treatment of a small laceration on her hand. She initially reported that she had cut herself while washing dishes. A.R. at 227. Two days later, she appeared at the Clarksburg Police Department, her father in tow, alleging that the injury was caused by the Defendant, now Petitioner, Darius Jordan Henning stabbing her in the hand. *Id.* at 153.

She alleged that Mr. Henning was a back seat passenger in a vehicle she was driving. She stated that during the ride an argument ensued because Mr. Henning accused her of hiding property of his in her clothing. Mr. Henning then pulled a small pocket knife from his pocket and threatened to cut the car's tires if Ms. Purdue did not return his property. At this point, Ms. Purdue stopped the vehicle and ordered Mr. Henning to exit. She reached into the back seat in an attempt to pull him from the vehicle and when she withdrew her hand, she noticed that it had been cut. *Id.* at 100-110.

Mr. Henning immediately emerged from the vehicle, apologized to Ms. Purdue, and removed his jacket in an attempt to cover the small wound. He offered to drive her to the hospital. Ms. Purdue refused Mr. Henning's offer and left him along side of the road. *Id.* at 113.

The grand jury of Harrison County sitting at the May 2015 term of court indicted Mr. Henning on one count of Malicious Assault, in violation of W.Va. Code §61-2-9 (a). *Id.* at 5. On June 29, 2015, Mr. Henning was brought to trial in front of a petit jury in Harrison County on the sole count of Malicious Assault.

The State asked that the jury be allowed to consider the lesser included offenses of unlawful assault and misdemeanor battery. The State further asked for an instruction on the purported lesser included offense of misdemeanor assault relating to “unlawfully commit[ing] an act that placed Skilor Purdue in reasonable apprehension of immediately suffering physical pain or injury.” *Id.* at 162. Mr. Henning did not object to unlawful assault and misdemeanor battery being included. *Id.* at 161. However, he did object to the inclusion of misdemeanor assault as he argued that such crime, at least the definition proposed by the State, is not a lesser included offense under this Court’s precedent. *Id.* The trial court overruled Mr. Henning’s objection and offered the jury the option of considering misdemeanor assault. *Id.* at 163.

After a one day trial, Mr. Henning was acquitted of the charges of malicious assault, unlawful assault, and misdemeanor battery. He was, however, convicted of the charge of misdemeanor assault. *Id.* at 200.

On July 17, 2015, Mr. Henning filed a “Motion for Post-Verdict Judgment of Acquittal/Reconsideration of Inclusion of Purported Lesser Included Offense of Misdemeanor Assault” requesting that the trial court reverse its earlier ruling offering the jury the option to consider misdemeanor assault and to enter a directed verdict of acquittal. *Id.* at 16.

At a hearing held on August 14, 2015, the trial court denied Mr. Henning’s motion and sentenced him to six months incarceration in the North Central Regional Jail, such incarceration to run concurrent with another sentence he was serving. Mr. Henning was also ordered to pay the costs of the proceeding, including the jury fees. *Id.* at 22.

It is from this conviction and sentence which Mr. Henning now appeals to this Honorable Court for relief.

SUMMARY OF ARGUMENT

The propriety of giving an instruction to the jury regarding an offense that is lesser than the one for which a defendant is indicted is the same no matter if proposed by the State or the defendant. *State v. Wallace*, 377 S.E.2d 321 (W.Va. 1985).

The test for whether to give such an instruction is a two-part test. The first is an objective test to determine if it is impossible to commit the greater offense without also having committed the lesser. The second is a subjective test in order to determine if the facts of the case could reasonably lead a jury to believe that the defendant is only guilty of the lesser included offense. *State v. Wilkerson*, 738 S.E.2d 32 (W.Va. 2014).

In this matter, it was improper to instruct the jury that misdemeanor assault is a lesser included offense of malicious assault. Misdemeanor assault may be committed in two ways: 1) by committing an act which places a person in reasonable fear of harm, or 2) by attempting to inflict physical pain or injury on a person. W.Va. Code §61-2-9 (c).

