IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0943

STATE OF WEST VIRGINIA,

Respondent,

v.

TIMOTHY MAICHLE,

Petitioner.

RESPONDENT'S BRIEF

Appeal from the October 20, 2021, Order
Circuit Court of Fayette County
Case No. 21-F-130 & 21-F-156

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I. INTRODUCTION

Respondent State of West Virginia, by counsel, Andrea Nease Proper, Assistant Attorney General, responds to Timothy Maichle's ("Petitioner") Brief filed in the above-styled appeal. Petitioner has failed to demonstrate the existence of reversible error and, therefore, the circuit court's order should be affirmed.

II. ASSIGNMENTS OF ERROR

Petitioner argues a single assignment of error: that the circuit court erred in failing to grant Petitioner's pretrial motion to dismiss the malicious assault count as it did not allege "intent to maim, disfigure, disable or kill" which Petitioner claims is an essential element of the offense. Pet'r Br. 1.

III. STATEMENT OF THE CASE

This case arises from a September 9, 2020, incident wherein Petitioner pushed his wife, Amanda Maichle, from a moving vehicle, at which time she slipped under the vehicle and was run over by its back tires. Appendix Record ("A.R.") 203, 382. At some point thereafter, Petitioner was arrested and apparently released on bond, although the arrest record and bond order are not contained in the appendix record.

On February 16, 2021, a hearing regarding the motion to revoke Petitioner's bond was held wherein the State produced evidence that Petitioner refused to return a phone that an employer had lent him; that Petitioner had used the phone to leave threatening messages; that he was texting his wife from the phone—despite a no contact order in place—upwards of 300 times; that Petitioner telephoned his wife despite a no contact order; and, that he had made threats to kill people if he thought he was going back to prison. A.R. 1-28. Petitioner admitted to contacting his wife against the terms and conditions of his bond. A.R. 33-34, 39. The State noted that Petitioner had previously

served a prison sentence for third offense domestic battery against an ex-wife in 2016, and has two other previous domestic violence convictions as well as multiple protective orders filed against him. A.R. 42-43. The court denied Petitioner's request to reinstate his bond. A.R. 46.

Petitioner was indicted on one count of attempted murder, one count of malicious assault, and one count of third offense domestic battery in May 2021. A.R. 609-10. The only count at issue in this appeal is Count 2. The Indictment on Count 2 reads, in pertinent part:

> TIMOTHY R. MAICHLE, on or about the 9th day of September, 2020, in the said County of Fayette, committed the offense of "malicious assault" in that he did unlawfully, intentionally, feloniously, and maliciously wound Amanda Maichle, by pushing her from a moving motor vehicle, against the peace and dignity of the State. W.Va. Code § 61-2-9.

A.R. 609.

In June 2021, Petitioner filed a motion to dismiss count 2, the malicious assault count, arguing that the element of bodily injury and the element of intent to maim, disfigure, disable or kill was not present in this count. A.R. 612. The State filed a response arguing that the malicious assault statute provides multiple ways in which the offense can be committed: (1) bodily injury, (2) the intent to maim, disfigure, or kill, or (3) shoot, stab, cut or wound. A.R. 615. Specifically, the State argued that the use of the disjunctive "or" separates the clauses and denotes alternative ways to commit the crime. A.R. 615-16.

On June 29, 2021, a pretrial hearing was held in which the court heard arguments on various motions, including the motion to dismiss the indictment. A.R. 68. Petitioner argued that Mrs. Maichle's medical records contained a statement that she jumped from the car and that this information was not before the grand jury in this case. A.R. 69. The State noted that Mrs. Maichle made a separate statement that Petitioner pushed her from the vehicle. A.R. 72-73. The State further argued that Petitioner was the one making statements to Mrs. Maichle's medical care

providers as Mrs. Maichle was incoherent. A.R. 73. The motion to dismiss on this issue was denied. A.R. 74.

The court also heard arguments on Petitioner's motion to dismiss Count 2 of the indictment, in which he argued that there were elements missing from the indictment. A.R. 81. Specifically, Petitioner argued that the statutory requirements of malicious assault were not met by the language in the indictment. A.R. 81. In response, the State argued that there are different ways to violate the malicious assault statute: one can maliciously shoot, stab, cut or wound a person or one can cause bodily injury with the intent to maim, disfigure, disable or kill. A.R. 81-82. The State differentiated the ways one can commit malicious assault by stating that under the first portion—maliciously shooting, stabbing, cutting or wounding—the mechanism of injury must be by something other than the use of the human body; in this case, the car caused the injuries. A.R. 82-83. Under the second portion of the statute—causing bodily harm with the intent to maim, disfigure, disable, or kill—the State argued "that is essentially used in the situation where you have a person that uses their body to cause injury to another person" such as punching or biting. A.R. 83. The court denied the motion. A.R. 84.

