# STATE OF WEST VIRGINIA
# SUPREME COURT OF APPEALS

**State of West Virginia**,
**Plaintiff Below, Respondent**

**vs) No. 11-0644** (Mercer County 10-F-335)

**Tiffany Lynn Justice,**
**Defendant Below, Petitioner**

**FILED**
**June 22, 2012**
**RORY L. PERRY II, CLERK**
**SUPREME COURT OF APPEALS**
**OF WEST VIRGINIA**

## MEMORANDUM DECISION

Petitioner Tiffany Lynn Justice appeals from the Mercer County Circuit Court's order dated March 15, 2011, denying her motion for a new trial and imposing consecutive sentences of two to ten years for her malicious assault conviction and one to five years in the penitentiary for her conspiracy conviction. The trial court suspended the sentence for malicious assault and ordered that petitioner be placed on probation for five years upon completion of her sentence for conspiracy. Petitioner is represented on appeal by her counsel Joseph T. Harvey, and respondent State of West Virginia is represented by its counsel Jacob Morgenstern.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

On August 26, 2009, Rachel Duncan was sitting in her car while waiting for her child to get out of school. Ms. Duncan and eyewitnesses state that petitioner and her two accomplices, Marsha Rakes (petitioner's mother) and Charissa Reinschild (petitioner's friend), came speeding up in a vehicle, which they stopped and exited, after which the three women began to physically assault Ms. Duncan, including beating her with a wooden stick.[1] An eyewitness telephoned the Princeton Police Department and ran over to the scene yelling that the police were coming. Petitioner and her accomplices then drove off in their vehicle with one of them indicating that they were going to the police. Soon thereafter, petitioner's vehicle was stopped by Sergeant W.J. Gilley of the Princeton

[1] There was testimony at petitioner's trial that Ms. Duncan had also been stabbed with an object, which could have been a ball point pen or a small corkscrew. Although Ms. Duncan gave the police a corkscrew that she believed was used in the attack upon her, there was apparently no forensic testing performed on the corkscrew, nor was a ball point pen ever recovered.

Police Department. Petitioner and her accomplices were then taken to the police department where petitioner waived her *Miranda* rights and gave several versions of the incident, including versions where the victim was the initial aggressor. Ultimately, however, petitioner stated that she wanted to teach the victim a lesson, so she followed the victim to the school where she attacked her, including hitting her several times with a wooden stick and punching her several times with a big ring that she [petitioner] wears. At the time of the assault, the victim had been dating petitioner's ex-husband.

Petitioner, Ms. Rakes, and Ms. Reinschild were indicted on one count of malicious assault in violation of West Virginia Code §61-2-9 and one count of conspiracy in violation of West Virginia Code §61-10-31. Petitioner went to trial on these charges and the jury found her guilty of both the malicious assault and the conspiracy. Petitioner's motion for a new trial was denied.

**Jury Instructions**

On appeal, petitioner asserts that she was denied her constitutional right to due process and a fair trial when the trial court refused to give a jury instruction on mutual combat. Petitioner asserts that both she and the victim had been engaged in mutual threats against one another over the internet for an extended period of time prior to the incident in question. Petitioner argues that the trial court's refusal to give her mutual combat instruction prevented her from explaining to the jury her defense theory, i.e., a situation where two persons meet in a fight and consent to a certain amount of contact.