Under the objective test discussed in *Wilkerson*, the first definition of misdemeanor assault is improper as a malicious assault can be committed without a victim being placed in fear. *Id.* The uncontroverted evidence in underlying matter showed a clear injury to the alleged victim, and as such fails the subjective test of *Wilkerson* as no reasonably jury could have concluded that Mr. Henning attempted, yet failed, to cause her bodily harm. *Id.*

Therefore, the trial court committed reversible error by giving this instruction, and Mr. Henning's conviction should be reversed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner submits that oral argument in this matter is unnecessary as the trial court did not apply the clear precedents of this Court regarding the inclusion of lesser included

offenses. Should the Court deem oral argument necessary in this matter, Counsel would be honored to address these issues.

ARGUMENT

“[T]he question of whether a jury was properly instructed is a question of law, and the review is *de novo*.” *State v. Hinkle*, Syl. Pt. 1, 489 S.E.2d 257 (1996).

Although it is almost universally a defendant asking for a lesser included offense instruction and the State opposing it, the law provides that when a defendant takes the risky trial strategy of objecting to lesser included offense instructions, the propriety of offering the instruction is the same. *State v. Wallace*, 377 S.E.2d 321 (W.Va. 1985).

Whether a jury may consider lesser included offenses to those contained in an indictment is subject to a two-part inquiry. *State v. Wilkerson*, 738 S.E.2d 32 (W.Va. 2014).

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.

Id. at 35-6. (citing *State v. Neider*, 295 S.E.2d 902 (W.Va. 1982)). In determining the first part of the inquiry, this Court has held that:

The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is **impossible** to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense.

Id. at 36 (citing *State v. Louk*, Syl. Pt. 1, 285 S.E.2d 432 (W.Va. 1981) (emphasis added)).

In other words, [b]efore a lesser offense can be said to contribute a necessary part of a greater offense, all the legal ingredients of the corpus delicti of the lesser offense must be included in the elements of the greater offense. If an element necessary to establish the corpus delicti of the lesser offense is irrelevant to the proof of the greater offense, the lesser cannot be held to be a necessarily included offense.

Id. (citing *State v. Vance*, Syl. Pt. 1, 285 S.E.2d 437 (W.Va. 1981)). The test is a legal one and is independent of the facts of a particular case. *Id.* at 36-7. (“[W]e decline to adopt the approach ... whereby each case is considered individually to determine whether the evidence adduced at trial supports a lesser included instruction. This Court has always applied the strict elements test....”).

Simply put, the first task before a trial court related to a lesser included offense is to compare the elements of the offenses and apply the *Wilkerson* test.

In this matter, the higher charge, malicious assault, requires that a person “maliciously shoot, stab, cut or wound any person, or by any means cause him or her bodily injury with intent to maim, disfigure, disable or kill....” W.Va. Code §61-2-9 (a).

Misdemeanor assault requires that a person “unlawfully attempts to use physical force capable of causing physical pain or injury to the person of another or unlawfully commits an act that places another in reasonable apprehension of immediately suffering physical pain or injury.” *Id.* at (b).

A. The first definition of misdemeanor assault, fear of reasonable harm, fails the first prong of the *Wilkerson/Neider* Test.

As noted, misdemeanor assault can be committed in two ways: by an attempt to use physical force, or by placing another in fear of suffering that force. *Id.* In this matter, the State only proposed to instruct the jury on the reasonable fear method.¹ A.R. at 176.

This Court has previously ruled on a nearly identical issue. The *Wilkerson* Court found that misdemeanor assault was not a lesser included offense of first degree robbery, even if the facts of the particular case supported an inference that the person was in fear of injury:

[I]t is also possible to commit robbery in the first degree without placing a person in fear of injury. For example, in the instance where the victim’s back is turned

¹ However, as discussed below, a hypothetical instruction on the “attempt” portion would be improper as well.

and force is used against him or her unknowingly, robbery in the first degree is accomplished without the victim perceiving the threat of force. Moreover, assault requires the intent to place a person in fear of harm. As discussed, such an intent is not required for robbery in the first degree.

