IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2004 Term

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No. 31585

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FILED
June 30, 2004
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee

v.

JASON H.,
Defendant Below, Appellant

Appeal from the Circuit Court of McDowell County
Honorable Rudolph J. Murensky, II, Judge
Case No. 01-JD-68

AFFIRMED

Submitted: May 25, 2004
Filed: June 30, 2004

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The Opinion of the Court was delivered PER CURIAM.
CHIEF JUSTICE MAYNARD and JUSTICE DAVIS dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect." Syl. pt. 2, *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 470 S.E.2d 162 (1996).

2. "A motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion." Syl. pt. 2, *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979).

3. "A party moving for a continuance due to the unavailability of a witness must show: (1) the materiality and importance of the witness to the issues to be tried; (2) due diligence in an attempt to procure the attendance of the witness; (3) that a good possibility exists that the testimony will be secured at some later date; and (4) that the postponement would not be likely to cause an unreasonable delay or disruption in the orderly process of justice." Syl. pt. 4, *State v. McCallister*, 178 W.Va. 77, 357 S.E.2d 759 (1987).

Per Curiam:

This case is before this Court upon the July 31, 2002, order of the Circuit Court of McDowell County, West Virginia, finding the appellant, Jason H., guilty of malicious assault and adjudicating him to be a juvenile delinquent within the meaning of *W.Va. Code*, 49-1-4 [1998].[1] As a result, the Circuit Court, by order entered on April 7, 2003, directed that the appellant be confined at the Industrial Home for Youth in Salem, West Virginia, for a period of 2 to 10 years or until the appellant reaches the age of 21, whichever comes first. In addition, the appellant was ordered to pay $30,160.93 in restitution.

The finding of malicious assault arose from an incident wherein the appellant repeatedly struck an individual by the name of Billy Atwell (age 18) with a baseball bat. According to the appellant, Atwell was an intruder in the appellant's home, and the appellant's actions were taken in defense of himself and others on the premises. In that regard, the appellant contends that the Circuit Court committed error by failing to apply the correct standard of self-defense where an intruder is present in the home. In addition, the appellant contends that the Circuit Court abused its discretion in denying his motion for a continuance of the adjudicatory hearing based upon the absence of an eyewitness who

[1]The phrase "juvenile delinquent" is defined in *W.Va. Code*, 49-1-4(8) [1998], as a juvenile "who has been adjudicated as one who commits an act which would be a crime under state law or a municipal ordinance if committed by an adult." Malicious assault is a felony offense in West Virginia pursuant to *W.Va. Code*, 61-2-9 [1978].

allegedly would have confirmed the appellant's version of the events. Based upon those contentions, the appellant asks this Court to reverse the adjudication of delinquency.

This Court has before it the petition for appeal, all matters of record and the briefs and argument of counsel. For the reasons stated below, this Court is of the opinion that the contentions of the appellant are without merit. Accordingly, the orders of the Circuit Court of McDowell County, entered on July 31, 2002, and April 7, 2003, are affirmed.

I.
FACTUAL BACKGROUND

In October 2000, the appellant, Jason H., age 17, was living in a house in the Town of Iaeger in McDowell County. Living with him was his girlfriend, Drema M.,[2] age 17, and her 10 month-old infant son. The appellant's acquaintances included Billy Atwell, age 18, whom he had known since the 5th grade. The two often socialized together and, in the words of the appellant, were "best friends." The evidence of the appellant and the evidence of Atwell coincide up to this point. Thereafter, there is a sharp conflict with regard to the incident in question.

[2]This Court follows its past practice and shall refer to the last names of the underage individuals herein by initials only. *In the Matter of Jonathan P.*, 182 W.Va. 302, 303 n. 1, 387 S.E.2d 537, 538 n. 1 (1989).

