IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Petitioner Below, Respondent,

v. **NO. 21-0424**

CANDICE T. SALMONS,
Respondent Below, Petitioner.

Case No. Below 16-F-71
Circuit Court of Wyoming County

PETITIONER'S BRIEF

G. Todd Houck WVSB# 5674
Hrko Building
105 Guyandotte Avenue
Mullens WV 25882
(304)294-8055
gthouck@aol.com
Counsel for Petitioner,
Candice T. Salmons,

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STATEMENT OF THE CASE

On November 26, 2015, The Petitioner, Candice Salmons (Petitioner) and David Laney (Laney) visited the home of a friend, Jerry Goins, Jr (Goins). Goins had requested Petitioner and Laney to come over to his home and shoot pool, at this time Goins was living with his parents Jerry and Melissa Goins. AR[1] 61-62.

According to Goins, his parents were out of the home on a 4 day holiday to Tennessee. AR 63. During that evening Goins stated he found Petitioner looking through his mother's closet, but did not see her remove anything from of the home, nor did he notice anything missing. AR 64-65. Goins stated that he had been drinking throughout the day, and admitted that he could have passed out and someone else came in the home after Petitioner had left. AR 66-67. Goins stated he did not see Petitioner or Laney steal anything from his home. AR 67-68

Goins' father Jerry Goins Sr. testified that they were in Tennessee for a week AR 70 and when he and his wife Melissa Goins returned from Tennessee he noticed several items were missing, including a class ring, but he didn't remember what all was missing. AR 72. He

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[1] Refers to Appendix Record and the numbering references the number at the bottom right page.

testified the following items were missing: $2,000 worth of jewelry; $700-800 of clothes; a $2,000.00 dill; and his class ring valued at $207. AR 73. On cross he admitted he had no proof or receipts that he even owned the items declared missing or stolen. AR 75.

Goins' mother Melissa Goins testified that when she came home from Tennessee she noticed her closet was out of order. AR 78. That she had a lot of clothing, jewelry and purses that were missing. She offered that in her "guestimaiton" she was missing 5-6 rings and valued the missing items at $17,000.00. AR 78-83.

Tina Riffe testified that Petitioner had sold her purses, clothes, make-up and a bracelet. AR 110-11 & AR 209-212. She also testified that a friend of her bought two purses from Petitioner. Riffe ultimately returned the items to Melissa Goins.

Jennifer Justice testified that she bought a purse and some shirts that apparently came from Melissa Goins home; however, the witness was unable to identify the property depicted in the State's exhibit. AR 131-132 & 211. According to Justice, Petitioner told her she took the items for Melissa Goins' home. AR 134.

Petitioner denied any involvement of a crime to the investigating officer, Trooper Shifflette. AR 137. Trooper Shifflette stated that Melissa Goins and her husband had collected several items of personal property that were stolen from their home and he documented those items by photographs which ultimately became some of the State's exhibits. AR 140- 141 & 207-213.

After speaking with individuals in the neighborhood – some of the herein witnesses, Trooper Shifflette acquired a search warrant for Petitioner's home; however, no stolen property was found. Petitioner was arrested and interviewed and denied any involvement in the burglary

of Melissa Goins' home. AR 144.

Trooper Shifflette testified that the property Melissa Goins' reported stolen was valued over a $1,000.00. AR 148 and the value of the recovered property was $810 2-29. As to the valuation of the property stolen or recovered, the trooper testified he found the values on the internet or values supplied by Melissa Goins. AR 156.

At the conclusion of the State's evidence, Petitioner's then attorney moved for a judgement of acquittal contending: a) that Petitioner did not unlawfully or feloniously break and enter or enter without breaking inasmuch as Petitioner was invited. The only evidence relating to this entry was from Jerry Goins, Jr. who stated on the spur of the moment he walked over to Petitioner's home and invited her and Laney back to his house. No other evidence exists regarding any planning or conspiring to enter any home or commit a crime therein; 2) there existed no credible evidence to support a value as to the items alleged stolen. The only exhibits of the items recovered were $810.00. There were allegation of other items stolen but no evidence was presented that the actual property existed; there existed no evidence to suggest Petitioner made an agreement with anyone to commit a crime. They were invited over on the spur of the moment without any preplanning or any evidence that Petitioner and/or Laney and/or Goins had concocted any criminal plan. Additionally, there was no evidence presented that Laney or Goins knew, assisted or benefitted from Petitioner's alleged crime. AR 159-162.

The Defense offered no witnesses and the jury convicted Petitioner on all three counts, AR 253-254. The Petitioner was sentenced to the West Virginia Division of Corrections for a 1-15 year sentence. AR 300-302.

SUMMARY OF ARGUMENT

That the Circuit Court erred by not directing a verdict in favor of Petitioner and erred in finding that the evidence presented at trial was sufficient to establish proof beyond a reasonable doubt as to the charges of : breaking and entering; grand larceny; and conspiracy.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Because the principle issues in this case have been authoritatively decided prior cases, oral argument under rev. R.A.P. 18(a) is not necessary unless the Court determines that other issues arising upon the record should be addressed. If the Court determines that oral argument is necessary, this case is appropriate for a Rule 19 argument and disposition by memorandum decision.

