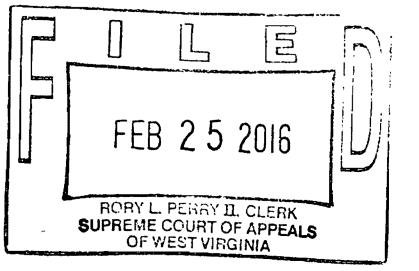
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



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 REPLY BRIEF

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STATEMENT REGARDING ORAL ARGUMENT AND DECISION

After careful review of the State's Response Brief, the Petitioner continues to believe that this appeal is one of settled law and may be dispensed with in a memorandum opinion reversing the Circuit Court of Harrison County.

Should this Court deem oral argument to be necessary, Petitioner's counsel would welcome the opportunity to address the Court.

ARGUMENT

The response of the State fails to properly appreciate the difference between prior case law regarding the distinct common law offense of "assault and battery" and that of misdemeanor assault codified at W.Va. Code §61-2-9 (b) (2015). Further, the Court should decline the State's invitation to overrule the *Wilkerson/Neider* tests for lesser included offenses as those adequately protect the interests of both the State and defendants.

I. The State's contention that the common law crime of "assault and battery" also applies to the modern statutory crime of misdemeanor assault is without merit.

Although this Court set forth the applicable test for determining the propriety of a lesser included offense instruction just three years ago, *State v. Wilkerson*, 738 S.E.2d 32 (W.Va. 2013), the State asks this Court to disregard that decision stating it "need not be applied in this case." Response at 3. This very first sentence of the State's argument section in its Response is counter to the very case it cites. *Wilkerson*, 738 S.E.2d at 36 ("we decline to adopt the approach...whereby each case is considered individually....). In these types of cases, this Court should always "run a *Wilkerson* test." Response at 4.

The State seems to argue that because over sixty years ago this Court held that the common law crime of "assault and battery," a crime not at issue in this case, to be a lesser

included offense of malicious assault, that this old case should act as an exception to and supersede the *Wilkerson* test. *State v. King*, 84 S.E.2d 313 (W.Va. 1954); Response at 3.

This argument is untenable. Prior to the year 1978, "assault and battery" was not a statutory crime, but a holdover from the common law. *State v. McKain*, 49 S.E.20, Syl. Pt. 1 (W.Va. 1904). Although containing what seems to be two crimes, the phrase was a single, discreet misdemeanor common law crime. *Id.* (Assault and battery is an offense at common law, and cognizable as such by our circuit courts and other courts which exercise like jurisdiction in such cases.) (verb tense emphasized).

Today, these two crimes are considered separately and have their own statutory meanings which are contained in W.Va. Code §61-2-9 (b) (assault) and (c) (battery).

Although the *King* Court's did not predict the future and read *Wilkerson*, its holding is nonetheless consistent with the *Wilkerson/Neider* test as it is impossible to commit a malicious assault without first committing an assault and a battery, that is an attempt to commit a battery and a subsequent battery. *King* did not concern itself with an unsuccessful attempted battery nor a situation where a victim was placed in fear of harm, but was not in fact harmed. The lesser included offense of "assault and battery" by its very definition requires a battery in addition to an assault.

The State cites one line of dicta from *King* which states that "simple assault, as distinguished from malicious assault and unlawful assault, is an offense at common law, and punishable as a misdemeanor." *Id.* at 315. It is clear from the description of these crimes that the Court has done what many laypeople and common law speakers alike have done for centuries: use the terms assault and battery as interchangeable. *See* Criminal Code of Canada, R.S. C-34, s. 265 (1) ("A person commits an assault when...without the consent of another

person, he applies force intentionally to that other person, directly or indirectly.") Further, although W.Va. Code §61-2-9 (a) styles itself as "malicious assault," it is clear that the more precise term is malicious battery.

Even if somehow *King* could be contorted to show that this State at one time considered assault in every case as a lesser included offense to battery, this holding has been expressly overruled by *Wilkerson* and *Dixon*, *infra*.

The State cites *Collins* for the uncontroverted proposition that the codification of a common law crime does not necessarily change its elements. *State v. Collins*, 329 S.E.2d 839 (W.Va. 1984); Response at 3. *Collins* held that the codification of the crime of robbery did not remove larceny as one of its elements. The Petitioner agrees and is unsure how that observation is harmful to his argument.

With minor changes, the statutes regarding misdemeanor assault and misdemeanor battery retain similar definitions to their common law counterparts. However, their codification "within the same section" or because they are "a continuous flow of closely related offenses" does not mean that one is always a lesser included offense of the other, or that a lesser included offense jury instruction is proper. Response at 3; *Wilkerson*, 738 S.E.2d at 36.