By order dated July 14, 2021, the motion to dismiss the indictment was denied. A.R. 620-22. The court found that the indictment was sufficient in that it indicted Petitioner under the "wounding" provision of the statute and, thus, the elements of "bodily injury" and "intent to maim, disfigure, or kill" need not be set forth in the indictment. A.R. 622.

Petitioner went to trial on August 18, 2021. A.R. 97. Petitioner renewed his motion to dismiss Count 2 of the indictment, and the State reiterated its argument that there are multiple ways to commit malicious wounding. A.R. 113. The court denied the motion. A.R. 114.

The State's first witness was Jordan Manning who witnessed the September 9, 2020, incident. A.R. 201-02. Manning was driving behind a Jeep when she rounded a curve and saw the back tires of the Jeep run over a body. A.R. 203. The Jeep drove up the road, made a loop in a parking lot and drove back. A.R. 212-13. As Manning attempted to assist Amanda Maichle, Petitioner ran up to them shouting "I don't know why you're always doing this shit to me" repeatedly. A.R. 206. Petitioner never asked how Amanda Maichle was doing and did not seem concerned for his wife. A.R. 207-08, 216. After Amanda Maichle was taken away via ambulance, Petitioner asked Manning who she was and where she lived, but Manning refused to answer out of fear of what Petitioner would do. A.R. 209.

Dr. Tiffany Lasky,[1] a trauma surgical critical care physician, testified that she treated Amanda Maichle as a result of this incident. A.R. 218, 224. The injuries included facial fractures of the orbital and nasal bones; bilateral maxillary, zygoma, and mandible fractures; facial bruising and abrasions; and bilateral lower extremity fractures, one of which was an open fracture that required several surgeries. A.R. 226. Dr. Lasky considered the injuries to be life-threatening. A.R. 227. Dr. Lasky believed that the eye socket injury was caused by a fist or elbow, not from the fall from the vehicle. A.R. 229.[2]

Amanda Maichle was given fentanyl for pain, which is 100 times more powerful than morphine. A.R. 230. Fentanyl can leave the patient "disassociated and confused." A.R. 231. Further, the injuries and medication would affect Amanda Maichle's cognitive functioning and ability to recall details. A.R. 232. Amanda Maichle stayed in the hospital for 21 total days. A.R.

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[1] Dr. Edward Tobin also testified regarding Mrs. Maichle's injuries and his testimony was consistent with Dr. Lasky's testimony. A.R. 244-64.

[2] Dr. Tobin agreed. A.R. 253-54 (injury mechanism likely was "[b]eing hit in the eye or a projectile hitting the eye" "potentially a fist."

239. The information in the records indicating that Amanda Maichle jumped may have been received from EMS personnel. A.R. 240-41.

Jason Sears with the Anstead Volunteer Fire Department testified that he was the first responder to arrive on the scene and helped immobilize Mrs. Maichle. A.R. 267, 270. Petitioner kept coming up to Mrs. Maichle while Sears was holding her head repeatedly stating that Mrs. Maichle had jumped from the vehicle; Sears eventually had to tell him to move back so that medical personnel could take care of Mrs. Maichle. A.R. 273. Petitioner never asked the status of his wife's condition. A.R. 273.

Tracey Gray, a critical care paramedic, testified that Mrs. Maichle was very unresponsive and had decreased consciousness on scene and during the ambulance ride when they took her to be life flighted to the hospital. A.R. 294. Mrs. Maichle never told them what happened to her during the ambulance ride. A.R. 295. Petitioner was acting erratically at the scene and being very loud. A.R. 297. Petitioner never asked how his wife was doing. A.R. 298. Joel Feltner, also a critical care paramedic, testified that Petitioner was insistent that Mrs. Maichle had jumped from the vehicle, but Mrs. Maichle never told Feltner she jumped. A.R. 308. Feltner testified that Petitioner kept coming up to Mrs. Maichle asking why she jumped and asking her to tell them she jumped until the paramedics had to ask him to back off. A.R. 309-10.

Amanda Maichle testified that on the evening of September 9, 2020, Petitioner was angry with her for borrowing money from a cousin and for "liking" a man's photograph on Facebook. A.R. 372-73. Ms. Maichle testified that her husband was very controlling. A.R. 374. Ms. Maichle testified that she and Petitioner would often go for drives and that Petitioner hoped to see two "archenemies" of his so that he could harass them. A.R. 376. In the past, Petitioner had taken her keys or slashed her tires to prevent her from leaving. A.R. 380.

