IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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No. 23-189

STATE OF WEST VIRGINIA,

Plaintiff Below/Respondent,

v.

DELIEZHA DAVONTE GRAVELY,

Defendant Below/Petitioner.

Appeal from the Circuit Court of Mercer County
Case Nos. CC-28-2022-F-169; CC-28-2022-F-186

PETITIONER'S BRIEF

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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.

2. The Circuit Court further erred in denying Defendant's Motion for judgment of acquittal for lack of sufficient evidence.

STATEMENT OF THE CASE

Factual and Procedural Background

On January 27, 2022, Petitioner Deliezha Davonte Gravely entered a plea of guilty and was convicted of the felony offense of "Conspiracy," W. Va. Code § 61-10-31. (App. 24-26).

Later that year, on March 25, 2022, Mr. Gravely was pulled over for speeding by Bluefield Police Department (BPD) Patrolman D.L. Bishop. (App. 246). After learning that Mr. Gravely was driving with a license that had been revoked for a driving under the influence conviction, Patrolman Bishop and other officers arrested Mr. Gravely (App. 249-250). Subsequent to the arrest, Mr. Gravely's person was searched. BPD officers discovered what appeared to be a loaded handgun in the front pocket of his hooded sweater (App. 276-277). Mr. Gravely was then arrested for being a felon in possession of a firearm.

Mr. Gravely was then indicted with, among other offenses, two firearms charges. An essential element of both charges is that a defendant be previously convicted of a felony "crime of violence against the person of another." W. Va. Code §§ 61-7-7-(b)(1) and 61-7-7(e). The State listed as the predicate felony "Conspiracy to Commit Robbery – First Degree." (App. 15-16).

The case was set for trial on September 13, 2022. Prior to trial, the State filed a Motion for Judicial Notice, requesting that the circuit court take judicial notice that "Conspiracy to Commit Robbery – First Degree" was a felony crime of violence against the person of another. (App. 48-51). Mr. Gravely responded, stating that it was not a crime of violence against the other. (App. 52-58).

The parties argued the Motion for Judicial Notice on September 13, the date of trial, prior to the swearing in of the jury. The circuit court held that "Conspiracy to Commit Robbery – First Degree" was a crime of violence against the person of another. (App. 213-218; 222-224).

The case proceeded to trial. At trial, the State produced no evidence that the alleged handgun was an operable firearm. BPD Patrolman Bishop admitted that he did not submit the alleged firearm for testing to show that it was an operable firearm, despite knowing that the West Virginia State Police Forensic Laboratory offered that service. (App. 250-271). BPD Patrolman C.A. Matthews indicated that the firing pin was located on the alleged firearm which made the firearm "ready to discharge" but made no conclusion as to the specific operability of the alleged firearm. (App. 271-289).

After the close of evidence, Mr. Gravely moved for a judgment of acquittal and filed a supporting memorandum, renewing his argument that "Conspiracy to Commit Robbery – First Degree" was not a crime of violence and citing among other things, insufficient evidence. (App. 59-71; 296-301). The circuit court denied this motion. The trial continued, and the jury found Mr. Gravely guilty of the firearms counts, one count of speeding, and one count of driving with a license revoked for DUI. (App. 340-343).

Mr. Gravely subsequently filed a motion for judgment of acquittal notwithstanding the verdict, or alternatively, a new trial, and a supporting memorandum renewing his arguments. (App. 72-91; 344). This motion was denied at a post-trial motions hearing on November 4, 2022. (App. 157-159; 348-362).

The State then filed a recidivist information against Mr. Gravely. (App. 18-47). A recidivist trial was held on December 15, 2022. (App. 167-170; 380-569). During and subsequent to this trial, Mr. Gravely renewed his motion for judgment of acquittal or new trial (App. 92-145; 508-509; 565-567). The parties argued this motion at a January 30, 2023, hearing. (App. 570-591). At a hearing on March 6, 2023, the circuit court denied the renewal of his motion and sentenced Mr. Gravely (App. 160-163; 592-610).

SUMMARY OF THE ARGUMENT

For purposes of West Virginia's felon in possession of firearms statute, courts must use the categorical approach to determine whether a predicate felony is a felony crime of violence against the person of another.

When using the categorical approach, courts must look only to the fact of conviction and the elements required for conviction, not to any specific conduct tied to the offense. If it is at all possible for the elements of a crime to be met without the use of violence against another, then the crime is not a crime of violence against the person.

