

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**STATE OF WEST VIRGINIA,
Respondent,**

v. No.: 19-0447

**STEVEN TEWALT,
Petitioner.**

**(An appeal of a final order in
Preston County Circuit Court
Case No.: 18-F-44)**

PETITIONER'S BRIEF



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ASSIGNMENTS OF ERROR

1. The Circuit Court erred by denying the Petitioner's Motion for Judgment of Acquittal due to insufficient evidence.
2. The Circuit Court erred by denying the Petitioner's Motion for New Trial based upon the improper admission of collateral acts evidence under Rule 404(b).
3. The Circuit Court erred by denying the Petitioner's Motion for Arrest of Judgment based upon the invalidity of the "Strangulation" statute for being unconstitutionally vague.
4. The Circuit Court erred by denying the Petitioner's Motion for Mistrial based upon the jury's resolution of doubt in favor of the State rather than the accused.
5. The Circuit Court erred by issuing a lifetime no-contact order against the Petitioner.
6. The Circuit Court erred cumulatively to the prejudice of the Petitioner.

STATEMENT OF THE CASE

The Petitioner was indicted on a single count of Strangulation, pursuant to W. Va. Code §61-2-9d, by the Preston County Grand Jury. (Appendix Record Volume 1 ["A.R.1."], at 5). The State noticed its intent to use certain collateral acts evidence, either via Rule 404(b) of the West Virginia Rules of Evidence, or as *res gestae*. (A.R.1., at 9-11). This evidence included a recording of a conversation between the Petitioner and his wife, the alleged victim, surreptitiously recorded by the alleged victim, as well as the alleged victim's testimony concerning multiple prior instances of strangulation. The State also sought to admit the alleged victim's testimony of prior instances of strangulation as intrinsic evidence. The Petitioner

objected to the collateral acts evidence upon a number of grounds, including the spousal communication privilege, a failure to meet the requirements of Rule 404(b), the failure to prove the allegations by a preponderance, and that the collateral acts were not intrinsic to the indicted offense. (A.R.1., at 14-18). The State's motion was addressed inconclusively at a pretrial motion, and then during an *in camera* hearing held the day of trial. (A.R.2., at 8-38; A.R.3.).

At the *in camera* hearing, the Circuit Court heard testimony of the alleged victim, primarily on the issue of the recording. Based on her testimony, the Circuit Court ruled that the recording was inadmissible due to the spousal communication privilege. (A.R.1., at 20-21; A.R.2., at 8-38). However, without an opportunity for the Petitioner to cross-examine the alleged victim, the Circuit Court also ruled that the alleged victim's testimony concerning prior attacks, and the police report, would be admissible as 404(b) evidence, and offered the instruction throughout the trial to the jury that the evidence was offered to prove "motive, opportunity, intent, absence of mistake and lack of accident." (A.R.2., at 182, 208, 239).

During the state's case-in-chief, the alleged victim and the investigating officer testified. (A.R.2., at 133-205). The Petitioner offered the testimony of three individuals who were living in or visiting the household during the relevant time periods. The Petitioner did not testify. (A.R.2., at 208-233). The State entered eleven exhibits into evidence: ten photographs of the alleged victim and one photograph of the Petitioner's arms. (A.R.1., at 36-46). The Petitioner offered one exhibit into evidence: the alleged victim's petition for an emergency protective order. (A.R.1., at 47-57). The Petitioner moved, at the close of the State's case and the close of evidence, for a judgment of acquittal, which was denied. (A.R.2., at 205-08, 233).

The jury was instructed, and went to deliberate. During the first evening of deliberation

the jury asked the Court whether to include lesser included defenses, to which the answer was negative, and for a definition of “substantial,” concerning which the Court instructed the jury to essentially rely on its judgment rather than offering a specific definition. (A.R.1., at 22; A.R.2., at 266-270). The jury deadlocked, and was given an Allen Charge with no objection. (A.R.1., at 23; A.R.2., at 270-274). On the second day of deliberation, the jury returned a guilty verdict. (A.R.1., at 24-25; A.R.2., at 281-84). The State filed a recidivist information shortly after the verdict.

