IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No.: 21-0738
Case No. 20-F-430
Circuit Court of Raleigh County

TREMAINE JACKSON,

Petitioner.

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

The State's response confuses Petitioner's right to stipulate to his felon status with the circuit court's broad discretion to "[make] evidentiary and procedural rulings." Resp. Br. 15–16. The State doubles down, advancing formalistic procedural arguments to defend the circuit court's erosion of Petitioner's due process protections and concerned only with denying Petitioner the "benefit" of stipulating to his felon status. *Id.* at 18–19.

Petitioner enjoys no benefit from stipulating to felon status; out of fear of prejudice, and to maintain constitutional fairness, this Court requires felon status stipulations be accepted over the admission of a prior conviction. This prophylactic rule prevents the admission of cumulative and inflammatory evidence that would otherwise infect a jury's deliberation. Because Petitioner was denied that protection, his convictions must be reversed, and he must be granted a new trial.

I. The circuit court erred when it refused Petitioner's felon status stipulation because it denied him an impartial and unbiased jury.

When the circuit court wrongly admitted prejudicial evidence with no probative value, it violated Petitioner's due process rights under the federal and state constitutions. *See* U.S. Const. amend. XIV; W. Va. Const. art. III, § 10, 14. The State defends the circuit court's erroneous decision by arguing that Petitioner's stipulation was invalid, that the circuit court was free to rule on the stipulation as it wished, and that any error was harmless. Resp. Br. 16. Those arguments ignore the specific stipulation at issue and discount this Court's precedent in favor of trial court rules and the circuit court's discretion. Petitioner needs a new trial on all charges.

A. Petitioner's felon status stipulation was valid.

The circuit court had all it needed to accept Petitioner's stipulation, and the court abused its discretion when it rejected that stipulation without legal authority. The State now contends Petitioner's stipulation was invalid because it violated West Virginia Trial Court Rule 42.05. Resp.

Br. 17 (quoting the rule to say "[u]nless otherwise ordered, stipulations *must* be in writing, signed by the parties making them or their counsel, and promptly filed with the clerk (emphasis added)"). The State also argues the stipulation is invalid under exceptions to Rule 42.05 that allow for verbal stipulations because the State did not agree, and there was no related action. *Id.* The State's position is unworkable because if the State is correct, it must always agree to a felon status stipulation; Rule 42.05 requires written mutual assent, and the exception for verbal in-court stipulations also requires the parties' agreement. W. Va. TCR 42.05; *Lawyer Disc. Bd. v. Sidiropolis*, 241 W.Va. 777, 785, 828 S.E.2d 839, 847 (2019). The State is not correct. Irrespective of the State's position, Petitioner was entitled to unilaterally stipulate to his felon status.

This Court and the Supreme Court of the United States have held there is no legitimate prosecutorial interest to oppose a felon status stipulation.[1] Both courts made clear a stipulation prohibits the prosecution from introducing additional evidence of a prior conviction—an odd prohibition to impose if the stipulation originally required the State's consent. *Id.* This Court requires circuit courts to accept felon status stipulations. *Nichols*, 208 W. Va. at 434, 541 S.E.2d at 312; *Herbert*, 234 W. Va. at 579, 767 S.E.2d at 475. It was an abuse of discretion to spurn Petitioner's stipulation because the State "preferred to prove [felon status] through the admission of the [voluntary manslaughter conviction,]" and "the [circuit court] cannot require a stipulation." A.R. 570, 574.

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[1] "[T]he trial court must permit such stipulation and preclude the state from presenting any evidence to the jury regarding the stipulated prior conviction(s)." Syl. Pt. 3, *State v. Nichols*, 208 W. Va. 432, 541 S.E.2d 310 (1999). To be clear, "[w]hen a defendant . . . *stipulates* to having been previously convicted of a crime . . . [t]he jury shall be informed of the prior [conviction], but shall otherwise not be informed of the name or nature of the defendant's prior conviction(s)." Syl. Pt. 5, *State v. Herbert*, 234 W. Va. 576, 767 S.E.2d 471 (2014) (emphasis in original). Thus, "a trial court abuses its discretion . . . [when] it spurns a defendant's offer to concede a prior judgment and admits the full judgment record over the defendant's objection." *Old Chief v. United States*, 519 U.S. 172, 174 (1997).

