IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-189

STATE OF WEST VIRGINIA,
Respondent,

v.

DELIEZHA DAVONTE GRAVELY,
Petitioner.

RESPONDENT'S BRIEF

Appeal from the March 19, 2023, Order
Circuit Court of Mercer County
Case No. 22-F-186

PATRICK MORRISEY
ATTORNEY GENERAL

Michael R. Williams (WV Bar #14148)
Principal Deputy Solicitor General
Spencer Davenport (WV Bar #14364)
Assistant Solicitor General
Mary Beth Niday (WV Bar #9092)
Assistant Attorney General
Counsel of Record
West Virginia State Bar No. 9092
Office of the Attorney General
1900 Kanawha Blvd. E.
State Capitol, Bldg. 6, Ste. 406
Charleston, WV 25305
Telephone: (304) 558-5830
Facsimile: (304) 558-5833
Email: Michael.R.Williams@wvago.gov
Spencer.J.Davenport@wvago.gov
Mary.B.Niday@wvago.gov

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INTRODUCTION

Respondent, State of West Virginia, responds to Deliezha Davonte Gravely's ("Petitioner") Brief filed in the above-styled appeal. Though he brings two assignments of error, neither succeeds. First, Conspiracy to Commit First Degree Robbery is a crime of violence against the person of another. Second, the evidence was more than sufficient to prove beyond a reasonable doubt that Petitioner possessed an operable firearm within the meaning of West Virginia Code § 61-7-2(7). At trial, the State provided officer testimony, the serial number of the firearm, the live round removed from the firearm, and Petitioner's affirmative response that he possessed a concealed firearm, and the gun itself. Petitioner has therefore failed to meet his burden of establishing his entitlement to relief, and this Court should affirm the judgment of the Mercer County Circuit Court.

ASSIGNMENTS OF ERROR

Petitioner advances two assignments of error: (1) "The circuit court erred in denying the Petitioner's motion for judgment of acquittal or new trial by ruling that the predicate felony of 'Conspiracy to Commit Robbery – First Degree' for the charged offenses of W.Va. Code §§ 61-7-7(b) and 61-7-7(e) was a felony crime of violence against the person of another"; and (2) "The circuit court further erred in denying Defendant's Motion for judgment of acquittal for lack of sufficient evidence." (Pet'r's Br. 1.)

STATEMENT OF THE CASE

In January 2022, Petitioner pled guilty to the felony offense of Conspiracy to Commit First Degree Robbery, in violation of West Virginia Code § 61-10-31. (App. 24–26.)

Subsequently, in March 2022, Petitioner was indicted of Unlawful Possession of a Firearm by a Prohibited Person in violation of West Virginia Code § 61-7-7(b)(1); Concealed Possession

of a Firearm by a Prohibited Person in violation of West Virginia Code § 61-7-7(e); Driving Revoked for DUI; Speeding; and Simple Possession of a Schedule I Controlled Substance, to wit: Marijuana in Criminal Case No. 22-F-169. (App. 15–17.) The firearm charges resulted after Petitioner was arrested and Bluefield Police Department officers found a loaded handgun in the front pocket of his hooded sweater. (App. 276–77.) The two firearm offenses required that Petitioner had been convicted of a felony crime of violence, which was identified as "Conspiracy to Commit Robbery—First Degree," in January 2022. (App. 16–17.)

Prior to trial, the State moved for the trial court to take judicial notice that the predicate offense Conspiracy to Commit Robbery—First Degree was a felony crime of violence against the person of another within the meaning of West Virginia Code § 61-7-7(b)(1) and (e). (App. 48–51.) Petitioner responded that the conspiracy does not constitute a crime of violence against the person of another because an act of violence was not a required element for conviction of that offense. (App. 56.) Following a hearing on the motion at the outset of trial (App. 213–21), the trial court concluded that the conspiracy was a crime of violence against the person of another. (App. 222–24).