Petitioner and Ms. Maichle got into the vehicle to drive around so their children could not hear them fight; Petitioner continued to call Ms. Maichle names, so Ms. Maichle called her mother and told her that Ms. Maichle would ask Petitioner to let her out on the side of the road so her mother could pick her up. A.R. 377-78. Petitioner then indicated he would take Ms. Maichle home if she wanted to go home, so she called her mother back and told her not to come. A.R. 379. Petitioner continued to swear at Ms. Maichle and call her names so she asked to be let out of the vehicle and intended to walk to her mother's home nearby. A.R. 380. Petitioner slammed on the brakes and Ms. Maichle removed her seatbelt and opened the door, intending to exit the vehicle as soon as he stopped so he could not stop her from leaving. A.R. 381. Petitioner then "stomped the gas and he pushed [Ms. Maichle] about in the middle of [her] back." A.R. 382. Ms. Maichle has no doubt that she was pushed from the vehicle. A.R. 388. Ms. Maichle does not remember anything from that point until she was hospitalized. A.R. 382. Ms. Maichle was hospitalized from September 9 through 30, then from October 14 through 19. A.R. 383.

Ms. Maichle now has metal plates in her right leg and a metal rod in her left leg. She had all of her waist-long hair shaved off and has multiple metal plates in her face. Ms. Maichle also walks with a walker, and was still undergoing treatment at the time of trial. A.R. 384.

Petitioner moved for judgment of acquittal when the State rested, arguing that Ms. Maichle had stated previously that she jumped but at trial indicated that she was pushed. A.R. 401. The State argued that the testimony was a credibility issue that should be put to the jury. A.R. 403. The court denied the motion. A.R. 405-06.

Matthew Lucas, a paramedic, testified that Ms. Maichle could respond to him on-scene but that he had to ask her every question multiple times to get an answer. A.R. 418. Lucas could barely hear Ms. Maichle's response when he asked what happened in the incident but believes she said

she jumped; however, he asked repeatedly if she jumped and she never answered him. A.R. 420. Lucas noted that the records indicate Ms. Maichle was confused. A.R. 425.

Deputy Ryan Fox testified that Petitioner kept telling him Ms. Maichle had jumped from the vehicle. A.R. 433. Petitioner's statement on scene was played for the jury. A.R. 435, 441. Avery Davis, who was in the vehicle with Jordan Manning, testified that the Maichle vehicle was traveling approximately 35 miles per hour when he saw it run over Ms. Maichle. A.R. 449. Petitioner was "frantic" on scene and seemed somewhat angry. A.R. 453.

Petitioner again moved for judgment of acquittal on the basis that the victim jumped from the vehicle. A.R. 483. The motion was denied. A.R. 486.

Petitioner was convicted of attempted second degree murder, a lesser included offense of the charged offense of attempted first degree murder; malicious assault; and domestic battery. A.R. 558. A conviction order was entered on August 25, 2021. A.R. 654-59. On August 27, 2021, a recidivist information was filed against Petitioner alleging that he had a prior felony conviction. A.R. 662-64.

Petitioner filed a motion for a new trial on August 30, 2021, arguing, among other issues not addressed on appeal, that the malicious assault indictment was deficient. A.R. 666-67. The State filed a response in opposition to the motion. A.R. 668-69.

On September 9, 2021, Petitioner was arraigned on the recidivist information. A.R. 568-78. Petitioner stipulated to the prior conviction. A.R. 572. On October 4, 2021, a sentencing hearing was held wherein the court heard arguments on Petitioner's motion for a new trial. A.R. 587. Petitioner noted that his argument was the same as his pretrial motion, renewing his objection to the indictment's failure to contain the elements of "intent to maim, disfigure, disable, or kill."

A.R. 587-88. The State reiterated its prior argument that there are multiple ways to commit malicious assault. A.R. 589. The court denied the motion for new trial. A.R. 590.

Petitioner made a statement on his own behalf at sentencing. A.R. 592-94. Petitioner asked for alternative sentencing, A.R. 595, which the State opposed. A.R. 596-99. The State requested that the recidivist enhancement be applied to the malicious assault conviction, and that all three sentences be run consecutively. A.R. 599-600. Petitioner was sentenced to one to three years of incarceration on the attempted second degree murder conviction; four to ten years of incarceration on the malicious assault conviction after application of the recidivist enhancement; and, one to five years of incarceration on the third offense domestic battery conviction. A.R. 604-05.

The combined order denying the Petitioner a new trial and sentencing him was entered on October 20, 2021. A.R. 678-83. The court found that the indictment tracked the language of the statute and all of the essential elements were present for the manner in which the State alleged Petitioner committed the offense. A.R. 679. The motion for new trial was denied. A.R. 680. Petitioner was then sentenced as noted above and the court ran the sentences consecutively. A.R. 680-81. Petitioner appeals from this order.

