WEST VIRGINIA
CRIMINAL JURY INSTRUCTIONS
THIRD EDITION

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INTRODUCTION

This Third Edition of the West Virginia Jury Instructions for Criminal Cases includes all the basic material of the First and Second Editions with material added to reflect court decisions from July, 1992 through April 1, 1994 and statutory changes from July, 1992 through December 1993. Instructions cover substantive law, with comments and research footnotes, so as to save time and unnecessary research. Included are the basic elements of most crimes against the person, crimes against property, driving under the influence of alcohol or drugs (DUI), sexual offenses, certain common law defenses and general charges to the jury.

We have attempted to be faithful to the strict dictates of the law and yet tried to simplify the language as much as possible in order to make the instructions comprehensible to the average juror. In some instructions archaic, obtuse language was left as a precaution against challenge. You should use this volume as you would any other type of form or pattern; always amend where necessary to fit the specific facts of your case. In particular, note that no verdict choices are included.

Public Defender Services is especially indebted to Prof. Franklin D. Cleckley for his generous donation of time. Any errors, however, are strictly the responsibility of Public Defender Services. Thanks are also appropriate to Judge George Scott, acting on behalf of the Judicial Association, for his support and advice throughout this project.

Finally, please note that specific legislative changes made during the 1994 Regular and Extraordinary Sessions are not included. A later edition will include these changes.

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GENERAL CHARGE
PRESUMPTION OF INNOCENCE, REASONABLE DOUBT, BURDEN OF PROOF[1]

The law presumes a defendant to be innocent of crime. Thus a defendant, although accused, begins the trial with a "clean slate" with no evidence against him. And the law permits nothing but legal evidence presented before the jury to be considered in support of any charge against the accused. So the presumption of innocence alone is sufficient to acquit a defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense - the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it.

The jury will remember that a defendant is never to be convicted on mere suspicion or conjecture.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant; for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

So if the jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that a defendant is guilty of the charge, it must acquit. If the jury views the evidence in the case as reasonably permitting either of two conclusions - one of innocence, the other of guilt - the jury should of course adopt the conclusion of innocence.

FOOTNOTES

[1] Footnote 9, State v. Goff, 166 W.Va. 47, 272 S.E.2d 457 (1980). "This instruction is almost identical to the widely used federal instruction, E. Devitt and C. Blackmar, Federal Jury Practice and Instructions Sec. 11.14."; See, State v. Berry, 176 W.Va. 291, 342 S.E.2d 259, 264 (1986); See footnote 7, State v. Fisher, 179 W.Va. 516, 370 S.E.2d 480 (1988).

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COMMENTS

1. "We, as well as the United States Supreme Court, have recognized the fundamental right to have a presumption of innocence and burden of proof instruction in a criminal case. Taylor v. Kentucky, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978); cf. Coffin v. United States, 156 U.S. 432, 15 S.Ct. 394, 39 L.Ed. 481 (1895); State v. Cokeley, 159 W.Va. 664, 226 S.E.2d 40 (1976). Because of the crucial significance of such instructions, most appellate courts have cautioned against altering the form of such instruction. United States v. Bridges, 499 F.2d 179 (7th Cir. 1974), cert. denied, 419 U.S. 1010, 95 S.Ct. 330, 42 L.Ed.2d 284; Scurry v. United States, 347 F.2d 468 (D.C. Cir. 1965); State v. Boyken, 217 N.W.2d 218 (Iowa 1974); Commonwealth v. Ferreira, 373 Mass. 116, 364 N.E.2d 1264 (1977); State v. Flippin, 280 N.C. 682, 186 S.E.2d 917 (1972); Commonwealth v. Young, 456 Pa. 102, 317 A.2d 258 (1974). Since this case must be retried, we offer a standard instruction on the presumption of innocence and burden of proof. (Instruction set out above).

"In the present case, we hold that the quoted language (under review) standing alone will not constitute reversible error but when coupled with other language which is at substantial variance with the standard instruction on the presumption of innocence and burden of proof, such deviant instruction may constitute reversible error."

Goff, supra, at 462, 463.

2. "The appellant also challenges the trial court's refusal of Defendant's Instructions Nos. 5, 6, 8, and 15 which instructed the jury as to the presumption of innocence, the burden of proof and reasonable doubt. The trial court refused these instructions on the ground that the legal principles they contained were adequately covered by instructions proffered by the State. The appellant asserts, however, that he was entitled to have them read to the jury in this own language."

"A defendant may have the right to have an instruction given in his own language provided that there are facts in evidence to support the instruction, that the instruction contains a correct statement of the law and that the instruction is not vague, ambiguous, obscure, irrelevant or calculated to mislead the jury. State v. Evans, 33 W.Va. 417, 10 S.E. 792 (1890). Where, however, both the State and the defendant have offered instructions which in form and effect embody the same legal principle and amount to the same thing, it is not reversible error for the trial court to give one instruction and to refuse the other. State v. Hamric, 151 W.Va. 1, 151 S.E.2d 252 (1966); State v. Rice, 83 W.Va. 409, 98 S.E. 432 (1919). After reviewing the instructions proffered by the appellant and those given by the trial court at the request of the State, we find no reversible error in the trial court's refusal of Defendant's Instructions 5, 6, 8 and 15."

State v. Williams, 172 W.Va. 295, 305 S.E.2d 251, at 266 (1983).

3. " 'In the trial of a criminal case, the refusal of a trial court to give to the jury, when requested to do so, an instruction or charge that the defendant is presumed to be innocent of the charge laid against him in the indictment on which he is being tried, is prejudicial to the defendant, and constitutes reversible

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error.' Point 8, Syl., State v. Foley, 131 W.Va. 326, 47 S.E.2d 40 (1948)." Syl. pt. 3, State v. Cokeley, 159 W.Va. 664, 226 S.E.2d 40 (1976).

4. A criminal defendant is entitled, as a matter of right, to an instruction to the jury that he is presumed to be innocent of the crime for which he is charged and it is reversible error to refuse to give such an instruction unless the statement is contained in other instructions. Syl. pt. 7, State v. Milam, 159 W.Va. 691, 226 S.E.2d 433 (1976).

5. Footnote 4, State v. Evans, 172 W.Va. 810, 310 S.E.2d 877 (1983) - "We discourage the use of instructions which attempt to define reasonable doubt beyond the standard charge." (cites omitted).

6. A criminal defendant is entitled, as a matter of right, to an instruction to the jury that he is presumed to be innocent of the crime for which he is charged and it is reversible error to refuse to give such an instruction unless the statement is contained in other instructions. Syl. pt. 7, State v. Milam, 159 W.Va. 691, 226 S.E.2d 433 (1976).

GENERAL CHARGE
ALIBI

The defendant has offered in his defense evidence that he was not present at the place where, and at the time when, the alleged offense was committed. This is known in the law as an alibi. It is not incumbent upon the defendant to establish that he was not present at the time and place of the commission of the alleged offense, or that he was at some other place. The burden is on the State to prove beyond a reasonable doubt that the defendant was present at the time and place the State claims the alleged offense was committed, and that the defendant committed the offense as charged.

If, after a consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time and place the alleged crime was committed, you should find the defendant not guilty.

COMMENTS

1. "Because of the holding in Adkins v. Bordenkircher, 674 F.2d 279 (4th Cir.), cert. denied, 459 U.S. 853, 103 S.Ct. 119, 74 L.Ed.2d 104 (1982), State v. Alexander, (161 W.Va. 776), 245 S.E.2d 633 (1978), is overruled to the extent that it permits the giving of an instruction that places the burden upon the defendant to prove his alibi defense sufficiently to create a reasonable doubt in the mind of the jury as to his guilt." Syllabus point 1, State v. Kopa, 173 W.Va. 43, 311 S.E.2d 412, at 418 (1983).

"The invalidation of the instruction approved in State v. Alexander, (161 W.Va. 776), 245 S.E.2d 633 (1978), that places the burden upon the defendant to prove his alibi defense sufficiently to create a reasonable doubt in the mind of the jury as to his guilt is only applicable to those cases currently in litigation or on appeal where the error has been properly preserved at trial." Syllabus point 2, State v. Kopa, 173 W.Va. 43, 311 S.E.2d 412 (1983). Syl. pt. 3, State v. Hall, 179 W.Va. 398, 369 S.E.2d 701 (1988).

2. "The so-called Alexander instruction on alibi is unconstitutional as impermissibly burden shifting, but this error is subject to the doctrine of harmless constitutional error." Syl. pt. 4, Morrison v. Holland, 177 W.Va. 297, 352 S.E.2d 46 (1986).

"Where a burden-shifting alibi instruction has been offered and the question arises as to whether it is harmless constitutional error, courts look to the credibility of the alibi testimony and, if it is not incredible, the error is not harmless." Syl. pt. 5, Morrison v. Holland, 177 W.Va. 297, 352 S.E.2d 46 (1986).

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3. Reverses based on Alexander instruction. State v. Collins, 174 W.Va. 767, 329 S.E.2d 839 (1984).

4. Acord v. Hedrick, 176 W.Va. 154, 342 S.E.2d 120 (1986) - instruction set forth in footnote 6 did not shift the burden of persuasion to the defendant to prove his alibi.

5. An instruction to the jury that the defendant did not have to prove his alibi beyond a reasonable doubt or even by a preponderance of the evidence, but had only to introduce evidence which when considered with the whole evidence, created a reasonable doubt regarding guilt was not an impermissible shift to defendant of prosecution's burden of proving every element of the crime charged beyond a reasonable doubt. The court found the instruction was no more than a comment on the weight of evidence and had nothing to do with burden of proof or introduction of evidence. Frye v. Procunier, 746 F.2d 1011 (4th Cir.Va. 1984).

6. Trial counsel's failure to look beyond State v. Alexander and discover and apply Adkins v. Bordenkircher, 674 F.2d 279 (4th Cir. 1982), not cert. denied, 459 U.S. 853, 103 S.Ct. 119, 74 L.Ed.2d 104 (1982), overruled on other grounds, Meadows v. Holland, 831 F.2d 493 (4th Cir. 1987), not ineffective assistance of counsel. [cert. granted and judgment vacated by Meadows v. Holland, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 575 (1989); on remand to Meadows v. Legursky, 904 F.2d 903 (4th Cir. (W.Va.) 1990); cert. denied, Meadows v. Legursky, 111 S.Ct. 523, 112 L.Ed.2d 534 (1990)]. State v. Hutchinson, 176 W.Va. 172, 342 S.E.2d 138 (1986).

7. The Court did not recognize plain error in the giving of an Alexander instruction where the giving of the instruction did not substantially impair the truth-finding function of the trial. State v. Hutchinson, 176 W.Va. 172, 342 S.E.2d 138 (1986); State v. Fisher, 179 W.Va. 516, 370 S.E.2d 480 (1988).

8. The Court noted their displeasure with trial counsel's failure to request an alibi instruction, but refrained from determining whether the trial court's failure to give an alibi instruction was error. State v. Davis, 176 W.Va. 454, 345 S.E.2d 549 (1986).

9. Instruction set forth in footnote 10 did not shift the burden of proof to the defendant to prove his alibi. State v. Grubbs, 178 W.Va. 811, 364 S.E.2d 824 (1987).

10. The Alexander instruction could not be recognized as plain error in those cases where it had not been properly preserved at trial. State v. Hutchinson, 176 W.Va. 172, 342 S.E.2d 138 (1986); State v. Hall, 179 W.Va. 398, 369 S.E.2d 701 (1988).

11. Jury instruction that when the defendant relies on the defense of alibi, the burden is on him to prove it by such evidence and to such degree of certainty as will, when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt as to the guilt of the accused, but that the State is not relieved of proving beyond a reasonable doubt the actual presence of the accused at the time and place of the commission of the alleged crime was valid and trial counsel was not ineffective for failing to object to it. State v. England, 180 W.Va. 342, 376 S.E.2d 548 (1988).

HOMICIDE

A homicide may be murder of the first degree, murder of the second degree, voluntary manslaughter, involuntary manslaughter, or it may be justifiable homicide.[1]

FOOTNOTES

[1] State v. Galford, 87 W.Va. 358, 105 S.E. 237 (1920); State v. Stevenson, 147 W.Va. 211, 127 S.E.2d 638 (1962), cert. denied, 372 U.S. 938, 83 S.Ct. 886, 9 L.Ed.2d 768 (1963).

HOMICIDE
MURDER

Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance, is murder of the first degree. All other murder is murder of the second degree.[1]

FOOTNOTES

[1] W.Va.Code, 61-2-1 (1991).

HOMICIDE
FIRST DEGREE MURDER
MURDER BY ANY WILLFUL, DELIBERATE AND PREMEDITATED KILLING

The willful, deliberate, premeditated and malicious killing of a person is murder in the first degree. [1]

To prove the commission of a willful, deliberate, premeditated and malicious killing, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. willfully
3. intentionally [2]
4. deliberately [3]
5. premeditatedly [4]
6. maliciously [5]
7. and unlawfully
8. killed
9. _____ (name of victim).

FOOTNOTES

[1] W.Va.Code, 61-2-1 (1991).

[2] Defined in separate instruction.

The distinctive element in willful, deliberate, and premeditated murder, not in murder of the second degree, is the specific intention to take life. State v. Hertzog, 55 W.Va. 74, 46 S.E. 792 (1904); State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982); State v. Schrader, 172 W.Va. 1, 302 S.E.2d 70 (1982).

[3] Defined in separate instruction.

State v. Dodds, 54 W.Va. 289, 46 S.E. 228 (1903); footnote 6, State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982).

[4] Defined in separate instruction.

State v. Dodds, 54 W.Va. 289, 46 S.E. 228 (1903); footnote 6, State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982).

[5] Defined in separate instruction.

State v. Saunders, 108 W.Va. 148, 150 S.E. 519 (1929); State v. Slonaker, 167 W.Va. 97, 280 S.E.2d 212 (1981); State v. Bongalis, 180 W.Va. 584, 378 S.E.2d 449 (1989).

HOMICIDE
FIRST DEGREE MURDER
MURDER BY ANY WILLFUL, DELIBERATE AND PREMEDITATED KILLING
INTENT

To constitute first degree murder, it is not necessary that an intention to kill exist for any particular length of time prior to the actual killing. It is only necessary that such intention come into existence for the first time at the time of the killing or at any previous time thereto.[1]

FOOTNOTES

[1] This instruction is adequate when supplemented with instructions which accurately define the other degrees of homicide. State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982); State v. Schrader, 172 W.Va. 1, 302 S.E.2d 70 (1982).

COMMENTS

1. The element which distinguishes willful, deliberate, and premeditated murder from murder of the second degree is the specific intention to take life.

State v. Hertzog, 55 W.Va. 74, 46 S.E. 792 (1904); State v. Schrader, 172 W.Va. 1, 302 S.E.2d 70 (1982).

In State v. Jenkins, (No. 21775) (3/25/94), the Court noted that State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982) said that the concept of malice is often used as a substitute for specific intent to kill or an intentional killing, and had concluded that "the intent to kill or malice is a required element of both first and second degree murder but the distinguishing feature for first degree murder is the existence of premeditation and deliberation." Hatfield, 169 W.Va. 191, 286 S.E.2d at 407-08.

2. The doctrine of transferred intent can be described by stating that when one party shoots at another with the intent to kill, and accidentally kills a third party, the same intent will be transferred to the killing of the third party. Syl. pt. 8, State v. Meadows, 18 W.Va. 658 (1881). State v. Daniel, 182 W.Va. 643, 391 S.E.2d 90 (1990). See also, State v. Hall, 174 W.Va. 599, 328 S.E.2d 206, 209 n.2 (1985); State v. Currey, 133 W.Va 676, 57 S.E.2d 718 (1950).

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3. The doctrine of transferred intent provided that where a person intends to kill or injure someone, but in the course of attempting to commit the crime accidentally injures or kills a third party, the defendant's criminal intent will be transferred to the third party. Syl. pt. 6, State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991).

In Julius, supra, at 11, the Court found even though the defendant did not intend to hurt Joseph Vance, under the doctrine of transferred intent, he may be charged and convicted of malicious assault.

HOMICIDE
FIRST DEGREE MURDER
MURDER BY ANY WILLFUL, DELIBERATE AND PREMEDITATED KILLING
DELIBERATION

To deliberate is to reflect, with a view to making a choice. If a person reflects even for a moment before he acts it is sufficient deliberation.[1]

FOOTNOTES

[1] State v. Dodds, 54 W.Va. 289, 46 S.E. 228 (1903); footnote 6, State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982).

HOMICIDE
FIRST DEGREE MURDER
MURDER BY ANY WILLFUL, DELIBERATE AND PREMEDITATED KILLING
PREMEDITATION

To premeditate is to think of a matter before it is executed. Premeditation implies something more than deliberation, and may mean the party not only deliberated, but formed in his mind the plan of destruction.[1]

FOOTNOTES

[1] ("seems to imply") - State v. Dodds, 54 W.Va. 289, 46 S.E. 228 (1903); footnote 6, State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982).

HOMICIDE
FIRST DEGREE MURDER
MURDER BY ANY WILLFUL, DELIBERATE AND PREMEDITATED KILLING
MALICE

Malice appears when the circumstances show such a reckless disregard for human life as necessarily to include a formed design against the life of a person slain.[1]

Malice is defined as an action flowing from a wicked and corrupt motive, a thing done with wrongful intent, under circumstances as carry in them the plain indication of a heart heedless of social duty and fatally bent on mischief.[2]

It is not essential that malice exist for any length of time before the killing. It is sufficient if malice springs into the mind before the accused did the killing.[3]

Malice is a species of criminal intent[4] and must be shown to exist against the deceased in a homicide case.[5]

FOOTNOTES

[1] State v. Saunders, 108 W.Va. 148, 150 S.E. 519 (1929).

[2] ("a thing done malo animo") State v. Douglass, 28 W.Va. 297, 299 (1886); State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219, 223 (1978); State v. Bongalis, 180 W.Va. 584, 378 S.E.2d 449 (1989).

[3] Syl. pt. 2, State v. Slonaker, 167 W.Va. 97, 280 S.E.2d 212 (1981).

[4] Is this appropriate to put in the instruction? See State v. Jenkins, (No. 21775) (3/25/94).

[5] State v. Jenkins, (No. 21775) (3/25/94). The one exception may be a transferred intent homicide. See footnote 7, Jenkins.

COMMENTS

1. An instruction in a first degree murder case that informs the jury that malice need not be shown on the part of the defendant against the deceased is erroneous. Syl. pt. 4, State v. Jenkins, (No. 21775) (3/25/94).