The parties then proceeded to trial. (App. 227–348.) Officer David Bishop with the Bluefield City Police Department testified that the firearm found concealed in Petitioner's front sweater pocket was not tested by the West Virginia State Police Forensic Laboratory to determine if the firearm was operable. (App. 266–67.) Patrolman Matthews, also with the Bluefield City Police Department, testified that as Petitioner was exiting his vehicle upon request, Matthews observed a bulge in the front pocket of Petitioner's hoodie. (App. 276–77.) Matthews asked Petitioner if he had a firearm and he responded that he did. (App. 277.) Officer Bishop removed the firearm from Petitioner's pocket. (App. 277.) Matthews testified that the firearm was a .40

caliber Glock that was black in color with some colors of green and tan. (App. 277.) The firearm had a live round in the chamber in addition to a firing pin making it ready to discharge. (App. 280–81.) The serial number on the firearm was reported to the State Police Crime Lab. (App. 279.) Matthews's body cam captured the removal of the firearm from Petitioner, which firearm was produced to the jury. (App. 278–79.)

Petitioner was convicted of Possession of a Firearm By a Prohibited Person, Concealed Possession of a Firearm By a Prohibited Person, Driving on a Revoked License for DUI, and Speeding. (App. 340–41.) Subsequently, Petitioner filed a motion for judgment of acquittal notwithstanding the verdict, or, alternatively a motion for new trial. (App. 72–91.) In his motion, Petitioner again challenged the trial court's ruling allowing Conspiracy to stand as the predicate offense for the two firearm convictions. (App. 72–91.) Following a hearing on the motion (App. 348–62), the trial court denied Petitioner's motion (App. 158).

The State then filed a recidivist information against Petitioner, alleging that his convictions in August 2015 of Fleeing From an Officer While Driving DUI, in January 2022 of Conspiracy to Commit Robbery—First Degree, and in September 2013 of Possession with Intent to Deliver a Schedule I Controlled Substance, to-wit: Marijuana were qualifying felony offenses. (App. 19–47.) Petitioner proceeded to trial in December 2022 and the jury found Petitioner was the same person who was previously convicted of the three foregoing felony offenses. (App. 168–70.)

Petitioner renewed his motion for judgment of acquittal or for new trial which was denied by order entered March 19, 2023. (App. 161–63.) After finding Petitioner's prior conviction of Fleeing From an Officer While Driving DUI was not a qualifying offense for recidivism (App. 161), the trial court sentenced Petitioner to consecutive, determinate terms of imprisonment of five years for Unlawful Possession of a Firearm by a Prohibited Person and three years for Concealed

Possession of a Firearm by a Prohibited Person; and a concurrent determinate term of six months for Driving Revoked for DUI. (App. 162.) The trial court further adjudicated Petitioner as a second time habitual criminal offender and enhanced his sentence by five years at the end of eight years of imprisonment. (App. 162.) The court denied Petitioner's renewed motion. (App. 162.) Petitioner appeals from that order.

SUMMARY OF THE ARGUMENT

Both of Petitioner's claims are without merit.

First, applying the categorical approach, Petitioner's predicate offense of Conspiracy to Commit First Degree Robbery is a felony crime of violence against the person of another.

Second, the State produced sufficient evidence in the form of officer testimony, serial numbers, and the actual firearm, that the firearm concealed and possessed by Petitioner was an operable firearm within the meaning of West Virginia Code § 61-7-2(7).

Respondent, therefore, requests that this Court affirm the conviction and sentence of the Circuit Court of Mercer County.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent asserts that oral argument is unnecessary and that this case is suitable for disposition by memorandum decision because the record is fully developed and the arguments of both parties are adequately presented in the briefs. W.Va. R. App. P. 18(a)(3) and (4).

ARGUMENT

A. The trial court did not err in finding that Conspiracy to Commit First Degree Robbery was a crime of violence against the person of another under West Virginia Code § 61-7-7.

1. Standard of Review

This Court has held that "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute," the Court applies "a *de novo* standard of review." Syl. Pt. 1, *State v. Soustek*, 233 W.Va. 422, 758 S.E.2d 775 (2014).