IV. SUMMARY OF THE ARGUMENT

This Court should affirm Petitioner's conviction for malicious assault. A plain reading of the statute in question shows that malicious assault can be committed in two ways, one of which does not require the intent to maim, kill, disfigure, or disable the victim. Further, the rules of statutory construction support the lower court's finding. Petitioner's conviction should be upheld.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

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

VI. ARGUMENT

A. Standard of review

> "This Court's standard of review concerning a motion to dismiss an indictment is, generally, de novo. However, in addition to the de novo standard, where the circuit court conducts an evidentiary hearing upon the motion, this Court's 'clearly erroneous' standard of review is invoked concerning the circuit court's findings of fact." Syllabus Point 1, *State v. Grimes*, 226 W.Va. 411, 701 S.E.2d 449 (2009).

Syl. Pt. 1, *State v. Carter*, 232 W. Va. 97, 750 S.E.2d 650 (2013).

"'Generally, the sufficiency of an indictment is reviewed *de novo*. An indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by practical rather than technical considerations.' Syl. [P]t. 2, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996)." Syl. Pt. 3, *State v. Wallace*, 205 W. Va. 155, 517 S.E.2d 20 (1999).

B. The lower court properly denied the motion to dismiss the indictment.

Petitioner argues that the lower court erred in failing to dismiss the malicious assault count of the indictment because the indictment was insufficient for not alleging an "intent to maim, disfigure, disable or kill." Pet'r Br. 6. Petitioner asserts that the failure to include the entirety of the statute in the indictment rendered it insufficient. Pet'r Br. 7. As the indictment in this case was sufficient, the lower court properly denied the motion to dismiss the indictment.

This Court has stated that "'[g]enerally, the sufficiency of an indictment is reviewed de novo. An indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by practical rather than technical considerations.' Syl. pt. 2, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996)." Syl. Pt. 3, *Wallace*, 205 W. Va. 155, 517 S.E.2d

20. Furthermore, "[a]n indictment is sufficient under Article III, § 14 of the West Virginia Constitution and W. Va. R.Crim. P. 7(c)(1) if it (1) states the elements of the offense charged; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy." *Id.* at Syl. Pt. 6. "An indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based." Syl. Pt. 4, *State v. Johnson*, 219 W. Va. 697, 639 S.E.2d 789 (2006). In other words, an indictment is sufficient if "it adopts and follows the language of the statute, or uses substantially equivalent language, and plainly informs the accused of the particular offense charged and enables the court to determine the statute on which the charge is founded." Syl. Pt. 3, *State v. Slie,* 158 W. Va. 672, 213 S.E.2d 109 (1975) (quoting Syl. Pt. 3, *Pyles v. Boles,* 148 W. Va. 465, 135 S.E.2d 692 (1964)).

> The Indictment in this matter reads, in pertinent part, as follows:
>
> TIMOTHY R. MAICHLE, on or about the 9th day of September, 2020, in the said County of Fayette, committed the offense of "malicious assault" in that he did unlawfully, intentionally, feloniously, and maliciously wound Amanda Maichle, by pushing her from a moving motor vehicle, against the peace and dignity of the State. W.Va. Code § 61-2-9.

A.R. 609. The code provision, cited in the indictment itself, defines malicious wounding: "If any person maliciously shoots, stabs, cuts or wounds any person, or by any means cause him or her bodily injury with intent to maim, disfigure, disable or kill, he or she, except where it is otherwise provided, is guilty of a felony . . . ." W. Va. Code § 61-2-9(a). The indictment in this case met the minimum constitutional standards and fully informed Petitioner of the charges against him. The indictment gives the victim's name, the date, specific details of the incident, and the code provision

under which he is being charged. Further, the indictment substantially follows the statutory language the State chose to charge Petitioner under in this matter, which is the first half of the malicious wounding statute.

It is important to note that, after hearing all of the evidence, Petitioner was convicted by a jury. A.R. 558. As this Court has noted, "[e]xcept for willful, intentional fraud the law of this State does not permit the court to go behind an indictment . . . either to determine its legality or its sufficiency." Syl. Pt. 3, *State v. Grimes*, 226 W. Va. 411, 701 S.E.2d 449 (2009) citing Syl., *Barker v. Fox*, 160 W.Va. 749, 238 S.E.2d 235 (1977). There is no allegation of willful, intentional fraud here.

