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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 19-0142

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff below, Respondent,

v.

MARK A. WILSON, JR.,

Defendant below, Petitioner.

RESPONSE BRIEF
OF THE STATE OF WEST VIRGINIA

Appeal from a January 22, 2019 Sentencing Order
Circuit Court of Harrison County
Case No. 18-F-241

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RESPONSE BRIEF OF THE STATE OF WEST VIRGINIA

The State of West Virginia, Respondent, by counsel, Assistant Attorney General Holly M. Flanigan,[1] respectfully responds to Petitioner's Brief. This Court should affirm the January 22, 2019 Amended Sentencing Order of the Circuit Court of Harrison County, West Virginia, because the trial court's giving of a flight instruction and its refusal to instruct on a lesser included offense were appropriate decisions and do not warrant a new trial, as Petitioner contends.

I. ASSIGNMENTS OF ERROR

Mark A. Wilson Jr., ("Petitioner"), by counsel, advances two assignments of error in this appeal. Pursuant to Rule 10(d) of the West Virginia Revised Rules of Appellate Procedure, the assignments of error are not restated here but will be addressed below.

II. STATEMENT OF THE CASE

A. Petitioner fled from Trooper Jones on a high speed chase over roads, people's yards, and fields, which ended when Petitioner abandoned his damaged truck and fled from the scene on foot.

On October 8, 2017, Trooper Jones was traveling on the interstate and noticed Petitioner driving a truck with a DOH license plate. Appendix Record "AR" 119.[2] Trooper Jones pulled up

[1] The Respondent's Brief is substantially the work product of Michael McDonald, a rising second-year student at The Ohio State University Moritz College of Law who served an internship with the Office of the Attorney General during the summer of 2019. Mr. McDonald prepared this Respondent's Brief with the advice and supervision of the undersigned counsel and other lawyers in the Attorney General's Appellate Division.

[2] "Appendix Record" refers to the Appendix Petitioner filed with his appellate brief. It will be hereinafter referenced as "AR" followed by the page(s) being cited.

next to the truck and saw Petitioner pull his hood over his head. AR 118. The DOH plates did not look like they belonged on the old, multicolored, civilian truck, so Trooper Jones ran the plates through his dispatch, and he found no record of them. AR 119-20. Trooper Jones initiated his lights to stop the truck, but upon exiting the interstate and coming to a stop sign, Petitioner turned right and accelerated. AR 119. Trooper Jones activated his sirens, but the vehicle refused to stop. *Id.* Trooper Jones called into his supervisors for permission to pursue the vehicle. AR 121. Because this was so early on in the chase, Trooper Jones said there was only minimal danger to himself and road traffic "at that point," and was allowed to pursue. *Id.* After Trooper Jones called in, however, Petitioner initiated a prolonged series of driving violations until Petitioner ultimately abandoned the truck. AR 119.

First, Petitioner made an improper passing over a double-line, followed by driving at a speed of 70 miles per hour in an area posted at 55 miles per hour. AR 120-21. According to Trooper Jones, Petitioner continued to drive left-of-center multiple times, at one point almost hitting a street sweeper. AR 122. Petitioner whipped back into his lane before an accident occurred; the street sweeper was unable to swerve, because there was nowhere for it to go. AR 122, 142. Petitioner continued to drive well over the speed limit, reaching 70 miles per hour in a 45 zone. AR 122.

While being pursued, Petitioner turned off the road completely, barreling through a person's yard. *Id.* Petitioner then drove back on the road and continued to swerve back and forth across lanes, traveling more than double the speed limit in a 25 mile per hour zone, and blowing through at least two stop signs. AR 122-23. All the while, Petitioner improperly left his blinker on from the time he had first exited the interstate. AR 142. During Trooper Jones' pursuit, civilian traffic, often coming in the opposite direction, pulled over onto the side of the road to avoid getting hit. AR 129. There was traffic on every road Petitioner drove on except for one, Joy Lane. AR 138.