HOMICIDE
FIRST DEGREE MURDER
MURDER BY ANY WILLFUL, DELIBERATE AND PREMEDITATED KILLING
INFERENCE OF INTENT, WILLFULNESS, DELIBERATION AND MALICE

Intent,[2] willfulness, deliberation and malice[1] may be inferred from the intentional[1] use of a deadly weapon under circumstances where the defendant does not have excuse, justification or provocation for his conduct.[2]

FOOTNOTES

[1] "Malice, willfulness and deliberation, elements of crime of first degree murder, may be inferred from the intentional use of a deadly weapon." Syl. pt. 2, State v. Ferguson, 165 W.Va. 529, 270 S.E.2d 166 (1980) overruled on other grounds, State v. Kopa, 173 W.Va. 43, 311 S.E.2d 412 (1983).

[2] Malice and intent could be inferred by the jury from the defendant's use of a deadly weapon, under circumstances which they did not believe afforded him excuse, justification or provocation for his conduct. State v. Bowles, 117 W.Va. 217, 221, 185 S.E. 205, 207 (1936); State v. Boggs, 129 W.Va. 603, 42 S.E.2d 1 (1946); State v. Bragg, 140 W.Va. 585, 87 S.E.2d 689 (1955); State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990).

"'In a homicide trial, malice and intent may be inferred by the jury from the defendant's use of a deadly weapon, under circumstances which the jury does not believe afforded the defendant excuse, justification or provocation for his conduct. Whether premeditation and deliberation may likewise be inferred, depends upon the circumstances of the case.' Point 2, Syllabus, State v. Bowles, 117 W.Va. 217[, 185 S.E. 205 (1936)]." Syllabus, State v. Johnson, 142 W.Va. 284, 95 S.E.2d 409 (1956). Syl. pt. 5, State v. Jenkins, (No. 21775) (3/25/94).

It is erroneous in a first degree murder case to instruct the jury that if the defendant killed the deceased with the use of a deadly weapon, then intent, malice, willfulness, deliberation, and premeditation may be inferred from that fact, where there is evidence that the defendant's actions were based on some legal excuse, justification, or provocation. To the extent that the instruction in State v. Louk, 171 W.Va. 639, 643, 301 S.E.2d 596, 600 (1983), is contrary to these principles, it is disapproved. Syl. pt. 6, State v. Jenkins, (No. 21775) (3/25/94).

COMMENTS

1. "Malice may be inferred from the intentional use of a deadly weapon; however, where the State's own evidence demonstrates circumstances affirmatively showing an absence of malice which would make an inference of malice from the use of a deadly weapon alone improper, a conviction of first or second degree murder cannot be upheld." Syl. pt. 2, State v. Brant, 162 W.Va. 762, 252 S.E.2d 901 (1979).

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2. "A jury instruction which infers malice and deliberation from the intentional use of a deadly weapon does not violate a West Virginia citizen's constitutional right to keep and bear arms." State v. Daniel, 182 W.Va. 643, 391 S.E.2d 90 (1990).

3. "Where a defendant is the victim of an unprovoked assault and in a sudden heat of passion uses a deadly weapon and kills the aggressor, he cannot be found guilty of murder where there is no proof of malice except the use of a deadly weapon." Syl. pt. 2, State v. Kirtley, 162 W.Va. 249, 252 S.E.2d 374 (1978); Syl. pt. 3, State v. Jenkins, (No. 21775) (3/25/94).

HOMICIDE
FIRST DEGREE MURDER
RECOMMENDATION OF MERCY

If you find the defendant guilty of murder of the first degree, the court must sentence the defendant to confinement in the penitentiary for life. The defendant will not be eligible for parole unless you add to your verdict a recommendation of mercy. A recommendation of mercy would mean the defendant could be eligible for parole consideration only after having served a minimum of ____ years.[1] Otherwise the defendant would be confined to the penitentiary for life without possibility of parole.[2]

Mere eligibility for parole in no way guarantees immediate parole after ____ years. Parole is given to inmates only after a through consideration of their records by the parole board.[3]

FOOTNOTES

[1] See W.Va.Code, 62-3-15 (1965).

[2] State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977).

[3] State v. Headley, 168 W.Va. 138, 282 S.E.2d 872 (1981). State v. Jenkins, (No. 21775) (3/25/94).

COMMENTS

1. "In a case in which a jury may return a verdict of guilty of murder of the first degree, it is the mandatory duty of the trial court, without request, to instruct the jury that to such verdict it may add a recommendation of mercy, that such recommendation would mean that the defendant could be eligible for parole consideration only after having served a minimum of ten years and that otherwise the defendant would be confined to the penitentiary for life without possibility of parole." Syl. pt. 3, State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977).

"... Furthermore, the court must explain that mere eligibility for parole in no way guarantees immediate parole after ten years and that parole is given to inmates only after a thorough consideration of their records by the parole board. See W.Va.Code, 62-12-13 (1981)." State v. Headley, 168 W.Va. 138, 282 S.E.2d 872, 875 (1981).

Eligibility for parole does not insure or entitle a prisoner to release from prison on parole. Lindsey, supra.

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2. "It is the mandatory duty of the trial court to instruct the jury that it may add a recommendation of mercy to a verdict of murder of the first degree and such duty shall be fulfilled by the trial court over the objection of the defendant unless it affirmatively appears from the record that the defendant understands the consequences of his action." Syl. pt. 3, State v. Kopa, 173 W.Va. 43, 311 S.E.2d 412 (1983).

3. "[T]he defendant is entitled to any instruction which correctly states the law and which he deems will present the proposition in its most favorable light." State v. Wayne, 245 S.E.2d 838, at 843 (W.Va. 1978). State v. Headley, supra, at 875.

4. "An instruction outlining factors which a jury should consider in determining whether to grant mercy in a first degree murder case should not be given." Syl. pt. 1, State v. Miller, 178 W.Va. 618, 363 S.E.2d 504 (1987); Billotti v. Dodrill, 183 W.Va. 48, 394 S.E.2d 32 (1990).

5. Parole eligibility generally becomes available on a life sentence once ten years have been served unless the exclusion of parole eligibility is specifically set forth in the individual criminal statute. State v. England, 180 W.Va. 342, 376 S.E.2d 548, 561 (1988).

Where there is a life sentence and the defendant has two prior felony convictions, parole eligibility does not occur until fifteen years have been served. W.Va.Code, 62-12-13. Footnote 23, State v. England, supra.

HOMICIDE
FIRST DEGREE MURDER
MURDER BY LYING IN WAIT

Murder by lying in wait is murder of the first degree. [1]

To prove the commission of murder by lying in wait, the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant, did
2. lie in wait, [2] and
3. unlawfully,
4. intentionally, [3]
5. and maliciously [4]
6. kill _____ (name victim).

FOOTNOTES

[1] W.Va.Code, 61-2-1 (1991).

State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987); State v. Walker, 181 W.Va. 162, 381 S.E.2d 277 (1989); State v. Abbott, 8 W.Va. 741 (1875).

[2] Defined in separate instruction.

[3] We express no view as to the intent requirement of the statutory grounds for first degree murder such as by poison, imprisonment and starving. Footnote 4, State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219, 223 (1978).

[4] Defined in separate instruction.

COMMENTS

1. QUESTION - ARE THESE THE ELEMENTS OF MURDER BY LYING IN WAIT?

See, State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987); State v. Walker, 181 W.Va. 162, 381 S.E.2d 277 (1989); State v. Abbott, 8 W.Va. 741 (1875).

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"As to the first two categories, this Court recognized in State v. Abbott, 8 W.Va. 741 770-72 (1875), that the term 'murder by poison, lying in wait, imprisonment, starving' does not require that premeditation or a specific intent to kill has to be shown, but to elevate the homicide to first degree murder a killing with malice must be proved and one of the four enumerated acts must be established: 'If it be proved that the killing was of such a character that, under ordinary circumstances, it would have been murder at common law, and the fact of lying in wait exist, that fact will make it a case of murder in the first degree. [8 W.Va. at 770-71].'" State v. Sims, 162 W.Va. 212, 248 S.E.2d 834, 840 (1978).

Abbott relied in part on Commonwealth v. Jones, 28 Va. (1 Leigh) 598 (1829). Jones found cases of murder by poison, lying in wait, imprisonment, starving, torture or malicious whipping did not require proof of the defendant's will, deliberation and premeditation.

2. "Where, in the prosecution of first degree murder by lying in wait, there is sufficient evidence before the trial court that the defendant was unaware that the principal in the first degree was preparing to kill or inflict bodily harm upon the victim, the trial court should also instruct the jury on the offense of second degree murder if the elements of that offense are present." Syl. pt. 4, State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987).

HOMICIDE
FIRST DEGREE MURDER
MURDER BY LYING IN WAIT
MALICE

Malice appears when the circumstances show such a reckless disregard for human life as necessarily to include a formed design against the life of a person slain.[1]

Malice is defined as an action flowing from a wicked and corrupt motive, a thing done with wrongful intent, under circumstances as carry in them the plain indication of a heart heedless of social duty and fatally bent on mischief.[2]

It is not essential that malice exist for any length of time before the killing. It is sufficient if malice springs into the mind before the accused did the killing.[3]

Malice is a species of criminal intent[4] and must be shown to exist against the deceased in a homicide case.[5]

FOOTNOTES

[1] State v. Saunders, 108 W.Va. 148, 150 S.E. 519 (1929).

[2] ("a thing done malo animo") State v. Douglass, 28 W.Va. 297, 299 (1886); State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219, 223 (1978); State v. Bongalis, 180 W.Va. 584, 378 S.E.2d 449 (1989).

[3] Syl. pt. 2, State v. Slonaker, 167 W.Va. 97, 280 S.E.2d 212 (1981).

[4] Is this appropriate to put in the instruction? See State v. Jenkins, (No. 21775) (3/25/94).

[5] State v. Jenkins, (No. 21775) (3/25/94). The one exception may be a transferred intent homicide. See footnote 7, Jenkins.

COMMENTS

1. An instruction in a first degree murder case that informs the jury that malice need not be shown on the part of the defendant against the deceased is erroneous. Syl. pt. 4, State v. Jenkins, (No. 21775) (3/25/94).

HOMICIDE
FIRST DEGREE MURDER
MURDER BY LYING IN WAIT
LYING IN WAIT

To prove the defendant was lying in wait, the State must prove beyond a reasonable doubt:

1. the defendant, _____,
2. was waiting and watching
3. with concealment or secrecy
4. for the purpose of or with the intent to
5. kill or inflict bodily harm upon a person. [1]

FOOTNOTES

[1] State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987); State v. Walker, 181 W.Va. 162, 381 S.E.2d 277 (1989).

HOMICIDE
FIRST DEGREE MURDER
RECOMMENDATION OF MERCY

If you find the defendant guilty of murder of the first degree, the court must sentence the defendant to confinement in the penitentiary for life. The defendant will not be eligible for parole unless you add to your verdict a recommendation of mercy. A recommendation of mercy would mean the defendant could be eligible for parole consideration only after having served a minimum of ____ years.[1] Otherwise the defendant would be confined to the penitentiary for life without possibility of parole.[2]

Mere elibibility for parole in no way guarantees immediate parole after ____ years. Parole is given to inmates only after a thorough consideration of their records by the parole board.[3]

FOOTNOTES

[1] See W.Va.Code, 62-3-15 (1965).

[2] State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977).

[3] State v. Headley, 168 W.Va. 138, 282 S.E.2d 872 (1981). State v. Jenkins, (No. 21775) (3/25/94).

COMMENTS

1. "In a case in which a jury may return a verdict of guilty of murder of the first degree, it is the mandatory duty of the trial court, without request, to instruct the jury that to such verdict it may add a recommendation of mercy, that such recommendation would mean that the defendant could be eligible for parole consideration only after having served a minimum of ten years and that otherwise the defendant would be confined to the penitentiary for life without possibility of parole." Syl. pt. 3, State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977).

"... Furthermore, the court must explain that mere eligibility for parole in no way guarantees immediate parole after ten years and that parole is given to inmates only after a thorough consideration of their records by the parole board. See W.Va.Code, 62-12-13 (1981)." State v. Headley, 168 W.Va. 138, 282 S.E.2d 872, 875 (1981).

Eligibility for parole does not insure or entitle a prisoner to release from prison on parole. Lindsey, supra.

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2. "It is the mandatory duty of the trial court to instruct the jury that it may add a recommendation of mercy to a verdict of murder of the first degree and such duty shall be fulfilled by the trial court over the objection of the defendant unless it affirmatively appears from the record that the defendant understands the consequences of his action." Syl. pt. 3, State v. Kopa, 173 W.Va. 43, 311 S.E.2d 412 (1983).

3. "[T]he defendant is entitled to any instruction which correctly states the law and which he deems will present the proposition in its most favorable light." State v. Wayne, 245 S.E.2d 838, at 843 (W.Va. 1978). State v. Headley, supra, at 875.

4. "An instruction outlining factors which a jury should consider in determining whether to grant mercy in a first degree murder case should not be given." Syl. pt. 1, State v. Miller, 178 W.Va. 618, 363 S.E.2d 504 (1987); Billotti v. Dodrill, 183 W.Va. 48, 394 S.E.2d 32 (1990).

5. Parole eligibility generally becomes available on a life sentence once ten years have been served unless the exclusion of parole eligibility is specifically set forth in the individual criminal statute. State v. England, 180 W.Va. 342, 376 S.E.2d 548, 561 (1988).

Where there is a life sentence and the defendant has two prior felony convictions, parole eligibility does not occur until fifteen years have been served. W.Va.Code, 62-12-13. Footnote 23, State v. England, supra.

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

HOMICIDE
FIRST DEGREE MURDER
MURDER BY POISON

Murder by poison is murder of the first degree. [1]

To prove the commission of murder by poison, the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant,
2. unlawfully,
3. intentionally [2]
4. and maliciously [3]
5. poisoned [4]
6. and killed _____ (name victim).

FOOTNOTES

[1] W.Va.Code, 61-2-1 (1991).

[2] We express no view as to the intent requirement of the statutory grounds for first degree murder such as by poison, imprisonment and starving. Footnote 4, State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219, 223 (1978).

[3] Defined in separate instruction.

[4] A substance is a "poison or other destructive thing" under W.Va.Code, 61-2-7 (attempt to kill or injure by poison) if the defendant knows or reasonably should know that in the quantity administered it will have a poisonous or destructive effect on the victim such that it may injure or kill. State v. Weaver, 181 W.Va. 274, 382 S.E.2d 327 (1989).

COMMENTS

1. QUESTION - ARE THESE THE ELEMENTS OF MURDER BY POISON?

See, State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987); State v. Walker, 181 W.Va. 162, 381 S.E.2d 277 (1989); State v. Abbott, 8 W.Va. 741 (1875).

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"As to the first two categories, this Court recognized in State v. Abbott, 8 W.Va. 741, 770-72 (1875), that the term 'murder by poison, lying in wait, imprisonment, starving' does not require that premeditation or a specific intent to kill has to be shown, but to elevate the homicide to first degree murder a killing with malice must be proved and one of the four enumerated acts must be established: 'If it be proved that the killing was of such a character that, under ordinary circumstances, it would have been murder at common law, and the fact of lying in wait exist, that fact will make it a case of murder in the first degree. [8 W.Va. at 770-71].'" State v. Sims, 162 W.Va. 212, 248 S.E.2d 834, 840 (1978).

Abbott relied in part on Commonwealth v. Jones, 28 Va. (1 Leigh) 598 (1829). Jones found cases of murder by poison, lying in wait, imprisonment, starving, torture or malicious whipping did not require proof of the defendant's will, deliberation and premeditation.

2. Poison may take the life of one or more not within the design of the person who lays the bait, and in such a case, the perpetrator is guilty of murder in the first degree without proof that the death was the ultimate result sought by the will, deliberation and premeditation of the party accused. Commonwealth v. Jones, 28 Va. (1 Leigh) 598 (1829).

3. "Where, in the prosecution of first degree murder by lying in wait, there is sufficient evidence before the trial court that the defendant was unaware that the principal in the first degree was preparing to kill or inflict bodily harm upon the victim, the trial court should also instruct the jury on the offense of second degree murder if the elements of that offense are present." Syl. pt. 4, State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987).

HOMICIDE
FIRST DEGREE MURDER
MURDER BY POISON
MALICE

Malice appears when the circumstances show such a reckless disregard for human life as necessarily to include a formed design against the life of a person slain.[1]

Malice is defined as an action flowing from a wicked and corrupt motive, a thing done with wrongful intent, under circumstances as carry in them the plain indication of a heart heedless of social duty and fatally bent on mischief.[2]

It is not essential that malice exist for any length of time before the killing. It is sufficient if malice springs into the mind before the accused did the killing.[3]

Malice is a species of criminal intent[4] and must be shown to exist against the deceased in a homicide case.[5]

FOOTNOTES

[1] State v. Saunders, 108 W.Va. 148, 150 S.E. 519 (1929).

[2] ("a thing done malo animo") State v. Douglass, 28 W.Va. 297, 299 (1886); State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219, 223 (1978); State v. Bongalis, 180 W.Va. 584, 378 S.E.2d 449 (1989).

[3] Syl. pt. 2, State v. Slonaker, 167 W.Va. 97, 280 S.E.2d 212 (1981).

[4] Is this appropriate to put in the instruction? See State v. Jenkins, (No. 21775) (3/25/94).

[5] State v. Jenkins, (No. 21775) (3/25/94). The one exception may be a transferred intent homicide. See footnote 7, Jenkins.

COMMENTS

1. An instruction in a first degree murder case that informs the jury that malice need not be shown on the part of the defendant against the deceased is erroneous. Syl. pt. 4, State v. Jenkins, (No. 21775) (3/25/94).

HOMICIDE
FIRST DEGREE MURDER
RECOMMENDATION OF MERCY

If you find the defendant guilty of murder of the first degree, the court must sentence the defendant to confinement in the penitentiary for life. The defendant will not be eligible for parole unless you add to your verdict a recommendation of mercy. A recommendation of mercy would mean the defendant could be eligible for parole consideration only after having served a minimum of ____ years.[1] Otherwise the defendant would be confined to the penitentiary for life without possibility of parole.[2]

Mere elibibility for parole in no way guarantees immediate parole after ____ years. Parole is given to inmates only after a thorough consideration of their records by the parole board.[3]

FOOTNOTES

[1] See W.Va.Code, 62-3-15 (1965).

[2] State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977).

[3] State v. Headley, 168 W.Va. 138, 282 S.E.2d 872 (1981). State v. Jenkins, (No. 21775) (3/25/94).

COMMENTS

1. "In a case in which a jury may return a verdict of guilty of murder of the first degree, it is the mandatory duty of the trial court, without request, to instruct the jury that to such verdict it may add a recommendation of mercy, that such recommendation would mean that the defendant could be eligible for parole consideration only after having served a minimum of ten years and that otherwise the defendant would be confined to the penitentiary for life without possibility of parole." Syl. pt. 3, State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977).