With regard to the sufficiency of indictments, this Court has referenced the statute of jeofails which states that a "[j]udgment in any criminal case, after a verdict, shall not be arrested or reversed upon any exception to the indictment or other accusation, if the offense be charged therein with sufficient certainty for judgment to be given thereon, according to the very right of the case." *State v. Chic-Colbert*, 231 W. Va. 749, 760, 749 S.E.2d 642, 653 (2013), *citing* W. Va. Code § 62-2-11. In other words, "[o]ur statute of jeofails, W. Va. Code, 62–2–11 [1923] [footnote omitted] cures any technical defect in an indictment when the indictment sufficiently apprises the accused of the charge which he must face." *Chic-Colbert*, 231 W. Va. at 760, 749 S.E.2d at 653, *quoting State v. Casdorph*, 159 W. Va. 909, 912, 230 S.E.2d 476, 479 (1976), *abrogated on other grounds by State v. Persinger*, 169 W. Va. 121, 286 S.E.2d 261 (1982). This Court noted that "[n]o particular form of words is required . . . so long as the accused is adequately informed of the nature of the charge and the elements of the offense are alleged." *Chic-Colbert*, 231 W. Va. at 760, 749 S.E.2d at 653, *quoting Wallace*, 205 W. Va. at 161, 517 S.E.2d at 26.

In examining the indictment, this Court noted that it would measure "it by practical and common sense terms, rather than technical considerations," and found the indictment sufficient because the petitioner was fully apprised of the crime with which he was charged. *Chic-Colbert*, 231 W. Va. at 761, 749 S.E.2d at 654. Such is the case at bar. Petitioner was fully apprised of the basis of the charges against him and that he was being charged under West Virginia Code § 61-2-9 and all of the elements the State was charging against him.

Finally, the jury in this matter was apprised of all of the elements Petitioner alleges comprise the crime of malicious assault. Specifically, the instruction given stated that "[t]he felony crime of malicious assault is the malicious shooting, wounding, stabbing, cutting or wounding of any person, or by any means causing him or her bodily injury with intent to maim, disfigure, disable or kill." A.R. 515. Thus, the jury, as well as Petitioner, was sufficiently apprised of the crime of which Petitioner was accused. For all of the foregoing reasons, the indictment was sufficient and the circuit court's order should be affirmed.

C. This Court has not determined that defects in an indictment deprive a court of jurisdiction, and the law of the Supreme Court of the United States is that defects in an indictment do not deprive a court of jurisdiction.

Inasmuch as Petitioner relies on *State v. Johnson*, 219 W. Va. 697, 639 S.E.2d 789, to support his contentions or argue that any defect in this indictment is jurisdictional, said reliance is misplaced for several reasons. First, *Johnson* is a per curiam opinion subject to this Court's holdings in *Walker v. Doe*, 210 W. Va. 490, 558 S.E.2d 290 (2001).[3] *Walker* notes that per curiam

[3] Respondent acknowledges that *Walker* was overruled by *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303 (2014), which, following the revision of the West Virginia Rules of Appellate Procedure and the addition of Memorandum Decisions in 2010, eliminated the need for per curiam opinions in West Virginia. It is clear from a reading of *McKinley*, however, that *McKinley* is not a retroactive opinion. *See* 234 W.Va. at 153, 764 S.E.2d at 313 (noting that this Court was then adopting a prospective "three-tier system of precedent" and eliminating per curiam opinions

opinions are for "application of settled principles of law to facts" and act merely as "guidance . . . to the lower courts regarding the proper application of syllabus points of law relied upon to reach decisions in those cases." Syl. Pt. 3, in part, *Walker*, 210 W. Va. 490, 558 S.E.2d 290. As such, *Johnson* cannot set forth new principles of law.

Second, although the *Johnson* Court was "not persuaded" by the State's reliance on *United States v. Cotton*, 535 U.S. 625 (2002), it did not specifically reject the notion that *Cotton* sets forth regarding defects in an indictment not being jurisdictional. *Id.* at 702, 639 S.E.2d at 794. The *Johnson* Court, rather, notes only that it was not persuaded by the State's argument that an objection to the sufficiency of an indictment cannot be brought at any time. *Id.* Thus, this Court has not examined the *United States v. Cotton* decision, but should determine in this case that *Cotton* is adopted in West Virginia for the provision of law that indictment omissions do not deprive a court of jurisdiction. 535 U.S. at 631.

Further, *Johnson* is wholly distinguishable factually from the case at bar. In *Johnson*, the indictment at issue followed the robbery statute that had been in effect prior to its amendment in 2000, but the petitioner in that matter was indicted in 2002. 219 W. Va. at 700-01, 639 S.E.2d at 792-93. Thus, the indictment reflected old law. Further, the indictment in this matter "was so defective as not to charge an offense under West Virginia law as it existed in 2002." *Id.* at 702, 639 S.E.2d at 794. The instant indictment certainly charges an offense. Accordingly, for the foregoing reasons, the court's order should be affirmed.

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wholly). Accordingly, at the time *Johnson* was published, *Walker* was the governing law in West Virginia regarding per curiam opinions.

D. The use of the disjunctive "or" shows that West Virginia Code § 61-2-9 (a) can be committed in two separate and distinct manners, one of which does not require the intent to maim, disfigure, disable or kill.