Trooper Jones recounts that Petitioner was "driving recklessly in manner" and eventually burst through a gate fencing off a gravel road, and in the process, spun gravel out all over the side of the trooper's vehicle, causing damage. AR 123-24. Petitioner then drove off the gravel road into a field filled with horses, all of which he missed, before driving into a ravine. AR 124. Petitioner next attempted to ram through a second fence, but the fence held up, so Petitioner backed up and repeatedly rammed into the fence trying to burst it open. *Id.* By this point, several police officers had joined the pursuit. AR 129. Trooper Jones and many other officers exited their vehicles to apprehend Petitioner. AR 133, 251. However, Petitioner broke through the fence and continued his flight, so Trooper Jones returned to his vehicle. AR 124. Petitioner busted through a few more fences. *Id.* At this point, Trooper Jones completely lost sight of Petitioner. *Id.*

Eventually, Trooper Jones found Petitioner's truck, but when he did, the vehicle was abandoned, heavily damaged, and hot to the touch. *Id.* Petitioner had abandoned the truck in a field and fled from the sight on foot. AR 124, 351. The truck had approximately 300 feet of the high tensile fencing wrapped around it, and the vehicle was completely covered in mud. AR 133. A wrecker company eventually towed the truck. AR 125. When asked if Petitioner left main roads to try get far away from other individuals, Trooper Jones instead stated that Petitioner "was attempting to get away from [him]." AR 144. A search around the vehicle revealed Petitioner's wallet on the ground approximately 20 feet from the truck. AR 130, 132. The wallet held Petitioner's identification, an envelope with his address, and his cell phone. AR 130. According to the truck's VIN number, Petitioner registered the truck. AR 134.

Days later, Petitioner, a registered sex offender, reported to the State Police Detachment to update his registry. *Id.* One of the troopers there recognized Petitioner's truck, and called Trooper Jones, telling him that Petitioner was there. AR 134-35. Trooper Jones came to talk to him. *Id.* Petitioner declined to give a statement but then asked "if his father would pay for the damages,

could this just go away?" AR 135-36. Also, Petitioner claimed that the plates were not stolen, but found on a truck behind his father's house. AR 136. Trooper Jones also recalled that Petitioner had a black-eye and was completely covered with scratches and scrapes as if he had just ran through woods or briars. AR 137.

Petitioner was charged by indictment with Fleeing in a Vehicle with Reckless Indifference to the Safety of Others, Felony Destruction of Property, and Misdemeanor Destruction of Property. AR 207-09. Prior to trial, the circuit court dismissed both destruction of property charges without prejudice. AR 60.

B. Petitioner argued that his vehicular flight did not involve "reckless indifference to the safety of others," because his traffic violations were occasionally interspersed with some correct driving practices.

Petitioner's theory of defense at trial admitted flight, but disputed the element of "reckless indifference to the safety of others." AR 163-64. Petitioner asked the jury to concentrate on his conduct during the chase that demonstrated appropriate driving practices. For example, even though he improperly left his turn signal on, Petitioner states that he was using it correctly at times. AR 113. Also, Petitioner emphasizes that he slowed down for oncoming traffic, and avoided main roads, while driving on back roads and horse fields. *Id.* In his closing statement, Petitioner argued that while his driving may have been reckless, the evidence showed it was not with indifference to the safety of others. AR 163-64.

In regard to the jury instructions, Petitioner argued to the court that a lesser included offense instruction was warranted, and that the lesser included offense "would be regular fleeing without reckless indifference to others." AR 149. The trial court ruled in favor of the State, finding that there was no factual basis for the lesser included offense based upon the evidence presented at trial. *Id.*

C. Petitioner objected to the flight instruction because he alleges that the flight on foot from the damaged vehicle is simply a continuation of the first flight in which he was driving away from the troopers.

Prior to closing arguments, the court considered instructions to be included in its charge to the jury. The State offered a flight instruction, which stated:

> 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 such 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 the consciousness of guilt.