"... Furthermore, the court must explain that mere eligibility for parole in no way guarantees immediate parole after ten years and that parole is given to inmates only after a thorough consideration of their records by the parole board. See W.Va.Code, 62-12-13 (1981)." State v. Headley, 168 W.Va. 138, 282 S.E.2d 872, 875 (1981).

Eligibility for parole does not insure or entitle a prisoner to release from prison on parole. Lindsey, supra.

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2. "It is the mandatory duty of the trial court to instruct the jury that it may add a recommendation of mercy to a verdict of murder of the first degree and such duty shall be fulfilled by the trial court over the objection of the defendant unless it affirmatively appears from the record that the defendant understands the consequences of his action." Syl. pt. 3, State v. Kopa, 173 W.Va. 43, 311 S.E.2d 412 (1983).

3. "[T]he defendant is entitled to any instruction which correctly states the law and which he deems will present the proposition in its most favorable light." State v. Wayne, 245 S.E.2d 838, at 843 (W.Va. 1978). State v. Headley, supra, at 875.

4. "An instruction outlining factors which a jury should consider in determining whether to grant mercy in a first degree murder case should not be given." Syl. pt. 1, State v. Miller, 178 W.Va. 618, 363 S.E.2d 504 (1987); Billotti v. Dodrill, 183 W.Va. 48, 394 S.E.2d 32 (1990).

5. Parole eligibility generally becomes available on a life sentence once ten years have been served unless the exclusion of parole eligibility is specifically set forth in the individual criminal statute. State v. England, 180 W.Va. 342, 376 S.E.2d 548, 561 (1988).

Where there is a life sentence and the defendant has two prior felony convictions, parole eligibility does not occur until fifteen years have been served. W.Va.Code, 62-12-13. Footnote 23, State v. England, supra.

HOMICIDE
FIRST DEGREE MURDER
MURDER BY IMPRISONMENT

Murder by imprisonment is murder of the first degree. [1]

To prove the commission of murder by imprisonment, the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant,
2. unlawfully
3. intentionally [2]
4. and maliciously [3]
5. imprisoned [4]
6. and killed _____ (name victim).

FOOTNOTES

[1] W.Va.Code, 61-2-1 (1991).

[2] We express no view as to the intent requirement of the statutory grounds for first degree murder such as by poison, imprisonment and starving. Footnote 4, State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219, 223 (1978).

[3] Defined in separate instruction.

[4] Imprisonment, confinement or starvation may be with a view of reducing the victim to the necessity of yielding to some proposed condition, as well as a punishment for failure to obey without any clear intent to destroy life. Proof that death was intended is not necessary to convict. Commonwealth v. Jones, 28 Va. (1 Leigh) 598 (1829).

COMMENTS

1. QUESTION - ARE THESE THE ELEMENTS OF MURDER BY IMPRISONMENT?

See, State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987); State v. Walker, 181 W.Va. 162, 381 S.E.2d 277 (1989); State v. Abbott, 8 W.Va. 741 (1875).

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2. "Where, in the prosecution of first degree murder by lying in wait, there is sufficient evidence before the trial court that the defendant was unaware that the principal in the first degree was preparing to kill or inflict bodily harm upon the victim, the trial court should also instruct the jury on the offense of second degree murder if the elements of that offense are present." Syl. pt. 4, State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987).

HOMICIDE
FIRST DEGREE MURDER
MURDER BY IMPRISONMENT
MALICE

Malice appears when the circumstances show such a reckless disregard for human life as necessarily to include a formed design against the life of a person slain.[1]

Malice is defined as an action flowing from a wicked and corrupt motive, a thing done with wrongful intent, under circumstances as carry in them the plain indication of a heart heedless of social duty and fatally bent on mischief.[2]

It is not essential that malice exist for any length of time before the killing. It is sufficient if malice springs into the mind before the accused did the killing.[3]

Malice is a species of criminal intent[4] and must be shown to exist against the deceased in a homicide case.[5]

FOOTNOTES

[1] State v. Saunders, 108 W.Va. 148, 150 S.E. 519 (1929).

[2] ("a thing done malo animo") State v. Douglass, 28 W.Va. 297, 299 (1886); State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219, 223 (1978); State v. Bongalis, 180 W.Va. 584, 378 S.E.2d 449 (1989).

[3] Syl. pt. 2, State v. Slonaker, 167 W.Va. 97, 280 S.E.2d 212 (1981).

[4] Is this appropriate to put in the instruction? See State v. Jenkins, (No. 21775) (3/25/94).

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COMMENTS

1. An instruction in a first degree murder case that informs the jury that malice need not be shown on the part of the defendant against the deceased is erroneous. Syl. pt. 4, State v. Jenkins, (No. 21775) (3/25/94).

HOMICIDE
FIRST DEGREE MURDER
RECOMMENDATION OF MERCY

If you find the defendant guilty of murder of the first degree, the court must sentence the defendant to confinement in the penitentiary for life. The defendant will not be eligible for parole unless you add to your verdict a recommendation of mercy. A recommendation of mercy would mean the defendant could be eligible for parole consideration only after having served a minimum of ____ years.[1] Otherwise the defendant would be confined to the penitentiary for life without possibility of parole.[2]

Mere elibibility for parole in no way guarantees immediate parole after ____ years. Parole is given to inmates only after a thorough consideration of their records by the parole board.[3]

FOOTNOTES

[1] See W.Va.Code, 62-3-15 (1965).

[2] State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977).

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COMMENTS

1. "In a case in which a jury may return a verdict of guilty of murder of the first degree, it is the mandatory duty of the trial court, without request, to instruct the jury that to such verdict it may add a recommendation of mercy, that such recommendation would mean that the defendant could be eligible for parole consideration only after having served a minimum of ten years and that otherwise the defendant would be confined to the penitentiary for life without possibility of parole." Syl. pt. 3, State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977).

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3. "[T]he defendant is entitled to any instruction which correctly states the law and which he deems will present the proposition in its most favorable light." State v. Wayne, 245 S.E.2d 838, at 843 (W.Va. 1978). State v. Headley, supra, at 875.

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Where there is a life sentence and the defendant has two prior felony convictions, parole eligibility does not occur until fifteen years have been served. W.Va.Code, 62-12-13. Footnote 23, State v. England, supra.

HOMICIDE
FIRST DEGREE MURDER
MURDER BY STARVING

Murder by starving is murder of the first degree. [1]

To prove the commission of murder by starving, the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant,
2. unlawfully,
3. intentionally [2]
4. and maliciously [3]
5. starved
6. and killed _____ (name victim).

FOOTNOTES

[1] W.Va.Code, 61-2-1 (1991).

[2] We express no view as to the intent requirement of the statutory grounds for first degree murder such as by poison, imprisonment and starving. Footnote 4, State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219 (1978).

[3] Defined in separate instruction.

[4] Imprisonment, confinement or starvation may be with a view of reducing the victim to the necessity of yielding to some proposed condition, as well as a punishment for the failure to obey without any clear intent to destroy life. Proof that death was intended is not necessary to convict. Commonwealth v. Jones, 28 Va. (1 Leigh) 598 (1829).

COMMENTS

1. QUESTION - ARE THESE THE ELEMENTS OF MURDER BY STARVATION?

See, State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987); State v. Walker, 181 W.Va. 162, 381 S.E.2d 277 (1989); State v. Abbott, 8 W.Va. 741 (1875).

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2. "Where, in the prosecution of first degree murder by lying in wait, there is sufficient evidence before the trial court that the defendant was unaware that the principal in the first degree was preparing to kill or inflict bodily harm upon the victim, the trial court should also instruct the jury on the offense of second degree murder if the elements of that offense are present." Syl. pt. 4, State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987).

HOMICIDE
FIRST DEGREE MURDER
MURDER BY STARVING
MALICE

Malice appears when the circumstances show such a reckless disregard for human life as necessarily to include a formed design against the life of a person slain.[1]

Malice is defined as an action flowing from a wicked and corrupt motive, a thing done with wrongful intent, under circumstances as carry in them the plain indication of a heart heedless of social duty and fatally bent on mischief.[2]

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Malice is a species of criminal intent[4] and must be shown to exist against the deceased in a homicide case.[5]

FOOTNOTES

[1] State v. Saunders, 108 W.Va. 148, 150 S.E. 519 (1929).

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COMMENTS

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HOMICIDE
FIRST DEGREE MURDER
RECOMMENDATION OF MERCY

If you find the defendant guilty of murder of the first degree, the court must sentence the defendant to confinement in the penitentiary for life. The defendant will not be eligible for parole unless you add to your verdict a recommendation of mercy. A recommendation of mercy would mean the defendant could be eligible for parole consideration only after having served a minimum of ____ years.[1] Otherwise the defendant would be confined to the penitentiary for life without possibility of parole.[2]

Mere elibibility for parole in no way guarantees immediate parole after ____ years. Parole is given to inmates only after a thorough consideration of their records by the parole board.[3]

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COMMENTS

1. "In a case in which a jury may return a verdict of guilty of murder of the first degree, it is the mandatory duty of the trial court, without request, to instruct the jury that to such verdict it may add a recommendation of mercy, that such recommendation would mean that the defendant could be eligible for parole consideration only after having served a minimum of ten years and that otherwise the defendant would be confined to the penitentiary for life without possibility of parole." Syl. pt. 3, State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977).

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2. "It is the mandatory duty of the trial court to instruct the jury that it may add a recommendation of mercy to a verdict of murder of the first degree and such duty shall be fulfilled by the trial court over the objection of the defendant unless it affirmatively appears from the record that the defendant understands the consequences of his action." Syl. pt. 3, State v. Kopa, 173 W.Va. 43, 311 S.E.2d 412 (1983).

3. "[T]he defendant is entitled to any instruction which correctly states the law and which he deems will present the proposition in its most favorable light." State v. Wayne, 245 S.E.2d 838, at 843 (W.Va. 1978). State v. Headley, supra, at 875.

4. "An instruction outlining factors which a jury should consider in determining whether to grant mercy in a first degree murder case should not be given." Syl. pt. 1, State v. Miller, 178 W.Va. 618, 363 S.E.2d 504 (1987); Billotti v. Dodrill, 183 W.Va. 48, 394 S.E.2d 32 (1990).

5. Parole eligibility generally becomes available on a life sentence once ten years have been served unless the exclusion of parole eligibility is specifically set forth in the individual criminal statute. State v. England, 180 W.Va. 342, 376 S.E.2d 548, 561 (1988).

Where there is a life sentence and the defendant has two prior felony convictions, parole eligibility does not occur until fifteen years have been served. W.Va.Code, 62-12-13. Footnote 23, State v. England, supra.

HOMICIDE
FIRST DEGREE MURDER
FELONY MURDER

MURDER IN THE COMMISSION OF ARSON, KIDNAPPING, SEXUAL ASSAULT, ROBBERY, BURGLARY, BREAKING AND ENTERING, ESCAPE FROM LAWFUL CUSTODY, OR A FELONY OFFENSE OF MANUFACTURING OR DELIVERING A CONTROLLED SUBSTANCE.

Murder in the commission of arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody or a felony offense of manufacturing or delivering a controlled substance is murder of the first degree. [1] This type of murder is commonly known as felony murder.

To prove the commission of felony murder, the State must prove each of the following elements beyond a reasonable doubt: [2]

1. the commission of _____ [3] (list one of the enumerated felonies);
2. the defendant, _____, participated in the commission of the _____ (underlying felony);
3. and the death of _____ (the victim) was a result of injuries received during the course of the commission of the _____ (underlying felony).

FOOTNOTES

[1] W.Va.Code, 61-2-1 (1991).

[2] State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983); State v. Julius, 185 W.Va. 422, 408 S.E.2d 1, (1991).

[3] Separate instruction on elements of underlying felony provided.

"Since the underlying felony is an essential element of felony-murder, the jury must be instructed as to the elements which constitute the underlying felony." Syl. pt. 2, State v. Stacy, 181 W.Va. 736, 384 S.E.2d 347 (1989).

COMMENTS

1. To sustain a conviction of felony-murder, proof of the elements of malice, premeditation or specific intent to kill is not required. State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983); State v. Julius, 185 W.Va. 422, 408 S.E.2d 1, (1991).

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2. "In a prosecution for first-degree murder, the State must submit jury instructions which distinguish between the two categories of first-degree murder---willful, deliberate, and premeditated killing and felony-murder---if, under the facts of the particular case, the jury can find the defendant guilty of either category of first-degree murder. When the State also proceeds against the defendant on the underlying felony, the verdict forms provided to the jury should also reflect the foregoing distinction so that, if a guilty verdict is returned, the theory of the case upon which the jury relied will be apparent." Syl. pt. 9, State v. Giles, 183 W.Va. 237, 395 S.E.2d 481 (1990). Syl. pt. 1, State v. Walker, 425 S.E.2d 616 (W.Va. 1992).

"However, the Giles decision contemplated a situation where the State did not elect between premeditated murder and felony murder, but offered a general jury instruction for first-degree murder that encompassed both theories... In this case, the State elected only to proceed on felony murder, not on premeditated murder..." State v. Walker, supra at 621.

The State need not elect whether it will proceed on premeditated murder or felony murder until the close of all evidence; however, a defendant may make a motion to force an earlier election if he can make a strong, particularized showing that he will be prejudiced by further delay in electing. Syl. pt. 2, State v. Walker, supra.

The granting of a motion to force the State to elect rests within the discretion of the trial court, and such a decision will not be reversed unless there is a clear abuse of discretion. Syl. pt. 3, State v. Walker, supra.

Here, the Court found the only thing the defendant was deprived of was a jury instruction concerning the lesser offenses included within a premeditated murder indictment. The Court found, however, if the prosecutor can make a valid felony murder case, there is no error in the court's giving only the felony murder charge to the jury.

3. See, State v. Ruggles, 183 W.Va. 58, 394 S.E.2d 42 (1990) for discussion of lesser included offenses of felony murder.

4. A person cannot be charged with felony-murder pursuant to W.Va.Code, § 61-2-1 (1989) if the only death which occurred in the commission of the underlying felony was the suicide of a co-conspirator in the criminal enterprise. Syl. pt. 2, State ex rel. Painter v. Zakaib, 186 W.Va. 82, 411 S.E.2d 25 (1991).

HOMICIDE
FIRST DEGREE MURDER
FELONY MURDER

MURDER IN THE COMMISSION OF ARSON, KIDNAPPING, SEXUAL ASSAULT, ROBBERY, BURGLARY, BREAKING AND ENTERING, ESCAPE FROM LAWFUL CUSTODY, OR A FELONY OFFENSE OF MANUFACTURING OR DELIVERING A CONTROLLED SUBSTANCE.

UNDERLYING FELONY

To prove the commission of _____ (list felony), the State must prove each of the following elements beyond a reasonable doubt:

1. (list elements of the underlying felony). [1]

FOOTNOTES

[1] "Since the underlying felony is an essential element of felony-murder, the jury must be instructed as to the elements which constitute the underlying felony." Syl. pt. 2, State v. Stacy, 181 W.Va. 736, 384 S.E.2d 347 (1989).

COMMENTS

1. Where there is more than one underlying felony supporting a felony murder conviction and one of the underlying felonies is committed upon a separate and distinct victim who was actually murdered, that underlying felony conviction does not merge with the felony murder conviction for the purposes of double jeopardy. Syl. pt. 3, State v. Elliott, 186 W.Va. 361, 412 S.E.2d 762 (1991).

HOMICIDE
FIRST DEGREE MURDER
FELONY MURDER

MURDER IN THE COMMISSION OF ARSON, KIDNAPPING, SEXUAL ASSAULT, ROBBERY, BURGLARY, BREAKING AND ENTERING, ESCAPE FROM LAWFUL CUSTODY, OR A FELONY OFFENSE OF MANUFACTURING OR DELIVERING A CONTROLLED SUBSTANCE.

ACCIDENT

The crime of felony-murder in this state does not require proof of the elements of malice, premeditation or specific intent to kill. It is deemed sufficient if the homicide occurs accidentally during the commission of, or the attempt to commit, one of the enumerated felonies.[1]

FOOTNOTES

[1] Syl. pt. 7, State v. Sims, 162 W.Va. 212, 248 S.E.2d 834 (1978); Syl. pt. 1, State ex rel. Painter v. Zakaib, 186 W.Va. 82, 411 S.E.2d 25 (1991).

HOMICIDE
FIRST DEGREE MURDER
FELONY MURDER

MURDER IN THE COMMISSION OF ARSON, KIDNAPPING, SEXUAL ASSAULT, ROBBERY, BURGLARY, BREAKING AND ENTERING, ESCAPE FROM LAWFUL CUSTODY, OR A FELONY OFFENSE OF MANUFACTURING OR DELIVERING A CONTROLLED SUBSTANCE.

CONTINUOUS TRANSACTION

The felony-murder statute applies where the initial felony and the homicide were parts of one continuous transaction, and were closely related in point of time, place, and causal connection.[1]

FOOTNOTES

[1] (As where the killing was done in flight from the scene of the crime to prevent detection or promote escape). State v. Wayne, 169 W.Va. 785, 289 S.E.2d 480 (1982).

HOMICIDE
FIRST DEGREE MURDER
RECOMMENDATION OF MERCY

If you find the defendant guilty of murder of the first degree, the court must sentence the defendant to confinement in the penitentiary for life. The defendant will not be eligible for parole unless you add to your verdict a recommendation of mercy. A recommendation of mercy would mean the defendant could be eligible for parole consideration only after having served a minimum of ____ years.[1] Otherwise the defendant would be confined to the penitentiary for life without possibility of parole.[2]

Mere elibibility for parole in no way guarantees immediate parole after ____ years. Parole is given to inmates only after a thorough consideration of their records by the parole board.[3]

FOOTNOTES

[1] See W.Va.Code, 62-3-15 (1965).

[2] State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977).

[3] State v. Headley, 168 W.Va. 138, 282 S.E.2d 872 (1981). State v. Jenkins, (No. 21775) (3/25/94).

COMMENTS

1. "In a case in which a jury may return a verdict of guilty of murder of the first degree, it is the mandatory duty of the trial court, without request, to instruct the jury that to such verdict it may add a recommendation of mercy, that such recommendation would mean that the defendant could be eligible for parole consideration only after having served a minimum of ten years and that otherwise the defendant would be confined to the penitentiary for life without possibility of parole." Syl. pt. 3, State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977).

"... Furthermore, the court must explain that mere eligibility for parole in no way guarantees immediate parole after ten years and that parole is given to inmates only after a thorough consideration of their records by the parole board. See W.Va.Code, 62-12-13 (1981)." State v. Headley, 168 W.Va. 138, 282 S.E.2d 872, 875 (1981).