The lower court held that West Virginia Code § 61-2-9(a) can be violated in more than one way, and that the State indicted Petitioner under the "wounding provision of the statute" as opposed to the bodily injury portion. A.R. 622. A plain reading of the statute supports this holding.

The statute in question utilizes a comma and the word or to separate two of the ways that malicious assault may be committed. "Recognizing the obvious, the normal use of the disjunctive 'or' in a statute connotes an alternative or option to select." *Carper v. Kanawha Banking & Tr. Co.*, 157 W. Va. 477, 517, 207 S.E.2d 897, 921 (1974) (construing "or" in a statute to allow recovery against all listed categories). "Normally, of course, 'or' is to be accepted for its disjunctive connotation, and not as a word interchangeable with 'and.'" *United States v. Moore*, 613 F.2d 1029, 1040 (D.C. Cir. 1979); *see also Zorich v. Long Beach Fire Dep't & Ambulance Serv., Inc.*, 118 F.3d 682, 684 (9th Cir. 1997) (noting use of disjunctive "or" meant that the statute in question contained two separate and independent categories); *United States v. Snider*, 502 F.2d 645, 655 (4th Cir. 1974), *disapproved of on other grounds by United States v. Hudler*, 605 F.2d 488 (10th Cir. 1979) (interpreting the word "or" in a statute as its customary meaning and finding that "this interpretation gives meaning to both words and avoids the judicial rewriting of 'or' as 'and.'"). "When the term 'or' is used, it is presumed to be used in the disjunctive sense unless the legislative intent is clearly contrary." *United States v. O'Driscoll*, 761 F.2d 589, 597 (10th Cir. 1985) (citations omitted).

The "or" in question shows that there are separate and distinct ways to commit malicious assault. First, as in this case, one can maliciously shoot, stab, cut or wound any person." Second, one can "by any means cause him or her bodily injury with intent to maim, disfigure, disable or

kill." These two phrases are separated by the disjunctive "or" showing that the Legislature intended to create two ways to commit malicious wounding. As this Court noted in Syllabus Point Three of *Osborne v. United States*,

> "It is presumed the legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms so used to be effective, wherefore an interpretation of a statute which gives a word, phrase or clause thereof no function to perform, or makes it, in effect, a mere repetition of another word, phrase or clause thereof, must be rejected as being unsound, if it be possible so to construe the statute as a whole, as to make all of its parts operative and effective." Syllabus point 7, *Ex parte Watson*, 82 W. Va. 201, 95 S.E. 648 (1918).

211 W. Va. 667, 567 S.E.2d 677 (2002). In this case, the use of "or" shows that the Legislature intended to separate the provisions of West Virginia Code § 61-2-9(a). Since the Legislature has "substantive power to define crimes and prescribe punishments," this Court should defer to the legislative intent. Syl. Pt. 3, in part, *State v. Sears*, 196 W. Va. 71, 468 S.E.2d 324 (1996). Surely the legislature intended to punish Petitioner's conduct of shoving his wife out of a vehicle then running her over as a felony, as he did such with malicious intent. This Court should uphold the jury's verdict and affirm Petitioner's conviction.

E. This Court's case law supports the contention that malicious assault can be committed in two distinct ways.

This Court has recognized that malicious wounding can be committed in two ways: wounding and bodily injury. *State v. Daniel*, 144 W. Va. 551, 554, 109 S.E.2d 32, 34 (1959); *State v. Gibson*, 67 W. Va. 548, 68 S.E. 295, 296 (1910). This supports the State's position below that the statute in question divides malicious wounding into two categories. See A.R. 614-19.

The *Daniel* Court noted that

> The indictment charges both wounding and bodily injury caused by a blow of the fist. Under the wounding provision of the indictment it is not necessary to specify the instrument with which the wound was inflicted, but the wound must have been inflicted by something other than that with which the body is naturally equipped, and the skin, either externally or internally, must have been broken. However, the

> provision or charge in the indictment with regard to bodily injury must specify the means by which the injury was caused and it is not necessary for the skin to have been broken in order for a conviction to be sustained under this part of the statute. *State v. Gibson*, 67 W. Va. 548, 68 S.E. 295, 28 L.R.A.,N.S., 965; *State v. Coont*, 94 W. Va. 59, 117 S.E. 701.

144 W. Va. at 554–55, 109 S.E.2d at 34–35. The two separate provisions of West Virginia Code § 61-2-9 clearly require different proof, showing a legislative intent that the "or" separating the two provisions divides the statute into two different ways to commit malicious assault.