Neither Petitioner's noncompliance with Rule 42.05, nor the State's opposition, gave the circuit court authority to refuse the stipulation. Rule 42.05 provides the court discretion to accept stipulations that do not comply with the rule. *State v. Mitchell*, 214 W. Va. 516, 524, 590 S.E.2d 709, 717 (2003). Thus, under Rule 42.05, the circuit court had discretion to "otherwise order" the stipulation be accepted. Really, the court had a responsibility to accept the stipulation because the alternative—and reality—corrupted the jury, prejudiced Petitioner, and tainted his convictions.

B. The circuit court abused its discretion.

No matter the breadth, it was an abuse of discretion for the circuit court to deny Petitioner a procedural safeguard this Court requires circuit courts to provide. The State's defense of the circuit court's "broad discretion" values form over function and asks this Court to create a new rule for felon status stipulations. At bottom, the State's backing of the circuit court's decision is unworkable and blurs the lines between criminal and civil cases and factual and status stipulations.

A stipulation to a status element of a charged criminal offense differs greatly from a general stipulation of fact in a civil matter. Edward J. Imwinkelried, *The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as A Denial of Equal Protection*, 40 EMORY L.J. 341, 389–90 (1991) (attributing the differences to the due process rights of criminal defendants and using depositions as an example of how "maintain[ing] the balance of the adversary system" looks different in each context). Because of that distinction, the civil cases cited by the State in support of invalidating Petitioner's stipulation are unpersuasive. Resp. Br. 17-19. In contrast to a factual stipulation for civil litigants, a felon status stipulation does not confer some advantageous tactical windfall. This Court implemented the felon status stipulation rule to supplant WVRE 403 in status element cases

because—across the board and in every instance—the probative need is vastly outweighed by the prejudicial effect.[2]

Relatedly, the two main criminal cases the State cites to support its position both deal with factual stipulations and are readily distinguishable. *See State v. Crystal W.*, No. 17-0193, 2020 WL 261716, *5, n. 4 (W. Va., Jan. 17, 2020) (memorandum decision) (allowing, in a child abuse resulting in bodily injury case, the State to introduce the victim to the jury to show the physical injuries over defendant's offer to stipulate to the extent of the injuries); *State v. Gates*, No. 17-0905, 2018 WL 6131292, *2 (W. Va., Nov. 21, 2018) (memorandum decision) (rejecting, in a sexual abuse by a custodian case, defendant's offer to stipulate that sexual contact occurred which would eliminate the need for the State to introduce evidence concerning the nature of the sexual encounters). Through *Crystal W.* and *Gates*, the State advances the same general argument: "a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." Resp. Br. 18–19 (quoting *Old Chief*, 519 U.S. at 186–87). That argument misses the dispositive distinction between factual and status stipulations. *Compare Old Chief*, 519 U.S. at 189 (discussing factual stipulations and concluding "[a] syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it") *with Old Chief*, 519 U.S. at 190–91 (discussing status stipulations and concluding "evidence for such an element is usually not between an eventful narrative and an

[2] Petitioner's case illustrates why this rule exists. If a conviction order serves an evidentiary purpose other than proving status, the State is free to seek its admission under WVRE 404(b). *Accord Old Chief*, 519 U.S. 190–92 (1997). Here, after an unsuccessful attempt to admit the prior conviction under WVRE 404(b) to show *modus operandi*, the State resorted to introducing the full conviction record to prove felon status. A.R. 174, 570. The record shows the State attempted to use the name and nature of Petitioner's voluntary manslaughter conviction against him on his murder charge, and it also shows the State found a way to make it happen. The record seriously dilutes any good faith argument the State can assert for refusing the stipulation.

abstract proposition, but between propositions of slightly varying abstraction" and "[p]roving status without telling exactly why the status was imposed leaves no gap in the story of a defendant's subsequent criminality").