In refusing to give petitioner's mutual combat instruction, the trial court stated, in part, that the mutual combat instruction essentially placed some burden of proof on petitioner when she had no burden, and that the self-defense jury instruction adequately covered petitioner's theory. The trial court instructed the jury on self-defense, as follows:

> If the defendant was not the aggressor, and had reasonable grounds to believe and actually did believe that she was in imminent danger of bodily harm from which she could save herself by using reasonable force against her assailant, she had the right to employ reasonable force in order to defend herself.
>
> In order for the defendant to have been justified in the use of reasonable force in self-defense, she must not have provoked the assault on him or her or have been the aggressor. Mere words, without more, do not constitute provocation or aggression.
>
> In general, the right of self-defense cannot be successfully invoked by an aggressor or one who provoke[s] an altercation, unless he or she in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action.
>
> The circumstances under which she acted must have been such as to produce in the mind of a reasonably prudent person, similarly situated, the reasonable belief

> that the other person was then about to do her bodily harm. In addition, the defendant must have actually believed that she was in imminent danger of bodily harm and that reasonable force must be used to repel it.
>
> If evidence of self-defense is present, the State of West Virginia must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find that the State has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty. In other words, if you have a reasonable doubt whether or not the defendant acted in self-defense, your verdict must be not guilty.

Petitioner also asserts that she was denied her constitutional right to due process and a fair trial when the trial court gave the following jury instruction on flight:

> The Court instructs the jury that evidence of flight by the defendant is competent, along with other facts and circumstances on the defendant's guilt, but the jury should consider any evidence of flight with caution since such evidence has only a slight tendency to prove guilt.
>
> The jury is further instructed that the farther away the flight is from the time of the alleged commission of the offense the less weight it will be entitled to, and the circumstances should be cautiously considered since flight may be attributed to a number of reasons other than consciousness of guilt.

Petitioner contends that the testimony of multiple witnesses at trial, including her own testimony, demonstrated that she was headed to the State Police when she left the scene of her altercation with the victim, which was an explanation for her departure, other than fleeing.

"As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*." Syl. Pt. 1, *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996). Further, "'[a] trial court . . . 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. 1, in part, *State v. Kendall*, 219 W.Va. 686, 639 S.E.2d 778 (2006). Under these standards and based upon our review of the appendix record, we find no error in the trial court's refusal to instruct the jury on mutual combat nor in its giving of the jury instruction on flight.

**Sentencing**

Petitioner argues that the sentence imposed upon her by the trial court is disproportionate to the character and degree of the offenses involved and to the sentence given to Ms. Reinschild, who

received one year in jail following her guilty plea to battery, a misdemeanor. Petitioner asserts that her presentence report did not reveal a substantial risk that she would commit another crime, particularly since her only other criminal offense was a no contest plea to battery in 1998.

This Court 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). "Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982). Here, the sentences imposed are within statutory limits. The trial court noted in its order dated March 15, 2011, that there was a substantial risk that petitioner would commit another crime during a period of probation or conditional discharge, that probation or conditional discharge would unduly depreciate the seriousness of her crime, and that the public good would be served by imposing a sentence of incarceration specified by statute. Upon a review of the record and the parties' arguments, we find neither error nor an abuse of discretion in sentencing.

**Sufficiency of the Evidence**

Petitioner asserts that there was insufficient evidence to show beyond a reasonable doubt that she committed either malicious assault or conspiracy. Petitioner notes that eyewitnesses did not know who started the fight nor who had the wooden stick first. Petitioner adds that codefendant Reinschild (who testified for the State per her plea agreement) and codefendant Rakes (petitioner's mother) each testified that the victim instigated the fight with the stick. Regarding the conspiracy, petitioner asserts that no witness testified about a plan amongst the codefendants to commit the offense of malicious wounding upon the victim.

In reviewing a defendant's challenge to the sufficiency of the evidence to convict, we have stated, as follows:

> "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).

Syl. Pt. 1, *State v. Juntilla*, 227 W.Va. 492, 711 S.E.2d 562 (2011). We have also stated that

> "[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." Syl. pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 2, *State v. McFarland*, 228 W.Va. 492, 721 S.E.2d 62 (2011). Having applied these standards to our review of the evidence adduced at trial, as set forth in the appendix record, we find that there was sufficient evidence to support petitioner's convictions.

For the foregoing reasons, we affirm.

Affirmed.

**ISSUED:** June 22, 2012

**CONCURRED IN BY:**

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh