
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SUPREME COURT NO: 19-0143

HARRY LEE SMITH, JR.

PETITIONER/APPELLANT

V.

STATE OF WEST VIRGINIA,

RESPONDENT/APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF
MERCER COUNTY, WEST VIRGINIA**

(18-F-172)

BRIEF OF APPELLANT

ORAL PRESENTATION REQUESTED

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ASSIGNMENTS OF ERROR

Appellant asserts the following errors as to the proceedings below:

- I. The Trial Court Erred in Denying Appellant's Motion to Dismiss as to the Counts in the Indictment Alleging Kidnapping upon a Defective Indictment.
- II. The Trial Court Erred in Assigning Mitigation Findings to the Jury.
- III. The Evidence Does Not Support the Jury's Findings as to Mitigating Factors
- IV. The Trial Court Erred in Denying Appellant's Motion in Limine Regarding Evidence of Post Event Impact of Destiny Rose.
- V. The Trial Court Erred in Failing to Conduct Appropriate Analysis Prior to Admitting Evidence pursuant to Rule 404(b) of the West Virginia Rules of Evidence.
- VI. The State Improperly Exceeded the Scope of the Trial Court's Ruling as to the Admission of 404(b) Evidence.
- VII. The Imposition of a Life Sentence Without Mercy Violates Proportionality Provisions in the West Virginia Constitution.
- VIII. The Trial Court Erred in Refusing to Instruct the Jury as to the Offense of Unlawful Restraint as a Lesser Included Offense of Kidnapping.

STATEMENT OF THE CASE

Appellant seeks relief from convictions rendered against him in the Circuit Court of Mercer County on charges of Kidnapping, two counts, Wanton Endangerment, three counts and Breaking and Entering, one count.

Appellant's charges arose from an event occurring on December 4, 2017. On that date appellant appeared at the home of his girlfriend, Amy Rose, and held her and her two children at gun point in her home. The daughter, Destiny Rose, subsequently escaped the home. Defendant's girlfriend's son, Dustin Rose was also subsequently released. Defendant and Amy Rose ended up on the porch of an adjacent home where she was released after extended communications between defendant and law enforcement.¹

Appellant was tried on October 23 and 24, 2018. The jury returned a verdict of guilty as to all counts. The jury did not recommend mercy as to the kidnapping charge relating to Amy Rose. The jury also made findings that Amy Rose was not released without bodily injury, and that Dustin Rose was released without bodily harm, but not without concession. (App. Vol. II, 569-576).

Following the verdict, Appellant timely filed a Motion for New Trial. The trial court subsequently denied Appellant's Motion for New Trial and sentenced him to life without mercy upon the kidnapping charge relating to Amy Rose. This sentence was

¹ The adjacent home was the residence of Frankie Rose, Amy Rose's husband. Amy Rose and Frankie Rose were separated but lived on the same parcel of land in different homes.

consecutive to the 20-50 year sentence upon the kidnapping charge relating to Dustin Rose. Those sentences were followed by three concurrent 5 year sentences on convictions for Wanton Endangerment to run consecutive to the kidnapping sentences, and a consecutive 1 to 10 year sentence on the charge of Breaking and Entering. (App. Vol. II, 600-602).

It is from these convictions and sentences that defendant seeks relief.

SUMMARY OF ARGUMENT

Appellant, rests his argument on those points, as set forth in the Assignments of Error section.

I. The trial court erred in denying appellant's Motion to Dismiss as to the counts in the indictment alleging kidnapping upon the defective indictment.

The indictment returned against appellant charged two counts of kidnapping. In setting forth the kidnapping charges, the indictments for both counts stated the offense was committed by "unlawful feloniously holding Amy Rose/Dustin Rose against his/her will with the intent to terrorize him/her."

In charging appellant it is clear that the State intended to charge him under West Virginia Code §61-2-14a with the operative intent being the intent to "terrorize". The indictment against appellant was deficient in that it failed to allege transportation, which is a material element of the offense set forth in the statute.

Appellant raised the issue of the deficient indictment by motion prior to trial, again immediately prior to trial, and again in his Motion for New Trial. On all occasions the court denied appellant's motion and found that the indictment was sufficient to set forth the alleged offense.

II. The court erred in submitting the matter of the mitigation of Appellant's sentence to the jury.

The trial court erroneously relinquished to the jury the function of making findings as to mitigating factors as to potential sentences relating to defendant's kidnapping charge.

While under West Virginia kidnapping statute 61-2-14a the jury is provided the ability to allow a sentence of mercy to mitigate from the life sentence penalty, the statute states, "in all cases", and then goes on to outline those factors, which if found applicable, would provide for, not a life sentence, but either a 20 to 50 year sentence or a 10 to 30 year sentence. Assigning the factual findings as to such factors to a jury in the event of a trial, or to a judge in the event of a plea, create a system which would potentially yield widely divergent and inconsistent results.

Such an allocation is also inconsistent with the structure of sentencing in this state. Unlike, some other states, juries in West Virginia do not determine sentences. In fact, information as to potential sentences is kept from a jury. To assign the findings as to the factors set forth under subsections (b)(3) and (b)(4) to the jury essentially makes the jury the sentencing agent. Such a scenario appears nowhere else in the jurisprudence of this state. The jury's application of sentencing factors are limited to grants of mercy in capital cases.

In light of the foregoing, appellant submits that permitting the jury to consider and determine mitigating facts was error requiring grant of a new trial.

III. The evidence does not support the jury's findings as to mitigating factors.

The consideration of mitigation factors was submitted to the jury. Which was requested to consider whether either Amy Rose or Dustin Rose had been permitted to return "without bodily harm", and whether such return was after any concession or advantage of any sort had been paid or yielded.

The jury ultimately found that Amy Rose had not been returned without bodily harm and that while Dustin Rose had been returned without bodily harm, he had not been returned without a concession or advantage having been paid or yielded.

The only evidence before the jury relating to bodily harm to Amy Rose was testimony from Dustin Rose that in the course of the encounter the appellant had grabbed Amy Rose by the hair and pulled her, causing some hair loss and some bruising from appellant's grip on her arm.

Likewise, the only evidence before the jury as to Dustin Rose's release was that he had convinced the appellants to let him go so that he could perhaps find an unlocked window, and find and retrieve his father, to come to the scene.

Appellant asserts that each of these pieces of evidence as to their respective issues was insufficient to permit the jury to make a finding that disregarded these elements as potential mitigation factors, thus denying appellant the opportunity to avoid a term of imprisonment of life.

IV. The trial court erred in its denial of Appellant's Motion in Limine limiting testimony and evidence of post event impact from Destiny Rose.

Prior to trial, counsel for appellant filed a Motion in Limine requesting the court limit testimony and evidence of post event impact from victims. Principally the motion was directed at testimony of Destiny Rose, daughter of appellant's girlfriend, Amy Rose. Destiny Rose was not the subject of either kidnapping count, and was the subject of only a charge of wanton endangerment.

Appellant argued that any post event, or residual effect of the events of December 4, 2017 were irrelevant to the charge of wanton endangerment. While such testimony would arguably be relevant to the jury's consideration of a grant of mercy on kidnapping charges, Destiny Rose was not the subject of any kidnapping charge. The court permitted such testimony from Destiny Rose, and she testified extensively as to her anxiety and emotional turmoil following the events. Such testimony was extraordinarily prejudicial to appellant, and materially affected the jury's consideration of mercy for appellant upon the kidnapping charges on which appellant was convicted.

V. The trial court erred in failing to conduct appropriate analysis prior to admitting evidence pursuant to Rule 404(b) of the West Virginia Rules of Evidence.

Prior to trial the State presented a motion to introduce evidence pursuant to Rule 404(b) the West Virginia Rules of Evidence. The court conducted a hearing upon such motion. At the hearing, the State argued only for the admission of evidence of prior confrontations between appellant and one of the alleged kidnapping victims, girlfriend, Amy Rose. The State argued that such evidence was admissible for the purpose of “refuting appellant’s claim of a reaction to Cymbalta” and appellant’s malicious intent.

The court granted the State’s motion. However, in doing so the court did not in any fashion engage in the analysis necessary and required for the admission of 404(b) evidence. Most importantly, the court performed no balancing analysis for the admission of such evidence.

VI. The State improperly exceeded the scope of the trial court's ruling as to the admission of 404(b) evidence.

The trial court granted the State's request for admission of 404(b) evidence relating to confrontations between appellant and Amy Rose on dates prior to the date of appellant's offenses. However, during trial, the State exceeded the court's order regarding 404(b) evidence by offering extensive testimony as to acts of vandalism, speculated to have been committed by appellant, prior to the date of the offenses charged. The State, although referencing such evidence in their initial motion, presented no evidence nor sought approval for such evidence at the hearing on its motion, and such evidence was not part of the court's ruling admitting 404(b) evidence.

In addition to the extraordinarily speculative nature of the testimony as to vandalism testimony presented, such evidence was significantly prejudicial to appellant in giving the appearance of a calculated course of conduct aimed at the State's witnesses prior to defendant's alleged offenses.

VII. Imposition of a life sentence without mercy violates proportionality provisions of the West Virginia Constitution.

Upon his conviction for the kidnapping offense relating to Amy Rose, appellant was subject to a life sentence. The jury did not recommend mercy upon such conviction. Lacking such recommendation, appellant was sentenced to life in prison without the possibility of parole.

Appellant submits that such sentence violates the proportionality provisions of the West Virginia Constitution in that it in that such penalty is disproportionate to the conduct supporting appellant's conviction. The factor distinguishing between a sentence of life without parole, and a sentence of a significant period of years, but not a life imprisonment is as little as bruising and hair pulling. While the offense conduct in this matter was certainly serious, there were no significant physical injuries. Furthermore, the evidence of the level of harm to the actual kidnapping victims was negligible, and in no event would support the imposition of a term of life without parole.

IX. The court erred in refusing to instruct the jury as to the offense of Unlawful Restraint as a lesser included offense of kidnapping.

At the time of consideration of the instructions to the jury, counsel for appellant requested the court instruct the jury as to the offense of unlawful restraint under West Virginia Code § 61-2-14g as a lesser included offense of kidnapping. The court declined to do so.

The offense of unlawful restraint, created by the legislature in 2011 was created for the specific purpose of recognizing, and criminalizing those instances as a lesser included offense of the offense of kidnapping. The evidence presented would have supported a finding of unlawful restraint, and the jury was entitled to consider such offense.