AR 158-59 (emphasis added). The State argued that the instruction was proper because Petitioner left the scene of the crime when he abandoned his damaged truck and fled after Trooper Jones had lost sight of him. AR 147. Petitioner objected, having issue because the indictment charged Petitioner with fleeing. AR 147-48. Ultimately, the State moved to withdraw the instruction, but the trial court denied the motion finding it both proper and favorable to the defendant, and the instruction was given. AR 148.

The jury convicted Petitioner of fleeing with reckless indifference to the safety of others, and the trial court sentenced him to the statutorily required term of not less than 1 nor more than 5 years. AR 345. Petitioner appealed.

III. SUMMARY OF ARGUMENT

The State charged Petitioner with fleeing in a vehicle with reckless indifference to the safety of others. The trial court denied Petitioner's motion for a lesser included offense instruction of fleeing in a vehicle because there was no factual basis for that offense grounded on the evidence presented to the Court. A trial court must instruct the jury on a lesser included offense if a two prong test is met. The first prong is satisfied if the lesser offense is included in the greater offense.

State v. Davis, 205 W. Va. 569, 573, 519 S.E.2d 852, 856 (1999) (citing Syl. Pt. 1, *State v. Jones*, 174 W. Va. 700, 329 S.E.2d 65 (1985)). The second prong is satisfied if there is evidence which would tend to prove such lesser included offense. *Id.* Under this prong, if there is an evidentiary dispute or insufficiency on the elements of the greater offense which are not included in the lesser included offense, then the defendant is entitled to a jury instruction for the lesser included offense. *State v. Wilkerson*, 230 W. Va. 366, 370, 738 S.E.2d 32, 36 (2013) (quoting Syl. Pt. 2, *State v. Neider*, 170 W. Va. 662, 295 S.E.2d 902 (1982)).

In the case at bar, the first prong is satisfied because fleeing in a vehicle, the lesser offense, is by virtue of its definition included in fleeing with reckless indifference, the greater offense. In order to commit the crime of fleeing with reckless indifference to the safety of others, one must necessarily flee in a vehicle. However, the second prong is not satisfied, because overwhelming evidence in support of the greater offense is grounds for a court refusing to give a jury instruction on the lesser included offense. Further, even when the grounds for requesting a jury instruction on the lesser included offense are technically true, those grounds may not be sufficient to show the trial court committed reversible error. Even though Petitioner points to some instances when reasonable driving practices were followed, Petitioner's repeated and substantial traffic violations demonstrate a reckless indifference to the safety of others, and so no instruction on the lesser offense is warranted.

Additionally, the trial court's flight instruction concerning Petitioner escaping on foot to flee from the scene of the criminal activity was warranted. The instruction correctly stated the law and was relevant to this case, because the flight on foot from the truck was potential evidence of Petitioner's consciousness of guilt for having fled with reckless indifference while in the vehicle. While it is true that the offense in this case and Petitioner's escape from that offense both involved flight, the two flights were clearly separated by Petitioner abandoning his damaged vehicle along

with his ID, and losing the pursuit of the troopers. To avoid confusion, the jury instruction emphasized that two different flights occurred by including the statement, "the further away the flight is from the time of the alleged offense the less weight it will be entitled to[.]" The only "alleged offense" in this case was fleeing with reckless indifference. Thus, this instruction clearly differentiated between the flight that occurred on foot, and the alleged offense, particularly by explaining how the two can occur far away from one another.

IV. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to West Virginia Revised Rules of Appellate Procedure 18(a)(3) and (4), oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and the record. This case is appropriate for resolution by memorandum decision.

V. ARGUMENT

A. Standard of Review

"As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion." Syl. Pt. 1, in part, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996). Likewise, in *State v. Lease*, 196 W. Va. 318, 472 S.E.2d 59 (1996), this Court explained that we review a "trial court's failure to give a requested instruction or the giving of a particular instruction under an abuse of discretion standard . . . ." *Id.* at 322, 472 S.E.2d at 63; *see also State v. Guthrie*, 194 W. Va. 657, 671, 461 S.E.2d 163, 177 (1995). Syllabus point eleven of *State v. Derr*, 192 W. Va. 165, 451 S.E.2d 731 (1994), specifies:

> A trial court's refusal to give a requested instruction is reversible only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense.