ARGUMENT

1. Standard of Review

In reviewing a claim that the evidence at trial was insufficient to convict, this Court has stated that a de novo standard of review is applied to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence and the evidence is to be viewed in the light most favorable to the prosecution. *State v Vilela* 792 S.E.2d 22, 238 W.Va. 11 (2016).

> The trial court's disposition of a motion for judgment of acquittal is subject to our *de novo* review; therefore, this Court, like the trial court, must scrutinize the evidence in the light most compatible with the verdict, resolve all credibility disputes in the verdict's favor, and then reach a judgment about whether a rational jury could find guilt beyond a reasonable doubt. *State v. LaRock*, 196 W.Va. 294, 304, 470 S.E.2d 613, 623 (1996)

2. **The Circuit Court Erred in Not Granting Petitioner's Motion for Acquittal for the Charge of Breaking and Entering**

The crime of burglary is defined in W.Va.Code, 61-3-11(a), as: If any person shall, in the nighttime, break and enter, or enter without breaking, or shall, in the daytime, break and enter, the dwelling house, or an outhouse adjoining thereto or occupied therewith, of another, with intent to commit a felony or any larceny therein, he shall be deemed guilty of burglary."

In *State v. Louk*, 285 S.E.2d, 169 W.Va. 24 (1981), this court recognized the our statue is consistent with the conclusion of most courts that the burglary is complete once there has been an unauthorized entry and a showing that there was an intent to commit a felony citing – *State v. Van Brocklin*, 598 P.2d 938 (Alaska 1979); *Patterson v. Commonwealth*, 251 Ky. 395, 65 S.W.2d 75 (1933); *State v. Rand*, 430 A.2d 808 (Me.1981); *State v. Revelle*, 301 N.C. 153, 270 S.E.2d 476 (1980); 13 Am.Jur.2d Burglary § 1 (1964).

"The crime of burglary is complete when the defendant makes an unauthorized entry into a structure if at the time of his entry into the building he entertains the actual intent to commit a specific crime therein, which may be theft by unauthorized taking. *State v. Field, Me.*, 379 A.2d 393, 395 (1977), *Louk*, at 435.

As the facts in this case are rather simple and straight forward the only evidence that Petitioner unlawfully or feloniously broke or entered into the Goins' home was the testimony of Jerry Goins Jr., who stated that he without any previous arrangement went next door and invited Petitioner and Laney over to his home. They were there as friends with him to shoot pool and drink. Goins further stated that he did not see Petitioner take any property from his home nor did

he suspect a theft, or property being missing, during their visit. The only suspicious fact offered was Petitioner was looking through his mother's closet. AR 61-68. A fact that does not equate to larceny or the other felony requirement for burglary.

To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

3. **The Circuit Court Erred in Not Granting Petitioner's Motion for Acquittal for the Charge of Grand Larceny**

Petitioner's then counsel consistently objected to any evidence that was speculative and not supported by physical evidence relating to the existence or value of goods allegedly taken. The State offered personal items on a list that were never substantiated and some of which were not listed on the indictment. AR 71, 80-81, 158.

Questions to the Court from the jury, evince that even jury was unsure on how to place a value on the property allegedly taken. Moreover, those same notes indicate that the jury improperly considered the Petitioner's silence in reaching its verdict. AR 252-253.

In *State, ex rel. Day v. Silver*, 556 S. E. 2d 820, 210 W. Va. 175 (2001), this Court reversed a lower court's finding that an indictment was sufficient even though it did not list the items stolen or their values. That an indictment charging larceny and destruction of property needed to itemize or describe the property alleged stolen and destroyed; the indictment failed to allege an essential element and did not provide sufficient information for preparing a defense and pleading a conviction as a bar to later prosecution for the same offense. In citing an earlier ruling

the *Day* Court held "the indictment before us in no way lists, defines, or describes the property the petitioner is accused of stealing and destroying". This Court enumerated the components of grand larceny in *State v. Goodnight,* 169 W.Va. 366, 367, 287 S.E.2d 504, 506 (1982), as being "jurisdiction, date, specific property, value, owner, intent, taking and asportation[.]"

An element of larceny is an itemization or description of the property the accused is charged with stealing. The indictment lacks an essential element. The Petitioner was put on notice as to what property he was accused of stealing and destroying; therefore, he did not have sufficient information to prepare his defense and plead his conviction as a bar to later prosecution for the same offense. *Day* at 825.

Like the *Day* case, the instant case does not inform the Petitioner the value of the goods taken or their identity. The Indictment states that Petitioner took "numerous household items, makeup, purses, class ring, pendant and assorted jewelry and coins" it does not list a value of each item and the identity of the goods is lacking. AR 7-8. As evinced by Petitioner's then counsel, many of the items were never disclosed to Petitioner, nor were the items values understood. AR 17 & 74 Counsel objected to the supposed list of missing items, as there was no foundation laid that any of those items were actually missing or allegedly stolen by Petitioner. Jerry Goins, Sr. testified that he was missing a class, a $2,000.00 drill and $700-$800 worth of his clothing. A review of the indictment does not mention Jerry Goins Sr. as a victim of larceny, nor does it contain the property he now claims to have been stolen – a clear violation of the *Day* decision.