As to Petitioner's argument that the intent for the lesser included offense of unlawful assault is the intent to maim, disfigure, disable or kill, a plain reading of the statute belies that contention. The second half of West Virginia Code § 61-2-9 (a) states that "[i]f the act is done unlawfully, but not maliciously, with the intent aforesaid, the offender is guilty of a felony. . . ." As noted by this Court, "the only difference between the two being that unlawful wounding is done without malice." *Daniel*, 144 W. Va. at 554, 109 S.E.2d 32 at 34. The statute, thus, references the malicious intent rather than unlawful intent.

F. The rules of statutory construction support the lower court's findings.

Further support for the State's position below is found in this Court's interpretation of West Virginia Code § 61-2-9(b), the second section of the relevant statute herein. West Virginia Code § 61-2-9(b) defines misdemeanor assault, and states that "[a]ny person who unlawfully attempts to commit a violent injury to the person of another or unlawfully commits an act that places another in reasonable apprehension of immediately receiving a violent injury is guilty of a misdemeanor . . . ." This Court has examined the elements of misdemeanor assault, finding that there are two ways to commit the crime:

> With respect to the crime of assault, which is classified as a misdemeanor, the statute provides that a person can commit the offense in two ways: (1) "attempt[ing] to use physical force capable of causing physical pain or injury" or (2) "unlawfully

> commit[ting] an act that places another in reasonable apprehension of immediately suffering physical pain or injury."

State v. Henning, 238 W. Va. 193, 198, 793 S.E.2d 843, 848 (2016) (citing W.Va. Code § 61-2-9(b)). This interpretation of West Virginia Code § 61-2-9(b) should be carried over in this Court's interpretation of West Virginia Code § 61-2-9(a), and is consistent with the findings of the lower court in this matter.

It is axiomatic that consistency is the goal of statutory interpretation: "[i]n developing our jurisprudence of statutory construction, we have directed that statutes relating to the same subject matter, or subparts of the same statutory provision, should be construed consistently with one another." *Henry v. Benyo*, 203 W. Va. 172, 178, 506 S.E.2d 615, 621 (1998). "'Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments.' Syllabus Point 3, *Smith v. State Workmen's Comp. Comm'r*, 159 W.Va. 108, 219 S.E.2d 361 (1975)." Syl. Pt. 4, *Cmty. Antenna Serv., Inc. v. Charter Commc'ns VI, LLC*, 227 W. Va. 595, 712 S.E.2d 504 (2011). Further,

> "Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded *in pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly." Syllabus Point 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W.Va. 14, 217 S.E.2d 907 (1975).

Id. at Syl. Pt. 6. *See also United States v. Stauffer Chem. Co.,* 684 F.2d 1174, 1186 (6th Cir. 1982), *aff'd on other grounds,*, 464 U.S. 165 (1984) ("Different portions of the same statute should be read and interpreted consistently with each other, avoiding conflicts.") (citations omitted). As the two code provisions are stylistically parallel, West Virginia Code §§ 61-2-9(a) and (b) should be interpreted consistently.

This Court has repeatedly found that statutes should be read according to their plain meaning and interpreted according to legislative intent. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). "Where the language of a statute is plain and unambiguous, there is no basis for application of rules of statutory construction; but courts must apply the statute according to the legislative intent plainly expressed therein." Syl. Pt. 1, *Dunlap v. State Compensation Director*, 149 W.Va. 266, 140 S.E.2d 448 (1965). "Courts always endeavor to give effect to the legislative intent, but a statute that is clear and unambiguous will be applied and not construed." Syl. Pt.1, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968). "Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. Pt. 2, *Crockett v. Andrews*, 153 W.Va. 714, 172 S.E.2d 384 (1970). "We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. 573, 587, 466 S.E.2d 424, 438 (1995). "'The basic and cardinal principle, governing the interpretation and application of a statute, is that the Court should ascertain the intent of the Legislature at the time the statute was enacted, and in the light of the circumstances prevailing at the time of the enactment.' Syl. Pt. 1, *Pond Creek Pocahontas Co. v. Alexander,* 137 W.Va. 864, 74 S.E.2d 590 (1953)." *Leggett v. EQT Prod. Co.*, 239 W. Va. 264, 267, 800 S.E.2d 850, 853, cert. denied, 138 S. Ct. 472, 199 L. Ed. 2d 358 (2017).

Petitioner's interpretation would contradict the duty of this Court to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results. "Where a particular construction of a statute would result in an absurdity, some other

reasonable construction, which will not produce such absurdity, will be made." *State v. Kerns*, 183 W. Va. 130, 135, 394 S.E.2d 532, 537 (1990) (citations omitted). Thus, the lower court's order should be affirmed.

G. The indictment herein does not allege only simple battery.

Petitioner contends that the indictment herein alleges "no more than simple battery." Pet'r Br. 17. Petitioner is mistaken. The battery statute reads that "[a]ny person who unlawfully and intentionally makes physical contact of an insulting or provoking nature to the person of another or unlawfully and intentionally causes physical harm to another person is guilty of a misdemeanor. . . ." W.Va. Code § 61-2-9 (c). It is clear that the indictment in this matter alleges more than "simple battery."