In *Kessel v. Leavitt*, 204 W. Va. 95, 511, S.E.2d 720 (1998), *cert. denied* 525 U.S. 1142, 119 S.Ct. 1035, 143 L.Ed.2d 43 (1999), this Court explained that where the alleged error is based

upon the trial court's refusal to give an instruction, this Court will presume that the lower court "acted correctly . . . unless it appears from the record in the case . . . that the instructions refused were correct and should have been given." *Id.* at 144, 511 S.E.2d at 769, *quoting Coleman v. Sopher*, 201 W. Va. 588, 602, 499 S.E.2d 592, 606 (1997) (internal quotations and citations omitted).

B. The trial court did not commit reversible error when it denied Petitioner's motion for a jury instruction on the lesser included offense of fleeing in a vehicle, because Petitioner was not entitled to such an instruction.

This Court has long held that the question of whether a defendant is entitled to an instruction on a lesser included offense involves a two-part inquiry. Syl. Pt. 1, *State v. Jones*, 174 W. Va. 700, 329 S.E.2d 65 (1985). 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. *Id.* Where "the lesser offense is by virtue of its legal elements or definition included in the greater offense," the first prong is satisfied. *State v. Davis*, 205 W. Va. 569, 573, 519 S.E.2d 852, 856 (1999) (citing Syl. Pt. 1, *Jones*, at 701, 329 S.E.2d at 66. 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. *Davis*, at 573, 519 S.E.2d at 856. Both parts of the test must be met before a trial court is required to instruct the jury on a lesser included offense. *See generally, id.* Here, Petitioner cannot satisfy both prongs, and this claim thus fails.

1. Fleeing in a vehicle is a lesser included offense of fleeing with reckless indifference to the safety of others.

The first prong is satisfied because fleeing in a vehicle, the lesser offense, is by virtue of its definition included in fleeing with reckless indifference, the greater offense. *W. Va. Code* § 61-5-17(e); *W. Va. Code* § 61-5-17(f). A person flees in a vehicle when he "intentionally flees or attempts to flee in a vehicle from a law-enforcement officer, probation officer or parole officer

acting in his or her official capacity after the officer has given a clear visual or audible signal directing the person to stop . . . ." *W. Va. Code* § 61-5-17(e). A person flees with reckless indifference to the safety of others when he "intentionally flees or attempts to flee in a vehicle from a law-enforcement officer, probation officer or parole officer acting in his or her official capacity after the officer has given a clear visual or audible signal directing the person to stop, and who operates the vehicle in a manner showing a reckless indifference to the safety of others[.]" *W. Va. Code* § 61-5-17(f).

The only difference between these two offenses is that fleeing with reckless indifference has the additional element of "operat[ing] the vehicle in a manner showing reckless indifference to the safety of others." *Id.* All other elements of fleeing with reckless indifference are included in fleeing in a vehicle, and no element of fleeing in a vehicle is not also an element of fleeing with reckless indifference. *Id.* Because the definition of fleeing in a vehicle is wholly included in the definition of fleeing with reckless indifference, the first prong is satisfied.

2. Because there is no evidentiary dispute or insufficiency of the elements of the greater offense of fleeing with reckless indifference, Petitioner cannot sustain his claim of entitlement to an instruction on the lesser included offense of fleeing in a vehicle.

The second prong requires that the trial court determine whether there is evidence in support of the lesser included offense. *Davis*, at 573, 519 S.E.2d at 856. Under this prong, when "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. Wilkerson*, 230 W. Va. 366, 370, 738 S.E.2d 32, 36 (2013) (quoting Syl. Pt. 2, *State v. Neider*, 170 W. Va. 662, 295 S.E.2d 902 (1982)). In the case at bar, the only difference between the greater offense of fleeing with reckless indifference and the lesser offense of fleeing in a vehicle is the element of "operat[ing] the vehicle in a manner showing

reckless indifference to the safety of others." *W. Va. Code* § 61-5-17(e); *W. Va. Code* § 61-5-17(f). Therefore, if there is no evidentiary dispute or insufficiency on this element, then the second prong fails, and the trial court did not commit error in denying Petitioner's motion for a jury instruction on the lesser included offense of fleeing in a vehicle.