The Petitioner filed post-trial motions, which essentially mirror the first four assignments of error in this appeal (A.R.1., at 26-31), as well as a motion to dismiss the recidivist action due to the failure to arraign the Petitioner on the same prior to the expiration of the term of court at which trial was held. The post-trial motions were denied after a hearing on the same, although the recidivist information was dismissed. (A.R.1., at 32-33; A.R.4.). The Petitioner was thereafter sentenced to 1-5 years of incarceration, without an alternative sentence. The Circuit Court additionally ordered the Petitioner to have no contact with the alleged victim for life, to which the Petitioner objected. (A.R.1., at 34-35; A.R.5.) It is from the final judgment of the sentencing order that the Petitioner appeals.

SUMMARY OF ARGUMENT

The Petitioner asserts that the State failed to prove certain elements necessary to sustain a strangulation verdict. Specifically, there was no evidence establishing that the alleged victim's air supply and/or blood flow was restricted. Moreover, even if one of those effects was proven, there was no proof that the alleged victim suffered one of the statutory classifications of injury *as a result* of the cutting off of her air supply or blood flow.

The Petitioner also avers that the Circuit Court erred in permitting collateral acts evidence under Rule 404(b) because both the State and the Circuit Court failed to comply with the requirement for specificity for the reason such evidence was being admitted, because the evidence was irrelevant, and because the evidence was more prejudicial than probative.

The Petitioner next argues that the Circuit Court erred in denying a Motion in Arrest of Judgment relating to the unconstitutionally vague statutory requirement of a “substantial” injury. There is no meaningful definition of “substantial” that is sufficiently clear to pass constitutional muster, and as the jury's questions demonstrated, the Petitioner was specifically prejudiced by this issue in the context of this case.

The Petitioner also maintains that the Circuit Court erred by denying the Motion for Mistrial as a result of the jury's failure to abide by the instruction to resolve issues of doubt in favor of the accused. It is obvious that at least some members of the jury had difficulties parsing the meaning of the word substantial, yet instead of resolving those questions in favor of a theory of innocence, the jury convicted.

The Petitioner asserts that the Circuit Court lacked the authority to issue a lifetime no-contact order restraining the Petitioner from ever having any contact with the alleged victim. Because a sentence that lacks statutory authority is invalid, this aspect of the sentencing order should be vacated. Finally, the Petitioner asserts that the Circuit Court erred cumulatively, to the Petitioner's prejudice.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner asserts that this case is appropriate for oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure because the fifth assignment of error concerns an

issue of first impression. Alternatively the case is appropriate for oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure because of a result against the weight of the evidence, and an unsustainable exercise of discretion by the trial court. The case should be resolved by signed opinion.

ARGUMENT

1. The Circuit Court erred by denying the Petitioner's Motion for Judgment of Acquittal due to insufficient evidence.

The standard by which this Court will judge a challenge to the sufficiency of the evidence has been set forth in Syllabus Points 2 and 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), as follows:

2. The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

3. A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

This standard requires essentially a near total absence of evidence concerning an element of the offense before the denial of a motion for judgment of acquittal will be reversed by this Court. The Petitioner asserts, however, that a judgment of acquittal was appropriate in this case

because of a failure of the State to prove a specific element of the offense. Specifically, in order to prove "strangulation" as charged in the indictment, the State is required to show that there was a restriction of air intake or blood flow, and that the restriction caused a loss of consciousness, substantial physical pain, illness, or impairment of physical condition [emphasis added]:

§61-2-9d. Strangulation; definitions; penalties.

(a) As used in this section:

(1) "Bodily injury" means substantial physical pain, illness or any impairment of physical condition;

(2) "Strangle" means knowingly and willfully restricting another person's air intake or blood flow by the application of pressure on the neck or throat;

(b) Any person who *strangles* another without that person's consent *and thereby causes* the other person bodily injury or loss of consciousness is guilty of a felony and, upon conviction thereof, shall be fined not more than \$2,500 or imprisoned in a state correctional facility not less than one year or more than five years, or both fined and imprisoned.

The alleged victim testified that she became unconscious, testified that she experienced pain, testified that she had a sore throat, and testified that she had a hoarse voice following the Petitioner's alleged attack. (A.R.2., at 133-182). However, there was no evidence supporting the causal link between a supposed restriction of air intake or blood flow, and any of these conditions. First, there is no actual evidence of any credible nature that the alleged victim's blood flow or air intake were actually restricted, beyond the general statement that the Petitioner put his hands around her neck and the evidence of bruises. Merely making contact with a person's neck does not support the notion that air or blood were restricted in the first place. There was, of course, no medical testimony, and there were no medical records entered into evidence. The alleged victim admitted under cross-examination that she did not even have any purported neck injury medically assessed or examined, nor did she even disclose it to her

medical providers when she went to Preston Memorial Hospital. (A.R.2., at 167-68).

Second, there is no evidence in the record whatsoever that the alleged victim's alleged period of unconsciousness, pain, sore throat, or hoarse voice were caused by the restriction of air intake or blood flow. Any of those conditions can have other causes besides the restriction of air intake or blood flow. Obviously, one can get a hoarse voice or sore throat from shouting. One could experience pain from physical contact to the neck short of contact capable of restricting air flow. The alleged victim specifically testified that she could not identify the reason why she became unconscious. The lack of any evidence of a medical forensic nature, combined with a failure of the State to actually put forth any lay evidence whatsoever connecting the alleged victim's purported injuries with a restriction of air intake or blood flow, is fatal to the State's case, and requires that this Court enter a judgment of acquittal on the single count of the indictment.

2. The Circuit Court erred by denying the Petitioner's Motion for New Trial based upon the improper admission of collateral acts evidence under Rule 404(b).

The standard of review pertaining to appeals of the admission of Rule 404(b) evidence is set forth in *State v. LaRock*, 196 W.Va. 294, 310-11, 470 S.E.2d 613, 629-30 (1996):

The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review de novo whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403.

The Petitioner moved for a new trial based upon the Court's admission of 404(b) evidence of prior alleged incidents of strangulation by the Petitioner against the alleged victim. The Court's ruling allowing the State's witnesses to testify about these prior alleged incidents

violated the principles underlying *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994), in a variety of ways.

Syllabus Point 2 of *McGinnis* states [boldface emphasis added]:

Where 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.

First, there was an insufficient record from which the Court could make a factual finding that the alleged incidents actually happened by a preponderance of the evidence. While the alleged victim was sworn to testify, her testimony centered on the admissibility of the recorded statement that the Court did not ultimately admit. She was not actually subject to cross examination in this context on the question of whether those prior acts occurred. (A.R.2., at 23-31). She gave no details concerning the prior bad acts about which she was permitted to testify, and no details were ever brought to light with the exception of the one contained in the police report. However, given that there was not a proper evidentiary hearing on the matter, the Court should not have admitted the evidence as 404(b) evidence because the proffered evidence did not satisfy the threshold requirement of *McGinnis*.

Second, the Court was incorrect to determine that the prior acts were relevant to the charge being prosecuted. The factual question presented to the jury was whether the Petitioner engaged in the specific physical conduct, creating the specific physical results, to the alleged victim, on one specific night. Whether or not he had ever previously engaged in that conduct had no bearing whatsoever upon whether his acts during the altercation of the night in question met the elements of the Strangulation offense.

Third, for reasons related to the relevancy question, the Circuit Court was also incorrect in determining that the Rule 403 balancing test was satisfied. The evidence was clearly more prejudicial than probative. The Circuit Court's ruling allowed the State to tar the Petitioner as an abuser with a predilection to engage in strangulation, thereby inflaming the jury instead of causing them to concentrate on the specific charge in the indictment.

