

Armstead, Justice, concurring in part and dissenting in part:

While, based on the language of the relevant statutes, I must concur with the majority's conclusion that conspiracy to commit first-degree robbery is not a crime of violence for purposes of West Virginia Code § 61-7-7(b), I write separately to encourage the Legislature to review the statute to determine if modifications are needed in order to implement the Legislature's true intent. Moreover, I dissent as to the majority's decision to vacate the petitioner's conviction of possession of a firearm by a prohibited person because I believe this conviction should have been remanded for resentencing.

A person who has been convicted of a "felony crime of violence against the person of another" is prohibited from possessing in firearm pursuant to West Virginia Code § 61-7-7(b). Specifically, the statute provides:

(b)... any person:

(1) Who has been convicted in this state or any other jurisdiction of a felony crime of violence against the person of another. . .

(2) ... and who possesses a firearm as such is defined in section two of this article shall be guilty of a felony and, upon conviction thereof, shall be confined in a state correctional facility for not more than five years or fined not more than \$5,000, or both.

This statute’s “plain language . . . makes it a crime for a person previously convicted under a statute whose elements constitute a ‘felony crime of violence against the person of another’ to possess a firearm.” *State v. Mills*, 243 W. Va. 328, 337, 844 S.E.2d 99, 108 (2020). To determine whether a predicate offense is a “felony crime of violence against the person of another” for the purposes of West Virginia Code § 61-7-7(b), *Mills* requires us to employ an elements test, which confines us “to looking at the fact of conviction and the elements required for conviction . . . not the ‘specific conduct of [a] particular offender.’” *Id.* at 338, 844 S.E.2d at 109 (internal citations omitted).

The predicate felony offense at issue in this case, namely conspiracy to commit first-degree robbery, requires an agreement and an overt act, but it does not expressly require an act of violence against another person. I am sympathetic to the State’s argument that the conspiracy cannot be divorced from its violent objective, and believe it is possible that the Legislature may have intended such result. However, the language of the statutes, along with our previous holding in *Mills*, do not support such a conclusion in the absence of language indicating the Legislature’s intent that conspiracy to commit a violent offense equates to an actual crime of violence as referenced in West Virginia Code § 61-7-7(b). For this reason, I must concur with the majority’s decision that a conspiracy conviction under our general conspiracy statute is not a “felony crime of violence against the person of another” for the purposes of West Virginia Code § 61-7-7(b)(1). Accordingly, the State is left with the unfortunate option of seeking clarification of the law

by the Legislature or allowing some felons who possess firearms to escape felony prosecution for such possession.

Although I concur with the majority's conclusion that conspiracy to commit first-degree robbery is not a crime of violence for purposes of West Virginia Code § 61-7-7(b), I dissent to the majority's decision to vacate the petitioner's conviction for felony prohibited person in possession of a firearm. I believe the petitioner's conviction should have been remanded to the circuit court for resentencing rather than vacated. In addition to the felony crime of unlawful possession of a firearm by a prohibited person, West Virginia Code § 61-7-7(a)(1) establishes a misdemeanor is committed by a person who possesses a firearm after being convicted of a crime that was punishable by imprisonment for a term exceeding one year. I believe that this misdemeanor crime is a lesser-included offense of felony prohibited possession.¹ Indeed, we have held:

The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense.

Syl. Pt. 5, *State v. Wright*, 200 W. Va. 549, 490 S.E.2d 636 (1997) (citations omitted).

¹ See W. Va. Code § 61-7-7(a).

The misdemeanor crime of prohibited possession prohibits a person who “[h]as been convicted in any court of a crime punishable by *imprisonment for a term exceeding one year*” from possessing a firearm. *See* W. Va. Code § 61-7-7(a)(1) (emphasis added). The felony crime of prohibited possession prohibits a person who “has been convicted in this state or any other jurisdiction of a *felony crime of violence* against the person of another” from possessing a firearm. *See* W. Va. Code § 61-7-7(b)(1) (emphasis added). Clearly, a person who has been convicted of a crime that is punishable by imprisonment for a term exceeding one year has, in fact, been convicted of a felony. While the language set forth in the two statutory provisions is not identical in terms of their definition of a “felony,” such variance in language is a distinction without a difference.

Indeed, just last year we recognized that both subsection (a) and (b) of West Virginia Code § 61-7-7 relate to individuals previously convicted of a *felony* and that West Virginia Code § 61-7-7(a)(1), while not specifically using the word “felony,” nonetheless prohibits one convicted of a felony from possessing a firearm. In *State v. Lowery*, we held:

West Virginia Code § 61-7-7 prohibits *any person convicted of a felony* from possessing a firearm, a person possessing a firearm who was previously convicted of “a crime punishable by imprisonment for a term exceeding one year,” is guilty of a misdemeanor, while a person possessing a firearm who was convicted of a “felony crime of violence against the person of another” is guilty of a felony.

State v. Lowery, No. 23-100, 2024 WL 4603584, at *4 (W. Va. October 29, 2024) (memorandum decision) (emphasis added). In addition, in *State v. Stewart*, we held that “[u]nder West Virginia law, a convicted felon may not possess a firearm. It is undisputed that petitioner is a **convicted felon** and, therefore, **a prohibited person under [West Virginia Code] § 61-7-7(a)(1).**” *State v. Stewart*, No. 12-0392, 2013 WL 2157814, at *2 (W. Va. May 17, 2013) (memorandum decision) (emphasis added). Finally, in *State v. Brown*, we indicated that a defendant who was previously convicted of a felony was prohibited from possessing a firearm under West Virginia Code § 61-7-7(a)(1), finding:

Pursuant to West Virginia Code § 61-7-7(a)(1), “[e]xcept as provided in this section, no person shall possess a firearm, as such is defined in section two of this article, who ... [h]as been convicted in any court of a crime punishable by imprisonment for a term exceeding one year[.]” Petitioner does not dispute that he was **previously convicted of a felony** and, thus, was prohibited from possessing a firearm at the time of the search at issue.

State v. Brown, No. 17-0911, 2018 WL 4944193, at *4 fn. 3 (W. Va. October 12, 2018) (memorandum decision) (emphasis added).

Clearly, in *Lowery*, *Stewart* and *Brown*, we equated the term “crime punishable by imprisonment for a term exceeding one year” with the term “felony.” The true difference between the two criminal offenses under West Virginia Code § 61-7-7 is that to be charged with the misdemeanor offence under subsection (a), a person must have been convicted of a prior felony, but to be charged with the felony offense under subsection (b), his or her prior felony must have been a crime of violence. Because it would be

impossible for a person to commit the felony crime of possession by one with a prior violent felony conviction without having committed the misdemeanor crime of possession by one convicted of any prior felony, misdemeanor prohibited possession is a lesser-included offense of felony prohibited possession. For this reason, I believe that the petitioner's conviction for felony prohibited possession should have been reversed and remanded for resentencing pursuant to West Virginia Code § 61-7-7(a)(1) and, therefore, dissent from the majority's decision to vacate the petitioner's conviction.