IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia, Plaintiff Below,

Respondent,

vs. **Docket No. 15-0931**

Leonard C. Lewis , Defendant Below,

Petitioner.

PETITIONER'S REPLY BRIEF IN SUPPORT OF APPEAL

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1. The State's Response does not justify denial of relief to Petitioner in this case.

2. The State asserts on page 16 of its Response that Petitioner does not contest the trial court's finding that a prior act of violence occurred on or about February 15, 2011 (evidence of which was admitted under Rule 404). However, Petitioner does contest that finding. Although Defendant was convicted of a Domestic Battery arising from the February 15, 2011 allegations, he asserts he only plead to the charge after being misled by counsel.

3. The State suggests on page 20 of its Response that Petitioner does not assert how he was surprised or hampered in the presentation of his defense by the admission of the Facebook page itself. But as explained by Petitioner on page 26 of his Brief:

> [D]isclosing a purported bloody Facebook printout a week prior to trial hampered the presentation and preparation of the Defendant's case. Whether there was blood on the document and whose blood it may have been were undoubtedly material facts in the case. The defense may have been able to secure DNA testing and evidence establishing that the substance was not blood or it was a third party's blood, which would have totally destroyed the State's case. The late disclosure prevented the defense from doing so.
>
> The trial court's ruling – that the document could be admitted evidence but that no reference could be made to the alleged blood – did not alleviate the harm done by the State's late disclosure because the jury was left to assume the substance was blood. The trial court compounded the problem and committed reversible and prejudicial error by not granting Motion for Mistrial during the direct examination testimony of Ms. Thomas who offered testimony about her blood on the Facebook note in violation of the court's earlier ruling.

4. The State argues on page 23 of its Response that the fact that Ms. Thomas's injuries were not life-threatening is irrelevant because serious bodily injury is not an element of Attempted Murder. However, the State acknowledges that "specific intent to kill" is a required element of Attempted Murder. If the State's theory that Petitioner essentially held Ms. Thomas hostage for several hours is to be believed, then Petitioner had every opportunity to kill or inflict life-threatening injuries upon her if he intended to kill her. But he did not do so.

Instead, he took her to the hospital – dispositive proof in rebuttal the State's theory that he intended to kill Ms. Thomas.

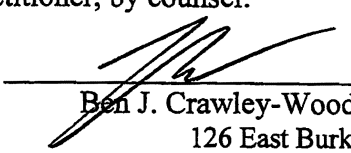
5. The State's Response arguing that lack of life-threatening injuries is "irrelevant" also appears inherently contradictory, considering its argument on page 27 of its Response that the "kidnapping" was not incidental to the other alleged crimes, in part because "Ms. Thomas was exposed to an increased risk of death due to lack of medical attention", and "Ms. Thomas may have died." But again, the State failed to establish that Ms. Thomas's injuries were life-threatening, so its argument is unpersuasive.
6. The State's argument regarding the distance Ms. Thomas was "forced to move" under the *State v. Miller* factors, suggesting Petitioner should be penalized for taking Ms. Thomas to the hospital in Washington, D.C., is also unpersuasive. (See page 27 of State's Response.) There was no testimony that Ms. Thomas was forced to go to the hospital. And as a matter of public policy, defendants should not be held accountable for additional allegations of heightened criminal conduct (*i.e.* kidnapping) as a result of seeking medical treatment for victims.
7. The State argues on page 30 of its Response that "Petitioner offers no proof in the record" to support his assertion that the Assistant Prosecuting Attorney "made any racist remarks" and "offers no legal basis that trials should be recorded in some manner other than by court reporter." How about in order to provide proof in the record of what happened at trial fully and accurately (not subject to human error) such that racist remarks, if made, do not go undetected? Interestingly, Rule 17(d) of the West Virginia Rules of Criminal Procedure entitled "Record of Jury Trial" provides in pertinent part: "Every jury trial shall be recorded

electronically by a magistrate." Why should this same protection not be afforded at the circuit court level?

8. The State argues in its Response on pages 34-35 that the Petitioner cannot demonstrate prejudice from the trial court's question to the jury near the end of day three of the trial, regarding whether anyone had a spouse that was going to "beat them up or anything." App. p. 837. The prejudice from such a judicial comment is plain and clear though (in light of the allegations of domestic violence within the case), including the fact that Petitioner was improperly convicted of crimes. As discussed in Petitioner's brief, it seems clear the jury had an unfortunate misapprehension about the law and proof of elements required regarding attempted first degree murder and kidnapping, and thus, may have improperly convicted Petitioner even in the absence of the impermissible "joke" from the bench. However, the judge's comment endorsing the State's theory likely sealed the deal on the improper convictions.

For all these reasons and those discussed in his initial brief, Petitioner is entitled to relief, and requests this Supreme Court grant him judgment of acquittal and dismiss with prejudice the counts of attempted murder in the first degree and kidnapping, or grant him a new trial on all counts, or at the very least in the interests of justice, direct resentencing under the lesser included statutory sentences for kidnapping.

Petitioner, by counsel:



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CERTIFICATE OF SERVICE

I, Ben Crawley-Woods, counsel for Petitioner did serve the foregoing Petitioner's Reply Brief by mailing a copy of the same first class, to the following persons at the following address, on this 19th day of April, 2016:

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