Finally, despite the Petitioner's specific objection on this issue, the Court did not comply with Syllabus Point 1 of *McGinnis*:

When offering evidence under Rule 404(b) of the West Virginia Rules of Evidence, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction.

Both the State and the Circuit Court failed to abide by this requirement, resulting in the State alleging the acts for the purpose of "intent, motive, opportunity, absence of mistake, absence of accident," with the Court adopting that improper, multifaceted approach. The Defendant asserts that it is far from "clearly... shown from the record" that any of those purposes were satisfied. This shotgun approach only heightens the prejudice of the admission of the

collateral acts evidence by further confusing the jury beyond the probative value of any of those categories.

3. The Circuit Court erred by denying the Petitioner's Motion for Arrest of Judgment based upon the invalidity of the "Strangulation" statute for being unconstitutionally vague.

The Petitioner assigns as error the Circuit Court's denial of his Motion for Arrest of Judgment, based upon the argument that the statute under which he was convicted was void for vagueness. In order for a statute to pass constitutional muster, where a statute is challenged upon the grounds of vagueness, the court looks to determine whether the criminal statute is "set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards of adjudication." Syl. Pt. 1, *State v. Flinn*, 208 S.E.2d 538 (1974).

Additionally, the standard of review for a constitutional challenge to a statute is highly deferential to the legislature owing to the separation of powers:

In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.

Given our clear preference for upholding legislative enactments, this Court "will interpret legislation in any reasonable way which will sustain its constitutionality." *State v. Legg*, 207 W.Va. 686, 694, 536 S.E.2d 110, 118 (2000); accord Syl. Pt. 3, *Slack v. Jacob*, 8 W.Va. 612 (1875) ("Wherever an act of the Legislature can be so construed and applied as to avoid a conflict with the Constitution, and give it the force of law, such construction will be adopted by the courts.").

State v. Yocum, 233 W.Va. 439, 759 S.E.2d 182, 186 (2014).

The Petitioner asserts that the Strangulation statute, W. Va. Code §61-2-9d, is unconstitutionally vague due to its reliance on the term “substantial,” which is nearly impossible to define with any level of precision, let alone the necessary precision to satisfy the “sufficient definiteness” standard, and which does not provide a person of ordinary intelligence adequate notice of the elements of the offense. Nor does the word prevent the inconsistent application of the law; to the contrary, because of the difficulty in defining “substantial,” the statute essentially invites different prosecutors and different juries to come to inconsistent results when determining whether to prosecute or convict. Furthermore, the Petitioner can demonstrate actual prejudice in this case, given the jury's inquiry about the word "substantial," and the fact that any of the jury's doubts regarding whether that definition was satisfied by the evidence should have been resolved in favor of the Defendant, and not the State (discussed in further detail in the next assignment of error).

Notably, in response to the jury question, the Petitioner attempted to supply the Circuit Court with a legal definition of “substantial,” which is not apparently defined in any applicable code section:

MR. COOPER: Your Honor, I will say that a very cursory Google search of the term "substantial," Black's Law Dictionary defines it as, "Essentially; without material qualification; in the main; in substance, materially; in a substantial manner." So I submit that's probably not going to be helpful.

(A.R.2., at 268).

Ultimately, the Circuit Court, without objection, told the jury to rely on its own judgment. (A.R.2., at 266-70).

THE COURT: [...] To the second question, "To determine what's

substantial for the element of bodily injury and strangulation statute, you are to reach conclusions which reason and common sense leads you to draw from the facts established by the evidence of the case."

(A.R.2., at 269-70).

The fact that this was the best instruction that could be offered to the jury demonstrates that the "substantial" element is vague in the precise ways the constitution prohibits. The Circuit Court essentially is asking the jury to make a *post hoc* determination of what constitutes a "substantial" bodily injury. A valid law would define "substantial" in a way that the degree of injury that would lead to criminal liability could be determined.