STATEMENT REGARDING ORAL ARGUMENT IN DECISION

Appellant submits that oral argument is necessary in view of the criteria set forth in Rule 18 (a) of the West Virginia Rules of Appellate Procedure. Appellant submits pursuant to Rule 18, that the issues presented in the instant appeal, particularly those relating to the kidnapping statute have not been authoritatively decided. In addition, while facts and arguments are significantly and adequately presented in Appellant's brief, Appellant believes the decision process would be significantly aided by oral argument.

Appellant believes that the instant matter would be appropriate for oral argument pursuant to Rule 19 of the Rules of Appellate Procedure in that the matter involves assignments of error in the application of settled law which are also narrow issues of law.

Appellant further believes the case at bar would also be appropriate for oral argument under Rule 20 of the Rules of Appellate Procedure, in that the appeal presents constitutional questions regarding the rulings of the trial court.

ARGUMENT

Standard of Review

The instant appeal follows from the denial of Appellant's Motion for New Trial by the trial court below. Findings and rulings of the trial court are reviewed utilizing a two-pronged deferential standard of review. Rulings of the circuit court concerning a new trial, and its conclusion as to the existence of a reversible error are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law, however, are subject to a de novo review. Syl. Pt. 3, State v. Vance, 207 W.Va. 640, 535 S.Ed.2d 484 (2000).

I. The Trial Court Erred in Denying Appellant's Motion to Dismiss as to the Counts in the Indictment Alleging Kidnapping upon a Defective Indictment.

Counts one and two of the indictment charged the offense of kidnapping pursuant to West Virginia Code § 61-2-14a, by stating that appellant "committed the offense of "kidnapping" by unlawfully and feloniously holding Dustin Rose/Amy Rose at gunpoint against his/her will with the intent to terrorize him/her, against the peace and dignity of the state." (App. Vol. II, 501).

An indictment for kidnapping is sufficient if it follows the language of the statute, fully informs the particular accused of the particular offense with which he is charged, and enables the court to determine the statute on which the charge is based. Syllabus Point 3, State v. Hall, 3304 S.E.2d 43 (W.Va. 1983). However, in order to lawfully charge an accused with a particular crime it is imperative that the essential

elements of that crime be alleged in the indictment. Syl. Pt. 1, State ex rel Combs v. Boles, 151 S.E.2d 115 (W.Va. 1966).

The offense of kidnapping as set forth in West Virginia Code § 61-2-14a (a)(2), states that the offense is committed when the accused acts with a specific intent to "Transport another person with the intent to inflict bodily injury or terrorize the victim or other person." ²

The kidnapping charge described in the indictment lacked the intent of transportation, and with the absence of this essential element did not substantially follow the language of the statute and was deficient.

The transportation element in the variety of kidnapping charged by the State in this matter is an essential element. The construction given by the State, and approved by the court in denying appellant's Motion to Dismiss, is contrary to the text of the statute as well as any practical application of its terms.

Under the State's construction, as set forth in the indictment, any individual appearing at a location standing in a doorway so as to restrict, egress and wielding a firearm would be guilty of kidnapping. Such an application would run serious risk of every commission of the offense of wanton endangerment being labeled a kidnapping. It cannot be imagined this was the intent of the legislature in creating the statute.

² West Virginia Code § 61-2-14a reads:

- (a) Any person who unlawfully takes custody of, conceals, confines or restrains another person against his or her will by means of force, threat of force, duress, fraud, deceit, inveiglement, misrepresentation or enticement with the intent:
 - (1) To hold another person for ransom, reward, or concession;
 - (2) To transport another person with the intent to inflict bodily injury or to terrorize the victim of another person; or
 - (3) To use another person as a shield or hostage, shall be guilty of a felony...

Clearly, transportation is not required for every variety of kidnapping. The offenses described in subsection (a)(1) & (a)(3) of § 61-2-14a clearly do not require transportation to commit the offense. However, the configuration of the statute makes clear that for those kidnappings with the specific intent to "inflict bodily injury" or "terrorize" transportation is a requisite element.

Here the State failed to include this essential element in the indictment against the appellant. As a result the jury was not instructed and did not have the opportunity to consider that essential element. See: State ex rel Combs v. Boles, supra.

There is no logical basis for differentiating between the intent to inflict bodily injury or the intent to terrorize as set forth in subsection (a)(2), as it relates to the transportation element of the statute. It is clear that the legislature intended to broaden the scope of the kidnapping statute with the revisions, first appearing in 2012, which added the "intent to inflict bodily injury or to terrorize" to the list of ways the offense could be committed. (App. Vol. II, 612-613). Prior to that time kidnapping was limited to those instances where an individual was held for ransom, to gain a concession or advantage, or for use as a shield or to evade arrest. (App. Vol. II, 622-623).

With the expansion, the legislature divided the kidnapping offense into three separate categories. Under Subsection (a)(1), the offense is committed by holding another for ransom, reward, or concession. Subsection (a)(2) relates to an offense with the intent to inflict bodily injury or to terrorize, and Subsection (a)(3) deals with

those situations where an individual was held for the purpose of protection or acting as a shield.

All three subsections require the action as set forth in Subsection (a) of taking custody, confining etc. by force, duress, etc. Subsection (a) ends by imposing a specific intent requirement attaching to each of those subsections that follow. The first element set forth in Subsection (a)(2) is the element of transportation. Read together Subsection (a) and (a)(2) would require proof of such action "With the intent to transport another person with the intent to inflict bodily injury, or to terrorize the victim or another person".