According to the appellant, his friendship with Atwell ended because of a dispute over a guitar amplifier, a $90 loan he made to Atwell, and the appellant's suspicion that Atwell had vandalized his home. On the evening of October 31, 2000, the appellant, Drema M. and her infant son were in the appellant's home when Atwell suddenly punched through a plywood panel on the door, reached through and unlocked the dead-bolt and entered. Atwell then swung his fist at the appellant but missed and hit Drema M., causing her to drop the infant. At that point, the appellant grabbed a baseball bat and began striking Atwell. In the meantime, Atwell reached behind himself as if trying to draw a weapon. The appellant never saw a weapon, however, and Atwell was struck with the bat 8 to 10 times.[3] The appellant testified that, during the incident, he feared for his life and for the life of Drema M., especially since Atwell was known to carry various weapons on his person.

On the other hand, Atwell indicated that it was not unusual for him to visit the appellant and that, on October 31, 2000, the appellant specifically invited him to enter the

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[3]With regard to the existence of a weapon, the appellant's testimony was contradictory. As the appellant testified during the adjudicatory hearing:

> [Atwell] reached behind his back like he was getting ready to pull something. 'Cause like I said, I didn't know if he was going to pull a gun or knife or what, and when he did he said, I've got something for you. He was pissed off and he pulled out a knife and that's when I hit him with the bat.

Later during the adjudicatory hearing, the appellant denied seeing Atwell with a knife or any other weapon.

home. Drema M. and her infant son were present, and Atwell and the appellant talked for about 45 minutes. The appellant then made a sudden, unprovoked attack upon Atwell and struck him with the baseball bat 10 to 20 times, initially striking Atwell in the back of the head. Atwell lost consciousness. When he regained consciousness, he was still in the home, law enforcement officers were present, and an ambulance was arriving.

As the appellant acknowledged after viewing a post-incident videotape made by Atwell's father, most of Atwell's injuries from the beating were to the back of his head and to his back.[4] Specifically, Atwell was transported to Welch Emergency Hospital in McDowell County where he received stitches to the back and top of his head. Soon after, he underwent surgery at Charleston Area Medical Center in Kanawha County for a brain hemorrhage. Atwell received continued medical treatment for the back injury.

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[4]During the adjudicatory hearing, the appellant testified as follows:

> Q. You, of course, watched the videotape that we saw just here a few minutes ago?
>
> A. Right.
>
> Q. Would you agree with me that most of the injuries that Mr. Atwell had are to the back of his head or to his back side? To his back?
>
> A. Yes, sir.

II.
PROCEDURAL HISTORY

A petition was filed in the Circuit Court of McDowell County, West Virginia, charging the appellant, Jason H., with malicious assault and asking the Court to adjudicate him a juvenile delinquent. *W.Va. Code*, 61-2-9 [1978]; *W.Va. Code*, 49-1-4(8) [1998]. Subsequently, on December 11, 2001, the Circuit Court appointed the McDowell County Public Defender to represent the appellant.

On July 24, 2002, an adjudicatory hearing was conducted, without a jury, in the Circuit Court. *W.Va. Code*, 49-5-11 [1998]. Counsel for the appellant moved for a continuance upon the ground that Drema M., a material witness, had not been located. The Circuit Court denied the motion, indicating that the appellant had not made a showing that Drema M. would ever be located. As the adjudicatory hearing proceeded, Atwell and the appellant testified and described the events of October 31, 2000, as set forth above. Billy Atwell's father testified with regard to his son's injuries. At the conclusion of the hearing, the Circuit Court found the appellant guilty of malicious assault. That ruling and the determination of juvenile delinquency were reflected in the order of the Circuit Court subsequently entered on July 31, 2002.

It should be noted that, at the adjudicatory hearing, the appellant relied upon self-defense in justification of his striking of Atwell. Specifically, the appellant testified, as

stated above, that during the incident he feared for his life and for the life of Drema M. In that regard, the Circuit Court cited this State's general rule on self-defense as set forth in *State v. Baker*, 177 W.Va. 769, 356 S.E.2d 862 (1987). As syllabus point 1 of *Baker* states: "The amount of force that can be used in self-defense is that normally one can return deadly force only if he reasonably believes that the assailant is about to inflict death or serious bodily harm; otherwise, where he is threatened only with non-deadly force, he may use only non-deadly force in return." Nevertheless, the Circuit Court rejected the appellant's assertion of self-defense in this case. In particular, the Circuit Court determined that: (1) there was no credible evidence that the appellant believed he was going to receive serious bodily harm from Atwell and (2) the appellant, out of anger, severely beat Atwell. As the Circuit Court observed:

> There were strikes all over him, there were stitches down the back of his head; Billy Atwell was severely beaten. * * * And, to a certain extent, [Jason H.] may have been justified in striking him one time, but he used far more force than was necessary to subdue [Atwell]; he beat him senseless.