In *Yocum, supra*, this Court examined the statutory phrase "likely to result in serious bodily injury." This Court denied the constitutional challenge to the statute, finding that the mere fact that individuals could disagree about the meaning did not doom the validity of the statute. *Id.*, 759 Se.2d at 186. Further, this Court held that the requirement of a potential for harm was adequately conveyed by the language in the statute. *Id.*, 759 Se.2d at 188.

Conversely, in this case, unlike the phrase "serious bodily injury," which is defined throughout the Code (*see, e.g.*, W. Va. Code § 61-8B-1), "substantial" is not defined anywhere. This Court has held a vagueness challenge to be defeated when "persons of ordinary intelligence know what the terms mean." *State ex rel. Sale v. Goldman*, 539 S.E.2d 446, 459, 208 W. Va. 186 (2000). As the instant case demonstrates, however, the persons of (presumably) ordinary intelligence serving on the jury, not to mention the court and counsel, could not ascertain what "substantial" means in any communicable way.

4. The Circuit Court erred by denying the Petitioner's Motion for Mistrial based upon the jury's resolution of doubt in favor of the State rather than the accused.

The standard of review for the denial of a motion for mistrial is as follows:

We review the circuit court's decision to grant or deny a motion for mistrial is reviewed under an abuse of discretion standard. "In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review." Syllabus Point 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).

State v. Thornton, 228 W.Va. 449, 720 S.E.2d 572, 582-583 (2011).

In this case, the jury was clearly instructed to resolve a conflict in the evidence in favor of the Petitioner. The Circuit Court instructed the jury that "if you view the evidence as reasonably permitting either of two conclusions -- one of innocence, the other of guilt -- you should, of course, adopt a conclusion of innocence." (A.R.2., at 242.) However, it is clear, based upon the jury's inquiry concerning the word "substantial" that such a conflict was present. It is grounds for the setting aside of a verdict if it can be shown that a jury has violated the court's instructions: "The jury did not follow that instruction, and the court set aside the verdict. It is manifest that, if the court was right as a matter of law on this instruction, the verdict should have been set aside." *News Pub. Co v. Denison-pratt Paper Co*, 94 W.Va. 236, 117 S.E. 920, 927 (1923). At the moment the jury voiced its uncertainty over the meaning of "substantial," the Petitioner asserts that the only viable results comporting with the Circuit Court's instruction would have been a not guilty verdict or a hung jury. Accordingly, the Circuit Court erred by not declaring a mistrial once the guilty verdict was rendered.

5. The Circuit Court erred by issuing a lifetime no-contact order against the Petitioner.

At sentencing, the Circuit Court ordered that the Petitioner have no contact with the alleged victim for life. (A.R.1., at 35). The Petitioner objected, and requested that the Circuit

Court identify the authority under which it was permitted to enter a lifetime restraining order.

The Circuit Court was unable to do so. (A.R.5., at 12-13). The Petitioner asserts that the Circuit Court exceeded its legitimate powers and erred by including this term in the Petitioner's sentence.

The Petitioner has not identified any statute, rule, or case which bestows upon a circuit court the authority to bind a convicted person from contacting an individual for life, except in circumstances that are not applicable in this case. Courts have authority to enter no-contact orders only in certain circumstances, and only for certain durations. W. Va. Code §48-5-608 allows for a permanent protective order to be issued in conjunction with a divorce. However, the court would only be permitted to restrain the party from:

entering the school, business or place of employment of the other for the purpose of molesting or harassing the other or from entering or being present in the immediate environs of the residence of the petitioner or from contacting the other, in person or by telephone, for the purpose of harassment or threats; or from harassing or verbally abusing the other.

W. Va. Code §48-5-608(a). Clearly, this is not a pure “no contact” order, but instead an order restraining a party from unprotected speech in the nature of harassment. Notwithstanding that the Circuit Court was not presiding over the Petitioner's divorce from the alleged victim, the lifetime restraint contemplated by this code section is significantly less restrictive than an order that proscribes all contact whatsoever.