This Court "applies a *de novo* standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence." *State v. Benny W.*, 242 W.Va. 618, 626, 837 S.E.2d 679, 687 (2019) (quoting *State v. Juntilla*, 227 W.Va. 492, 497, 711 S.E.2d 562, 567 (2011)). In reviewing the evidence to support a conviction, an appellate court must "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." *Benny W.*, 242 W.Va. at 626, 837 S.E.2d at 687 (quoting in part, Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995)). The relevant inquiry for the Court, therefore, "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." *Id.*

Petitioner takes on a heavy burden in arguing that the trial court erred in denying his motion for judgment of acquittal:

> The defendant fails if the evidence presented, taken in the light most agreeable to the prosecution, is adequate to permit a rational jury to find the essential elements of the offense of conviction beyond a reasonable doubt. Phrased another way, as long as the aggregate evidence justifies a judgment of conviction, other hypotheses more congenial to a finding of innocence need not be ruled out. We reverse only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

State v. LaRock, 196 W.Va. 294, 303, 470 S.E.2d 613, 622 (1996). To that end, the evidence "must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. Syl. Pt. 2, in part, *LaRock*, 196 W.Va. 294, 470 S.E.2d 613. "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." Syl. Pt. 3, in part, *Guthrie*, 194 W.Va. 657, 461 S.E.2d 163. "[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." *Id.*

2. Petitioner's predicate offense of felony Conspiracy to Commit First Degree Robbery is a crime of violence under West Virginia Code § 61-7-7(b)(1).

The Court uses the categorical approach to determine whether Petitioner's conspiracy conviction constitutes a crime of violence. *See State v. Mills*, 243 W.Va. 328, 335, 844 S.E.2d 99, 106 (2020). But applying that framework, Conspiracy to Commit First Degree Robbery is a violent crime because the elements of conspiracy to commit robbery entail violence. The offense fits squarely in West Virginia's definition of a "crime of violence."

West Virginia's felon-in-possession-of-a-firearm statute is composed of two parts—an elements clause ("felony crime of violence against the person of another") and an enumerated crimes clause ("a felony sexual offense"). W.Va. Code § 61-7-7(b)(1); *see Mills*, 243 W.Va. at 337, 844 S.E.2d at 108. Because Petitioner's conspiracy offense is not a sexual offense, the Court must "look to whether the statutory elements of the predicate offense constitute a 'felony crime of violence against the person of another.'" *Mills*, 243 W.Va. at 337–38, 844 S.E.2d at 108–09. The Court does "not look at what [Petitioner] did." *Id.* at 338, 844 S.E.2d at 109.

Although Section 61-7-7 does not define a "felony crime of violence against the person of another," other parts of the West Virginia Code do. This Court should look to how the Legislature

interprets "crime of violence" in other parts of the code when interpreting the phrase in the felon-in-possession context. After all, "a legislative body generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972).

West Virginia statutes often expressly provide that robbery is a crime of violence (or similar crime). For example, West Virginia's expungement statute, West Virginia Code § 61-11-26, provides that certain enumerated offenses are not eligible for expungement, including "[a]ny felony offense of violence against the person." W.Va. Code § 61-11-26(c)(1). The code then defines a "felony crime of violence" with references to other parts of the code, *see* West Virginia Code § 61-11-26(p)(3), which includes among other things, sexual offenses, strangulation, murder, and—most relevant here—robbery. Similarly, West Virginia's solicitation to commit certain felonies statute applies to "a felony crime of violence against the person," West Virginia Code § 61-11-8A(a), and references code sections of crimes that fall in that definition: murder, malicious or unlawful assault, battery and assault on governmental representatives, and—again, most important for this case—robbery or attempted robbery. W.Va. Code § 61-11-8A(b)(2).

In other contexts, this Court looks to the degree of risk or harm that might be expected to arise from a given offense. This Court also uses "crime of violence" in determining whether the State's recidivist statute applies. *See State ex rel. Appleby v. Recht*, 213 W.Va. 503, 516, 583 S.E.2d 800, 813 (2002). Here, the Court looks at the crime to see if it causes any serious harm or risks causing serious harm to others. For example, in *Recht*, the Court found that driving under the influence—while not a "violent crime"—is a "crime of violence" because the offense "inherently creates a grave risk of injury to persons and property and raises very significant concerns for public safety." 213 W.Va. at 516–17, 583 S.E.2d at 813–14 (internal citation omitted). Conversely, this Court in *State v. Kilmer* found that driving a vehicle on a revoked license is not a crime of violence

because it does not "render[] the offender a risk to the public." 240 W.Va. 185, 189, 808 S.E.2d 867, 871 (2017).