Melissa Goins testimony was not consistent with the items listed on the indictment. Melissa Goins testified that she couldn't give an exact number but she had as many as 10 purses

gone . . . some were Coaches, Dolces Gabanna, Vera Bradley and then some others. She further testified that lots of shirts and jewelry, some costume jewelry, five, six bracelets or maybe [more] and her "guestimation" about five or six rings, a lot of other jewelry earrings and necklaces. AR 78-79. How was Petitioner able to defend herself with the indictment so flawed in view of Melissa Goins' testimony? Her testimony in comparison with the indictment is a violation of the *Day* decision.

State v Cooper 161 S.R. 30, 111 W. Va. 255 (1931) held that a count in an indictment charging larceny of five tires of a certain value was insufficient as a description of stolen property. *State v. Criss*, 23 S. E. 2d, 125 W. Va. 225 (1931) held that the use of the word approximate in connection with value in an indictment for larceny where value is material in determining the degree of the offense is fatal. *State v Boswell*, 148 W. E. 1, 107 W. Va. 213 (1929). Market value, if any, of the things stolen as at time and place of theft, must be proven to sustain grand larceny charge.

The State's case violated the precedent of these earlier cases. It seems that each witness had a different figure or valuation on what property was taken or missing, as well as a different belief as to what was stolen. As alluded to earlier, Jerry Goins, Sr. whose not listed as a victim of larceny, nor were his items listed on the indictment, testified that he lost: $2,000.00 worth of jewelry; a $2,000.00 drill; a $208 class ring; and $700 - $800 in clothing. AR 73. Melissa Goins lost: about $3,000 - $4,000 worth of purses, even though she was not sure how many purses were taken; shirts, husband's jackets and jean which averaged $35 - $150 - $160 for the shirts; or other shirts worth between $75-150; her clothes worth $5,000 - $6,000; jewelry worth $7,000.00; eight bras worth $40 each; makeup; a camcorder. That all of her missing items totaled

$17,000.00. AR 79-83. In redirect by the State, Melissa Goins testified she knew exactly what was missing. AR 98.

Trooper Shifflette testified that he believed the items were over $1,000 and the property recovered was worth $810, AR 154, and on cross examination he valued the same recovered property at $820. AR 156-157.

The indictment and testimony was too speculative and any missing item, unless recovered, was not properly identified or valued. As recognized by the *Day* decision, how can Petitioner be confident she will not be tried again for this same offense, if it is later determined that the Goins had another purse, pair of jeans, or another box of costume jewelry missing? The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." Syl. Pt. 1, *State v. Gill,* 187 W.Va. 136, 416 S.E.2d 253 (1992).

4. **The Circuit Court Erred in Not Granting Petitioner's Motion for Acquittal for the Charge of Conspiracy**

There exists no proof that Petitioner conspired with either Goins or Laney. The only witness to issue was Jerry Goins, Jr., who testified that he was drinking alone that night and had some company come over to shoot pool. AR 62. Without any planning or forethought, he asked Petitioner and Laney to come over to drink and shoot pool. Petitioner and Laney were there for two hours and Goins did not see either one of them carry, or steal, anything from the

house. AR 65-68. None of the other testimony established that Goins or Laney assisted, participated or counseled Petitioner in her alleged crimes.

The evidence adduced at trial only established that Petitioner was present with Goins and Laney on the evening these crimes were allegedly committed. There was no evidence, sufficient or otherwise, to show that Petitioner or the others participated in the planning, preparation or commission of the crimes alleged. Moreover, there is no evidence to support a finding that Petitioner entered into any agreement to conspire with the others to commit the alleged crimes.

In order for the State to prove a conspiracy under W.Va. Code, 61-10-31(1), it must show that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy." Syl. Pt. 9, in part, *State v. Bouie*, 235 W.Va. 709, 776 S.E.2d 606 (2015).

CONCLUSION

The Circuit Court erred in finding that the evidence presented at trial was sufficient to establish proof of guilt beyond a reasonable doubt as to the charges of : breaking and entering; grand larceny; and conspiracy. Therefore this matter should be reversed, and this matter should be remanded and dismissed.

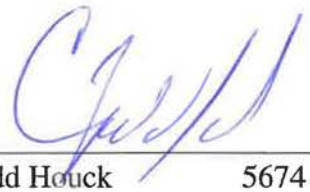
G. Todd Houck 5674
Counsel for Petitioner

CERTIFICATE OF SERVICE

I Hereby certify that on January 25, 2022, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U. S. Mail contained in postage paid envelope addressed to counsel for all other parties to this appeal as follows:

Gregory Bishop
Raleigh Co Pros Atty
PO Box 462
Pineville WV 24870

William E. Long
Office of WV Attorney General
812 Quarrier St 6th Floor
Charleson WV 25301
william.e.long@wvago.gov



G. Todd Houck 5674
Counsel for Petitioner