First, there is no requirement of malice in the battery statute, but the indictment herein noted specifically that Petitioner acted with malice. Second, there is a requirement that Petitioner "wound" Ms. Maichle under the indictment, which is significantly different than merely causing physical harm. "Wound" has been specifically defined by this Court with regard to the malicious wounding statute, noting that "the wound must have been inflicted by something other than that with which the body is naturally equipped, and the skin, either externally or internally, must have been broken." *Daniel*, 144 W. Va. at 554–55, 109 S.E.2d at 34. This requirement is not part of the battery statute. Accordingly, this contention must fail.

H. There is no requirement that courts utilize stock jury instructions set forth by the Prosecuting Attorneys Institute or Public Defender Services.

To the extent Petitioner peripherally alludes to the stock jury instructions set forth by other entities outside of this Court, Petitioner's barebones argument in this regard should be disregarded. Pet'r Br. 6. Petitioner does not allude to either set of stock jury instructions in his argument section,

nor does he expand upon his single statement that the circuit court's decision flies in the face of these jury instructions created by entities unrelated to the Court or Legislature. Indeed,

> [a]n . . . indictment in the words of the statute is ordinarily sufficient, as long as the statute fully defines and describes the offense, and the charging instrument fully informs accused of the particular offense with which he is charged and enables the court to determine on what statute the charge is founded.

State ex rel. Day v. Silver, 210 W. Va. 175, 178, 556 S.E.2d 820, 823 (2001) (internal quotation omitted) (quoting 42 C.J.S. Indictments and Informations § 123 (1991)); see also *Lind v. Ballard*, No. 16 1033, 2017 WL 4570572, at *6 (W. Va. Supreme Court, Oct. 13, 2017) (memorandum decision) (Requiring an indictment to meet only "minimal constitutional standards" and to "charge[] an offense under West Virginia law.") The indictment in this case, while not tracing any form indictment, is nevertheless sufficient as detailed above. The lower court's order should be affirmed.

I. Even if this Court finds that the indictment omitted an essential element of the crime, this Court should follow federal court law that allows a harmless error review.

Any alleged omitted element in this case should be considered harmless error. Numerous federal courts have found that omissions of an essential element in an indictment are subject to a harmless error review. *See United States v. Stevenson*, 832 F.3d 412, 427 (3d Cir. 2016); *United States v. Allen*, 406 F.3d 940, 945 (8th Cir. 2005); *United States v. Robinson*, 367 F.3d 278, 285 (5th Cir. 2004); *United States v. Higgs*, 353 F.3d 281, 304–06 (4th Cir. 2003); *United States v. Cor–Bon Custom Bullet Co.*, 287 F.3d 576, 580 (6th Cir. 2002); *United States v. Prentiss*, 256 F.3d 971, 981 (2001); *United States v. Corporan–Cuevas*, 244 F.3d 199, 202 (1st Cir. 2001).

Likewise, this Court has applied a harmless error test to indictments with omissions. *See State ex rel. Thompson v. Watkins*, 200 W. Va. 214, 218, 488 S.E.2d 894, 898 (1997). The Court notes that the operative test is whether the petitioner was deprived of any constitutional rights or

whether he can demonstrate prejudice. As noted at length above, Petitioner was not deprived of any constitutional rights nor was he prejudiced. The indictment gives the victim's name, the date, specific details of the incident, and the code provision under which he is being charged. A.R. 609. All of this is sufficient to protect Petitioner's rights by fully informing him of the charge against him. Further, there is no prejudice here, as Petitioner clearly knew the case the State sought to prosecute against him. Thus, any alleged omissions here are harmless error, and this Court should affirm the circuit court.

VII. CONCLUSION

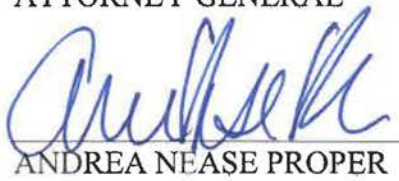
For the foregoing reasons, the Respondent respectfully asks this Court to affirm the circuit court's order.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Respondent,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 21-0943

STATE OF WEST VIRGINIA,

Respondent,

v.

TIMOTHY MAICHLE,

Petitioner.

CERTIFICATE OF SERVICE

I, Andrea Nease Proper, counsel for the State of West Virginia, the Respondent, hereby certify that I have served a true and accurate copy of the foregoing **Respondent's Brief** upon counsel for Petitioner, by depositing said copy in the United States mail, postage prepaid, on this day, May 4 2022, and addressed as follows:

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