A crime of violence also includes the inchoate crimes of attempt and conspiracy if the object of the attempt or conspiracy is itself a crime of violence. That's because both are inextricably linked to the offense that was the object of the attempt or conspiracy. Just recently, this Court affirmed that "[t]he crime of attempt does not exist in the abstract but rather exists only in relation to other offenses." *State v. Conn*, 247 W.Va. 256, 261, 879 S.E.2d 74, 79 (2022) (quoting *State v. Starkey*, 161 W.Va. 517, 522 n.2, 244 S.E.2d 219, 223, n.2 (1978)). "[T]he statute establishes the punishment for attempting, unsuccessfully, to commit some crime specified elsewhere in the code." *State v. James F.*, No. 15-0194, 2016 WL 2905508, at *3 (W.Va. Supreme Court, May 18, 2016) (memorandum decision). That is why a court can "go beyond the general elements of a criminal conspiracy statute to determine whether a violent felony was the object of the conspiracy." *United States v. Ward*, 171 F.3d 188, 193 (4th Cir. 1999); *see also United States v. Dozier*, 848 F.3d 180, 185 (4th Cir. 2017) ("However, we note a unique complexity of general attempt statutes: they do not set forth a standalone crime … It would therefore be imprudent to analyze the statutory language … in complete isolation."). So, the circuit court here still used the categorical approach even though it looked at the object of the conspiracy.

West Virginia's expungement and recidivist statutes further support that inchoate offenses like attempt and conspiracy can be included in a crime of violence. After enumerating specific offenses that makes an individual ineligible for expungement—including a felony crime of violence—the statute then provides that "[a]ny offense of conspiracy or attempt to commit a felony" of the above enumerated offenses also prevents a crime from being expunged. W.Va. Code § 61-11-26(c)(15). The Legislature considered conspiracy of a crime of violence to be just as bad

as the crime of violence for purposes of expungement. Similarly, West Virginia's recidivist statute applies to qualifying offenses, which it defines as "any offenses or an attempt or conspiracy to commit any of the offenses," West Virginia Code § 61-11-18(a). Here again, the Legislature treats conspiracy and attempt as part and parcel with the offense itself.

Taken together, when interpreting "felony crime of violence," the Court must look to the elements of the offense and determine whether an element causes or risks causing serious harm to others. The Court should also consider other West Virginia statutes that define "felony crime of violence." And the Court should remember that attempt and conspiracy can be considered a "felony crime of violence" where the object of the attempt or conspiracy is a violent crime.

Applying those understandings here, Conspiracy to Commit First Degree Robbery in West Virginia is a felony crime of violence. Looking to the elements of the crime, the State must prove "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." *State v. Less*, 170 W.Va. 259, 265, 294 S.E.2d 62, 67 (1981). But again, conspiracy cannot be divorced from its violent objective—here, robbery with a dangerous weapon.[1]

The object of the conspiracy here—first-degree robbery—is a crime of violence under West Virginia's felon-in-possession statute. First-degree robbery is "a crime that involves a high potentiality for violence and injury to the victim involved." *State v. Lowe*, No. 20-0011, 2021 WL 3833731, at *5 (W.Va. Supreme Court, Aug. 27, 2021) (memorandum decision) (quoting *State v. Williams*, 205 W.Va. 552, 555, 519 S.E.2d 835, 838 (1999)). The elements approach confirms this.

[1] Some courts frame the object as a separately enumerated element of conspiracy. *See, e.g., United States v. Williams*, 998 F.3d 716, 728 (6th Cir. 2021). Although West Virginia courts have not phrased the elements in precisely that way, the alternative formulation is consistent with our State's approach, and it highlights how any assessment of the conspiracy offense *must* embrace the underlying object.

First-degree robbery is defined as "[c]ommitting violence to the person, including, but not limited to, partial strangulation or suffocation or by striking or beating; or [] us[ing] the threat of deadly force by the presenting of a firearm or other deadly weapon." W.Va. Code § 61-2-12(a). West Virginia's expungement statute and solicitation statute—which both use the phrase "crime of violence"—also consider first-degree robbery to be a crime of violence. *See* W.Va. Code § 61-11-26(p)(3); W.Va. Code § 61-11-8A(b)(2). No wonder, then, that the Legislature has so often separately delineated robbery as a crime of violence in so many different contexts.