Thus, the "[general rule] that the prosecution with its burden of persuasion needs evidentiary depth to tell a continuous story, has, however, virtually no application when the point at issue is a defendant's legal status." *Id.* at 190. When "there is no cognizable difference between the evidentiary significance of an admission and . . . the official record[,] . . . the functions of the competing evidence are distinguishable only by the risk inherent in the one and wholly absent from the other." *Id.* at 191. This Court has held and reaffirmed the same. *Nichols*, 208 W. Va. at 434, 541 S.E.2d at 312; *Herbert*, 234 W. Va. at 579, 767 S.E.2d at 475..

Despite this Court's mandatory instruction, the circuit court overruled Petitioner's objection to the admission of his prior conviction order. A.R. 579.[3] Such a clear command to circuit courts should not be defeated because the stipulation offer was made in the middle of trial, and the court deemed a colloquy inconvenient. A.R. 758.[4] While stipulations typically "relieve either party of the burden" to prove facts or "prepare that part of their case[,]" a felon status stipulation's utility is distinct from that. Resp. Br. 19. It focuses the jury's deliberation on the criminal conduct giving rise to the indictment and filters out contaminating considerations that risk polluting the jury's necessarily pure deliberation. This Court should find the circuit court abused its discretion.

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[3] The circuit court's full decision on Petitioner's stipulation can be found in the Appendix Record on pages 564–79.

[4] Contrary to the State's assertions, timeliness was not a dispositive factor in any of the decisions cited and discussed by both parties. *See Old Chief*, 519 U.S. at 176 n.2, 186 (deciding the case on grounds unrelated to defendant's pretrial motion); *Nichols*, 208 W. Va. at 432, 541 S.E.2d at 310 (deciding the case without mentioning when the motion to stipulate was made); *People v. Walker*, 812 N.E.2d 339, 341 (Ill. 2004) (finding reversible error in refusing a felon status stipulation made on the eve of trial); *State v. James*, 81 S.W.2d 751, 755–56 (Tenn. 2002) (mentioning the pretrial motion to stipulate in a factual recitation but making no mention of timeliness in its holdings).

C. It was not harmless error for Petitioner's jury to consider a prior voluntary manslaughter conviction when it deliberated his current murder and felon in possession charges.

The circuit court's abuse of discretion deprived Petitioner of an impartial jury. "[I]t is impossible to conclude that substantial rights were not affected" when the evidence presented and the jury's verdict are not sufficiently sound to withstand scrutiny. *State v. Blake*, 197 W. Va. 700, 709, 478 S.E.2d 550, 559 (1996). This Court cannot be sure the jury's knowledge and consideration of Petitioner's voluntary manslaughter conviction had no impact on the verdict.

It was prejudicial and reversible error for the circuit court to refuse the stipulation because the name and nature of the prior conviction closely resembles the present charges—exponentially increasing the risk of prejudice. *James*, 81 S.W.3d at 764 (finding admission of prior convictions similar to the charged offenses fatally prejudicial and ordering a new trial).[5] Further still, Petitioner's jury sent back questions aimed at the central issue of culpability—undermining confidence in the strength of the conviction. *Walker*, 812 N.E.2d at 342 (finding the jury's questions supported a finding of harmful error because it indicated the jury did not fully accept the State's theory).

Petitioner did not get a fair trial below. This Court should reverse all Petitioner's convictions and remand for a new trial.

II. The circuit court erred when it prohibited Petitioner from testifying about his personal knowledge of an alternative perpetrator.

The circuit court abused its discretion when it allowed the State to ambush Petitioner with an unsupported notice requirement and excluded testimony Petitioner was constitutionally entitled

[5] For similar reasons, the circuit court's limiting instruction was ineffectual. A.R. 578–79. If there is a concern a limiting instruction will not adequately control the jury's consideration of inflammatory evidence, the court can exclude the evidence. *See* FRE 403 advisory committee's notes.

to present to the jury. The State argues Petitioner's testimony was rightfully excluded because it did not meet the requisite standard and violated the court's pretrial orders. Both arguments fail.