When reviewing sufficiency of the evidence to support a criminal conviction, "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." *State v. Guthrie*, 194 W. Va. 657, 668, 461 S.E.2d 163, 174 (1995). "When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict." Syl. Pt. 2, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

Overwhelming evidence in support of the greater offense is grounds for a court to refuse giving a jury instruction on the lesser included offense. *State v. Richardson*, 240 W. Va. 310, 321-22, 811 S.E.2d 260, 271-72 (2018). In *Richardson,* the defendant's husband was found dead, and during a police interview, the defendant admitted to having devised a plan to kill her husband. *Id.* at 312, 811 S.E.2d 262. Upon being convicted for first degree murder, the defendant asserted the circuit court committed error by denying defendant's motion for a jury instruction on the lesser included offense of second degree murder. *Id.* at 321, 811 S.E.2d 271. However, because the defendant had planned to kill her husband, there was no evidentiary basis to support giving a second degree murder instruction. *Id.* at 322, 811 S.E.2d 272. The overwhelming evidence involving the defendant's plan plainly established premeditation, and so the circuit court did not abuse its discretion by refusing to give a jury instruction on the lesser included offense. *Id.*

Like in *Richardson*, here there is overwhelming evidence in support of the greater offense, which is fleeing with reckless indifference. While Trooper Jones was following Petitioner's truck, Petitioner made an improper passing, repeatedly drove on the left side of the road, nearly hit a street sweeper head-on, drove up to 30 miles per hour over the speed limit, drove through someone's yard, blew past multiple stop signs, drove through a gate which caused gravel to shoot up damaging the trooper's vehicle, failed to consistently use his blinker, drove through a field of horses, and drove through several fences which caused 300 feet of fence to wrap around the vehicle and drag behind it, all in an attempt to get away from the trooper. When Petitioner was not driving through people's yards and fields, the roads he drove on had light traffic, and cars pulled to the side of the road in an attempt to get out of Petitioner's way. The overwhelming evidence indicates that Petitioner operated his vehicle in a manner showing reckless indifference to the safety of others, and so the trial court did not abuse its discretion in refusing to give a jury instruction on the lesser included offense.

Even when the grounds for requesting a jury instruction on the lesser included offense are technically true, those grounds may not be sufficient to show the trial court committed reversible error. *State v. Phillips*, 199 W. Va. 507, 512, 485 S.E.2d 676, 681 (1997). In *Phillips*, the defendant used an air pistol to rob two restaurants, and employees testified that they believed the weapon was real. *Id.* at 510-11, 485 S.E.2d 679-80. The defendant was found guilty of two counts of aggravated robbery. *Id.* at 509-10, 485 S.E.2d 678-79. Subsequently, the defendant argued that the trial court committed error by refusing to instruct the jury on the lesser included offense of nonaggravated robbery, on the grounds that the robbery was committed without an actual firearm. *Id.* at 511, 485 S.E.2d 680. Though these grounds were factually valid, the district court's decision to refuse giving jury instruction for the lesser included offense was not an error, because the use

of the air pistol still induced fear of bodily injury, which satisfied the additional element present in the greater offense, aggravated robbery. *Id.* at 512, 485 S.E.2d 681.