By extension, conspiracy of first-degree robbery is also a crime of violence because robbery is bound up in the conspiracy conviction. The conspiracy requires 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. 4, *Less*, 170 W.Va. 259, 294 S.E.2d 62. Thus, entering a criminal partnership to commit a violent crime makes the acts of violence much more likely. Put differently, the object necessarily drives violence. Once a plan is hatched between two or more willing participants, the likelihood that force will be used on the victim or some violent outcome will result (either through the commission of the offense or the unwinding of the conspiracy) reaches a high enough level to call the offense a "violence."

Against the plain language of the statutes and this Court's decisions, Petitioner turns to federal courts that have determined that conspiracy to commit robbery is not a crime of violence. (Pet'r's Br. 10–13). Even some federal courts have continued to hold that conspiracy to commit robbery is a crime of violence. *See, e.g.*, *Clary v. Warden*, No. 1:20-cv-00440, 2023 WL 6368329, at *6 (S.D. W.Va. Aug. 23, 2023); *United States v. Brown*, No. CR 5:16-97-DCR-CJS, 2019 WL 7593113, at *5 (E.D. Ky. Sept. 11, 2019). But in any event, Petitioner's reliance on some other federal courts' approach is unavailing because the federal definitions are narrowly focused on

whether the elements involve use of force or whether the offenses land on a list of specifically enumerated offenses. Section 924(c) defines a "crime of violence" as a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *See also* 18 U.S.C. § 16 (same). And because conspiracies are "inchoate offense[s]" they do not need to "ripen into a substantive act" involving the use, attempted use, or threatened use of physical force. *United States v. Erbo*, No. 97-CR-1105, 2020 WL 6802946, at *2 (S.D. N.Y. Nov. 19, 2020) (internal quotations and citations omitted).

West Virginia interprets "crime of violence" more broadly than it is used in federal statutes. For example, DUI is a "crime of violence" in West Virginia, *see Recht*, 213 W.Va. 503, 583 S.E.2d 800, but is not considered a "crime of violence" under Section 16, *see Leocal v. Ashcroft*, 543 U.S. 1, 4, (2004). *See also State v. Norwood*, 242 W.Va. 149, 832 S.E.2d 75 (2019) (holding that, due to heroin's often fatal nature to its users, heroin trafficking was a crime of violence for a recidivist life sentence proportionality analysis); *but see* 18 U.S.C. § 924(c) (separating drug trafficking crimes from crime of violence). West Virginia has preferred not to myopically focus on the necessary use of force but instead to undertake a more holistic assessment that accounts for all manner of violence. *See United States v. McCollum*, 885 F.3d 300, 309 (4th Cir. 2018) (Wilkinson, J., dissenting) (explaining why the narrower federal approach produces the "deeply unfortunate conclusion that participation in a conspiracy to commit [an] enumerated violent crime . . . is somehow not a crime of violence"). So federal cases aren't helpful in interpreting crime of violence in Section 61-7-7 because federal statutes take a more restrictive view of crime of violence.

This Court's decisions and the Legislature's definition of a crime of violence confirm that Conspiracy to Commit First Degree Robbery is a crime of violence under Section 61-7-7. This Court should affirm.[2]

B. The State provided sufficient evidence to secure conviction for firearms offenses.

1. **Standard of Review.**

This Court's review of claims alleging insufficient evidence to support a conviction looks to "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." Syl. Pt. 1, in part, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). Moreover, this 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." *Id.* at Syl. Pt. 3, in part. "[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." *Id.*

This Court has recognized that, under the seminal United States Supreme Court decision in *Jackson v. Virginia,* 443 U.S. 307 (1979), "an appellate court, while reviewing the record in the light most favorable to the prosecution, must determine whether '*any* rational trier of fact could

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[2] If the Court is inclined to look at the offense of conspiracy *generally* (and not treat the relevant offense as "conspiracy to commit first degree robbery"), it would still end up at the same result. That's because a statute can set out elements in the alternative, such as alternative objects for the conspiracy. *Descamps v. United States*, 570 U. S. 254 (2013). When that happens, the Court can then look to the underlying indictment to discern which of these alternatives produced the conviction. *See Mathis v. United States*, 579 U. S. 500, 505 (2016); *cf. United States v. Laurent*, 33 F.4th 63, 88-89 (2d Cir. 2022) (holding that, when evaluating whether a substantive RICO offense is a crime of violence, a court can look to the predicate RICO offenses charged and evaluate whether they are themselves crimes of violence). Here, of course, the indictment charged conspiracy to commit robbery in the first degree.