Before the lower court, the State argued, and the court held, that "Conspiracy to Commit Robbery – First Degree" specifically was a crime of violence against the person of another due to the violent nature of the crime of robbery. However, this argument ignores the requirements of the categorical approach.

Conspiracy is not a crime of violence against the person. Conspiracy only occurs when two or more persons agree to commit a crime and one of those persons does *any* act to move towards the object of the conspiracy. Hypothetically, one only need agree to perform a robbery with another person to be guilty of the offense of conspiracy to commit robbery. If a person agrees to commit a robbery with another person and the other person performs one act to further the conspiracy—driving to the robbery location, for example—the crime of conspiracy has occurred and both hypothetical co-conspirators are guilty. Thus, no acts of violence are required to commit conspiracy.

Additionally, at trial the State did not introduce sufficient evidence to show that the alleged handgun was an operable firearm, which is defined in the West Virginia Code as a weapon that will expel a projectile by means of an explosion. Because the State did not produce evidence to show that the alleged handgun was operable, insufficient evidence was presented to the jury.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument pursuant under Rule 18(a) is not necessary because the dispositive issues have been authoritatively decided and dictate that Petitioner is entitled to relief.

Petitioner also asserts that this matter should be set for Rule 19(a) argument because this case involves assignments of error in the application of settled law and a claim of insufficient evidence.

STANDARDS OF REVIEW

"Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, [the Supreme Court of Appeals] applies a *de*

novo standard of review." Syl. Pt. 1, *State v. Hoyle*, 242 W. Va. 599, 836 S.E.2d 817 (2019), quoting Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

Furthermore, the Court also applies a *de novo* standard of review to the denial of a motion for judgment of acquittal based on sufficiency of evidence. *Hoyle*, 836 S.E.2d 817, 825, citing *State v. LaRock*, 196 W. Va. 294, 304, 470 S.E.2d 613, 623 (1996).

With regard to sufficiency of evidence challenges,

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

Syl. Pt. 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

The Court has also noted that

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

Id., at Syl. Pt. 3.

ARGUMENT

I. Conspiracy is not a felony crime of violence against the person of another.

A. Courts must use the categorical approach in determining whether a crime is a felony crime of violence against the person of another.

West Virginia's prohibited person in possession of a firearm statute, West Virginia Code § 61-7-7 (2016), creates criminal penalties for felons who possess firearms. The statute specifically states that a person "convicted in this state or any other jurisdiction of a felony crime of violence against the person of another" is guilty of a felony. W. Va. Code § 61-7-7(b)(1). The statute also creates a separate and additional offense for such felons who carry a concealed firearm. W. Va. Code § 61-7-7(e).

In order to determine if a prior conviction is a "felony crime of violence against the person of another" as described in the above-mentioned "elements clause," courts must use the categorical approach. *See State v. Mills*, 243 W. Va. 328, 844 S.E.2d 99 (2020). In using the categorical approach, courts focus solely on the "elements of an offense, rather than on the facts of the case." *United States v. McNeal*, 818 F.3d 141 (4th Cir. 2016). In other words, a court "must only 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 338, citing *McNeal*, 818 F.3d 141, 151-52.

Use of the categorical approach "does not require—in fact, it precludes—an inquiry into how any particular defendant may commit" a crime. *United States v. Taylor*, 142 S. Ct. 2015, 2020 (2022). Therefore, in determining whether a predicate felony is a felony crime of violence against the person of another, courts are "confined to looking at the fact of conviction and the elements required for conviction . . . [a]ll that counts . . . are the elements of the statute of conviction, not the specific conduct of a particular offender."

State v. Mills, 844 S.E.2d at 109, quoting *United States v. Davis*, 875 F.3d 592, 596-97 (11th Cir. 2017) (other citations omitted).

B. The trial court did not use the categorical approach in determining whether conspiracy was a crime of violence against the person of another.

The trial court did not use the categorical approach in holding that conspiracy was a crime of violence against the person of another. (App. 222-224).

In its ruling, the trial court stated that "the statute talks about a felony crime of violence against the person of another. Not an act of violence, but a crime of violence. Clearly, robbery is a crime of violence against a person. I don't think there is any question to that . . . Conspiracy, the essence of the conspiracy is the agreement between one or two or more persons to commit a crime. And conspiracy to commit robbery, therefore, is an agreement between two or more persons to commit a crime of violence. To me, that's a crime of violence." (App. 222-223).