Like in *Phillips*, even though the grounds for Petitioner requesting a jury instruction on the lesser included offense are technically true, those grounds are not sufficient to show that the trial court committed reversible error. Petitioner's defense emphasizes that Petitioner abandoned his ID and mail when fleeing from his truck, the truck was registered in Petitioner's name, Petitioner made incriminating statements, and also that Petitioner's defense admitted fleeing but disputed "with reckless indifference" as a factual basis to prove the lesser offense was established during trial. While all of these pieces are factually true, they do nothing to negate Petitioner's clearly reckless driving and indifference to the safety of others. If anything, Petitioner's abandonment of identification, paired with his making of incriminating statements, further underlines his carelessness.

This is not a case where the facts involving the additional element of the greater offense are self-contradicting, thus requiring a jury instruction for the lesser included offense. *State v. Henning*, 238 W. Va. 193, 200, 793 S.E.2d 843, 850 (2016). For example, in *Henning*, the defendant cut a woman with a knife. *Id.* at 195, 793 S.E.2d 845. At first, the woman said she did not see the knife until after she was injured, but on cross-examination, she admitted to testifying at the preliminary hearing that she was cut after trying to grab the knife. *Id.* Also, when she first went to the hospital to treat her wound, she had told medical personnel that she had accidentally cut herself. *Id.* Even though the defendant was found guilty of malicious assault, a jury instruction for the lesser included offense of misdemeanor assault was warranted. *Id.* at 196-200, 793 S.E.2d 846-50. This is because, based on the woman's testimony, a reasonable jury could conclude that she was not being truthful, because of her self-contradicting statements of the facts. *Id.* at 200, 793 S.E.2d 850.

Unlike *Henning*, there is no evidence here that is self-contradicting or inconsistent which could give rise to requiring a jury instruction for a lesser included offense. While Petitioner disputed that the fleeing was with reckless indifference, Petitioner did not dispute any of the copious instances of breaking traffic laws in the attempt to escape from Trooper Jones. For example, Petitioner highlighted that there was light traffic instead of heavy traffic. But light traffic is still traffic and Petitioner's intentional conduct still endangered the safety of other motorists and innocent bystanders, as well as created the potential for a serious accident. Also, Petitioner argued that there was not almost a head-on collision with a street sweeper because the street sweeper did not swerve. In reality, the street sweeper did not swerve because it had nowhere to swerve to, not because its driver trusted Petitioner to correct its course and evade the vehicle. Additionally, Petitioner emphasizes his occasional use of his turn signal as appropriate driving behavior. But, Trooper Jones explained that while Petitioner did turn on his blinker, once it was turned on, Petitioner improperly left it on during the entire first portion of the chase and did not correctly use it to signal turning.

Finally, Petitioner argues that the damage to the truck was evidence of getting off main roads and away from the public, and that Petitioner never tried to ram any vehicles. Be that as it may, when asked whether it was true that Petitioner was trying to get as far away from individuals as possible, Trooper Jones did not agree and instead replied that Petitioner was "attempting to get away from [him]." Ironically, it would have been counterintuitive for Petitioner to have intentionally tried to strike other vehicles while trying to escape Trooper Jones' pursuit. Such actions would defeat the purpose of fleeing altogether. Rather, an escape would invoke the maintenance of high speeds, improper passing, blowing through stop signs, cutting across people's yards and private property, and other reckless activity, all of which Petitioner did. Also, the prolonged amount of time Petitioner spent driving recklessly on roads before deciding to veer off

into yards and fields suggests keeping pedestrians and other drivers safe was not among Petitioner's priorities. Thus, there was no self-contradicting evidence presented and no grounds for giving a jury instruction on a lesser included offense.

In conclusion, there is no evidentiary dispute or insufficiency of the elements of the greater offense, and therefore, a jury instruction of fleeing in a vehicle as a lesser included offense was not warranted. Merely highlighting some of Petitioner's appropriate conduct while driving does not negate the plethora of reckless driving violations made in attempt to flee from Trooper Jones. When reviewing sufficiency of the evidence to support a criminal conviction, "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." *State v. Guthrie*, 194 W. Va. 657, 668, 461 S.E.2d 163, 174 (1995). Further, a "refusal to give a requested jury instruction is reviewed for an abuse of discretion." Syl. Pt. 1, in part, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996). This standard of review further accommodates a holding that the decision should be upheld, because the element of "operat[ing] the vehicle in a manner showing reckless indifference to the safety of others" was sufficiently and thoroughly satisfied. *W. Va. Code* § 61-5-17(f).