While the legislature unfortunately provided no punctuation to guide in the interpretation of the subsection, it is clear that if the legislature had intended there to be two separate types of kidnapping described in this subsection, one with transportation as an element and one without, they would have separated them into two separate subsections as they had done with the other various ways the offense could be committed, as in subsections (a)(1) and (a)(3). Instead the clear intent of the subsection was to describe kidnapping achieved by a transportation of its victim for either of those two purposes described: to inflict bodily injury or to terrorize.

In order to secure a conviction the State must prove each and every element of the crime charged beyond a reasonable doubt. Syll. Pt. 4, State v. Hannah, 378 S.E.2d. 640 (W. Va. 1989). As a result of the indictment lacking the transportation element the State was not required to prove this element and the jury rendered a

verdict for kidnapping under subsection (a)(2) without having considered or rendered a verdict as to an essential element of that offense.

II. The Trial Court Erred in Assigning Mitigation Findings to the Jury.

At the conclusion of the case, in the course of discussing instructions, the court indicated that it had determined that it would submit the findings which would constitute mitigation from the life sentence called for in the kidnapping statute to the jury. Specifically, these were findings as to whether the victims of kidnapping had been returned without bodily harm, and whether they were returned without any concession or advantage of any sort having been paid or yielded".

(App. Vol. II, 574-576)

A. Assigning Mitigation Factors to the Jury was Error

Appellant submits that the court erroneously relinquished to the jury the function of making findings as to mitigating factors as to potential sentences.

This Court has consistently recognized that the jury must be clearly and properly advised of the law in order to render a true and lawful verdict. State v. Romine, 166 W.Va. 135, 137, 272 S.E.2d 680, 682 (1980); State v. McClure, 163 W.Va. 33, 37, 253 S.E.2d 555, 558 (1979). The duty as to such clear and proper instruction has been recognized to rest with the trial court. "Ultimately, the responsibility to ensure in criminal cases that the jury is properly instructed rests with the trial court." State v. Lambert, 173 W.Va. 60, 312 S.E.2d 31, 34 (1984); State v.

Dozier, 163 W.Va. 192, 255 S.E.2d 552 (1979). All instructions are the court's instructions. State v. Riley, 151 W.Va. 364, 151 S.E.2d 308 (1966).

Although poorly expressed, the statutory provisions relating to sentencing in the kidnapping statute assigns the court the responsibility for determining those factors which mitigate the sentence from a life sentence, whether it be with or without mercy.

While the jury is provided the ability to allow a sentence of mercy to mitigate from the life sentence penalty, the statute states, "in all cases", and then goes on to outline those factors, which if found applicable, would provide for, not a life sentence, but either a 20 to 50 year sentence or a 10 to 30 year sentence.

By assigning the factual findings as to such factors to a jury in the event of a trial, or to a judge in the event of a plea, creates a system which will yield widely divergent results and create inconsistency. Such an allocation would also be inconsistent with the structure of sentencing in this state. Unlike, some other states, juries in West Virginia do not determine sentences. In fact, information as to potential sentences is typically kept from a jury. To assign the findings as to the factors set forth under subsections (b)(3) and (b)(4) to the jury essentially make the jury the sentencing agent. Such a scenario appears nowhere else in the jurisprudence of the state. Under our sentencing scheme the jury's application of sentencing factors are limited to grants of mercy in capital cases.

This court has pointed out that factual determinations regarding the existence of bodily harm in the payment of ransom, money, or the yielding of any other

concessions relate to punishment rather than the proof required of the State as to the elements of the crime. It has been rightly noted that it should be trial judges who routinely make factual determinations when determining sentences. State v. Farmer 454 S.E.2d. 378, 381 (W.Va. 1994); citing, Pyles v. Bowles, 135 S.E.2d. 692, 701 (W. Va. 1964).

Placing the determination of the facts which may support one of the sentences identified in the statute less than a term of life imprisonment with the jury would tend to render the alternative, lesser sentence illusory insofar as the jury in a number of cases, such as the instant case, would be given the opportunity to make factual findings that would result in a sentence less than life when that same jury had, already declined to grant mercy to the appellant. The fact that the portions of the statute setting forth the lesser sentences clearly indicate that those sections apply in "all cases" is a clear indication that those factual findings are to be made in even those cases where a jury has declined to grant mercy. Otherwise, the legislature could have designed those statutory provisions to be applicable in those cases where the jury had granted mercy. However, it did not.

In crafting the statute the legislature recognized and identified several key facts, which if established, would serve to mitigate even the harshest of sentences available in this state, life without mercy. These facts; return, lack of bodily harm, and lack of ransom or concessions etc., are clearly intended to afford the court the opportunity to ameliorate the harsh effects of the penalty relating to the kidnapping charge generally.

In surrendering the determination of mitigating factors, the trial court engaged in extensive exposition as to its reasoning to charge to the jury, including the mitigation factors:

I'm also going to instruct the jury that if they find him guilty of one of the kidnappings, whether or not they also find that each of the victims, that they find him guilty on, was returned unharmed and also was physically-without physical injury, and also whether they were returned after concessions were being made or not been made or advantage being made or not been made. Just so debts-just so that we-and the reason-even though we have case law from 1994 that says that's a trial court determination and not a jury determination, I think there's been a ton of case law since then that on other statutes that basically said these types of questions are questions of fact that the juries got to decide. And, specifically with regard to the prior criminal offenses on enhanced penalties for such as DUI third, things of that nature, as well as the findings of a firearm and things of that nature. I just think that those are questions of fact that's best left to the trier of fact, which in this case is the jury. I just don't-I just don't feel comfortable-I mean, I personally would feel comfortable making those decisions, but I don't think the Supreme Court's going – would feel, at this – in light of the case, the of (inaudible) case law with regards to the other matters, would find that it should be an issue that the jury should decide.