By not using the categorical approach, the court looked into the specific conduct of Mr. Gravely's conspiracy conviction. However, the elements of conspiracy are the same regardless of the object of the conspiracy. The crime of conspiracy can be accomplished by a person merely agreeing with one or more others to commit a crime.

C. The only necessary element of West Virginia's conspiracy statute is an agreement to commit any act that is a felony or misdemeanor in West Virginia. Because the crime of conspiracy can be accomplished by simply agreeing to commit a crime, there is no element that constitutes an act of violence against the person of another.

The crime of conspiracy in West Virginia occurs when "two or more persons . . . conspire to commit any offense against the State . . .[and] one or more of such persons does any act to effect the object of the conspiracy." W. Va. Code § 61-10-31(1). An act of violence against another person is not required to be convicted of conspiracy. In fact, no

overt action by a defendant is required at all. Only an agreement and an overt act by another individual is required. *See State v. Less*, 170 W. Va. 259, 265, 294 S.E.2d 62, 67(1982).

In *Less*, the defendant was convicted of conspiracy to commit robbery after a jury trial. 294 S.E.2d 62. On appeal, the defendant challenged the conviction citing insufficient evidence. *Id*, at 66. The evidence in the *Less* trial showed that the defendant did not actively participate in the robbery of a store. *Id*, at 68. The *Less* defendant discussed conducting the robbery, traveled to the robbery location as a passenger in a vehicle, waited in that vehicle as the robbery was occurring, and received money taken as a result of the robbery. *Id*.

On appeal, the *Less* Court then considered in "detail the elements necessary to the crime of conspiracy." 294 S.E.2d 62, 66. This Court held that "in order for the State to prove conspiracy under W. Va. Code, 61-10-31(1), it must show that the defendant agreed with others to commit an offense against the State and that some overt act was taken by a member of the conspiracy to effect the object of that conspiracy . . . the prohibited conduct is the agreement to commit an act made an offense by the laws of this State." *Id*., at 67.

The Court then held that given the above facts, the "State proved the existence of a conspiracy and the commission of one or more overt acts by a member or members of the conspiracy in furtherance of the aim of the conspiracy." *Id.* at 68. This reflects the principle that "the agreement to commit an offense is the essential element of the crime of conspiracy — it is the conduct prohibited by statute." *Id*.

Conspiracy to commit robbery cannot be a crime of violence against the person of another. In *Less*, the defendant made no violent actions towards the person of another. He discussed a possible robbery, traveled with others to the scene of the robbery, waited

outside, and profited from the robbery. However, he committed no acts of violence towards another person.

i. Mr. Gravely pled to and was found guilty of the crime of conspiracy, which is an offense distinct from robbery, W. Va. Code § 61-2-12. The crime of conspiracy is not a crime of violence against the person of another as applied to the categorical approach.

The only predicate offense of the firearms counts of the Indictment is "Conspiracy to Commit Robbery – First Degree." (App. 15-16). At trial, no other predicate offenses were proved or attempted to be proved by the State. (App. 171-347). At trial, the State's evidence showed that Mr. Gravely had pled guilty to the crime of conspiracy – W. Va. Code § 61-10-31(1). (App. 81-86; 289-294).

As stated above, the only required element to prove anyone guilty of conspiracy is an agreement to commit a crime. The underlying crime of an alleged conspiracy is relevant in the sense that the crime can be either a misdemeanor or a felony. There is no separate categorization of conspiracy under 61-10-31 for those who commit crimes of violence against the person of another. In other words, the only important issue regarding the underlying crime in a conspiracy charge is whether that crime is a felony or a misdemeanor. Anything else is surplusage. Therefore, the predicate felony in this case, "Conspiracy to Commit Robbery — First Degree," only describes a conspiracy to commit a felony (robbery).

The analysis of the evidence necessary to secure a conspiracy conviction described above shows that—aside from the *Less* Court's holding that an agreement is the essential element of the crime—one can be found guilty of conspiracy by merely discussing and profiting from a robbery.

Therefore, a proper application of the categorical approach, looking only at the required elements of the offense of conspiracy, 61-10-31(1), shows that conspiracy is not a crime of violence against the person.

D. Federal courts have used the categorical approach to determine that conspiracy to commit robbery is not a crime of violence.

i. The United States Court of Appeals for the Fourth Circuit has determined that conspiracy to commit robbery is not a crime of violence.