C. It was not error for the trial court to give a flight instruction because Petitioner committed two distinct flights: the first involving the use of his vehicle with reckless indifference to the safety of others, and the second involving his flight on foot after the fact.

The precise extent and character of a jury instruction is reviewed only for abuse of discretion. Syl. Pt. 4, *State v. Guthrie,* 194 W. Va. 657, 461 S.E.2d 163 (1995). Correspondingly, trial courts "ha[ve] broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law." *Id.* It is an almost universal rule that "[f]light is an admission by conduct" in which evidence of flight after a crime is admissible as potential evidence of guilt. 2 *McCormick*

On Evid. § 263 (7th ed.); *State v. Payne*, 167 W. Va. 252, 265, 280 S.E.2d 72, 79-80 (1981)(referencing numerous examples from across the nation). Despite this well-established rule, Petitioner argues that flight instructions regarding post-crime flight are an abuse of discretion and an improper comment on the evidence when the underlying charge is fleeing from law enforcement. Petitioner relies exclusively on cases from Oregon and Virginia, *State v. Girard*, 34 Or. App. 85, 578 P.2d 415 (1978) and *Graves v. Commonwealth*, 65 Va. App. 702, 780 S.E.2d 904 (2016) to demonstrate this point.

Both of the cases Petitioner cites are distinguishable from the facts at hand because both *Girard* and *Graves* involve one single flight that is inextricably linked to, and one and the same with, the criminal activity taking place. In *Girard*, police officers attempted to arrest the defendant, but the defendant began to fight with the officers, causing them to retreat, which allowed him to escape. *Girard*, 34 Or. App. at 87-88, 578 P.2d 416-17. In *Graves*, a police officer activated his lights to stop a vehicle, but the vehicle drove off going ninety miles per hour, and the officer terminated pursuit due to the excessive speed. *Graves*, 65 Va. App. at 705, 780 S.E.2d 905. In both cases, a flight instruction was found inappropriate because neither defendant had fled from a scene of criminal activity. *Girard*, 34 Or. App. at 87-88, 578 P.2d 416-17; *Graves*, 65 Va. App. at 705, 780 S.E.2d 904. Instead, the defendants' flights were part-and-parcel of the crimes they were convicted of, and the flights were inextricably linked to the crimes themselves. *Girard*, 34 Or. App. at 89, 578 P.2d 417; *Graves*, 65 Va. App. at 710, 780 S.E.2d 907-08. Thus, to warrant a flight instruction, the flight must occur after the commission of a crime, it cannot fully coincide with it. *Graves*, 65 Va. App. at 709, 780 S.E.2d 907.

Unlike *Girard* and *Graves*, Petitioner's flight from his vehicle was not part-and-parcel of the crime he committed. Petitioner was charged and convicted of fleeing in a vehicle with reckless indifference to the safety of others, which occurred while he fled from police, dangerously driving

his truck over roads, yards, and fields. That offense terminated when Petitioner stopped his damaged truck in a field. Petitioner then abandoned the vehicle, commencing a second flight, this time on foot and away from the location where his crime ended. Thus, even though Petitioner argues he engaged in a single instance of fleeing because of the temporal proximity of the flight on foot to his crime of fleeing in the vehicle, the series of events are nonetheless two distinct instances of flight: the vehicular flight with reckless indifference to the safety of others and the subsequent flight on foot to escape the location where his vehicular flight ended.

And contrary to Petitioner's assertion that the trial court failed to delineate the two instances of flight in its instruction to the jury, the record shows otherwise. Specifically, part of the flight instruction stated that "the further away the flight is from the time of the alleged offense the less weight it will be entitled to[.]" AR 158-159. Because the only "alleged offense" in this case was fleeing with reckless indifference to the safety of others, this jury instruction obviously differentiated between the criminal activity and Petitioner's subsequent flight on foot.