have found the essential elements of the crime beyond a reasonable doubt.'" *Guthrie*, 194 W.Va. at 667, 461 S.E.2d at 173 (quoting *Jackson*, 443 U.S. at 319). This Court recognized that "[t]his standard is a strict one," noting that an appellate court's review for sufficiency of the evidence to support a conviction is "a highly deferential approach: Appellate courts can reverse only if no rational jury could have found the defendant guilty beyond a reasonable doubt." *Id.* (footnote omitted). Moreover, this Court "may accept any adequate evidence, including circumstantial evidence, as support for the conviction." *Id.* at 668, 461 S.E.2d at 174. This Court's role in deciding whether sufficient evidence was presented at trial is not concerned with how this Court would have determined the case, but whether "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." *Id.*

2. The evidence was more than sufficient to support the jury's finding that Petitioner possessed a firearm capable of expelling a projectile within the meaning of West Virginia Code § 61-7-2(7).

Petitioner argues the State failed to produce sufficient evidence that he possessed a firearm capable of expelling a projectile by means of an explosion as required under West Virginia Code § 61-7-2(7). (Pet'r's Br. 13–14.) Petitioner is wrong.

As suggested above, a petitioner who challenges the sufficiency of the evidence underlying his or her conviction faces a heavy burden. Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). To prevail, a petitioner must establish that "no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. LaRock*, 196 W. Va. 294, 303, 470 S.E.2d 613, 622 (1996). While undertaking its review of the record, this Court must "review all the evidence . . . 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." Syl. Pt. 3, *Guthrie*, 194 W. Va. 657, 461 S.E.2d 163.

This Court has ruled that it may accept any adequate evidence, including circumstantial evidence, as support for a conviction. *State v. Spinks*, 239 W. Va. 588, 611, 803 S.E.2d 558, 581 (2017) (citing *Guthrie*, 194 W. Va. at 668, 461 S.E.2d at 174). As the Court explained in *Guthrie*, it will not overturn a verdict unless "reasonable minds could not have reached the same conclusion." 194 W. Va. at 669, 461 S.E.2d at 175. Finally, "[t]he evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt." *Id.* at Syl. Pt. 3. Instead, a 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." *Id.* "This standard is a strict one; a defendant must meet a heavy burden to gain reversal because a jury verdict will not be overturned lightly." *Id.* at 667–68, 461 S.E.2d at 173–74. This Court likewise has stated:

> The defendant fails if the evidence presented, taken in the light most agreeable to the prosecution, is adequate to permit a rational jury to find the essential elements of the offense of conviction beyond a reasonable doubt. Phrased another way, as long as the aggregate evidence justifies a judgment of conviction, other hypotheses more congenial to a finding of innocence need not be ruled out. We reverse only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

LaRock, 196 W. Va. at 303, 470 S.E.2d at 622. "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. 4, *State v. Etchell*, 147 W. Va. 338, 127 S.E.2d 609 (1962) (quoting Syl. Pt. 1, *State v. Bowles*, 117 W. Va. 217, 185 S.E. 205 (1936)).

Here, Petitioner cannot sustain his heavy burden on this assignment of error.

To begin, West Virginia Code § 61-7-2(7) defines a firearm as "any weapon which will expel a projectile by action of an explosion." Petitioner maintains that the definition excludes inoperable firearms. *But see, e.g.*, *United States v. Willis*, 992 F.2d 489, 491 n.2 (4th Cir. 1993) (holding that a similar definition under federal law does not contain any "requirement that a firearm be operable"); *United States v. Moss*, No. 1:18-cr-39, 2018 WL 6834708, at *3 (N.D. W.Va. Dec. 21, 2018) (same). Even assuming that is the case, the evidence here established that the weapon could fire.