(App. Volume II, 372).

The court's statements adequately display the trial court's thought process in reaching its decision, but also clearly display that the court labored under a misapprehension of the law in reaching its decision.

Clearly the primary motivating factor for the trial court was its perception that case law relating to the necessity of juries making findings of fact as to matters beyond the verdict of guilt required him to assign determinations as to mitigating factors to the jury. On this point, the trial court failed to appreciate the distinction between facts supporting enhancements and those going towards mitigation. It is only

findings as to additional facts which will enhance or lengthen a defendant's sentence that require a jury to make specific findings of fact. See: Apprendi v. New Jersey 530 U.S. 466 (2000).

In fact this Court has explicitly recognized this in cases involving this same statute where defendants have argued that the trial court must assign to the jury's findings as to those mitigating factors. See State v. Farmer, 454 S.E.2d. 378 (W. Va. 1994). However, those arguments have been rightly rejected upon the recognition that the additional factors serve to mitigate the statutory sentence, not enhance the sentence applicable to change upon which appellant found to be guilty by the jury. By the same principles the trial court's decision is also erroneous. These decisions then clearly contradict the trial court's finding that the task as to the fact-finding for mitigating factors was one required to be submitted by the jury.

This Court has, without apparent fail, recognized the trial judge's role in the additional findings required for a kidnapping conviction. It has been explained that West Virginia Code § 61-2-14a provides a maximum sentence of life with or without mercy, based upon the jury's findings, and that any additional findings of fact made by the trial court operates to reduce the appellant's sentence from the maximum sentence as found by the jury. State v. Slater, 665 S.E.2d. 674, 681 (W.Va. 2008). Citing State v. Haught, 624 S.E.2d. 889 (W.Va. 2005).

B. The Trial Court's Assignment of Findings of Mitigation Factors Is Reversible Even Under Plain Error Analysis.

After its rulings as to instructions to the jury as to the charges and mitigating factors as well as defendant's request for a lesser included instruction, the court noted objections. "Alright. The court would note your objections and exceptions with regards to the court's refusal to obstruct as to a misdemeanor abduction, as well as, I guess instructions as to life with mercy and life without mercy." (App. Vol. II, 376).

To the extent that the State would argue that such ruling did not specifically preserve objection to the court's assignment of mitigating factors to the jury, appellant submits that the court's action is reversible error even under plain error analysis.

"Where a party does not make a clear, specific objection at trial to the charge that he challenges is erroneous, he forfeits his appeal unless the issue is so fundamental and prejudicial as to constitute "plain error"." State v. Guthrie, 461 S.E.2d 163, 177, n. 13 (1995); State v. Miller, 459 S.E.2d 114 (1995). In the event plain error is found to be the applicable, the standards for plain error analysis have been identified as follows. "To trigger application of the "plain error" doctrine, there must be 1) an error; 2) that is plain; 3) that affects substantial rights; and 4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." State v. Poore, 704 S.E.2d 727 (2010); Syl. Pt. 7. State v. Miller, 459 S.E.2d 114 (1995). In the instant case, the trial court's assignment of determining mitigating factors, meets the plain error standard.

The first inquiry into plain error analysis is the determination if the error was "plain".

Under plain error analysis, an error may be "plain" in two contexts. First, an error may be plain under existing law, which means that the plainness of the error is predicated upon legal principles that the litigants and the trial court knew or should have known at the time the prosecution. Second, an error may be plain because of a new legal principle that did not exist at the time of the prosecution, i.e., the error was unclear at the time of trial; however, it becomes plain on appeal because the applicable law has been clarified.

Syl. Pt. 6, State v. Myers, 513 S.E.2d 676 (1998).

As noted previously, this Court has, on a multitude of occasions, recognized the trial court's role in addressing the mitigating factors under the kidnapping statute.

In determining whether the assigned plain error affected the "substantial rights" of a defendant, the defendant need not establish that in a trial absent the error a reasonable jury would have acquitted. Rather, the defendant need only demonstrate the verdict in his or her case was actually affected by the assigned, but unobjected to, error. Here it is not the verdict of guilt in question. Rather the right affected goes to the structure of the process, which by its nature involves a substantial right.

The final inquiry by the court is determination of the extent to which the error threatens the integrity of the judicial process and the fundamental fairness required of such processes and the public reputation of the judicial process.

This Court has noted:

"[o]nce a defendant has established the first three requirements of [the plain error doctrine], we have the authority to correct the error, but we are not required to do so unless a fundamental miscarriage of justice has occurred. Otherwise, we will not reverse unless, in our discretion, we find the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

State v. Marple, 475 S.E.2d 47, 52 (1996).

The appropriate distribution of decision making authority as to matters such as guilt, innocence, mitigation and sentencing goes to the very heart of the fairness and credibility of the judicial process.

The examination and application of plain error must also be weighed against the fundamental obligation of the trial court to assure the jury is properly instructed.

"Ultimately, the responsibility to ensure in criminal cases that the jury is properly instructed rests with the trial court." State v. Lambert, 312 S.E.2d 31, 34 (1984); State v. Dozier, 255 S.E.2d 552 (1979). All instructions are the court's instructions. State v. Riley, 151 S.E.2d 308 (1966).