The fact that the offenses are codified in the same subsection or are closely related has never been a test of lesser included offenses in the history of this Court's jurisprudence. Upon information and belief, the Legislature numbers its enactments in the W.Va. Code for the ease of the courts and the reader, not for any special legal significance, or at least none heretofore recognized by this Court. It seems that if the Legislature would reenact Chapter 61 of the Code, title it "Things People Cannot Do," and list all of the crimes contained therein without

subdivision or enumeration, the State's argument would have every crime be a lesser included offense of the other.

Further, the relationship, similarity, or whether crimes are "a continuous flow of closely related offenses" have nothing to do with whether they are lesser included offenses of one another. Response at 3. As noted in *Neider*, the defendant was found guilty of robbery, and was therefore by definition guilty of larceny, but was not entitled to a lesser included offense instruction of larceny. *State v. Neider*, 295 S.E.2d 902 (W.Va. 1982).

Further, larceny and burglary are very closely related, but larceny is not a lesser included offense of burglary because it is possible commit a burglary without committing a larceny. *State v. Louk*, 285 S.E.2d 432 (W.Va. 1981). Criminal trespass is also not a lesser included offense of burglary, even though closely related. *State v. Ocheltree*, Syl. Pt. 2, 289 S.E.2d 742 (W.Va. 1982).

As such, it is clear that the State has failed to rebut the clear directives of *Wilkerson* in its attempt to shoehorn simple assault as a lesser included offense of malicious assault, which is likely why it asks this Court to overrule *Wilkerson*.

II. <u>The Court should decline the State's invitation to overrule *Wilkerson* as that case sets forth a fair, equitable, and workable method to determine the propriety of lesser included offense instructions.</u>

The State next asks this Court to overturn its well-reasoned opinion in *Wilkerson* issued less than three years ago. Response at 5. The State argues that this Court should adopt the minority test and look at the facts of each case to determine the propriety of a lesser included offense instruction, without providing any argument as to why this Court was incorrect such a short time ago, or why the minority jurisdictions have a better rule than West Virginia.

The State's argument would also cause due process concerns because the indictment in this matter, A.R. at 5, did not place Mr. Henning on notice that he should appear in court with a defense as to whether he "put [the alleged victim] in fear for her life...." Response at 5; *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...). In this case, nowhere in the indictment is it charged that Mr. Henning placed the alleged victim in any type of fear, reasonable or otherwise. A.R. at 5. As discussed in *Wilkerson*, a battery can occur when a victim has his or her head turned, is sleeping, is unconscious, or is otherwise unsuspecting.

These are all very real and all too common methods of battery, murder, and rape and holding as such is not simply "dream[ing] up a scenario" or otherwise engaging in wild hypotheticals. Response at 5. It is simply not proper to infer reasonable fear from the language of this indictment.

Further, it is clear from the facts of this case that prior to the injury, Mr. Henning was threatening to cut the car tires if the alleged victim did not stop the car. A.R. at 106. It is possible that such an act did place the alleged victim in fear, however that was prior to the injury to her hand and was not the conduct for which Mr. Henning was indicted. It is very possible that the jury used this unindicted conduct to improperly convict Mr. Henning.

Throughout the trial, there was testimony of illegal drug use, illegal drug delivery, conspiracy, intoxicated driving, perjury, speeding, and other traffic offenses. The State's argument would lead to the unfathomable conclusion that any activity which comes forward at trial should be part of a lesser included offense instruction, and distract a jury from the conduct which is particularly charged in the indictment.

The State further notes that "[t]here is also evidence that the Petitioner stabbed the victim in the hand with a knife." Response at 5. Likewise, there was no evidence which showed that Mr. Henning attempted, yet failed to stab the alleged victim. Even under the State's new "facts as it pertains to each case" standard, no assault instruction related to attempt should have been given. *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, it was clear that the alleged victim was cut with a knife, and as such no failed attempted battery occurred.

For these reasons, the Court should reaffirm its holding in *Wilkerson*, or in the alternative, apply any modification prospectively to avoid *ex post facto* concerns.

CONCLUSION

For the reasons above and those contained in the Petitioner's brief previously submitted, the Petitioner respectfully requests that this Court reverse the underlying conviction in the Circuit Court of Harrison County with directions to enter a verdict of acquittal.

Respectfully submitted,

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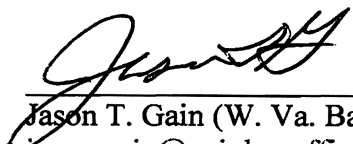
CERTIFICATE OF SERVICE

I certify that I have caused a copy of this Petitioner's "Reply Brief" to be placed in the United States mail, first-class, postage prepaid to Nic Dalton, Counsel for the Respondent, West Virginia Office of the Attorney General, 812 Quarrier Street, 6th Floor, Charleston, WV 25301 on this 23rd day of February, 2016.



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