First, Petitioner's alternative perpetrator testimony clears the standard outlined in *State v. Malick* and cited by the State in its pretrial motion. Syl. Pt. 2, 193 W. Va. 545, 457 S.E.2d482 (1995) (requiring the testimony of guilt of another to be directly linked to the crime and for the guilt of another to be inconsistent with the guilt of the defendant). Petitioner's intended testimony—that Araena Kersey was the actual shooter—is directly linked to Mr. William's death because evidence introduced by the State supports that theory. The testimony identifying Petitioner is not unequivocal. Ms. Carter was never asked to name the shooter directly and Ms. Ugbomah named Petitioner but "didn't see." A.R. 510–11, 728. Both witnesses identified a plausible alternative shooter, testifying that Ms. Kersey put a gun to Mr. Williams's head and threatened him. A.R. 507, 727. Ms. Kersey herself testified to the same, confirming the plausibility of that story. A.R. 788–89. Finally, undisputed testimony of only one shot being fired creates inconsistency between Petitioner and Ms. Kersey's guilt.

Second, the court's pretrial *Malick* and discovery orders cannot justify barring Petitioner's testimony, or save the State from reversal, because when erroneous evidentiary exclusions deprive a defendant of the right to present a complete defense, "the likelihood of a different outcome . . . [is] sufficiently high to undermine our confidence in the verdict." *State v. McCullar*, 335 P.3d 900, 912 (Utah. Ct. App. 2014) (quoting *State v. Knight*, 734 P.2d 913, 920 (Utah. 1987)). The court's pretrial *Malick* order was not based on notice because the State did not argue notice in support of the motion, arguing only the admissibility standard. A.R. 124. Conclusively, the court said nothing of notice when granting the State's motion. A.R. 126–27. The first time a notice requirement is

mentioned is when the State objects to Petitioner's testimony during trial. A.R. 948. The entirety of the Court's ruling on the objection concerns lack of notice. A.R. 952.[6]

Similarly, the discovery order prohibiting Petitioner from engaging in discovery less than five days prior to trial, does not bar Petitioner's testimony. Petitioner had never disclosed that statement, not even to his trial counsel, and it had not been reduced to writing. A.R. 950. Petitioner's trial counsel first became aware of the intended testimony during trial. *Id.* If that was a discovery violation worthy of excluding Petitioner's testimony, the State's similar failure to disclose that Ms. Kersey admitted to holding a gun to the head of Mr. Williams and threatening him would be a *Brady* violation. *See Brady v. Maryland*, 373 U.S. 83 (1963). The first time Petitioner learned of that evidence is when Ms. Kersey was on the stand. A.R. 857. The State told the circuit court it did not violate discovery because it wasn't required to turn over the statement, since it was given verbally only shortly before trial. A.R. 865–66.

"[T]he right to present a complete defense includes the right to tell a plausible story if the defendant has one." *McCullar*, 335 P.3d at 912 (quoting Blume et al., *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 AM. CRIM. L.REV. 1069, 1080 n. 77 (2007)) (holding "vague references to a third party's possible guilt . . . cannot compensate for the absence of specific evidence implicating a particular person"). Prior to convicting him, the jury did not hear Petitioner's testimony naming Ms. Kersey as the shooter. Petitioner had a plausible story that he was entitled to tell because vague references cannot compensate for specific evidence. *Id.* The circuit court abused its discretion when it excluded Petitioner's proposed testimony.

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[6] Concededly, Petitioner should have asked for permission before testifying to fully comply with the court's pretrial order. *See* A.R. 126–27. However, during the conference about the State's objection, Petitioner tried to argue there was foundation to support the testimony, but the court was not interested in that argument and ruled on the notice issue only. A.R. 952.

CONCLUSION

In prior cases, when presented with the central question of Petitioner's case, this Court reversed. It should do so again here. A circuit court commits reversible error when it spurns a status element stipulation. Petitioner respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Graham Platz, counsel for Petitioner, Tremaine Jackson, do hereby certify that I have caused to be served upon counsel of record in this matter a true and correct copy of the accompanying *"Petitioner's Reply Brief"* to the following:

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