Therefore, even applying this plain error standard, it is clear that the error engendered by the court's assignment of the mitigation factors demands correction.

III. The Evidence Was Insufficient to Support the Jury's Findings as to Mitigating Factors

In assigning the jury the consideration of mitigation factors, the court called upon the jury to make determinations as to both Amy Rose and Dustin Rose, and whether each had been returned or permitted to return without bodily injury, and whether each had been returned or permitted to return without any concession or advantage of any sort having been paid or yielded.

The jury found that Amy Rose had not been returned or permitted to return without bodily injury. The jury did find that Dustin Rose had been returned or permitted to return without bodily injury, but that his return had not been without concession or advantage of another sort having been paid or yielded.

Appellant submits that the findings of the jury in these respects were not supported by the evidence presented. A de novo standard of review is applied to examination of issues of sufficiency of evidence. State v. Juntilla, 711 S.E. 2d. 562, 567 (W. Va. 2011). In conducting this examination the evidence is to be viewed in that light most favorable to the prosecution to determine whether any rational trier of fact could have reached the jury's conclusion. Syl. Pt. 1, State v. Guthrie, 461 S.E. 2d. 163 (W. Va. 1995).

In making its findings as to mitigation factors, the jury determined that Amy Rose had not been "allowed to be returned without bodily harm." The only evidence presented by the state that related to any physical act on Amy Rose was provided by her son Dustin Rose.

Q. Did you see any injuries on your mom?

A. She was bruised up?

Q. Thank you.

A. And had a little bit of hair loss.

(App. Vol. II, 240-241).

Harm or injury of the variety and extent testified to by Dustin Rose is not the "bodily harm" contemplated by the legislature, a definition which constitutes the difference, at a minimum between a life sentence and a 30-50 year sentence.

The California Supreme Court of Appeals dealt with this issue in People v. Jackson 282 P.2d 898 (Cal. 1955). There the Court dealt with the term "bodily harm" which was, as here, undefined in the statute. The court noted competing potential constructions of the term. "One construction of the statute was based upon the assumption of the legislative intent to adopt the traditional meaning given those words in the context of an action in tort for battery. "Bodily harm is generally defined as any touching of the person of another against his will with physical force in an intentional, hostile aggravated manner, or the projecting of such force against his person." 282 at 901-902. The Jackson court noted however that the cases adopting such definition involved victims of kidnapping suffering serious bodily harm, i.e. bound with wire, tortured, suffocated, struck on the head, forcibly raped. 282 P.2d at 902.

The court in Jackson noted that in the case before it the only evidence of injury to the victim was his wrists were bound tightly by chains so as to "cut in" and impair the circulation of blood. There was no breaking of the skin, but there were "a few little

marks" similar to those that would be made by the band of the wristwatch. The victim was given no physical exam upon release, and there appeared to be no necessity for such exam.

The court indicated that it found "seriously questionable" the prospect that the legislature intended to distinguish between kidnapping with bodily harm and cases in which no injury to the victim resulted. The court noted that if the more serious penalty was intended to be imposed in cases of injury similar to those before it, which it indicated was "almost necessarily an incident to every forcible kidnapping", that neither the purpose of the enhancement of the penalty for the more heinous crime nor the intension of deterring the kidnapper from killing or injuring his prisoner would be served. 282 P. 2d at 902.

Similarly in People v. Schoenfeld, 111 Cal. App. 3d. 671, 168 Cal. Rptr. 762, 764-66 (1981). The court recognized the principles enunciated in Jackson in examining "minor cuts and bruises" and "insubstantial transient injuries," when the defendant had kidnapped q school bus full of children.

These principles from Jackson and Schoenfeld provide guidance in applying the concept of "bodily harm" as a clear point of distinction between levels of severity of the kidnapping offense. Because under the West Virginia statute "bodily injury" is the distinguishing factor between a kidnapping with a life sentence, and a sentence for a period of years, the recognition of the Jackson and Schoenfeld courts that harm beyond that incident to the kidnapping act itself is necessary to support the finding of "bodily injury" is the appropriate standard to apply. In applying that standard, the

only finding supported by the evidence what that Amy Rose did not suffer bodily harm.

The jury was also asked to consider the question as to whether Dustin Rose had been released without concession or advantage having been paid or yielded. The jury answered that question in the negative (App. Vol. II, 576). The evidence relating to this issue again came from Dustin Rose.

And, so we went – we was probably around the house probably fifteen minutes or so, before I can convince him to let me get away. So, I convinced him to see if I can go see if any of the windows were unlocked in our house and to go look for my dad to bring him back to the house. (App. Vol. I, 239).

This evidence does not support a factual scenario which falls within the parameters contemplated by the statute. The language of the statute speaking of a "concession" or thing of value or advantage clearly contemplates a situation where the party making the concession or surrendering value or surrendering an advantage is an individual or entity changing its position or taking an action that it would not otherwise do but for the desire to acquire the release of the kidnapped victim. In the instant matter, Dustin Rose was released voluntarily by the appellant with the prospect that he may locate his father and request his return to the location. Dustin Rose accepted no condition, conceded any value or undertook any action that was contrary to his interest or in any matter detrimental to him. These facts clearly support mitigation under the statute.

IV. The Trial Court Erred in Denying Appellant's Motion in Limine Regarding Evidence of Post Event Impact on Destiny Rose.