A dispositional hearing was conducted on September 4, 2002, at which time the appellant was ordered confined at the Industrial Home for Youth for a period of 2 to 10 years or until the appellant reaches the age of 21, whichever comes first. *W.Va. Code*, 49-5-13 [2002]. In addition, the appellant was directed to pay $30,160.93 in restitution. The Circuit Court stated that the basis of the sentence was "the severity of the crime" and "the

lack of remorse." Pursuant to the order of April 7, 2003, the appellant was re-sentenced in the same manner in order to renew the period of appeal to this Court.

III.
DISCUSSION

Asking this Court to reverse the findings of malicious assault and delinquency, the appellant contends that the Circuit Court committed error by failing to apply the correct standard of self-defense where an intruder is present in the home. As stated above, the Circuit Court cited *State v. Baker*, *supra*, which holds that the amount of force that can be used in self-defense is that a person can return deadly force only if he or she reasonably believes that the assailant is about to inflict "death or serious bodily harm." According to the appellant, the correct standard which the Circuit Court should have applied is a modification of the general self-defense rule and is specific to occupants facing an intruder in the home. That standard is reflected in syllabus point 2 of *State v. W.J.B.*, 166 W.Va. 602, 276 S.E.2d 550 (1981), which holds:

> The occupant of a dwelling is not limited in using deadly force against an unlawful intruder to the situation where the occupant is threatened with serious bodily injury or death, but he may use deadly force if the unlawful intruder threatens imminent physical violence or the commission of a felony and the occupant reasonably believes deadly force is necessary.

The appellant's contention in that regard, however, is somewhat deprived of significance because, in this case, the transcript of the adjudicatory hearing contains ample

testimony to the effect that the appellant was, in fact, threatened with serious bodily injury or death by Atwell. Specifically, the evidence of the appellant indicated that Atwell, who was known to carry various weapons on his person, was reaching behind himself as if trying to draw a weapon out. The appellant stated that he, therefore, feared for his life and for the life of Drema M., and, as a result, he returned the threat with deadly force. Thus, to that extent, the standards set forth in *Baker* and *W.J.B.* are the same, and the appellant was not prejudiced by the Circuit Court's reliance upon the *Baker* case.

The issue, however, concerns the Circuit Court's factual determination that there was no credible evidence that the appellant believed he was going to receive serious bodily harm from Atwell. That determination makes relevant the remainder of the *W.J.B.* standard, that the occupant may use deadly force "if the unlawful intruder threatens imminent physical violence or the commission of a felony [.]"

The *Baker* case, cited by the Circuit Court, involved a female defendant who shot and killed an assailant in a bar. The defendant operated the bar and lived in the basement thereof with another individual. In *Baker*, this Court held that the defendant was entitled to an acquittal based upon self-defense as a matter of law. Although the opinion in *W.J.B.* was cited by the defendant, this Court noted, in *Baker*, that, inasmuch as the defendant

did not assert that her standing, in terms of self-defense, was comparable to that of an occupant of a home, such issue would not be addressed by this Court.[5]

Similarly, the appellant never raised the self-defense standard concerning the occupant of a home or dwelling during any of the proceedings below. There is no reference in the record to the *W.J.B.* case. Moreover, there was no objection to the Circuit Court's reliance on *State v. Baker*. The appellant raises this issue for the first time upon appeal to this Court.