Eligibility for parole does not insure or entitle a prisoner to release from prison on parole. Lindsey, supra.

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2. "It is the mandatory duty of the trial court to instruct the jury that it may add a recommendation of mercy to a verdict of murder of the first degree and such duty shall be fulfilled by the trial court over the objection of the defendant unless it affirmatively appears from the record that the defendant understands the consequences of his action." Syl. pt. 3, State v. Kopa, 173 W.Va. 43, 311 S.E.2d 412 (1983).

3. "[T]he defendant is entitled to any instruction which correctly states the law and which he deems will present the proposition in its most favorable light." State v. Wayne, 245 S.E.2d 838, at 843 (W.Va. 1978). State v. Headley, supra, at 875.

4. "An instruction outlining factors which a jury should consider in determining whether to grant mercy in a first degree murder case should not be given." Syl. pt. 1, State v. Miller, 178 W.Va. 618, 363 S.E.2d 504 (1987); Billotti v. Dodrill, 183 W.Va. 48, 394 S.E.2d 32 (1990).

5. Parole eligibility generally becomes available on a life sentence once ten years have been served unless the exclusion of parole eligibility is specifically set forth in the individual criminal statute. State v. England, 180 W.Va. 342, 376 S.E.2d 548, 561 (1988).

Where there is a life sentence and the defendant has two prior felony convictions, parole eligibility does not occur until fifteen years have been served. W.Va.Code, 62-12-13. Footnote 23, State v. England, supra.

HOMICIDE
FELONY MURDER

MURDER IN THE ATTEMPTED COMMISSION OF ARSON, KIDNAPPING, SEXUAL ASSAULT, ROBBERY, BURGLARY, BREAKING AND ENTERING, ESCAPE FROM LAWFUL CUSTODY, OR A FELONY OFFENSE OF MANUFACTURING OR DELIVERING A CONTROLLED SUBSTANCE.

Murder in the attempted commission of arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance is murder of the first degree. [1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt: [2]

1. the attempt [3] to commit _____ [4] (list one of the enumerated felonies);
2. the defendant, _____, participated in the attempt to commit _____ (underlying felony);
3. and the death of _____ (the victim) was a result of injuries received during the course of the attempt to commit _____ (underlying felony).

FOOTNOTES

[1] W.Va.Code, 61-2-1 (1991).

[2] State v. Williams, 172 W.Va. 295, 305 S.E.2d 251 (1983); State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991).

[3] Separate instruction on attempt provided.

[4] Separate instruction on underlying felony provided.

"Since the underlying felony is an essential element of felony murder, the jury must be instructed as to the elements which constitute the underlying felony." Syl. pt. 2, State v. Stacy, 181 W.Va. 736, 384 S.E.2d 347 (1989).

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COMMENTS

1. To sustain a conviction of felony-murder, proof of the elements of malice, premeditation or specific intent to kill is not required. State v. Williams, 305 S.E.2d 251 (W.Va. 1983); State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991).

2. "In a prosecution for first-degree murder, the State must submit jury instructions which distinguish between the two categories of first-degree murder---willful, deliberate, and premeditated killing and felony-murder ---if, under the facts of the particular case, the jury can find the defendant guilty of either category of first-degree murder. When the State also proceeds against the defendant on the underlying felony, the verdict forms provided to the jury should also reflect the foregoing distinction so that, if a guilty verdict is returned, the theory of the case upon which the jury relied will be apparent." Syl. pt. 9, State v. Giles, 183 W.Va. 237, 395 S.E.2d 481 (1990). Syl. pt. 1, State v. Walker, 425 S.E.2d 6 (W.Va. 1992).

"However, the Giles decision contemplated a situation where the State did not elect between premeditated murder and felony murder, but offered a general jury instruction for first-degree murder that encompassed both theories... In this case, the State elected only to proceed on felony murder, not on premeditated murder ..." State v. Walker, supra at 621.

The State need not elect whether it will proceed on premeditated murder or felony murder until the close of all evidence; however, a defendant may make a motion to force an earlier election if he can make a strong, particularized showing that he will be prejudiced by further delay in electing. Syl. pt. 2, State v. Walker, supra.

The granting of a motion to force the State to elect rests within the discretion of the trial court, and such a decision will not be reversed unless there is a clear abuse of discretion. Syl. pt. 3, State v. Walker, supra.

Here, the Court found the only thing the defendant was deprived of was a jury instruction concerning the lesser offenses included within a premeditated murder indictment. The Court found, however, if the prosecutor can make a valid felony murder case, there is no error in the court's giving only the felony murder charge to the jury.

3. See, State v. Ruggles, 183 W.Va. 58, 394 S.E.2d 42 (1990) for discussion of lesser included offenses of felony murder.

4. A person cannot be charged with felony-murder pursuant to W.Va.Code, § 61-2-1 (1989) if the only death which occurred in the commission of the underlying felony was the suicide of a co-conspirator in the criminal enterprise. Syl. pt. 2, State ex rel. Painter v. Zakaib, 186 W.Va. 82, 411 S.E.2d 25 (1991).

HOMICIDE
FIRST DEGREE MURDER
FELONY MURDER

MURDER IN THE ATTEMPTED COMMISSION OF ARSON, KIDNAPPING, SEXUAL ASSAULT, ROBBERY, BURGLARY, BREAKING AND ENTERING, ESCAPE FROM LAWFUL CUSTODY, OR A FELONY OFFENSE OF MANUFACTURING OR DELIVERING A CONTROLLED SUBSTANCE.

UNDERLYING FELONY

_____ (list felony), is the _____ (list elements of the underlying felony).[1]

FOOTNOTES

[1]"Since the underlying felony is an essential element of felony-murder, the jury must be instructed as to the elements which constitute the underlying felony." Syl. pt. 2, State v. Stacy, 181 W.Va. 736, 384 S.E.2d 347 (1989).

COMMENTS

1. Where there is more than one underlying felony supporting a felony murder conviction and one of the underlying felonies is committed upon a separate and distinct victim who was actually murdered, that underlying felony conviction does not merge with the felony murder conviction for the purposes of double jeopardy. Syl. pt. 3, State v. Elliott, 186 W.Va. 3, 412 S.E.2d 762 (1991).

HOMICIDE
FIRST DEGREE MURDER
FELONY MURDER

MURDER IN THE ATTEMPTED COMMISSION OF ARSON, KIDNAPPING, SEXUAL ASSAULT, ROBBERY, BURGLARY, BREAKING AND ENTERING, ESCAPE FROM LAWFUL CUSTODY, OR A FELONY OFFENSE OF MANUFACTURING OR DELIVERING A CONTROLLED SUBSTANCE.

ATTEMPT

In order to constitute the crime of attempt, two requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime.[1]

FOOTNOTES

[1] Syl. pt. 2, State v. Starkey, 1 W.Va. 517, 244 S.E.2d 219 (1978); State v. Burd, 419 S.E.2d 676 (W.Va. 1991); Syl. pt. 4, State v. Mayo, (No. 21760) (3/25/94).

COMMENTS

1. Where formation of criminal intent is accompanied by preparation to commit the crime of murder and a direct overt and substantial act toward its perpetration, it constitutes the offense of attempted murder. Syl. pt. 2, State v. Burd, 419 S.E.2d 676 (W.Va. 1991).

HOMICIDE
FIRST DEGREE MURDER
FELONY MURDER

MURDER IN THE ATTEMPTED COMMISSION OF ARSON, KIDNAPPING, SEXUAL ASSAULT, ROBBERY, BURGLARY, BREAKING AND ENTERING, ESCAPE FROM LAWFUL CUSTODY, OR A FELONY OFFENSE OF MANUFACTURING OR DELIVERING A CONTROLLED SUBSTANCE.

ACCIDENT

The crime of felony-murder in this state does not require proof of the elements of malice, premeditation or specific intent to kill. It is deemed sufficient if the homicide occurs accidentally during the commission of, or the attempt to commit, one of the enumerated felonies.[1]

FOOTNOTES

[1] Syl. pt. 7, State v. Sims, 162 W.Va. 212, 248 S.E.2d 834 (1978); Syl. pt. 1, State ex rel. Painter v. Zakaib, 186 W.Va. 82, 411 S.E.2d 25 (1991).

HOMICIDE
FIRST DEGREE MURDER
FELONY MURDER

MURDER IN THE ATTEMPTED COMMISSION OF ARSON, KIDNAPPING, SEXUAL ASSAULT, ROBBERY, BURGLARY, BREAKING AND ENTERING, ESCAPE FROM LAWFUL CUSTODY, OR A FELONY OFFENSE OF MANUFACTURING OR DELIVERING A CONTROLLED SUBSTANCE.

CONTINUOUS TRANSACTION

The felony-murder statute applies where the initial felony and the homicide were parts of one continuous transaction, and were closely related in point of time, place, and causal connection.[1]

FOOTNOTES

[1] (As where the killing was done in flight from the scene of the crime to prevent detection or promote escape). State v. Wayne, 169 W.Va. 785, 289 S.E.2d 480 (1982).

HOMICIDE
FIRST DEGREE MURDER
RECOMMENDATION OF MERCY

If you find the defendant guilty of murder of the first degree, the court must sentence the defendant to confinement in the penitentiary for life. The defendant will not be eligible for parole unless you add to your verdict a recommendation of mercy. A recommendation of mercy would mean the defendant could be eligible for parole consideration only after having served a minimum of ____ years.[1] Otherwise the defendant would be confined to the penitentiary for life without possibility of parole.[2]

Mere elibibility for parole in no way guarantees immediate parole after ____ years. Parole is given to inmates only after a thorough consideration of their records by the parole board.[3]

FOOTNOTES

[1] See W.Va.Code, 62-3-15 (1965).

[2] State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977).

[3] State v. Headley, 168 W.Va. 138, 282 S.E.2d 872 (1981). State v. Jenkins, (No. 21775) (3/25/94).

COMMENTS

1. "In a case in which a jury may return a verdict of guilty of murder of the first degree, it is the mandatory duty of the trial court, without request, to instruct the jury that to such verdict it may add a recommendation of mercy, that such recommendation would mean that the defendant could be eligible for parole consideration only after having served a minimum of ten years and that otherwise the defendant would be confined to the penitentiary for life without possibility of parole." Syl. pt. 3, State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977).

"... Furthermore, the court must explain that mere eligibility for parole in no way guarantees immediate parole after ten years and that parole is given to inmates only after a thorough consideration of their records by the parole board. See W.Va.Code, 62-12-13 (1981)." State v. Headley, 168 W.Va. 138, 282 S.E.2d 872, 875 (1981).

Eligibility for parole does not insure or entitle a prisoner to release from prison on parole. Lindsey, supra.

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2. "It is the mandatory duty of the trial court to instruct the jury that it may add a recommendation of mercy to a verdict of murder of the first degree and such duty shall be fulfilled by the trial court over the objection of the defendant unless it affirmatively appears from the record that the defendant understands the consequences of his action." Syl. pt. 3, State v. Kopa, 173 W.Va. 43, 311 S.E.2d 412 (1983).

3. "[T]he defendant is entitled to any instruction which correctly states the law and which he deems will present the proposition in its most favorable light." State v. Wayne, 245 S.E.2d 838, at 843 (W.Va. 1978). State v. Headley, supra, at 875.

4. "An instruction outlining factors which a jury should consider in determining whether to grant mercy in a first degree murder case should not be given." Syl. pt. 1, State v. Miller, 178 W.Va. 618, 363 S.E.2d 504 (1987); Billotti v. Dodrill, 183 W.Va. 48, 394 S.E.2d 32 (1990).

5. Parole eligibility generally becomes available on a life sentence once ten years have been served unless the exclusion of parole eligibility is specifically set forth in the individual criminal statute. State v. England, 180 W.Va. 342, 376 S.E.2d 548, 561 (1988).

Where there is a life sentence and the defendant has two prior felony convictions, parole eligibility does not occur until fifteen years have been served. W.Va.Code, 62-12-13. Footnote 23, State v. England, supra.

HOMICIDE
SECOND DEGREE MURDER

Second-degree murder is the unlawful killing of another with malice, but without deliberation or premeditation. [1]

To prove the commission of second-degree murder, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. unlawfully and
3. maliciously, [2]
4. but without deliberation or premeditation,
5. killed _____ (name victim).

FOOTNOTES

[1] Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance, is murder of the first degree. All other murder is murder of the second degree. W.Va.Code, 61-2-1 (1991).

State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987); State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982); State v. Allen, 131 W.Va 667, 49 S.E.2d 847 (1948).

[2] Defined in separate instruction.

COMMENTS

1. A specific intention to kill is not essential to murder in the second degree. State v. Morrison, 49 W.Va. 210, 38 S.E. 481 (1901); State v. Beatty, 51 W.Va. 232, 41 S.E. 434 (1902), overruled on other grounds, State v. Chaney, 117 W.Va. 605, 186 S.E. 607 (1936); State v. Hertzog, 55 W.Va. 74, 46 S.E. 792 (1904).

The element distinguishing second degree murder from willful, deliberate and premeditated murder is the absence of specific intent to take life. State v. Hertzog, 55 W.Va. 74, 46 S.E. 792 (1904)

Specific intent to kill is not an element of the crime of second degree murder, see, e.g. State v. Starkey, 1 W.Va. 517, 244 S.E.2d 219, 223 (1978). A conviction for second degree murder cannot be sustained without proof beyond a reasonable doubt that the accused had the requisite criminal intent. In regard to second degree murder, the requisite criminal intent is the intent to do great bodily harm, or a criminal intent aimed at life, or the intent to commit a specific felony, or the intent to commit an act involving all the wickedness of a felony. State v. Haddox, 166 W.Va. 630, 276 S.E.2d 788 (1981), citing State v. Starkey, supra, and State v. Hedrick, 99 W.Va. 529, 130 S.E. 295 (1925).

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In State v. Jenkins, (No. 21775) (3/25/94) the Court noted that State v. Hatfield, 169 W.Va. 191, 286 S.E.2d 402 (1982) said that the concept of malice is often used as a substitute for "specific intent to kill or an intentional killing, and had concluded that the intent to kill or malice is a required element of both first and second degree murder but the distinguishing feature for first degree murder is the existence of premeditation and deliberation." Hatfield, 169 W.Va. 191, 286 S.E.2d at 407-08.

QUESTION - DOES THE ELEMENT OF MALICE SATISFY THE INTENT BURDEN FOR SECOND DEGREE MURDER OR MUST THE JURY BE INSTRUCTED ON SOMETHING MORE?

2. "Where, in the prosecution of first degree murder by lying in wait, there is sufficient evidence before the trial court that the defendant was unaware that the principal in the first degree was preparing to kill or inflict bodily harm upon the victim, the trial court should also instruct the jury on the offense of second degree murder if the elements of that offense are present." Syl. pt. 4, State v. Harper, 179 W.Va. 24, 365 S.E.2d 69 (1987).

HOMICIDE
SECOND DEGREE MURDER
MALICE

Malice appears when the circumstances show such a reckless disregard for human life as necessarily to include a formed design against the life of a person slain.[1]

Malice is defined as an action flowing from a wicked and corrupt motive, a thing done with wrongful intent, under circumstances as carry in them the plain indication of a heart heedless of social duty and fatally bent on mischief.[2]

It is not essential that malice exist for any length of time before the killing. It is sufficient if malice springs into the mind before the accused did the killing.[3]

Malice is a species of criminal intent[4] and must be shown to exist against the deceased in a homicide case.[5]

FOOTNOTES

[1] State v. Saunders, 108 W.Va. 148, 150 S.E. 519 (1929).

[2] ("a thing done malo animo") State v. Douglass, 28 W.Va. 297, 299 (1886); State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219, 223 (1978); State v. Bongalis, 180 W.Va. 584, 378 S.E.2d 449 (1989).

[3] Syl. pt. 2, State v. Slonaker, 167 W.Va. 97, 280 S.E.2d 212 (1981).

[4] Is this appropriate to put in the instruction? See State v. Jenkins, (No. 21775) (3/25/94).

[5] State v. Jenkins, (No. 21775) (3/25/94). The one exception may be a transferred intent homicide. See footnote 7, Jenkins.

COMMENTS

1. An instruction in a first degree murder case that informs the jury that malice need not be shown on the part of the defendant against the deceased is erroneous. Syl. pt. 4, State v. Jenkins, (No. 21775) (3/25/94).

HOMICIDE
VOLUNTARY MANSLAUGHTER

Voluntary manslaughter is the intentional, unlawful and felonious taking of life, without premeditation, deliberation or malice.[1]

To prove the commission of voluntary manslaughter, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____.
2. intentionally [2]
3. unlawfully and
4. feloniously, but without premeditation, deliberation or malice, [3]
5. killed _____.

FOOTNOTES

[1] State ex rel. Combs v. Boles, 151 W.Va. 194, 151 S.E.2d 115 (1966).

[2] Defined in separate instruction.

It is fundamental in W.Va. that voluntary manslaughter requires an intent to kill. State v. Wright, 162 W.Va. 332, 249 S.E.2d 519 (1978); State v. Barker, 128 W.Va. 744, 38 S.E.2d 346 (1946); State v. Foley, 131 W.Va. 326, 47 S.E.2d 40 (1948); State v. Reppert, 132 W.Va. 675, 52 S.E.2d 820 (1949); State v. Blizzard, 152 W.Va. 810, 166 S.E.2d 560 (1969). The court's failure to include in its instructions that voluntary manslaughter requires a specific intent to kill is reversible error. State v. Hamrick, 160 W.Va. 673, 236 S.E.2d 247 (1977).

[3] State v. Prater, 52 W.Va. 132, 43 S.E. 230 (1902); State v. Foley, 131 W.Va. 326, 47 S.E.2d 40 (1948).

COMMENTS

1. "This Court has rather consistently defined voluntary manslaughter as a sudden, intentional killing upon gross provocation and in the heat of passion. See State v. Stalnaker, 167 W.Va. 225, 279 S.E.2d 416 (1981); State v. Duvall, 152 W.Va. 162, 160 S.E.2d 155 (1968); State v. Bowyer, 143 W.Va. 302, 101 S.E.2d 243 (1957); State v. Foley, 131 W.Va. 326, 47 S.E.2d 40 (1948); State v. Zannino, 129 W.Va. 775, 41 S.E.2d 641 (1947); State v. Barker, 128 W.Va. 744, 38 S.E.2d 346 (1946)." State v. Beegle, 425 S.E.2d 823, 827 (W.Va. 1992).

HOMICIDE
VOLUNTARY MANSLAUGHTER
INTENT

Voluntary manslaughter requires a specific intent to kill.[1]

FOOTNOTES

[1] It is fundamental in W.Va. that voluntary manslaughter requires an intent to kill. State v. Wright, 162 W.Va. 332, 249 S.E.2d 519 (1978). The court's failure to include in its instructions that voluntary manslaughter requires a specific intent to kill is reversible error. State v. Hamrick, 160 W.Va. 673, 236 S.E.2d 247 (1977).