The Fourth Circuit examined whether conspiracy to commit Hobbs Act[1] robbery was a crime of violence in *United States v. Simms*, See 914 F.3d 229 (4th Cir. 2019). The *Simms* court used the categorical approach to find that conspiracy to commit robbery was not a crime of violence. In that case, the defendant had actually participated in an armed robbery of a McDonald's:

> "Simms and a co-conspirator crawled into the McDonald's through the drive-through window; a third robber served as a lookout. When inside, Simms pointed a gun at the manager, attempted to strike another employee, and demanded money. The manager complied and opened the restaurant's safe. After removing the contents, Simms struck the manager with the gun, threw a cash drawer at the other employee, and fled with his two co-conspirators and $1,100."

Id. at 232.

[1] The Hobbs Act prohibits obstructing, delaying, or affecting interstate commerce by robbery, which is defined similarly to West Virginia's robbery statute. For purposes of this case, any analysis regarding conspiracy to commit Hobbs Act robbery should be relevant to an analysis of conspiracy to commit robbery under West Virginia law. *See* 18 U.S.C.S. § 1951; W. Va. Code § 61-2-12; Syl. Pt. 1, *State v. Harless*, 168 W. Va. 707, 285 S.E.2d 461 (1981) (defining robbery under West Virginia law as common law robbery); *United States v. Melgar-Cabrera*, 892 F.3d 1053, 1064 (10th Cir. 2018) ("Hobbs Act robbery is defined as common-law robbery that affects interstate commerce"); *see also State ex rel. Knight v. Public Service Commission*, 161 W. Va. 447, 245 S.E.2d 144 (1978).

The court used the categorical approach to determine that conspiracy to commit robbery was not a crime of violence:

> To determine whether an offense is a crime of violence under that clause, courts use an inquiry known as the "categorical" approach. They look to whether the statutory elements of the offense necessarily require the use, attempted use, or threatened use of physical force. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1, 7–10, 125 S. Ct. 377, 160 L.Ed.2d 271 (2004) (interpreting materially identical text in 18 U.S.C. § 16(a)); *United States v. McNeal*, 818 F.3d 141, 151–52 (4th Cir. 2016) (interpreting § 924(c)(3)(A)). This approach is "categorical" because courts consider only the crime as defined, not the particular facts in the case. *See, e.g., McNeal*, 818 F.3d at 152. To be more precise, we will refer to the force clause inquiry as the elements-based categorical approach, because it begins and ends with the offense's elements. When a statute defines an offense in a way that allows for both violent and nonviolent means of commission, that offense is not "categorically" a crime of violence under the force clause.

Id.

The government then conceded, and the court found, that conspiracy to commit robbery was not a crime of violence under that approach. "This is so because to convict a defendant of this offense, the Government must prove only that the defendant agreed with another to commit actions that, if realized, would violate the Hobbs Act [or robbery]. Such an agreement does not invariably require the actual, attempted, or threatened use of physical force." *Id*. at 233-234.

ii. The Southern District of West Virginia similarly found that conspiracy to commit robbery under West Virginia's robbery statute was not a crime of violence.

In 2019, the Southern District of West Virginia used the categorical approach to determine if conspiracy to commit robbery under West Virginia's conspiracy statute was a crime of violence:

> To determine whether a statute is a "crime of violence" . . . courts use the categorical approach and look at "***the full range of conduct covered by [the] statute, 'including the most innocent conduct***. . ." In order to be convicted of conspiracy to commit robbery in West Virginia, the government must prove (1) "the defendant agreed with others to commit an offense against the State," and (2) "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, 294 S.E.2d 62, 67 (1981); see W. Va. Code § 61-10-31. The overt act element for conspiracy is undefined and could include actions which are not crimes of violence, as the United States conceded. See Tr. Sentencing Hr'g [ECF No. 33] 6:22–24 ("THE COURT: Does [the overt act requirement] of necessity have to be a crime of violence to be an adequate overt act? MR. TESSMAN: I don't believe so, Your Honor."). For example, an overt act could include giving someone money to buy a gun. *See State v. Burd*, 187 W.Va. 415, 419 S.E.2d 676, 680–81 (1991). Other states have found overt acts for conspiracy can include innocuous and nonviolent activities. *See e.g., People v. Carlock*, No. C085983, 2019 WL 2588793, at *5 (Cal. Ct. App. 2019) (finding sufficient "...the overt act of defendant renting the car."); *State v. Faust*, 161 Conn.App. 149, 127 A.3d 1028, 1044 (Conn. 2015) (deciding an overt act can be monitoring a store prior to a robbery.); *State v. Johnson*, No. A04-1653, 2005 WL 2352109, at *3 (Minn. Ct. App. 2005) (holding overt acts include providing "directions, a map, and a picture..."). The overt act in this case does not require "violent force—that is, force capable of causing physical pain or injury to another person." *See Johnson*, 559 U.S. at 140, 130 S.Ct.1265. ***Thus, conspiracy to commit robbery in West Virginia does not have an element which includes the "use, attempted use, or threatened use of physical force," and therefore is not a "crime of violence***." *See Shell*, 789 F.3d at 339; see U.S.S.G. § 4B1.2(a).