Prior to trial, appellant filed a Motion in Limine seeking the court to prohibit testimony from the alleged victims, most pointedly Destiny Rose as to the post-event impact of appellant's actions. (App. Vol. II, 559). The court denied appellant's motion finding the testimony relevant to the appellant's "intent to terrorize".

(App. Vol. I, 162)

Subsequently Destiny Rose testified that on the night of the event that she was studying for a nursing exam she was to take the next day when the events started. When asked by the prosecutor if she ever took the exam, she indicated that she could not retake that test, but attempted one several weeks later. She testified however, that she was never able to study again, because, "every time I tried I just had flashbacks." (App. Vol. I, 208). In her closing the prosecutor took Destiny Rose's testimony and clearly used to argue for issues well beyond any relating to the Wanton Endangerment charge concerning Destiny Rose.

She still can't study. She has post traumatic stress. She couldn't finish her nursing school. He terrorized her.

(App. Vol. II, 477).

This testimony and argument are precisely that which appellant's Motion in Limine sought to avoid. Destiny Rose's testimony and the State argument as to that testimony was absolutely irrelevant to any issue before the jury relating to Destiny Rose. She was not an alleged victim of kidnapping. While it may be argued that the post event impact of a kidnapping victim may be relevant in the jury's determination

as to the grant of mercy with reference to a kidnapping charge. There was no such charge relating to Destiny Rose. The only charges in which she was involved were a wanton endangerment charge and being in the household that was subject to a breaking and entering. (App. Vol. II, 539). Even as to that the evidence before the jury indicated that by the time appellant had committed the act which constituted the breaking and entering, Destiny Rose was no longer in the house. (App. Vol. I, 205).

The lack of any relevant connection between this testimony from Destiny Rose, and any charge in which she was a victim is clearly evident from the court's ruling that Destiny Rose's testimony as to post-event issues was relevant to Appellant's "intent to terrorize" even though that intent was not an element as to the charge pending involving Destiny Rose.

Such testimony from Destiny Rose, while irrelevant to any charges relating to her was extraordinarily prejudicial to appellant in the jury's consideration of the mercy component of the kidnapping charges relating to Amy Rose and Dustin Rose.

V. The Trial Court Erred in Failing to Conduct Appropriate Analysis Prior to Admitting Evidence Pursuant to Rule 404(b) of the West Virginia Rules of Evidence.

Prior to trial the State sought admission of certain evidence of other bad acts on the part of the appellant under Rule 404(b) of the West Virginia Rules of Evidence. (App. Vol. II, 547). Such evidence as proffered to the court related to an incident where appellant had reportedly pursued Amy Rose, and her daughter, Destiny, blocking their car on a rural roadway. This incident occurred several months prior to

the alleged offense conduct. Also at issue was a conversation between Amy Rose and appellant several days prior to the incident from which the charges arose. The State offered as its basis for admitting this evidence appellant's intent and to refute appellant's reliance on a defense of diminished capacity. (App. Vol. II, 547). The court entertained discussion as to the evidence. However, no evidence was taken with reference to the State's motion. (App. Vol. I, 48-50). The trial court's order stated only, "the court finds that any threats or interactions with the named victims are admissible, as well as the phone calls, and the road rage incident." (App. Vol. II, 565).

This court has been very clear as to the process necessary for the introduction of evidence pursuant to Rule 404(b).

[w]here an offer of evidence is made under Rule 404(b) of the West Virginia Rules of Evidence, the trial court, pursuant to Rule 104(a) of the West Virginia Rules of Evidence, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an in camera hearing as stated in State v. Dolin, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the West Virginia Rules of Evidence and conduct the balancing required under Rule 403 of the West Virginia Rules of Evidence. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

Syl. Pt. 2, State v. McGinnis, 455 S.E.2d at 520 (W.Va. 1994).

In admitting the evidence in this case, the court did not follow the prescribed method. No evidence was presented. Therefore, the court made no findings supported by evidence that the event, had in fact, occurred. While there was discussion of the State's purported basis for the offer of the evidence aside from it being character evidence the findings of the propriety of that reason were scant, and there was no analysis as to the balancing of the value of such evidence against its prejudicial effect. Absent this process, the basis for admission of the evidence is insufficient. Additionally, without such analysis meaningful review of the admission of that evidence is impossible.

The court recognized its obligations, notwithstanding the fact it did not meet those obligations. At a pretrial hearing occurring on September 10, 2018 there was discussion regarding State's 404(b) motion. During that discussion the court stated "you want to have your witnesses here on the date of the pretrial, because I think the court has to hear the testimony, because I think one of the issues the court has to decide is whether to allow the testimony, first of all, whether the testimony is credible. So I think in order to do that, I will at least have to hear the testimony."

(App. Vol. I, 27).

However, when the court subsequently took up the issue of the admission of such evidence no witnesses were required to be called, the court made no finding as to the occurrence, and most importantly gave no consideration as to the balancing of the probative value of such evidence against its prejudicial effect.

Additionally, the trial did not provide the jury any limiting instruction as to its admission of 404(b) evidence either at the time of its admission, or in its charge to the jury. This Court has required that "[a] limiting instruction . . . be given at the time [the Rule 404(b)] evidence is offered," and further recommended that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.' Syl. Pt. 2, State v. McGinnis, 455 S.E.2d 516 (W.Va. 1994)." State v. Ricketts, 632 S.E.2d 37, 38 (W.Va. 2006).