HOMICIDE
VOLUNTARY MANSLAUGHTER
SUDDEN HEAT OF PASSION

It is the element of malice which forms the critical distinction between murder and voluntary manslaughter.[1] Voluntary manslaughter arises from the sudden heat of passion, while murder is from the wickedness of the heart.[2]

Voluntary manslaughter involves an intentional killing but upon sudden provocation and in the heat of passion.[3]

FOOTNOTES

[1] State v. Kirtley, 162 W.Va. 249, 252 S.E.2d 374 (1978).

[2] State v. Roush, 95 W.Va. 132, 120 S.E. 304 (1923).

[3] State v. Cain, 20 W.Va. 679 (1882); State v. Foley, 131 W.Va. 326, 47 S.E.2d 40 (1948).

HOMICIDE
VOLUNTARY MANSLAUGHTER
PROVOCATION

The term "provocation", as it is used to reduce murder to voluntary manslaughter, consists of certain types of acts committed against the defendant which would cause a reasonable man to kill. This means that the provocation is such that it would cause a reasonable person to lose control of himself, that is, act out of the heat of passion, and that he in fact did so.[1]

FOOTNOTES

[1] Footnote 7, State v. Starkey, 1 W.Va. 517, 244 S.E.2d 219 (1978), citing State v. Clifford, 59 W.Va. 1, 52 S.E. 981 (1906), disapproved on other grounds, State v. Lawson, 128 W.Va. 136, 36 S.E.2d 26 (1945); State v. Michael, 74 W.Va. 3, 82 S.E. 1 (1914); State v. Galford, 87 W.Va. 358, 105 S.E. 237 (1920).

HOMICIDE
INVOLUNTARY MANSLAUGHTER

Involuntary manslaughter is committed when a person, while engaged in an unlawful act, unintentionally causes the death of another, or where a person engaged in a lawful act, unlawfully causes the death of another. [1]

To prove the commission of involuntary manslaughter, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. a. while engaged in an unlawful act
   b. unintentionally
   c. and with a reckless disregard of the safety of others, [2]
   d. caused the death of
   e. _____ (victim);

OR

1. the defendant, _____,
2. a. while engaged in a lawful act,
   b. unlawfully,
   c. and with a reckless disregard of the safety of others, [2]
   d. caused the death of
   e. _____ (victim).

FOOTNOTES

[1] State v. Cobb, 166 W.Va. 65, 272 S.E.2d 467 (1980); Syl. pt. 7, State v. Barker, 128 W.Va. 744, 38 S.E.2d 346 (1946).

[2] IS THIS STANDARD CORRECT?

"The giving of an instruction, at the instance of the State, which tells the jury "that involuntary manslaughter is where one person while engaged in an unlawful act, unintentionally causes the death of another person; or when a person engaged in a lawful act negligently causes the death of another person" is error." Syl. pt. 1, State v. Lawson, 128 W.Va. 136, 36 S.E.2d 26 (1945).

"To the extent only that they tend to hold that the crime of involuntary manslaughter may be committed in the performance of a lawful act by simple negligence, the cases of State v. Clifford, 59 W.Va. 1, 52 S.E. 981, and State v. Whitt, 96 W.Va. 268, 122 S.E. 742 (1924), are disapproved." Syl. pt. 4, State v. Lawson, 128 W.Va. 136, 36 S.E.2d 26 (1945).

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"An involuntary manslaughter charge arising from a death resulting from the operation of a motor vehicle requires something more than an act of ordinary negligence or the violation of a motor vehicle statute to sustain the conviction." See also, State v. Lott, 170 W.Va. 65, 289 S.E.2d 739 (1982). Syl. pt. 1, State v. Vollmer, 163 W.Va. 711, 259 S.E.2d 837 (1979).

"Our negligent homicide statute, W.Va.Code, 17C-5-1, requires the driving of "[a] vehicle in reckless disregard of the safety of others," and this means that more than ordinary negligence is required. It is compatible with the involuntary manslaughter standard set in State v. Lawson, 128 W.Va. 136, 36 S.E.2d 26 (1945)." Syl. pt. 2, State v. Vollmer, 163 W.Va. 711, 259 S.E.2d 837 (1979).

Defendant was convicted of four counts of involuntary manslaughter and was found not guilty on the reckless driving charge. The charges arose out of a vehicle accident which resulted in the death of four people. The Court found the evidence supported the conviction (see case for facts) and that the apparent inconsistency of the verdicts did not constitute reversible error. State v. Hose, 419 S.E.2d 690 (W.Va. 1992).

HOMICIDE
INVOLUNTARY MANSLAUGHTER
NO INTENT TO KILL OR PRODUCE DEATH OR GREAT BODILY HARM

The absence of an intention to kill or to commit any unlawful act which might reasonably produce death or great bodily harm is the distinguishing feature between voluntary and involuntary manslaughter.[1]

FOOTNOTES

[1] State v. Weisengoff, 85 W.Va. 271, 101 S.E. 450 (1919).

But See, State v. Hose, 419 S.E.2d 690 (W.Va. 1992).

HOMICIDE
INVOLUNTARY MANSLAUGHTER
CAUSATION

An essential element or ingredient of the crime of involuntary manslaughter is that the accused caused the unintentional death of the victim.[1]

FOOTNOTES

[1] State v. Craig, 131 W.Va. 714, 51 S.E.2d 283, 290 (1948).

AGGRAVATED ROBBERY [1]

Aggravated robbery is the unlawful taking and carrying away of money or goods from the person of another, or in his presence. The taking must occur against the victim's will by the use of force or violence on the victim or by the threat or presenting of firearms, or other deadly weapon or instrumentality, with the intent to deprive the victim permanently of the property. [2]

To prove the commission of aggravated robbery, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. unlawfully
3. took and carried away
4. _____ (describe money or goods)
5. from the person of another, [3] or in his presence, against his will, [4]
6. by use of force or violence to the person, [5]
7. or by the threat or presenting of firearms, or other deadly weapon or instrumentality, [6]
8. with the intent to permanently deprive the victim of the property. [7]

FOOTNOTES

[1] W.Va.Code, 61-2-12 (1961).

If any person commit, or attempt to commit, robbery by partial strangulation or suffocation, or by striking or beating, or by other violence to the person, or by the threat or presenting of firearms, or other deadly weapon or instrumentality whatsoever, - felony, 10 to life. If any person commit, or attempt to commit, a robbery in any other mode or by any other means, except as provided above - felony, 5-18.

[2] "An appropriate charging portion of an instruction for 'aggravated' robbery would be:

'Aggravated robbery is defined as the unlawful taking and carrying away of money or goods from the person of another, or in his presence, by the use of force or violence on the victim or through the use of a dangerous or deadly weapon or instrumentality, and with the intent to steal such property.'

Footnote 8, State v. Harless, 168 W.Va. 707, 285 S.E.2d 4 (1981).

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However, the above instruction was given in State v. Plumley, 179 W.Va. 356, 368 S.E.2d 726 (1988) and the Court found on the facts of that case that the jury was not "clearly and fully instructed...on the fact that animus furandi or the intent to deprive the owner permanently of his property, is an essential element of the crime of robbery." See footnote 7 below for further discussion of this issue.

[3] In the commission of robbery, the property must be taken by force and violence, not necessarily from the owner, but from any person in possession thereof whose right of possession is superior to that of the robber. Johnson v. Commonwealth, 215 Va. 495, 211 S.E.2d 71 (1975).

[4] "It cannot be doubted that one of the principal aspects of the common law crime of robbery is the taking of personal property of another against his will with the intent to permanently deprive him of the ownership thereof." State v. Collins, 174 W.Va. 767, 329 S.E.2d 839 at 842 (1984).

The instruction set forth in footnote 8 of Harless does not state "against his will". However, larceny is a lesser included offense in robbery, and includes the element of "taking and carrying away the personal property of another against his will. See Syl. pts. 4 and 5, State v. Neider, 170 W.Va. 662, 295 S.E.2d 902 (1982).

[5] When robbery is committed by force, the element of fear need not exist, although it may be committed without force by putting a person in fear. State v. Coulter, 169 W.Va. 526, 288 S.E.2d 819 (1982).

[6] W.Va.Code, 61-2-12 provides "...or by the threat or presenting of firearms, or other deadly weapon or instrumentality whatsoever". Footnote 8, Harless, supra, provides: "...through the use of a dangerous or deadly weapon or instrumentality...".

Robbery committed by simulation of firearm by gesturing with hand in pocket can be an aggravated robbery under Code, 61-2-12. State v. Combs, 175 W.Va. 765, 338 S.E.2d 365 (1985).

[7] "Animus furandi, or the intent to steal or to feloniously deprive the owner permanently of his property, is an essential element in the crime of robbery." Syl. pt. 2, State v. Plumley, 179 W.Va. 356, 368 S.E.2d 726 (1988). Syl. pt. 2, State v. Hudson, 157 W.Va. 939, 206 S.E.2d 415 (1974).

The aggravated robbery instruction offered in footnote 8 of Harless, supra, was given in Plumley, but the Court found on the facts of that case, the jury was not "clearly and fully instructed...on the fact that animus furandi or the intent to deprive the owner permanently of his property, is an essential element of the crime of robbery." The Court found "(w)here a taking of property is merely incidental to the commission of another crime the actor's need and desire for the property taken are incidental and cease to exist when the principal crime is perfected. Under such circumstances the intent to deprive the owner permanently of his property would not be present. Instead, the actor would seek to deprive the owner of the property only temporarily to

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assist in the completion of the principal crime. Because of this circumstance, the Court believes that the real question in a potential incidental robbery situation is whether the actor had requisite animus furandi, or intent to deprive the owner permanently of property, at the time of the taking of the property." Plumley, at 728.

COMMENTS

1. Defenses - Bona fide claim of right.

"A defendant may assert as a defense to a robbery or larceny charge, that he had a bona fide claim of ownership to the specific property stolen and, therefore, that he had no intent to steal. However, this defense is not available where the defendant took money or other property, to which he did not have a specific ownership claim, in satisfaction of a debt." Syl. pt. 2, State v. Winston, 170 W.Va. 555, 295 S.E.2d 46 (1982).

2. Enactment of robbery statute did not redefine the elements of robbery established by the common law. State v. Collins, 174 W.Va. 767, 329 S.E.2d 839 (1984).

NONAGGRAVATED ROBBERY [1]

Nonaggravated robbery is the unlawful taking and carrying away of money or goods from the person of another or in his presence. The taking must occur against the victim's will, without force or violence but by putting the victim in fear of bodily injury and with the intent to deprive the victim permanently of the property. [2]

To prove the commission of nonaggravated robbery, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. unlawfully
3. took and carried away
4. money or goods
5. from the person of another [3] or in his presence against his will [4]
6. without force or violence
7. but by putting the victim in fear of bodily injury
8. and with the intent to permanently deprive the victim of the property. [5]

FOOTNOTES

[1] W.Va.Code, 61-2-12 (1961).

If any person commit, or attempt to commit, robbery by partial strangulation or suffocation, or by striking or beating, or by other violence to the person, or by the threat or presenting of firearms, or other deadly weapon or instrumentality whatsoever, - felony, 10 to life. If any person commit, or attempt to commit, a robbery in any other mode or by any other means, except as provided above - felony, 5-18.

[2] "An appropriate charging portion of an instruction for 'nonaggravated' robbery would be:

'Nonaggravated robbery is defined as the unlawful taking and carrying away of money or goods from the person of another or in his presence, without force or violence but by putting the victim in fear of bodily injury and with intent to steal the property.'"

Footnote 7 of State v. Harless, 168 W.Va. 707, 285 S.E.2d 4 (1981).

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[3] In the commission of robbery, the property must be taken by force and violence, not necessarily from the owner, but from any person in possession thereof whose right of possession is superior to that of the robber. Johnson v. Commonwealth, 215 Va. 495, 211 S.E.2d 71 (1975).

[4] "It cannot be doubted that one of the principal aspects of the common law crime of robbery is the taking of personal property of another against his will with the intent to permanently deprive him of the ownership thereof." State v. Collins, 174 W.Va. 767, 329 S.E.2d 839 at 842 (1984).

The instruction set forth in footnote 7 of Harless does not state "against his will". However, larceny is a lesser included offense in robbery, and includes the element of "taking and carrying away the personal property of another against his will. See Syl. pts. 4 and 5, State v. Neider, 170 W.Va. 662, 295 S.E.2d 902 (1982).

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The aggravated robbery instruction offered in footnote 8 of State v. Harless, supra, was given in Plumley, but the Court found on the facts of that case, the jury was not "clearly and fully instructed... on the fact that animus furandi or the intent to deprive the owner permanently of his property, is an essential element of the crime of robbery." The Court found "(w)here a taking of property is merely incidental to the commission of another crime the actor's need and desire for the property taken are incidental and cease to exist when the principal crime is perfected. Under such circumstances the intent to deprive the owner permanently of his property would not be present. Instead, the actor would seek to deprive the owner of the property only temporarily to assist in the completion of the principal crime. Because of this circumstance, the Court believes that the real question in a potential incidental robbery situation is whether the actor had requisite animus furandi, or intent to deprive the owner permanently of property, at the time of the taking of the property." Plumley, at 728.

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2. Enactment of robbery statute did not redefine the elements of robbery established by the common law. State v. Collins, 174 W.Va. 767, 329 S.E.2d 839 (1984).

ATTEMPTED AGGRAVATED ROBBERY [1]

Attempted aggravated robbery is the attempt to unlawfully take and carry away money or goods from the person of another, or in his presence, against his will, by the use of force or violence on the victim or by the threat or presenting of firearms, or other deadly weapon or instrumentality, with the intent to deprive the victim permanently of the property. [2]

To prove the commission of attempted aggravated robbery, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. attempted [3]
3. to unlawfully
4. take and carry away
5. _____ (describe money or goods)
6. from the person of another, [4] or in his presence, against his will, [5]
7. by use of force or violence to the person, [6]
8. or by the threat or presenting of firearms, or other deadly weapon or instrumentality, [7]
9. with the intent to permanently deprive the victim of the property. [8]

FOOTNOTES

[1] W.Va.Code, 61-2-12 (1961).

If any person commit, or attempt to commit, robbery by partial strangulation or suffocation, or by striking or beating, or by other violence to the person, or by the threat or presenting of firearms, or other deadly weapon or instrumentality wnatsoever, - felony, 10 to life. If any person commit, or attempt to commit, a robbery in any other mode or by any other means, except as provided above - felony, 5-18.

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[3] Defined in separate instruction.

[4] In the commission of robbery, the property must be taken by force and violence, not necessarily from the owner, but from any person in possession thereof whose right of possession is superior to that of the robber. Johnson v. Commonwealth, 215 Va. 495, 211 S.E.2d 71 (1975).

[5] "It cannot be doubted that one of the principal aspects of the common law crime of robbery is the taking of personal property of another against his will with the intent to permanently deprive him of the ownership thereof." State v. Collins, 174 W.Va. 767, 329 S.E.2d 839 at 842 (1984).

The instruction set forth in footnote 8 of Harless does not state "against his will". However, larceny is a lesser included offense in robbery, and includes the element of "taking and carrying away the personal property of another against his will". See Syl. pts. 4 and 5, State v. Neider, 170 W.Va. 662, 295 S.E.2d 902 (1982).

[6] When robbery is committed by force, element of fear need not exist, although it may be committed without force by putting a person in fear. State v. Coulter, 169 W.Va. 526, 288 S.E.2d 819 (1982).

[7] W.Va.Code, 61-2-12 provides "...or by the threat or presenting of firearms, or other deadly weapon or instrumentality whatsoever". Footnote 8, Harless, supra, provides: "...through the use of a dangerous or deadly weapon or instrumentality...".

Robbery committed by simulation of firearm by gesturing with hand in pocket can be an aggravated robbery under Code, 61-2-12. State v. Combs, 175 W.Va. 765, 338 S.E.2d 365 (1985).

[8] "Animus furandi, or the intent to steal or to feloniously deprive the owner permanently of his property, is an essential element in the crime of robbery." Syl. pt. 2, State v. Plumley, 179 W.Va. 356, 368 S.E.2d 726 (1988). Syl. pt. 2, State v. Hudson, 157 W.Va. 939, 206 S.E.2d 415 (1974).

The aggravated robbery instruction offered in footnote 8 of Harless, supra, was given in Plumley, but the Court found on the facts of that case, the jury was not "clearly and fully instructed...on the fact that animus furandi or the intent to deprive the owner permanently of his property, is an essential element of the crime of robbery." The Court found "(w)here a taking of property is merely incidental to the commission of another crime the actor's need and desire for the property taken are incidental and cease to exist when the principal crime is perfected. Under such circumstances the intent to deprive the owner permanently of his property would not be present. Instead, the actor would

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assist in the completion of the principal crime. Because of this circumstance, seek to deprive the owner of the property only temporarily to the Court believes that the real question in a potential incidental robbery situation is whether the actor had requisite animus furandi, or intent to deprive the owner permanently of property, at the time of the taking of the property." Plumley, at 728.

It is not necessary that the defendant intend to appropriate the property to his own use. If he intended to deprive the prosecutrix of the property it is sufficient. Jordan v. Commonwealth, 66 Va. (25 Gratt.) 943 (1874).

COMMENTS

1. Defenses - Bona fide claim of right.

"A defendant may assert as a defense to a robbery or larceny charge, that he had a bona fide claim of ownership to the specific property stolen and, therefore, that he had no intent to steal. However, this defense is not available where the defendant took money or other property, to which he did not have a specific ownership claim, in satisfaction of a debt." Syl. pt. 2, State v. Winston, 170 W.Va. 555, 295 S.E.2d 46 (1982).

2. Enactment of robbery statute did not redefine the elements of robbery established by the common law. State v. Collins, 174 W.Va. 767, 329 S.E.2d 839 (1984).

3. "Under...(W.Va.Code, 61-2-12 (1961)), making robbery, and the attempt to commit robbery, a crime, and prescribing the penalties therefore, the attempt to commit robbery is a crime in itself...." Syl. pt. 4, in part, Syl. pt. 1, State ex rel. Vascovich v. Skeen, 138 W.Va. 417, 76 S.E.2d 283 (1953).

ATTEMPTED AGGRAVATED ROBBERY
ATTEMPT

"In order to constitute the crime of attempt, two requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime."[1]

FOOTNOTES

[1] Syl. pt. 2, State v. Starkey, 1 W.Va. 517, 244 S.E.2d 219 (1978); State v. Burd, 419 S.E.2d 676 (W.Va. 1991); Syl. pt. 4, State v. Mayo, (No. 21760) (3/25/94).