U.S. v. Cooper, 410 F.Supp.3d 769, 771-772 (2019) (emphasis added).

iii. The Supreme Court of the United States has also held that attempt to commit robbery was not a crime of violence.

In a 2022 decision, the Supreme Court of the United States examined attempted robbery under the Hobbs Act. *See United States v. Taylor*, 142 S. Ct. 2015 (2022). In *Taylor*, the defendant pleaded guilty to conspiracy to commit Hobbs Act robbery, attempt

to commit Hobbs Act robbery, and 18 U.S.C. § 924(c), a federal firearms statute. He later filed a federal habeas petition, seeking to challenge his conviction under § 924(c) after the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), which held that the categorical approach should be used to determine what crimes constitute crimes of violence under that statute.

In response, the government conceded that conspiracy to commit robbery was not a violent offense but argued that attempted robbery was. *Taylor*, 142 S. Ct. 2015, 2019. The Supreme Court held that attempted robbery was not a crime of violence after looking at the elements of attempt: "(1) The defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) he completed a "substantial step" toward that end . . . [t]step . . . must be 'unequivocal,' and 'significant,' though it 'need not be violent,' *Id*. 142 S. Ct. at 2021 (citations and quotations omitted).

This case can be compared to *Taylor*. Aside from the fact that the government conceded that conspiracy to commit robbery was not a crime of violence, the Supreme Court held that a person who not only agrees, but attempts—or actually does make a substantial move towards—the violent crime of robbery has not yet committed a violent crime.

II. The State provided insufficient evidence to secure a conviction for the firearms offenses.

For purposes of West Virginia's prohibited persons in possession of a firearms statute, a "firearm" is defined as "any weapon which will expel a projectile by action of an explosion . . ." W. Va. Code § 61-7-2(7). This definition excludes inoperable firearms. In other words, by definition, a handgun that is otherwise loaded and ready for use may or may not be a firearm depending on its capability to expel a projectile.

At trial, the State only introduced evidence that showed that the alleged firearm may have been able to expel a projectile by means of an explosion. (App. 250-289). The State introduced no evidence that the alleged firearm had been submitted for testing to show that it actually was an operable firearm. (App. 255-267). In fact, investigating officer BPD Patrolman Bishop offered no testimony that reflected whether the gun was capable of expelling a projectile. Patrolman Bishop admitted that the WVSP Forensic Laboratory tested firearms for operability and could make that conclusion. (App.265-266). However, he made no submissions to the laboratory related to the alleged firearm's operability. (App. 265-266). Finally, Bishop admitted that he had no knowledge that Mr. Gravely knew that the alleged firearm was capable of firing or expelling a projectile. (App. 264).

BPD Patrolman Matthews testified that the alleged firearm had a firing pin. (App. 281). However, like Bishop, Matthews could offer no testimony showing actual knowledge that the alleged firearm had been fired or had been tested to show it was capable of firing.

W. Va. Code § 61-7-2(7) makes clear that a firearm for purposes of West Virginia's person prohibited from possessing a firearm statute is only a weapon that "will" expel a projectile. Therefore, a weapon that won't expel a projectile, even one designed to, must not be a firearm. Because the State produced no evidence to show that the alleged firearm was capable of expelling a projectile at the time of Mr. Gravely's arrest, it did not produce sufficient evidence to convict Mr. Gravely.

CONCLUSION

For the above reasons, the Petitioner Deliezha Davonte Gravely asks that this Honorable Court reverse the circuit court and grant any other relief this Court deems just and proper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Ruperto Y. Dumapit, do hereby certify on the 26th day of July, 2023, pursuant to Rule 38A of the West Virginia Rules of Appellate Procedure, I e-filed the foregoing Petitioner's Brief and a true copy was served upon the following Counsel:

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