Such an order may, of course, be entered pursuant to Article 27, Chapter 48 of the Code; however, the duration of such an order is limited to one hundred eighty days, followed by an extension of ninety days. A one year order may be effectuated upon a showing of a violation of a prior order, and an order the duration of which is at the discretion of the court may be entered upon showing of a second such violation. W. Va. Code §48-27-505. Thus, there is no statutory

authority for a lifetime no contact order in the absence of specific findings of fact that do not exist in the present case (not to mention that no DVPO petition was pending before the Circuit Court). Another type of true no-contact order is the Personal Safety Order, which is limited to two years in duration. W. Va. Code §53-8-7(f). However, such an order is clearly inapplicable in the present circumstances because it is not available in the context of ex-spouses. W. Va. Code §53-8-3(c).

The other possible source of authority for a no-contact order could be the power to enter permanent injunctions, as set forth in W. Va. Code §53-5-1, *et seq.* Injunctions are also discussed under Rule 65 of the West Virginia Rules of Civil Procedure. However, even glossing over the fact that the Petitioner was not granted notice of the Court's consideration of permanent injunctive relief, nor made a party to a civil action requesting said relief, the Circuit Court lacks jurisdiction to make such a broad order. The ability of the Circuit Court to enjoin an "act," meaning the conduct of a person or entity, is limited, in this circumstance, to Preston County, West Virginia. "[W]e conclude that W.Va.Code § 53-5-3 permits a circuit court to enjoin an act only when the injunction is issued in the county in which the act is being performed." *Meadows on Behalf of Professional Employees of West Virginia Educ. Ass'n v. Hey*, 399 S.E.2d 657, 663, 184 W.Va. 75, 81 (1990)

By the time of sentencing, the Petitioner was being housed in Tygart Valley Regional Jail in Randolph County, West Virginia (he is presently in Pruntytown Correctional Center and Jail in Taylor County); while the alleged victim had relocated out of state. Any conjecture that the Petitioner would continue to reside in Preston County in the future is wholly speculative. The Circuit Court lacked jurisdiction under its authority to grant permanent injunctive relief to enter

a no-contact order that would be effective in all times and all places.

The Petitioner does not contest that the Circuit Court possesses authority to prohibit contact as a term of condition of bail (W. Va. Code §62-1C-17c), of probation (W. Va. Code §62-12-9), of parole if adopted by the Division of Corrections and Rehabilitation (W. Va. Code §62-12-17), or of extended supervision (W. Va. Code §62-12-26). However, the Circuit Court's order does not terminate at the conclusion of supervision or discharge of sentence; the order is entered for life, clearly outside the scope of any authority.

A sentence which exceeds statutory authority is invalid:

While this Court acknowledges the general principle that sentencing decisions are properly within the realm of the trial court, an order which violates statutory restrictions is invalid. See Syl. Pt. 1, in part, *State v. Lucas*, 201 W.Va. 271, 496 S.E.2d 221 (1997) (finding that sentencing matters are generally reviewed "under a deferential abuse of discretion standard, unless the order violates statutory or constitutional commands.").

State v. Cookman, 813 S.E.2d 769 (2018). Because the Circuit Court had no statutory authority to enter a lifetime no-contact order restraining the Petitioner, this Court should reverse that provision of the sentencing order.

6. The Circuit Court erred cumulatively to the prejudice of the Petitioner.

Syllabus Point 5 of *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972) states that:

Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.

The Petitioner has set forth multiple assignments of error. The Petitioner asserts that if this Court finds harmless error relating to two or more of those issues, that such error has accrued cumulatively to the Petitioner's prejudice, and that this Court should accordingly

reverse the Petitioner's conviction and grant a new trial.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant the following relief:

1. That the conviction be vacated and remanded for entry of a judgment of acquittal or other order dismissing the matter with prejudice;
2. That the conviction be vacated and remanded for a new trial;
3. That the lifetime no-contact order be vacated and the matter remanded for a lawful order;
4. That the Court grant any other relief the Court deems just and proper.

Respectfully Submitted,

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By counsel,



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