Id. For the very same reason, because it is *possible* to commit a malicious assault without placing a person in fear of harm, misdemeanor assault, under the theory instructed by the trial court, is not a lesser included offense.²

During trial, the State ignored this limitation and argued “in the circumstance before the Court with the evidence, there are -- there is testimony that Mr. Henning did unlawfully commit acts that placed Ms. Purdue in reasonable apprehension of immediately suffering physical pain or injury.” A.R. at 163. The trial court likewise ignored this limitation by concluding “there’s enough question of fact there in the Court’s mind to allow all three lesser included go to the jury in this case.” *Id.*

At the hearing on the post-trial motion, the State and the trial court likewise failed to understand the objective first prong of *Wilkerson* and continued to argue that a reasonable fear of harm could have been present in this case. The trial court posited hypotheticals about a malicious wounding where the victim did not see the attack coming, A.R. at 212, and further summarily stated that it believed that this Court had already held that assaults and batteries are lesser included offenses of malicious assault. *Id.* at 213.

The trial court’s initial inclination that this Court has previously ruled that misdemeanor assault and battery is a lesser included offense of malicious assault was correct. *See, e.g., State v. Craft*, Syl. Pt. 1, 47 S.E.2d 681 (W.Va. 1948) (“A conviction for **assault and battery** will be sustained under an indictment for violating the provisions of Code, 61-2-9....”) (emphasis

² “Before the Defendant, Darius Jordan Henning, can be convicted of assault, the State of West Virginia must prove [that he] ...4. did unlawfully commit an act, 5. that placed Skilor Purdue, 6. in reasonable apprehension of immediately suffering physical pain or injury.” A.R. at 176.

added). However, at the time of the *Craft* decision, the crime of “assault and battery” was not a statutory offense but one retained from the common law. *See State v. King*, Syl. Pt. 2, 84 S.E.2d 313 (W.Va. 1954).

The statutory definitions currently in use were not enacted until 1978,³ and that legislation separated the common law offenses into statutory misdemeanor assault and statutory misdemeanor battery. *Compare* W.Va. Code §61-2-9 (1976) and W.Va. Code §61-2-9 (1979) (adding subsections (b), related to misdemeanor assault, and (c) related to misdemeanor battery).

As such, the previous cases relied upon by the trial court are inapplicable as those cases dealt with different offenses, ones not even in use today, and carried over from the common law. By its own definition, the previous crime of “assault and battery” requires a common law battery, a jury instruction to which Mr. Henning did not object.

Although no controlling cases are on point since the codification of misdemeanor assault and/or battery, the *Wilkerson/Neider* test clearly indicates that the definition of misdemeanor assault related to placing a person in reasonable fear of harm is not a lesser included offense of malicious assault as a malicious assault may occur without any fear being experienced by the victim.

At the post-trial motion hearing, the State continued to argue the subjective test: that the facts of this particular matter supported a reasonable fear of harm. A.R. at 214. It failed to address the *Wilkerson* issue. It further argued that because of the offenses are in the same code section that the Legislature intended them to be intertwined. *Id.* It then confused the first prong of the test by somehow suggesting that Mr. Henning was alleging it was impossible to place a person in reasonable fear while also committing malicious assault. *Id.*

³ The code section has been subsequently amended but these amendments are not relevant to the consideration of this matter.

With respect to the State and the trial court, they both fundamentally misunderstood the objective nature of the first prong of the test. Under that prong, it makes absolutely no difference what Mr. Henning or Ms. Purdue did, where they were, whether a knife, gun, or a baseball bat was used, how it was used, or whether the purported act was done with her knowledge or fear. The sole question to be considered by the trial court was whether it was possible under *any* circumstance to commit malicious assault without placing a person in fear of harm. If it was possible, then the inquiry should have stopped there and no instruction given. *Wilkerson*, 738 S.E.2d at 32. The trial court erroneously proceeded to the second *Wilkerson* step without completing the first.

The trial court's interpretation of the law would have absurd consequences. If there was testimony in the underlying matter that Mr. Henning was drinking a beer as they drove down the road, under this flawed analysis, a violation of the open container law could be considered a lesser included offense of malicious assault.

Further, the indictment in this case did not allege that Ms. Purdue was placed in reasonable fear of harm. A.R. at 5. As such, Mr. Henning did not appear in court ready to answer that charge because he was never apprised of it. *See State v. Lutz*, 101 S.E. 434 (W.Va. 1919) ("unless the indictment does describe an offense of the lesser degree not involved in the crime charged, the accused cannot be found guilty of the lesser offense...").