COMMENTS

1. Where formation of criminal intent is accompanied by preparation to commit the crime of murder and a direct overt and substantial act toward its perpetration, it constitutes the offense of attempted murder. Syl. pt. 2, State v. Burd, 419 S.E.2d 676 (W.Va. 1991).

ATTEMPTED NONAGGRAVATED ROBBERY [1]

Attempted nonaggravated robbery is the attempt to unlawfully take and carry away money or goods from the person of another or in his presence, against his will, without force or violence but by putting the victim in fear of bodily injury and with the intent to deprive the victim permanently of the property.[2]

To prove the commission of attempted nonaggravated robbery, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. attempted to [3]
3. unlawfully
4. take and carry away
5. money or goods
6. from the person of another [4] or in his presence against his will [5]
7. without force or violence
8. but by putting the victim in fear of bodily injury
9. and with the intent to permanently deprive the victim of the property.[6]

FOOTNOTES

[1] W.Va.Code, 61-2-12 (1961).

If any person commit, or attempt to commit, robbery by partial strangulation or suffocation, or by striking or beating, or by other violence to the person, or by the threat or presenting of firearms, or other deadly weapon or instrumentality whatsoever, - felony, 10 to life. If any person commit, or attempt to commit, a robbery in any other mode or by any other means, except as provided above - felony, 5-18.

[2] "An appropriate charging portion of an instruction for 'nonaggravated' robbery would be:

'Nonaggravated robbery is defined as the unlawful taking and carrying away of money or goods from the person of another or in his presence, without force or violence but by putting the victim in fear of bodily injury and with intent to steal the property.'

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The instruction set forth in footnote 8 of Harless does not state "against his will". However, larceny is a lesser included offense in robbery, and includes the element of "taking and carrying away the personal property of another against his will". See Syl. pts. 4 and 5, State v. Neider, 170 W.Va. 662, 295 S.E.2d 902 (1982).

[6] "Animus furandi, or the intent to steal or to feloniously deprive the owner permanently of his property, is an essential element in the crime of robbery." Syl. pt. 2, State v. Plumley, 179 W.Va. 356, 368 S.E.2d 726 (1988). Syl. pt. 2, State v. Hudson, 157 W.Va. 939, 206 S.E.2d 415 (1974).

The aggravated robbery instruction offered in footnote 8 of Harless, supra, was given in Plumley, but the Court found on the facts of that case, the jury was not "clearly and fully instructed...on the fact that animus furandi or the intent to deprive the owner permanently of his property, is an essential element of the crime of robbery." The Court found "(w)here a taking of property is merely incidental to the commission of another crime the actor's need and desire for the property taken are incidental and cease to exist when the principal crime is perfected. Under such circumstances the intent to deprive the owner permanently of his property would not be present. Instead, the actor would seek to deprive the owner of the property only temporarily to assist in the completion of the principal crime. Because of this circumstance, the Court believes that the real question in a potential incidental robbery situation is whether the actor had requisite animus furandi, or intent to deprive the owner permanently of property, at the time of the taking of the property." Plumley, at 728.

It is not necessary that the defendant intend to appropriate the property to his own use. If he intended to deprive the prosecutrix of the property it is sufficient. Jordan v. Commonwealth, 66 Va. (25 Gratt.) 943 (1874).

COMMENTS

1. Defenses - Bona fide claim of right.

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"A defendant may assert as a defense to a robbery or larceny charge, that he had a bona fide claim of ownership to the specific property stolen and, therefore, that he had no intent to steal. However, this defense is not available where the defendant took money or other property, to which he did not have a specific ownership claim, in satisfaction of a debt." Syl. pt. 2, State v. Winston, 170 W.Va. 555, 295 S.E.2d 46 (1982).

2. Enactment of robbery statute did not redefine the elements of robbery established by the common law. State v. Collins, 174 W.Va. 767, 329 S.E.2d 839 (1984).

ATTEMPTED NONAGGRAVATED ROBBERY
ATTEMPT

In order to constitute the crime of attempt, two requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime.[1]

FOOTNOTES

[1] Syl. pt. 2, State v. Starkey, 1 W.Va. 517, 244 S.E.2d 219 (1978); State v. Burd, 419 S.E.2d 676 (W.Va. 1991); Syl. pt. 4, State v. Mayo, (No. 21760) (3/25/94).

COMMENTS

1. Where formation of criminal intent is accompanied by preparation to commit the crime of murder and a direct overt and substantial act toward its perpetration, it constitutes the offense of attempted murder. Syl. pt. 2, State v. Burd, 419 S.E.2d 676 (W.Va. 1991).

EXTORTION
BY THREATS [1]

Extortion by threats is committed when any person threatens injury to the character, person or property of another person, or to the character, person or property of his wife or child..., [2] and thereby extorts money, pecuniary benefit, or any bond, note or other evidence of debt.

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. with the intent [3] to obtain and extort [4] money, pecuniary benefit, or any bond, note or other evidence of debt,
3. threatened [5] injury to the character, person or property of _____, (name) or _____'s wife or child;
4. and thereby did obtain and extort money, pecuniary benefit, or any bond, note or other evidence of debt.

FOOTNOTES

[1] W.Va.Code, 61-2-13 (1923).

[2] "...or accuses him or them of any offense..." W.Va.Code, 61-2-13. See separate instruction on extortion by accusation of a criminal offense.

[3] INTENT IS NOT A STATUTORY ELEMENT OF EXTORTION

[4] Defined in separate instruction.

[5] Defined in separate instruction.

COMMENTS

1. Should the instruction include elements of "unlawfully and feloniously"? See, State v. Keiffer, 112 W.Va. 74, 163 S.E. 841 (1932).

EXTORTION
BY THREATS
THREAT

A "threat" is defined as "(a) declaration of an intention to injure another or his property by some unlawful act."[1]

A threat may be shown by conduct and representations as well as by specific language.[2]

FOOTNOTES

[1] Black's Law Dictionary 1327 (5th ed. 1979); Machinery Hauling v. Steel of W.Va., 181 W.Va. 694, 384 S.E.2d 139, at 141 (1989); Iden v. Adrian Buckhannon Bank, 6 F.Supp. 234 (N.D.W.Va. 1987), modified, 841 F.2d at 1122 (4th Cir. 1988).

[2] Syl. pt. 2, State v. Keiffer, 112 W.Va. 74, 163 S.E. 841 (1932).

EXTORTION
BY THREATS
EXTORT

To extort is to gain by wrongful methods; to obtain in an unlawful manner, as to compel payments by means of threats of injury to person, property or reputation.[1]

FOOTNOTES

[1] Iden v. Adrian Buckhannon Bank, 6 F.Supp. 234 (N.D.W.Va. 1987), modified, 841 F.2d at 1122 (4th Cir. 1988).

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

ATTEMPTED EXTORTION BY THREATS [1]

Attempted extortion by threats is committed when any person threatens injury to the character, person or property of another person, or to the character, person or property of his wife or child...,[2] with the intent to thereby extort money, pecuniary benefit, or any bond, note or other evidence of debt, but fails thereby to extort money, pecuniary benefit, or any bond, note or other evidence of debt.

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. with the intent [3] to obtain and extort [4] money, pecuniary benefit, or any bond, note or other evidence of debt,
3. threatened [5] injury to the character, person or property of _____, (name) or _____'s wife or child;
4. but failed thereby to obtain and extort money, pecuniary benefit, or any bond, note or other evidence of debt.

FOOTNOTES

[1] W.Va.Code, 61-2-13 (1923).

[2] "...or accuses him or them of any offense..." W.Va.Code, 61-2-13. Separate instruction on extortion by accusation of a criminal offense.

[3] INTENT IS NOT A STATUTORY ELEMENT OF EXTORTION

[4] Defined in separate instruction.

[5] Defined in separate instruction.

ATTEMPTED EXTORTION
BY THREATS
THREAT

A "threat" is defined as "(a) declaration of an intention to injure another or his property by some unlawful act."[1]

A threat may be shown by conduct and representations as well as by specific language.[2]

FOOTNOTES

[1] Black's Law Dictionary 1327 (5th ed.1979); Machinery Hauling v. Steel of W.Va., 181 W.Va. 694, 384 S.E.2d 139, at 141 (1989); Iden v. Adrian Buckhannon Bank, 6 F.Supp. 234 (N.D.W.Va. 1987), modified, 841 F.2d at 1122 (4th Cir. 1988).

[2] Syl. pt. 2, State v. Keiffer, 112 W.Va. 74, 163 S.E. 841 (1932).

ATTEMPTED EXTORTION
BY THREATS
EXTORT

To extort is to gain by wrongful methods; or to obtain in an unlawful manner, as to compel payments by means of threats of injury to person, property or reputation.[1]

FOOTNOTES

[1] Iden v. Adrian Buckhannon Bank, 6 F.Supp. 234 (N.D.W.Va. 1987), modified, 841 F.2d at 1122 (4th Cir. 1988).

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

EXTORTION
BY ACCUSATION OF AN OFFENSE) [1]

Extortion by accusation of an offense is committed when any person...[2] accuses another person, or that person's wife or child of any offense, and thereby extorts money, pecuniary benefit, or any bond, note or other evidence of debt.

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. with the intent [3] to obtain and extort money, pecuniary benefit, or any bond, note or other evidence of debt,
3. accused _____ (name) or _____'s wife or child of _____ (describe offense)[4]
4. and thereby did obtain and extort money, pecuniary benefit, or any bond, note or other evidence of debt.

FOOTNOTES

[1] W.Va.Code, 61-2-13 (1923).

[2] "threatens injury to the character, person or property of another person or the character, person or property of his wife or child or..." W.Va.Code, 61-2-13. Separate instruction on extortion by threats.

[3] INTENT IS NOT A STATUTORY ELEMENT OF EXTORTION

[4] Boggs v. Greenbrier Grocery Co., 53 W.Va. 536, 44 S.E. 777 (1903) seems to indicate the threat of an offense must be a threat of an actual or legitimate offense. ("a threat of arrest for which there is no ground does not constitute duress, as the party could not be put in fear thereby"). This is a civil case.

COMMENTS

1. Should the instruction include the elements "unlawfully and feloniously"?

See, State v. Keiffer, 112 W.Va. 74, 163 S.E. 841 (1932).

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

ATTEMPTED EXTORTION (BY ACCUSATION OF AN OFFENSE) [1]

Attempted extortion by accusation of an offense is committed when any person ...accuses another person, or that person's wife or child of any offense, [2] with the intent to thereby extort money, pecuniary benefit, or any bond, note or other evidence of debt, but fails thereby to extort money, pecuniary benefit, or any bond, note or other evidence of debt.

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. with the intent [3] to obtain and extort money, pecuniary benefit, or any bond, note or other evidence of debt,
3. accused _____ (name) or _____'s wife or child of _____ (describe the offense)[4]
4. but failed thereby to obtain and extort money, pecuniary benefit, or any bond, note or other evidence of debt.

FOOTNOTES

[1] W.Va.Code, 61-2-13 (1923).

[2] "threatens injury to the character, person or property of another person, or to the character, person or property of his wife or child..." W.Va.Code, 61-2-13. Separate instruction on extortion by threats.

[3] INTENT IS NOT A STATUTORY ELEMENT OF EXTORTION

[4] Boggs v. Greenbrier Grocery Co., 53 W.Va. 536, 44 S.E. 777 (1903) seems to indicate the threat of an offense must be a threat of an actual or legitimate offense. ("a threat of arrest for which there is no ground does not constitute duress, as the party could not be put in fear thereby"). This is a civil case.

MALICIOUS ASSAULT

Malicious assault is the malicious shooting, stabbing, cutting or wounding of any person, or by any means causing him bodily injury with intent to maim, disfigure, disable or kill.[1]

To prove the commission of malicious assault, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. unlawfully,
3. feloniously, and
4. maliciously [2]
5. a. shot,
   b. stabbed,
   c. cut,
   d. wounded [3]
   e. or _____ (specify means by which bodily injury was caused)[4]
6. _____ (name)
7. causing bodily injury to _____
8. with the intent to [5]
   a. kill,
   b. permanently maim,
   c. permanently disfigure, or
   d. permanently disable
9. _____ (name).

FOOTNOTES

[1] W.Va.Code, 61-2-9(a) (1978); State v. Farmer, 185 W.Va. 232, 406 S.E.2d 458 (1991); State v. George, 185 W.Va. 539, 408 S.E.2d 291 (1991) - (malicious assault requires proof of serious bodily injury).

[2] Defined in separate instruction.

[3] Defined in separate instruction.

[4] 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 (1910); State v. Coontz, 94 W.Va. 59, 117 S.E. 701 (1923). State v. Daniel, 144 W.Va. 551, 109 S.E.2d 32 (1959).

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In an indictment for causing bodily injury with intent to maim, disable and kill, it is sufficient to allege that such injury was inflicted by means of a blow with defendant's fist. The grade of the offense so charged is the same as stabbing, cutting and wounding and is subject to the same punishment. State v. Coontz, 94 W.Va. 59, 117 S.E. 701 (1923).

Under a proper indictment, any sort of bodily injury, inflicted by any means, with intent to maim, disfigure or kill, is an offense under this section, punishable as a malicious or unlawful wounding, but it is not a technical wounding, and an indictment merely for cutting and wounding does not cover it. State v. Gibson, 67 W.Va. 548, 68 S.E. 295, 28 L.R.A. (n.s.) 965 (1910).

[5] The State must prove the defendant inflicted the injury with an intent to produce a permanent disability or disfiguration. State v. Scotchel, 168 W.Va. 545, 285 S.E.2d 384 (1981), citing State v. Sacco, 165 W.Va. 91, 267 S.E.2d 193 (1980); State v. Bass, 432 S.E.2d 86 (W.Va. 1993); State v. Stalnaker, 138 W.Va. 30, 76 S.E.2d 906 (1953); McComas v. Warth, 113 W.Va. 163, 167 S.E. 96 (1933); and State v. Taylor, 105 W.Va. 298, 142 S.E. 254 (1928). See State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991).

The doctrine of transferred intent provided that where a person intends to kill or injure someone, but in the course of attempting to commit the crime accidentally injures or kills a third party, the defendant's criminal intent will be transferred to the third party. Syl. pt. 6, State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991).

In Julius, supra, at 11, the Court found even though the defendant did not intend to hurt Joseph Vance, under the doctrine of transferred intent, he may be charged and convicted of malicious assault.

MALICIOUS ASSAULT
MALICE

Malice is defined as an action flowing from a wicked and corrupt motive, a thing done with wrongful intent,[1] under such circumstances as carry in them the plain indication of a heart heedless of social duty and fatally bent on mischief.[1]

FOOTNOTES

[1] ("malo animo") State v. Douglass, 28 W.Va. 297, 299 (1886); State v. Starkey, 1 W.Va. 517, 244 S.E.2d 219, 223 (1978); State v. Bongalis, 180 W.Va. 584, 378 S.E.2d 449 (1989).

MALICIOUS ASSAULT
WOUND

To constitute a wound, within the meaning of this section, an injury must have been inflicted with a weapon, other than a part of the human body, and must include a complete parting or breaking of the skin.[1]

FOOTNOTES

[1] To constitute a wound, within the meaning of this section, an injury must have been inflicted with a weapon, other than any of those with which the human body is provided by nature, and must include a complete parting or solution of the external or internal skin. State v. Gibson, 67 W.Va. 548, 68 S.E. 295 (1910); State v. Stalnaker, 138 W.Va. 30, 76 S.E.2d 906 (1953); State v. Daniel, 144 W.Va. 551, 109 S.E.2d 32 (1959).

UNLAWFUL ASSAULT

Unlawful assault is the unlawful, but not malicious, shooting, stabbing, cutting or wounding of any person, or by any means causing him bodily injury with intent to maim, disfigure, disable or kill.[1]

To prove the commission of unlawful assault, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. unlawfully, but not maliciously,
3. a. shot,
   b. stabbed,
   c. cut
   d. wounded [2]
   e. or _____ (specify means by which bodily injury was caused)[3]
4. _____ (name)
5. causing bodily injury to _____
6. with the intent to [4]
   a. kill,
   b. permanently maim,
   c. permanently disfigure, or
   d. permanently disable
7. _____ (name).

FOOTNOTES

[1] W.Va.Code, 61-2-9(a) (1978); State v. George, 185 W.Va. 539, 408 S.E.2d 291 (1991) - (malicious assault requires proof of serious bodily injury).

[2] Defined in separate instruction.

[3] The provision or charge in the indictment with regard to bodily injury must specify the means by which the injury was caused. 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 (1910); State v. Coontz, 94 W.Va. 59, 117 S.E. 701 (1923). State v. Daniel, 144 W.Va. 551, 109 S.E.2d 32 (1959).

In an indictment for causing bodily injury with intent to maim, disable and kill, it is sufficient to allege that such injury was inflicted by means of a blow with defendant's fist. The grade of the offense so charged is the same as a technical stabbing, cutting and wounding and is subject to the same punishment. State v. Coontz, 94 W.Va. 59, 117 S.E. 701 (1923).

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Under a proper indictment, any sort of bodily injury, inflicted by any means, with the intent to maim, disfigure or kill, is an offense under this section, punishable as a malicious or unlawful wounding, but it is not a technical wounding, and an indictment merely for cutting and wounding does not cover it. State v. Gibson, 67 W.Va. 548, 68 S.E. 295, 28 L.R.A. (N.S.) 965 (1910).

[4] The State must prove the defendant inflicted the injury with an intent to produce a permanent disability or disfiguration. State v. Scotchel, 168 W.Va. 545, 285 S.E.2d 384 (1981), citing State v. Sacco, 165 W.Va. 91, 267 S.E.2d 193 (1980); State v. Stalnaker, 138 W.Va. 30, 76 S.E.2d 906 (1953); McComas v. Warth, 113 W.Va. 163, 167 S.E. 96 (W.Va. 1933); and State v. Taylor, 105 W.Va. 298, 142 S.E. 254 (1928).

The doctrine of transferred intent provides that where a person intends to kill or injure someone, but in the course of attempting to commit the crime accidentally injures or kills a third party, the defendant's criminal intent will be transferred to the third party. Syl. pt. 6, State v. Julius, 185 W.Va. 422, 408 S.E.2d 1 (1991).

In Julius, supra, at 11, the Court found even though the defendant did not intend to hurt Joseph Vance, under the doctrine of transferred intent, he may be charged and convicted of malicious assault.