Syllabus point 2 of *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 470 S.E.2d 162 (1996), holds: "To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect." Syl. pt. 10, *State v. Shrewsbury*, 213 W.Va. 327, 582 S.E.2d 774 (2003); syl. pt. 1, *Miller v. Triplett*, 203 W.Va. 351, 507 S.E.2d 714 (1998); syl. pt. 2, *State v. Craft*, 200 W.Va. 496, 490 S.E.2d 315 (1997). *See also*, syl. pt. 6, *In re Michael Ray T.*, 206 W.Va. 434, 525 S.E.2d 315 (1999), stating that "[t]he responsibility and burden of designating the record is on the parties, and appellate review must be limited to those issues which appear in the record presented to this Court."

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[5]Footnote 2 of *Baker* states: "The defendant did not urge below nor on appeal that as the co-owner of the bar she had a special standing to utilize self-defense similar to the occupant of a home. * * * As a consequence, we do not address this aspect of the self-defense rule." 177 W.Va. at 771 n. 2, 356 S.E.2d at 864 n. 2.

Consequently, inasmuch as the issue now asserted by the appellant concerning self-defense was not raised below or made a part of the record before the Circuit Court, it is not properly before this Court and is, accordingly, without merit.

In addition, the appellant contends that the Circuit Court abused its discretion in denying his motion for a continuance of the adjudicatory hearing based upon the absence of Drema M., an eyewitness who allegedly would have confirmed the appellant's version of the events of October 31, 2000. The appellant's counsel told the Circuit Court that he and his investigator tried to locate Drema M. but were unsuccessful. Indicating that the appellant had not made a showing that the whereabouts of Drema M. would ever be determined, the Circuit Court denied the motion.

In syllabus point 2 of *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979), this Court held: "A motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion." Syl. pt. 3, *In re Mark M.*, 201 W.Va. 265, 496 S.E.2d 215 (1997); syl. pt. 3, *State v. Bonham*, 184 W.Va. 555, 401 S.E.2d 901 (1990); syl. pt. 2, *State v. Catlett*, 180 W.Va. 447, 376 S.E.2d 834 (1988). Moreover, as *Bush* states in syllabus point 3: "Whether there has been an abuse of discretion in denying a continuance must be decided on a case-by-case basis in light of the factual circumstances presented, particularly the

reasons for the continuance that were presented to the trial court at the time the request was denied." Syl. pt. 7, *State v. Brown*, 210 W.Va. 14, 552 S.E.2d 390 (2001).

More specifically, in *State v. McCallister*, 178 W.Va. 77, 357 S.E.2d 759 (1987), this Court addressed the requirements for a continuance where a witness is unavailable. As syllabus point 4 of *McCallister* holds:

> A party moving for a continuance due to the unavailability of a witness must show: (1) the materiality and importance of the witness to the issues to be tried; (2) due diligence in an attempt to procure the attendance of the witness; (3) that a good possibility exists that the testimony will be secured at some later date; and (4) that the postponement would not be likely to cause an unreasonable delay or disruption in the orderly process of justice.

Syl. pt. 3, *State v. Snider*, 196 W.Va. 513, 474 S.E.2d 180 (1996); syl. pt. 4, *State v. Cole*, 180 W.Va. 412, 376 S.E.2d 618 (1988).

In the case now to be determined, no subpoena to secure the attendance of Drema M. at the adjudicatory hearing, directed to her last known address or otherwise, was requested by the appellant. Nor, at the time the motion for a continuance was made, did the appellant submit to the Circuit Court any affidavits or testimony concerning his efforts to locate her. Nor did counsel for the appellant made a proffer on the record as to what her testimony would be. Inasmuch as the time between the appointment of counsel for the appellant in December 2001 and the adjudicatory hearing in July 2002 involved a number

of months within which Drema M. was not located, the appellant should have provided the Circuit Court with a more thorough basis for the motion to continue, as contemplated under *McCallister*, rather than simply asking for more time.

Accordingly, this Court is of the opinion that the Circuit Court's denial of the motion to continue was "protected by the parameters of sound discretion." *Parker v. Knowlton Construction Company*, 158 W.Va. 314, 329, 210 S.E.2d 918, 927 (1975).

IV.
CONCLUSION

Upon all of the above, the orders of the Circuit Court of McDowell County, West Virginia, entered on July 31, 2002, and April 7, 2003, are affirmed.

Affirmed.