For the foregoing reasons, it was reversible error for the trial court to allow the state to proceed on a lesser included offense instruction related to reasonable fear of harm.

B. The second definition of assault, attempting to use force to cause harm, and not proposed by the State, fails the second prong of the *Wilkerson/Neider* test.

The second type of misdemeanor assault, attempting to cause physical harm, was not proposed by the State, not given as an instruction to the jury, and was thereby waived. However, this alternative definition of assault was read during the general jury charge in once instance and omitted in the next. A.R. at 173-74 (stating that assault can be committed by an attempt to cause physical pain); *Id.* at 176 (instructing that the State must prove that Mr. Henning placed Ms. Purdue in reasonable fear of harm).

However, even if it was properly raised by the State and somehow made clear to the jury, which Mr. Henning contends it was not, such an instruction would nonetheless have been impermissible as it fails the second prong of *Wilkerson*.

The second prong of *Wilkerson* was discussed more fully in the case it cites: “[W]here there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction.” *State v. Neider*, 295 S.E.2d 902, 906 (W.Va. 1982).

In *Neider*, the defendant was arguing for an instruction on larceny when the undisputed evidence showed a robbery with a knife. *Id.* at 904. The defendant stated that she was intoxicated at the time and did not remember the events. *Id.* In holding that the denial of the larceny instruction was appropriate, the Court held that “[u]nder the factual test discussed above for the defendant to have been entitled to an instruction on larceny as a lesser included offense it was essential for her during trial to have contested the distinguishing elements.” *Id.* It is important to note that Ms. Neider was *indeed* guilty of larceny as all of the elements of that crime were met. However, in finding that there was no reasonable factual scenario where the

defendant would have *only* been guilty of larceny, this Court held that the instruction was improper.

Just four years ago, this Court affirmed a refusal of a lesser included offense instruction for assault on a police officer when the evidence showed that contact had been made with the officer and therefore battery was the only appropriate instruction. *State v. Dixon*, 10-4019 (W.Va. Sup. Ct., November 15, 2011) (memorandum decision) (“the evidence is clear that the officer was in fact struck by petitioner. Thus the circuit court did not abuse its discretion in refusing to give an instruction on assault on a police officer....”).

In this matter, there was no dispute that Ms. Purdue suffered a laceration to her hand. It was reported to the hospital and a picture of the injury was shown to the jury. Ms. Purdue testified at trial as to the extent of her injuries. The State did not “contest” these facts, *id.*, it vigorously argued them to be true. As such, under no reasonable factual scenario could Mr. Henning have *only* been guilty of misdemeanor assault in which he attempted, yet failed, to inflict a knife wound.

As such, it was improper to allow a jury to consider the second definition of misdemeanor assault given the facts of this case.

CONCLUSION

The first definition of misdemeanor assault fails the objective portion of the applicable test, and the second definition of misdemeanor assault fails the subjective portion of the test. Mr. Henning has the exact same right as the State for improper lesser included offense instructions to be kept from the jury. *State v. Wallace*, 377 S.E.2d 321 (W.Va. 1985). Therefore the instruction should not have been given.

For these reasons, the Petitioner respectfully requests that this Court reverse the underlying conviction in the Circuit Court of Harrison County and remand the matter to that court with instructions to enter a verdict of acquittal.

Respectfully submitted,



Jason T. Gain (W. Va. Bar No. 12353)
jason.gain@gainlawoffices.com
Gain Law Offices
103 E. Main St.
Bridgeport, West Virginia, 26330
Telephone: (304) 842-0842
Facsimile: (304) 223-0100
Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that I have caused a copy of this Petitioner's "Appeal Brief" and "Joint Appendix" to be placed in the United States mail, first-class, postage prepaid to David A. Stackpole, Counsel for the Respondent, West Virginia Office of the Attorney General, 812 Quarrier Street, 6th Floor, Charleston, WV 25301 on this 18th day of December, 2015.



Jason T. Gain (W. Va. Bar No. 12353)

jason.gain@gainlawoffices.com

Gain Law Offices

103 E. Main Street

Bridgeport, West Virginia, 26330

Telephone: (304) 842-0842

Facsimile: (304) 842-0844

Counsel for Petitioner