VI. The State Improperly Exceeded the Scope of the Trial Court's Ruling as to the Admission of 404(b) Evidence.

The court's ruling admitting 404(B) evidence was limited to "threats or interactions with named victims, as well as telephone calls and the road rage incident. (App. Vol. II, 565).

At trial, the State offered testimony from Dustin Rose, Destiny Rose and Frankie Rose as to certain acts of vandalism that had occurred on their property, prior to the incident, giving rise to appellant's charges. Testimony also stated the witnesses believed that appellant was the perpetrator of these acts of vandalism. Such evidence was admitted over the objection of counsel for defendant. (App. Vol. I, 215-216).

Problems with this evidence are numerous. While the State made reference to past acts of vandalism in its written motion to admit 404(b) evidence, such facts and evidence were not presented to the court at the hearing on the State's motion. As a result the court could not make the required findings, and more importantly

necessarily did not have the opportunity to conduct the balancing test required before such evidence can be admitted.

The evidence was clearly of limited value probative value as it was absolutely speculative that appellant committed these acts. Conversely, the admission of this evidence was extraordinarily prejudicial for appellant as it gave parents that appellant had been engaging in a course of prolonged and plan conduct to afflict the Rose family.

VIII. The Imposition of a Life Sentence Without Mercy In The Case Violates Proportionality Provisions in the West Virginia Constitution.

Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment court counterpart to the Eighth Amendment of United States Constitution, has an express statement of the proportionality principle: "penalties shall be proportionate to the character and degree of the offense." Syll. Pt.5, State v. Phillips, 485 S.E.2d. 676 (W.Va. 1997).

Punishment may be constitutionally impermissible, although not cruel or unusual in its method, if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity, thereby violating West Virginia Constitution, Article III, Section 5 that prohibits a penalty that is not proportionate to the character and degree of an offense.

Syll. Pt. 5, State v. Cooper, 304 S.E.2d 851 (W.Va. 1983).

The first [test] is subjective and asks whether the sentence for that particular crime shocks the conscience of the court and society. If a sentence is so offensive that it cannot pass a societal and judicial sense of justice, the inquiry need not proceed further. When it cannot be said that a sentence shocks the conscience, a disproportionality challenge is guided by an objective test.

Cooper, 304 S.E.2d at 857.

This subjective test gives consideration to the nature of the offense, the legislative purpose behind punishment, a comparison of comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction. Syll. Pt.6 State v. Philips.

Appellant submits that the penalties imposed under the kidnapping statute, most particularly a life sentence without mercy, are disproportionate to the conduct penalized, and is sufficient to shock the conscience. In the instant matter given the jury's pronouncements the conduct separating a sentence of life without mercy and sentence of 30-50 years is as little as pulled hair and a bruise. That facts lacking significant severity can have such a significant impact on appellant's sentence clearly challenges constitutional ideals as to proportionality of sentences.

Appellant further asserts these circumstances would also run afoul of the provisions of the Eighth Amendment to the United States Constitution.

IX. The Trial Court Erred in Refusing to Instruct the Jury as to the Offense of Unlawful Restraint as a Lesser Included Offense of Kidnapping.

The question of whether an appellant is entitled to instruction on a lesser included offense involves a two part inquiry. The first inquiry is a legal one having to do with whether the lesser offense is by virtue of its legal elements of the definition included in the greater offense. The second inquiry is a factual one which involves a determination by the trial court whether there is evidence which would tend to prove such lesser included offense. Syll. Pt.1 State v. Phillips, 485 S.E.2d. 676 (W.Va. 1997).

Counsel for appellant requested an instruction under 61-2-14g as a lesser included offense of kidnapping. Such motion was denied. Counsel submits that 61-2-14g is a lesser included offense of kidnapping under 61-2-14a. Every element necessary to prove Unlawful Restraint under 61-2-14g is and element in the proof of a kidnapping offense. It is the additional specific intent element that differentiates the two charges. Therefore under the first prong of the test set forth in Phillips 61-2-14g should be recognized at a lesser included. As to the second prong of the Phillips test, there was ample evidence of appellant's efforts to confine or control the parties involved. The element of the presence of an additional specific intent was appropriate consideration for the jury. For those reasons defendant submits that he was entitled to the lesser included instruction.

CONCLUSION

For the reasons set forth herein, appellant respectfully requests, for the reasons stated herein that his appeal be granted and requests the verdict previously entered be set aside and that he be granted a new trial.

HARRY LEE SMITH, JR.,

By Counsel,

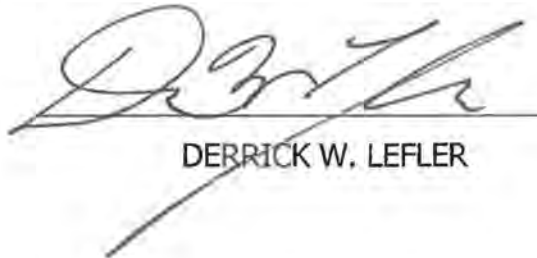


Derrick W. Lefler

CERTIFICATE OF SERVICE

I, Derrick W. Lefler, counsel for Appellant, do hereby certify that I have served a true copy of the foregoing Brief of Appellant to the Supreme Court of Appeals of Southern West Virginia, via Federal Express Mail Services, addressed to said counsel as follows, on this the 24th day of May, 2019:

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