What is more, because evidence of flight is admissible evidence, it follows that an instruction relating to that evidence is warranted. In syllabus point fourteen of *State v. Jessie*, 225 W. Va. 21, 689 S.E.2d 21 (2009), this Court explained:

> "In certain circumstances evidence of the flight of the defendant will be admissible in a criminal trial as evidence of the defendant's guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge, upon request by either the State or the defendant, should . . . determine whether the probative value of such evidence outweighs its possible prejudicial effect." Syl. Pt. 6, *State v. Payne*, 167 W. Va. 252, 280 S.E.2d 72 (1981).

In other words, actions can arise later in a series of events which give credence and evidence to support the criminal conviction for that which happened earlier in the series. Although in the present matter the trial court did not conduct a balancing test to determine the admissibility of the evidence that Petitioner left the field where he stopped his vehicle, no such request was made prior

to its admission. Nor did the defense object when Trooper Jones testified that he spotted the vehicle in a field, "pulled up to the vehicle. There was no driver." AR 124. It was not until the discussion of jury instructions after the State rested its case that Petitioner objected, at which point it was pointless to conduct a balancing test. AR 147. Furthermore, even if a balancing test had been requested and conducted, the evidence of Petitioner's post-crime flight would have been deemed admissible because his flight after the fact was probative of the crime of fleeing with reckless indifference to the safety of others and there was no indication of prejudicial effect. Abandoning one's sources of identification and fleeing from a damaged vehicle is probative evidence of one's desire to disassociate from his involvement with that vehicle and correspondingly provides facts and circumstances indicating a guilty conscience or knowledge. Syl. Pt. 6, *Payne*, at 253, 280 S.E.2d at 73 (explaining that "[i]n considering whether the facts and circumstances of the case indicate a guilty conscience or knowledge, the trial judge should consider whether the defendant was aware of the charges pending against him at the time he fled; was aware that he was a suspect at the time he fled; or fled the scene of a crime under circumstances that would indicate a guilty conscience or knowledge; or otherwise fled under circumstances such that would indicate a desire to escape or avoid prosecution due to a guilty conscience or knowledge.") Here, under the circumstances of Petitioner's lengthy and dangerous vehicular flight from Trooper Jones, which culminated with Petitioner driving through several fences, entangling the truck in 300 feet of high tensile fence and dragging the fencing with the truck through a field, the probative value of Petitioner abandoning his damaged vehicle and fleeing the scene is highly probative on whether Petitioner had a guilty conscience at the time. The fact Petitioner dropped his identification in the field as he made a mad dash from the scene further indicates the intensity of his desire to escape law enforcement's hot pursuit. There is no apparent prejudice from the admission of this evidence,

particularly considering the only testimony was a single statement that Petitioner was not at his vehicle by the time law enforcement arrived on scene. AR 124.

As to whether Petitioner was prejudiced by the jury instruction on flight, the trial court astutely noted that the flight instruction was to Petitioner's benefit, AR 148, as the instruction informed the jury it "should consider such evidence of flight with caution since such evidence has only a slight tendency to prove guilt" and expressly warned the jury that "the circumstances should be cautiously considered since flight may be attributed to a number of reasons other than the consciousness of guilt." AR 158-159. The instruction pointedly emphasized to the jury that evidence of Petitioner leaving the scene was not dispositive of guilt. AR 151-160. Hence, not only was it proper for the trial court to instruct the jury on how to treat the evidence of Petitioner fleeing the scene, the trial court accurately recognized "[i]t's a defendant's instruction really[,]" and "it's something that should be given." AR 148. The jury instruction on flight was neither prejudicial to Petitioner nor otherwise an improper comment on the evidence, as Petitioner contents. Instead, it reflects a sound exercise of the trial court's broad discretion in instructing the jury.

Petitioner has not met the heavy burden of showing the trial court abused its discretion, and this claim fails.

VI. CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court's sentencing order.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

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