UNLAWFUL ASSAULT
WOUND

To constitute a wound, within the meaning of this section, an injury must have been inflicted with a weapon, other than a part of the human body, and must include a complete parting or breaking of the skin.[1]

FOOTNOTES

[1] To constitute a wound, within the meaning of this section, an injury must have been inflicted with a weapon, other than any of those with which the human body is provided by nature, and must include a complete parting or solution of the external or internal skin. State v. Gibson, 67 W.Va. 548, 68 S.E. 295 (1910); State v. Stalnaker, 138 W.Va. 30, 76 S.E.2d 906 (1953); State v. Daniel, 144 W.Va. 551, 109 S.E.2d 32 (1959).

ASSAULT

Assault is the unlawful attempt to commit a violent injury to the person of another or the unlawful commission of an act which places another in reasonable apprehension of immediately receiving a violent injury.[1]

To prove the commission of assault, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. unlawfully
   a. attempted to commit a violent injury to _____ (name); or
   b. committed an act which placed _____ (name) in reasonable apprehension of immediately receiving a violent injury.

FOOTNOTES

[1] W.Va.Code, 61-2-9(b) (1978).

BATTERY

Battery is committed if any person unlawfully and intentionally makes physical contact of an insulting or provoking nature with the person of another or unlawfully and intentionally causes physical harm to another.[1]

To prove the commission of battery, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. unlawfully
3. and intentionally
   a. made physical contact of an insulting or provoking nature with _____ (name); or
   b. caused physical harm to _____ (name).

FOOTNOTES

[1] W.Va.Code, 61-2-9(c) (1978).

COMMENTS

1. See State v. Rummer, 432 S.E.2d 39, 49 (W.Va. 1993) for discussion of double jeopardy analysis for separate blows struck or separate portions of the body touched during the commission of a battery.

ASSAULT DURING THE COMMISSION OF A FELONY

Assault during the commission of a felony is committed when, during the commission of a felony, one unlawfully shoots, stabs, cuts or wounds another person.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. during the commission of _____ (list underlying felony)[2]
2. the defendant, _____,
3. unlawfully
   a. shot,
   b. stabbed,
   c. cut or
   d. wounded [3]
4. _____ (name).

FOOTNOTES

[1] W.Va.Code, 61-2-10 (1923).

[2] "Since the underlying felony is an essential element of felony-murder, the jury must be instructed as to the elements which constitute the underlying felony." See, Syl. pt. 2, State v. Stacy, 181 W.Va. 736, 384 S.E.2d 347 (1989).

Separate instruction on underlying felony provided.

[3] Defined in separate instruction.

ASSAULT DURING THE COMMISSION OF A FELONY
UNDERLYING FELONY

To prove the commission of _____ (list underlying felony), the State must prove each of the following elements beyond a reasonable doubt:

(list elements of the underlying felony).[1]

FOOTNOTES

[1] "Since the underlying felony is an essential element of felony-murder, the jury must be instructed as to the elements which constitute the underlying felony." See, Syl. pt. 2, State v. Stacy, 181 W.Va. 736, 384 S.E.2d 347 (1989).

ASSAULT DURING THE COMMISSION OF A FELONY
WOUND

To constitute a wound, within the meaning of this section, an injury must have been inflicted with a weapon, other than a part of the human body, and must include a complete parting or breaking of the skin.[1]

FOOTNOTES

[1] To constitute a wound, within the meaning of this section, an injury must have been inflicted with a weapon, other than any of those with which the human body is provided by nature, and must include a complete parting or solution of the external or internal skin. State v. Gibson, 67 W.Va. 548, 68 S.E. 295 (1910); State v. Stalnaker, 138 W.Va. 30, 76 S.E.2d 906 (1953); State v. Daniel, 144 W.Va. 551, 109 S.E.2d 32 (1959).

ASSAULT DURING THE ATTEMPT TO COMMIT A FELONY

Assault during the attempt to commit a felony is committed when any person in the attempt to commit a felony, unlawfully shoots, stabs, cuts or wounds another person.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. during the attempted[2] commission of _____ (list underlying felony);[3]
3. unlawfully
   a. shot,
   b. stabbed,
   c. cut or
   d. wounded[4]
4. _____ (name).

FOOTNOTES

[1] W.Va.Code, 61-2-10 (1923).

[2] Defined in separate instruction.

[3] "Since the underlying felony is an essential element of felony-murder, the jury must be instructed as to the elements which constitute the underlying felony." See, Syl. pt. 2, State v. Stacy, 181 W.Va. 736, 384 S.E.2d 347 (1989).

Set forth elements of underlying felony in separate instruction.

[4] Defined in separate instruction.

ASSAULT DURING THE ATTEMPT TO COMMIT A FELONY ATTEMPT

"In order to constitute the crime of attempt, two requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime."[1]

FOOTNOTES

[1] Syl. pt. 2, State v. Starkey, 1 W.Va. 517, 244 S.E.2d 219 (1978); State v. Burd, 419 S.E.2d 676 (W.Va. 1991); Syl. pt. 4, State v. Mayo, (No. 21760) (3/25/94).

COMMENTS

1. Where formation of criminal intent is accompanied by preparation to commit the crime of murder and a direct overt and substantial act toward its perpetration, it constitutes the offense of attempted murder. Syl. pt. 2, State v. Burd, 419 S.E.2d 676 (W.Va. 1991).

ASSAULT DURING THE ATTEMPTED COMMISSION OF A FELONY
UNDERLYING FELONY

_____ (list felony) is the _____ (list elements of the underlying felony.[1]

FOOTNOTES

[1] "Since the underlying felony is an essential element of felony-murder, the jury must be instructed as to the elements which constitute the underlying felony." See, Syl. pt. 2, State v. Stacy, 181 W.Va. 736, 384 S.E.2d 347 (1989).

ASSAULT DURING THE ATTEMPTED COMMISSION OF A FELONY WOUND

To constitute a wound, within the meaning of this section, an injury must have been inflicted with a weapon, other than a part of the human body, and must include a complete parting or breaking of the skin.[1]

FOOTNOTES

[1] To constitute a wound, within the meaning of this section, an injury must have been inflicted with a weapon, other than any of those with which the human body is provided by nature, and must include a complete parting or solution of the external or internal skin. State v. Gibson, 67 W.Va. 548, 68 S.E. 295 (1910); State v. Stalnaker, 138 W.Va. 30, 76 S.E.2d 906 (1953); State v. Daniel, 144 W.Va. 551, 109 S.E.2d 32 (1959).

ABDUCTION OF PERSON WITH INTENT TO MARRY OR DEFILE

Abduction of person with the intent to marry or defile is committed when any person takes away another person, or detains another person against such person's will, with the intent to marry or defile the person, or to cause the person to be married or defiled by another person.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
   a. took away _____ (name) or
   b. detained _____ (name),
2. against _____'s (name) will [2]
3. with the intent [3]
   a. to marry or defile [4] _____(name) or
   b. to cause _____(name) to be married or defiled by _____ (another person).

FOOTNOTES

[1] W.Va.Code, 61-2-14(a) (1984).

[2] Force or compulsion is an element of the offense of abduction with intent to marry or defile.

The general rule is that in order to prove force or compulsion on a kidnapping or abduction charge, the state is not required to show that the accused used actual physical force or express threats of violence to accomplish the crime. It is sufficient if the victim submits because of a reasonable fear of harm or injury from the accused.

By the same token, consent of the victim is not a defense to a charge of kidnapping or abduction where such consent is obtained because the victim has a reasonable fear of harm or injury if he or she does not consent. State v. Hanna, 180 W.Va. 598, 378 S.E.2d 640 (1989).

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[3] A sexual purpose or motivation is commonly understood to be an essential element of the offense of abduction with intent to defile. State v. Hanna, 180 W.Va. 598, 378 S.E.2d 640 (1989).

[4] Subsection (a) setting forth the offense of abduction with intent to defile, is not unconstitutionally vague because it does not define the word "defile". State v. Hatfield, 181 W.Va. 106, 380 S.E.2d 670 (1988).

COMMENTS

1. "A defendant can not be convicted of abduction under W.Va.Code, 61-2-14(b) if the movement or detention of the victim is merely incidental to the commission of another crime. The factors to be considered in determining whether the abduction is incidental to the commission of another crime are the length of time the victim was held or moved, the distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm." Syl. pt. 2, State v. Weaver, 181 W.Va. 274, 382 S.E.2d 327 (1989).

IS THIS AN ISSUE FOR THE JURY TO DETERMINE?
IF SO, OFFER AN INSTRUCTION ON THIS POINT.

2. "The crimes of abduction with intent to defile, W.Va.Code, 61-2-14 (1984), and kidnapping with intent to avoid arrest, W.Va.Code, 61-2-14a (1965), are separate offenses." Syl. pt. 13, State v. Fortner, 182 W.Va. 345, 387 S.E.2d 812 (1989).

3. Under the facts of this case, abduction of the victim was merely incidental or ancillary to the commission of sexual assault. The conviction and punishment for abduction with intent to defile violated the prohibition against double jeopardy. State v. Davis, 180 W.Va. 357, 376 S.E.2d 563 (1988).

ABDUCTION OF PERSON WITH INTENT TO MARRY OR DEFILE FORCE OR COMPULSION

Force or compulsion is an element of the offense of abduction with intent to marry or defile.

The general rule is that in order to prove force or compulsion on an ... abduction charge, the state is not required to show that the accused used actual physical force or express threats of violence to accomplish the crime. It is sufficient if the victim submits because of a reasonable fear of harm or injury from the accused.

Consent of the victim is not a defense to a charge of...abduction where such consent is obtained because the victim has a reasonable fear of harm or injury if he or she does not consent.[1]

FOOTNOTES

[1] State v. Hanna, 180 W.Va. 598, 378 S.E.2d 640 (1989).

ABDUCTION OF PERSON WITH INTENT TO MARRY OR DEFILE SEXUAL PURPOSE OR MOTIVATION

A sexual purpose or motivation is commonly understood to be an essential element of the offense of abduction with intent to defile.[1]

FOOTNOTES

[1] State v. Hanna, 180 W.Va. 598, 378 S.E.2d 640 (1989).

ABDUCTION OF CHILD UNDER AGE 16 FOR PROSTITUTION OR CONCUBINAGE

Abduction of child under age 16 for prostitution or concubinage is committed when any person takes away a child under the age of sixteen years from any person having lawful charge of such child, for the purpose of prostitution or concubinage.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. took away _____,
3. a child under the age of sixteen years,
4. from _____,
5. the person having lawful charge of _____ (such child)
6. for the purpose of prostitution or concubinage.

FOOTNOTES

[1] W.Va.Code, 61-2-14(a) (1984).

ABDUCTION OF CHILD UNDER AGE 16

Abduction of a child under age 16 is committed when any person, other than the father or mother, illegally, or for any unlawful, improper or immoral purpose [1] seizes, takes or secretes a child under sixteen years of age, from the person or persons having lawful charge of the child. [2]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant,_____,
2. a. illegally, or for any
   b. unlawful,
   c. improper or
   d. immoral purpose
3. a. seized,
   b. took or
   c. secreted
4. _____ (child)
5. from _____;
6. that the defendant, _____, is not the (father) (mother) of _____ (child),
7. that ____ was a child under sixteen years of age,
8. and that _____ was the person(s) having lawful charge of _____ (child).

FOOTNOTES

[1] ...other than the purposes stated in subsection (a) of this section or section fourteen-a or fourteen-c [§ 61-2-14a or § 61-2-14c] of this article...

[2] W.Va.Code, 61-2-14(b) (1984).

COMMENTS

1. "A defendant cannot be convicted of abduction under W.Va.Code, 61-2-14(b) if the movement or detention of the victim is merely incidental to the commission of another crime. The factors to be considered in determining whether the abduction is incidental to the commission of another crime are the length of time the victim was held or moved, the distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm." Syl. pt. 2, State v. Weaver, 181 W.Va. 274, 382 S.E.2d 327 (1989).

IS THIS AN ISSUE FOR THE JURY TO DETERMINE?
IF SO, OFFER AN INSTRUCTION ON THIS POINT.

KIDNAPPING

Kidnapping is committed if any person, by force, threat, duress, fraud or enticement take, confine, conceal, or decoy, inveigle or entice away, or transport into or out of this State or within this State, or otherwise kidnap any other person, for the purpose or with the intent of taking, receiving, demanding or extorting from such person, or from any other person or persons, any ransom, money or other thing, or any concession or advantage of any sort, or for the purpose or with the intent of shielding or protecting himself or others from bodily harm or of evading capture or arrest after he or they have committed a crime.[1]

To prove the commission of kidnapping, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. by
   a. force, [2]
   b. threat,
   c. duress,
   d. fraud
   e. or enticement
3. a. took,
   b. confined,
   c. concealed or
4. a. decoyed
   b. inveigled
   c. or enticed away or
5. transported
   a. into
   b. out of or
   c. within this State
6. or otherwise kidnapped (specify means)
7. _____ (name person)
8. a. for the purpose or
   b. with the intent of
9. a. taking,
   b. receiving,
   c. demanding or
   d. extorting
10. from _____ (name such person or from any other person or persons)
11. any
    a. ransom,
    b. money
    c. or _____ (specify other thing) or
12. a. any concession or
    b. advantage
       of any sort [3] or

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13. for the purpose or with the intent of
    a. shielding or protecting himself or others from bodily harm or
    b. of evading capture or arrest after he or others (they) have committed a crime.

FOOTNOTES

[1] W.Va.Code, 61-2-14a (1965).

[2] Separate instruction on force or compulsion provided. Offer if force or compulsion is charged.

[3] The specific intent necessary to the offense of kidnapping as charged in the indictment is the intent to demand "any concession or advantage of any sort."...Although a sexual purpose or motivation has been held to satisfy kidnapping statutes requiring such an intent...the intent to demand a concession or advantage has a much broader meaning and may encompass other benefits or purposes as well. (cites omitted). State v. Hanna, 180 W.Va. 598, 378 S.E.2d 640 (1989).

COMMENTS

1. The statutory definition of kidnapping is broad enough to encompass "almost any" forced movement or detention within the State. State v. Miller, 175 W.Va. 6, 336 S.E.2d 910 (1985); State v. Fortner, 182 W.Va. 345, 387 S.E.2d 812 (1989).

2. "Defendant argues he cannot be convicted of kidnapping if he is convicted of murder, because the kidnapping would be only incidental to the murder. ...There are situations where an offense that would technically constitute kidnapping under our broadly worded statute cannot be considered a separate offense...Here it is highly unlikely that the defendant enticed the victim to his trailer exclusively in order to kill; rather the jury could have reasonably believed that he enticed her to his trailer in order to commit the offense of rape, an offense with which he was not charged. Therefore, we find no reason that defendant cannot be convicted of the separate offenses of kidnapping and murder." State v. Ferrell, 184 W.Va. 123, 399 S.E.2d 834 (1990), cert. denied, 111 S.Ct. 2801, 115 L.Ed.2d 974, 59 U.S.L.W. 3823 (1991).

"In interpreting and applying a generally worded kidnapping statute, such as W.Va.Code, 61-2-14a, in a situation where another offense was committed, some reasonable limitations on the broad scope of kidnapping must be developed. The general rule is that a kidnapping has not been committed when it is incidental to another crime. In deciding whether the acts that technically constitute kidnapping were incidental to another crime, courts (emphasis added) examine the

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length of time the victim was held or moved, the distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm." Syl. pt. 2, State v. Miller, 175 W.Va. 6, 336 S.E.2d 910 (1985).

"Where an inmate by force, has unlawfully confined a correctional officer for a minimal period of time within the walls of a correctional facility in order to facilitate his escape, and movement of that officer was slight and did not result in exposure to an increased risk of harm, a conviction for the offense of kidnapping pursuant to W.Va.Code, 61-2-14a [1965] will be reversed where the confinement was incidental to the escape and the inmate has not utilized the officer as a hostage nor as a shield to protect that inmate or others from bodily harm or capture or arrest after that inmate or others have committed a crime." Syl. pt. 3, State v. Brumfield, 178 W.Va. 240, 358 S.E.2d 801 (1987).

DOES THE JURY DETERMINE THIS ISSUE?. (See Plumley, below). IF SO, OFFER AN INSTRUCTION.

"While this Court in the Brumfield and Miller cases, and other courts in cases cited in Brumfield and Miller, have recognized that kidnapping may be so incidental to another crime as not to constitute a separate offense, there is a paucity of cases addressing the question of whether an aggravated robbery committed in conjunction with another crime should be considered merely incidental to the other crime. The Nevada court, a court which has addressed the question, has concluded that the taking of property might be incidental, but, as in the incidental kidnapping cases, the question of whether it actually should be treated as incidental hinges upon the particular facts and circumstances of the case. See, McKenna v. State, 98 Nev. 323, 647 P.2d 865 (1982). The court indicated that where there was a question as to whether the taking was incidental, the question should be resolved by the trier of fact, the jury. State v. Plumley, 179 W.Va. 356, 368 S.E.2d 726, 728 (1988).

3. Under -2-14(a), the general kidnapping statute - In this case, the prosecution needed to prove the defendant used fraud to entice the victim to the area for the purpose of gaining a "concession or advantage" in the form of sexual gratification, State v. Ferrell, 184 W.Va. 123, 399 S.E.2d 834 (1990), cert. denied, 111 S.Ct. 2801, 115 L.Ed.2d 974, 59 U.S.L.W. 3823 (1991).

Under Hanna, it is clear kidnapping can be accomplished without force or compulsion since the statute uses terms such as fraud, decoy inveigle or entice away.

Just as the general kidnapping statute does not require force, neither does it require transportation or confinement of the victim.

4. See, W.Va.Code, 61-2-14c for penalty for threats to kidnap or demand ransom.

KIDNAPPING

The defendant, _____, may be found:

1. guilty of kidnapping, and the victim was killed or bodily harm was inflicted on the victim;

2. guilty of kidnapping and ransom, money or other thing, or any concession or advantage of any sort was paid or yielded, and the victim was returned alive or was permitted to return alive without bodily harm having been inflicted;

3. guilty of kidnapping and no ransom, money or other thing, or any concession or advantage of any sort was paid or yielded, and the victim was returned alive or was permitted to return alive without bodily harm having been inflicted;

4. not guilty.

COMMENTS

1. This section creates a single offense, with different punishments dependent upon and determined by the manner in which it is committed. Pyles v. Boles, 148 W.Va. 465, 135 S.E. 692 (1964), cert. denied, 379 U.S. 864, 85 S.Ct. 130, 13 L.Ed.2d 67 (1964). State v. Slie, 158 W.Va. 672, 213 S.E.2d 109 (1975).

2. This form sets forth the possible verdicts for the jury. If the jury finds the defendant guilty of kidnapping where the victim is killed or bodily harm was inflicted on the victim, the jury should be instructed that they may, in their discretion, recommend mercy. A separate instruction on recommendation of mercy is provided.