Witness testimony and more established that Petitioner's weapon was a functioning firearm. To be sure, Officer Bishop acknowledged that the firearm possessed by Petitioner was not tested by the West Virginia State Police Forensic Laboratory to determine if the firearm was operable. (App. 266–67.) But this Court—and, as far as the State is aware, every other court—has never required specific testing to establish that a gun works. *See, e.g.*, *State v. Sumpter*, 227 Or. App. 513, 517, 206 P.3d 1088, 1089 (2009) (agreeing that the State was "not required to adduce evidence that the gun had been test-fired" and could instead rely on "circumstantial evidence"). And Patrolman Matthews further testified about his intimate knowledge of this weapon. According to Matthews, as Petitioner was exiting his vehicle upon request, Matthews observed a bulge in the front pocket of Petitioner's hoodie. (App. 276–77.) Matthews asked Petitioner if he had a firearm, and Petitioner responded that he did. (App. 277.) Officer Bishop removed the firearm from Petitioner's pocket. (App. 277.) Matthews testified that the firearm was a .40 caliber Glock that was black, green, and tan in color. (App. 277.) The firearm had a live round in the chamber in addition to a firing pin making it ready to discharge. (App. 280–81.) Officer Bishop was able to rack the gun, ejecting the round. (App. 280.) The serial number on the firearm was reported to the State Police crime lab. (App. 279.) Matthews's body cam captured the removal of

the firearm from Petitioner, which firearm was produced to the jury. (App. 278–79.) Officer Matthews testified to the appearance of the firearm, that it was an actual .40 caliber Glock, and that it contained a firing pin. (App. 278–79.) Moreover, Petitioner told the officers upon questioning that he possessed a firearm. (App. 277.)

This Court has found similar evidence sufficient. In *State v. Smith*, No. 19-0565, 2021 WL 5028952, at *3 (W.Va. Supreme Court, Oct. 29. 2021) (memorandum decision), this Court found that the "State presented sufficient evidence at trial showing that petitioner possessed a firearm *capable* of expelling a projectile by means of an explosion." (emphasis added). The evidence was comprised primarily of the victim's testimony describing the firearm possessed by the petitioner and that the firearm appeared to be a "real gun—one capable of firing a real bullet." *Id.* at *3. Similarly, in *State v. Shamblin*, No. 13-1178, 2014 WL 2922804, at *2–3 (W.Va. Supreme Court, June 27, 2014) (memorandum decision), photographic evidence of the weapons by the crime lab, which were identified by serial number, was sufficient evidence that that the firearms were in working condition. Moreover, the petitioner's son testified that the firearms were in working condition. *Id.* at *3. Here, as in *Smith* and *Shamblin*, serial-number identification, juror engagement with the weapon itself, testimony about the functioning nature of the gun, and concessions from interested witnesses all supported the jury's finding. *See also, e.g.*, State v. Mercer, 2003-Ohio-3530, ¶ 27 (finding that evidence was sufficient to establish operability where officer found gun with a live round in the chamber). Thus, the evidence was more than sufficient to prove beyond a reasonable doubt that Petitioner possessed an operable firearm.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm Petitioner's convictions.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Respondent,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

MARY BETH NIDAY
ASSISTANT ATTORNEY GENERAL
W.Va. State Bar # 9092
Office of the Attorney General – Appellate Division
1900 Kanawha Blvd. East
State Capitol
Building 6, Suite 406
Charleston, WV 25305
Telephone: (304) 558-5830
Fax: (304) 558-5833
Email: Mary.B.Niday@wvago.gov

MICHAEL R. WILLIAMS
PRINCIPAL DEPUTY SOLICITOR GENERAL
W.Va. State Bar # 14148
SPENCER DAVENPORT
ASSISTANT SOLICITOR GENERAL
W.Va. State Bar # 14364
Office of the Attorney General
1900 Kanawha Blvd. East
State Capitol
Building 1, Room E-26
Charleston, WV 25305
Telephone: (304) 558-2021
Fax: (304) 558-0140
Email: Michael.R.Williams@wvago.gov
Spencer.J.Davenport@wvago.gov

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-189

STATE OF WEST VIRGINIA,
Respondent,

v.

DELIEZHA DAVONTE GRAVELY,
Petitioner.

CERTIFICATE OF SERVICE

I, Mary Beth Niday, do hereby certify that on the 11th day of October, 2023, I served a true and accurate copy of the foregoing **Respondent's Brief** upon the below-listed individuals via the West Virginia Supreme Court of Appeals E-filing System pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure:

Ruperto Y. Dumapit, Esquire
Katz, Kantor, Stonestreet & Buckner, PLLC
206 S. Walker St.
Princeton, WV 24740

Paul Cassell, Esquire
Cassell & Crewe, PC
135 W. Monroe St., Ste. A
Wytheville, VA 24382

Mary Beth Niday
Mary Beth Niday (State Bar No. 9092)
Assistant Attorney General