KIDNAPPING
FORCE OR COMPULSION [1]

The general rule is that in order to prove force or compulsion on a kidnapping ...charge, the state is not required to show that the accused used actual physical force or express threats of violence to accomplish the crime. It is sufficient if the victim submits because of a reasonable fear of harm or injury from the accused.

By the same token, consent of the victim is not a defense to a charge of kidnapping or abduction where such consent is obtained because the victim has a reasonable fear of harm or injury if he or she does not consent.[2]

FOOTNOTES

[1] Give separate instruction on force or compulsion if charged.

[2] State v. Hanna, 180 W.Va. 598, 378 S.E.2d 640 (1989).

KIDNAPPING
RECOMMENDATION OF MERCY

If you find the defendant guilty of kidnapping and the victim is killed or bodily harm was inflicted on the victim, the court must sentence the defendant to confinement in the penitentiary for life. The defendant will not be eligible for parole unless you add to your verdict a recommendation of mercy. A recommendation of mercy would mean the defendant could be eligible for parole consideration only after having served a minimum of ____ years. Otherwise the defendant would be confined to the penitentiary for life without possibility of parole.[1]

Mere eligibility for parole in no way guarantees immediate parole after ____ years. Parole is given to inmates only after a thorough consideration of their records by the parole board.[2]

FOOTNOTES

[1] State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977).

[2] State v. Headley, 168 W.Va. 138, 282 S.E.2d 872 (1981). State v. Jenkins, (No. 21775) (3/25/94).

COMMENTS

1. "In a case in which a jury may return a verdict of guilty of murder of the first degree, it is the mandatory duty of the trial court, without request, to instruct the jury that to such verdict it may add a recommendation of mercy, that such recommendation would mean that the defendant could be eligible for parole consideration only after having served a minimum of ten years and that otherwise the defendant would be confined to the penitentiary for life without possibility of parole." Syl. pt. 3, State v. Lindsey, 160 W.Va. 284, 233 S.E.2d 734 (1977).

"... Furthermore, the court must explain that mere eligibility for parole in no way guarantees immediate parole after ten years and that parole is given to inmates only after a thorough consideration of their records by the parole board. See W.Va.Code, 62-12-13 (1981)." Stat v. Headley, 168 W.Va. 138, 282 S.E.2d 872, 875 (1981).

Eligibility for parole does not insure or entitle a prisoner to release from prison on parole. Lindsey, supra.

2. "It is the mandatory duty of the trial court to instruct the jury that it may add a recommendation of mercy to a verdict of murder of the first degree and such duty shall be fulfilled by the trial court over the objection of the defendant unless it affirmatively appears from the record that the defendant understands the consequences of his action." Syl. pt. 3, State v. Kopa, 173 W.Va. 43, 311 S.E.2d 412 (1983).

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3. "[T]he defendant is entitled to any instruction which correctly states the law and which he deems will present the proposition in its most favorable light." State v. Wayne, 245 S.E.2d 838, at 843 (W.Va. 1978). State v. Headley, supra, at 875.

4. "An instruction outlining factors which a jury should consider in determining whether to grant mercy in a first degree murder case should not be given." Syl. pt. 1, State v. Miller, 178 W.Va. 618, 363 S.E.2d 504 (1987); Billotti v. Dodrill, 183 W.Va. 48, 394 S.E.2d 32 (1990).

5. Parole eligibility generally becomes available on a life sentence once ten years have been served unless the exclusion of parole eligibility is specifically set forth in the individual criminal statute. State v. England, 180 W.Va. 342, 376 S.E.2d 548, 561 (1988).

Where there is a life sentence and the defendant has two prior felony convictions, parole eligibility does not occur until fifteen years have been served. W.Va.Code, 62-12-13. Footnote 23, State v. England, supra.

BURGLARY
(Breaking and entering of dwelling any time; entry without breaking dwelling in the nighttime).

Burglary is committed if, in the daytime or nighttime, a person breaks and enters, or, in the nighttime, enters without breaking, another person's dwelling house, or an outhouse adjoining thereto or occupied therewith, with intent to commit a crime therein.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. a. in the daytime or nighttime,
   b. did feloniously [2] break and enter;
   or
   a. in the nighttime,
   b. did feloniously [2] enter without breaking
3. another person's [5]
   a. dwelling house, [3]
   b. an outhouse adjoining the dwelling house [4]
   c. an outhouse occupied with the dwelling house [4]
4. with intent to commit _____ (state crime) therein. [6]

FOOTNOTES

[1] W.Va.Code, 61-3-11 (1993). See, State v. Tharp, 184 W.Va. 292, 400 S.E.2d 300 (1990).

[2] An indictment for common-law burglary must charge the breaking and entering to have been done "feloniously and burglariously." State v. McDonald, 9 W.Va. 456 (1876).

[3] The term "dwelling house", ...includes, but is not limited to, a mobile home, house trailer, modular home, factory-built home or self-propelled motor home, used as a dwelling regularly or only from time to time, or any other nonmotive vehicle primarily designed for human habitation and occupancy and used as a dwelling regularly or only from time to time. W.Va.Code, 61-3-11(c) (1993).

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A building, suitable for residential purposes, having been so designated and used, and equipped with household furnishings, remains a dwelling house though temporarily unoccupied if the householder intends to return. Entry of such temporarily unoccupied building in the nighttime, with or without breaking, with intent to commit a felony or any larceny therein, constitutes burglary under this section. State v. Bair, 112 W.Va. 655, 166 S.E. 369 (1932).

A structure is no longer a "dwelling house" for the purposes of West Virginia's burglary statute, W.Va.Code, 61-3-11, when its occupants leave it without any intention of returning. State v. Scarberry, 418 S.E.2d 3, 364 (W.Va. 1992).

[4] An outhouse subject to burglary under this section must be a house within the ordinary meaning of the word and must adjoin the dwelling house of its owner or be occupied in connection therewith. State v. Neff, 122 W.Va. 549, 11 S.E.2d 171 (1940).

[5] Ownership defined in separate instruction.

"Ownership, in relation to the building involved in an indictment for breaking and entering, means possession or occupancy, not title." Syl. pt. 1, Newcomb v. Coiner, 154 W.Va. 653, 178 S.E.2d 155 (1970).

"In an indictment charging breaking and entering, an allegation that the premises allegedly broken and entered were 'used and occupied' by a named person, constitutes a sufficient allegation of ownership to support said indictment." Syl. pt. 2, Newcomb v. Coiner, 154 W.Va. 653, 178 S.E.2d 155 (1970).

"The specific ownership of a building involved in the crime of burglary is not an essential element of that offense and title as far as the law of burglary is concerned follows possession and an allegation of possession constitutes a sufficient allegation of ownership in an indictment for the offense of breaking and entering." Syl. pt. 3, Newcomb v. Coiner, 154 W.Va. 653, 178 S.E.2d 155 (1970).

[6] Separate instruction on underlying crime provided.

COMMENTS

1. A burglary is complete once there has been an unauthorized entry and an intent to commit a felony, State v. Louk, 169 W.Va. 24, 285 S.E.2d 432, 434 (1981).

The common-law definition of burglary consisted of (1) breaking and (2) entering of (3) a dwelling house (4) of another (5) in the nighttime (6) with the intent to commit a felony therein. Footnote 1, State v. Louk, supra, at 434.

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2. Under W.Va.Code, 61-3-11(a) (1973), the essential requirement of burglary committed in the nighttime is that the defendant "enter...with intent to commit a felony or any larceny". The intent and the acts of the defendant are controlling, and the consent of the occupant to entry is not a defense when the defendant is shown to have entered through fraud or threat of force with the requisite criminal intent. The statutory requirement of entry is also fulfilled when a person with consent to enter exceeds the scope of the consent granted. Syl. pt. 1, State v. Plumley, 181 W.Va. 685, 384 S.E.2d 130 (1989).

3. In prosecuting for breaking and entering with intent to commit larceny, an instruction is prejudicial if it does not sufficiently describe a larceny or any felony. State v. Belcher, 121 W.Va. 170, 2 S.E.2d 257 (1939). The felony or larceny need not be described with the same technical accuracy as in an indictment for those offenses.

4. The only element of larceny necessary to be shown for a burglary conviction is the intent to commit the larceny. Thus, larceny is not a lesser included offense of burglary. State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1981).

BURGLARY
(Breaking and entering of dwelling any time; entry without breaking dwelling in the nighttime).
OWNERSHIP

For the purpose of establishing the crime of breaking and entering, ownership of the building involved means possession or occupancy, not title.[1]

FOOTNOTES

[1] Syl. pt. 1, Newcomb v. Coiner, 154 W.Va. 653, 178 S.E.2d 155 (1970).

BURGLARY
(Breaking and entering of dwelling any time; entry without breaking dwelling in the nighttime).
UNDERLYING CRIME

_____ (state offense) is the:

(Define underlying crime).

ENTERING WITHOUT BREAKING
(Entry without breaking dwelling in the daytime).

Entering without breaking is committed if, in the daytime, a person enters without breaking another person's dwelling house, or an outhouse adjoining thereto or occupied therewith, with intent to commit a crime therein.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. in the daytime,
3. did feloniously [2] enter without breaking
4. another person's [5]
   a. dwelling house [3]
   b. outhouse adjoining the dwelling house [4]
   c. outhouse occupied with the dwelling house [4]
5. with intent to commit _____ (state crime) therein [6].

FOOTNOTES

[1] W.Va.Code, 61-3-11 (1993).

[2] An indictment for common-law burglary must charge the breaking and entering to have been done "feloniously and burglariously." State v. McDonald, 9 W.Va. 456 (1876).

[3] The term "dwelling house", ...includes, but is not limited to, a mobile home, house trailer, modular home, factory-built home or self-propelled motor home, used as a dwelling regularly or only from time to time, or any other nonmotive vehicle primarily designed for human habitation and occupancy and used as a dwelling regularly or only from time to time. W.Va.Code, 61-3-11(c) (1993).

A building, suitable for residential purposes, having been so designated and used, and equipped with household furnishings, remains a dwelling house though temporarily unoccupied, if the householder intends to return. Entry of such temporarily unoccupied building in the nighttime, with or without breaking, with intent to commit a felony or any larceny therein, constitutes burglary under this section. State v. Bair, 112 W.Va. 655, 166 S.E. 369 (1932).

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A structure is no longer a "dwelling house" for the purposes of West Virginia's burglary statute, W.Va.Code, 61-3-11, when its occupants leave it without any intention of returning. State v. Scarberry, 418 S.E.2d 3, 364 (W.Va. 1992).

[4] An outhouse subject to burglary under this section must be a house within the ordinary meaning of the word and must adjoin the dwelling house of its owner or be occupied in connection therewith. State v. Neff, 122 W.Va. 549, 11 S.E.2d 171 (1940).

[5] Ownership defined in separate instruction.

"Ownership, in relation to the building involved in an indictment for breaking and entering, means possession or occupancy, not title." Syl. pt. 1, Newcomb v. Coiner, 154 W.Va. 653, 178 S.E.2d 155 (1970).

"In an indictment charging breaking and entering, an allegation that the premises allegedly broken and entered were "used and occupied" by a named person, constitutes a sufficient allegation of ownership to support said indictment." Syl. pt. 2, Newcomb v. Coiner, 154 W.Va. 653, 178 S.E.2d 155 (1970).

"The specific ownership of a building involved in the crime of burglary is not an essential element of that offense and title as far as the law of burglary is concerned follows possession and an allegation of possession constitutes a sufficient allegation of ownership in an indictment for the offense of breaking and entering." Syl. pt. 3, Newcomb v. Coiner, 154 W.Va. 653, 178 S.E.2d 155 (1970).

[6] Separate instruction on underlying crime provided.

COMMENTS

1. A burglary is complete once there has been an unauthorized entry and an intent to commit a felony, State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1981).

The common-law definition of burglary consisted of (1) breaking and (2) entering of (3) a dwelling house (4) of another (5) in the nighttime (6) with the intent to commit a felony therein. Footnote 1, State v. Louk, supra, at 434.

2. Under W.Va.Code, 61-3-11(a) (1973), the essential requirement of burglary committed in the nighttime is that the defendant "enter...with intent to commit a felony or any larceny". The intent and the acts of the defendant are controlling, and the consent of the occupant to entry is not a defense when the defendant is shown to have entered through fraud or threat of force with the requisite criminal intent. The statutory requirement of entry is also fulfilled when a person with consent to enter exceeds the scope of the consent granted. Syl. pt. 1, State v. Plumley, 181 W.Va. 685, 384 S.E.2d 130 (1989).

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3. In prosecuting for breaking and entering with intent to commit larceny, an instruction is prejudicial if it does not sufficiently describe a larceny or any felony. State v. Belcher, 121 W.Va. 170, 2 S.E.2d 257 (1939). The felony or larceny need not be described with the same technical accuracy as in an indictment for those offenses.

4. The only element of larceny necessary to be shown for a burglary conviction is the intent to commit the larceny. Thus, larceny is not a lesser included offense of burglary. State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1981).

ENTERING WITHOUT BREAKING
(Entry without breaking dwelling in the daytime).
OWNERSHIP

For the purpose of establishing the crime of breaking and entering, ownership of the building involved means possession or occupancy, not title.[1]

FOOTNOTES

[1] Syl. pt. 1, Newcomb v. Coiner, 154 W.Va. 653, 178 S.E.2d 155 (1970).

ENTERING WITHOUT BREAKING
(Entry without breaking dwelling in the daytime).
UNDERLYING CRIME

_____ (state offense) is the:

(Define underlying crime).

BREAKING AND ENTERING [1]
(Breaking and entering or entry without breaking building, (other than dwelling) or boat or vessel).

Breaking and entering is committed if, at any time, a person breaks and enters, or enters without breaking, any shop, storehouse, warehouse, banking house, or any house or building, other than a dwelling house or outhouse adjoining thereto or occupied therewith, or any railroad or traction car, propelled by steam, electricity or otherwise, or any steamboat or other boat or vessel, with the intent to commit a felony or any larceny.[2]

To prove the commission of breaking and entering, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. a. did feloniously [3] break and enter
   b. did feloniously [3] enter without breaking
3. any
   a. shop
   b. storehouse
   c. warehouse
   d. banking house
   e. house or building other than a dwelling house [4] or outhouse adjoining thereto or occupied therewith [5]
   f. railroad or traction car, propelled by steam, electricity or otherwise,
   g. steamboat or other boat or vessel
4. with intent to commit
   a. the felony of _____;[6]
   b. a larceny.[7]

FOOTNOTES

[1] The primary difference between burglary and breaking and entering is that the former involves the breaking and entering or entering without breaking of a dwelling house or outbuilding adjoining thereto at nighttime or breaking and entering of a dwelling house or outbuilding adjoining thereto during the daytime. W.Va.Code, 61-3-11(a). If there is an entering without breaking of a dwelling during the daytime, W.Va.Code, 61-3-11(b), or the breaking and entering or entering without breaking of certain structures enumerated in W.Va.Code, 61-3-12, the offense is a felony with a penalty of one to ten years. These latter offenses are commonly called "breaking and entering" or "entering without breaking." In all the offenses, the entry must be with the intent to commit a felony or any larceny. Footnote 5, State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1981).

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[2] W.Va.Code, 61-3-12 (1923).

[3] An indictment for common-law burglary must charge the breaking and entering to have been done "feloniously and burglariously." State v. McDonald, 9 W.Va. 456 (1876).

[4] The term "dwelling house", ...includes, but is not limited to, a mobile home, house trailer, modular home, factory-built home or self-propelled motor home, used as a dwelling regularly or only from time to time, or any other nonmotive vehicle primarily designed for human habitation and occupancy and used as a dwelling regularly or only from time to time. W.Va.Code, 61-3-11(c) (1993).

A building, suitable for residential purposes, having been so designated and used, and equipped with household furnishings, remains a dwelling house though temporarily unoccupied, if the householder intends to return. Entry of such temporarily unoccupied building in the nighttime, with or without breaking, with intent to commit a felony or any larceny therein, constitutes burglary under this section. State v. Bair, 112 W.Va. 655, 166 S.E. 369 (1932).

A structure is no longer a "dwelling house" for the purposes of West Virginia's burglary statute, W.Va.Code, 61-3-11, when its occupants leave it without any intention of returning. State v. Scarberry, 418 S.E.2d 3, 364 (W.Va. 1992).

[5] An outhouse...must be a house within the ordinary meaning of the word and must adjoin the dwelling house of its owner or be occupied in connection therewith. State v. Neff, 122 W.Va. 549, 11 S.E.2d 171 (1940).

[6] Defined in separate instruction.

In prosecuting for breaking and entering with intent to commit larceny, an instruction is prejudicial if it does not sufficiently describe a larceny or any felony. State v. Belcher, 121 W.Va. 170, 2 S.E.2d 257 (1939). The felony or larceny need not be described with the same technical accuracy as in an indictment for those offenses.

[7] Definition of larceny provided in separate instruction.

COMMENTS

1. A burglary is complete once there has been an unauthorized entry and an intent to commit a felony, State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1981).

The common-law definition of burglary consisted of (1) breaking and (2) entering of (3) a dwelling house (4) of another (5) in the nighttime (6) with the intent to commit a felony therein. Footnote 1, State v. Louk, supra, at 434.

2. "Under W.Va.Code, 61-3-11(a) (1973), the essential requirement of burglary committed in the nighttime is that the defendant 'enter...with intent to commit a felony or any larceny'. The intent and the acts of the defendant are

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controlling, and the consent of the occupant to entry is not a defense when the defendant is shown to have entered through fraud or threat of force with the requisite criminal intent. The entry requirement is also fulfilled when a person with consent to enter exceeds the scope of the consent granted." Syl. pt. 1, State v. Plumley, 181 W.Va. 685, 384 S.E.2d 130 (1989).

3. "An indictment which charges that a defendant broke and entered a gasoline service station" with intent to commit larceny, is fatally defective as an indictment for burglary, for the reason that the term "service station" cannot be held to be included in the structures enumerated in W.Va.Code, 61-3-12, as those which may be the subject of burglary." Syl. pt. 1, State v. Stone, 127 W.Va. 429, 33 S.E.2d 144 (1945).

BREAKING AND ENTERING
(Breaking and entering or entry without breaking building, (other than dwelling) or boat or vessel).
UNDERLYING FELONY

_____ (felony) is the:

(Define underlying felony).

BREAKING AND ENTERING
(Breaking and entering or entry without breaking building, (other than dwelling) or boat or vessel).
LARCENY

Larceny is the unlawful stealing, taking and carrying away of the personal property of another, against his will, with the intent to permanently deprive the owner of his property.[1]

FOOTNOTES

[1] State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1981).

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

BREAKING AND ENTERING
(Breaking and entering or entry without breaking auto, motorcar or bus).

Breaking and entering is committed if any person shall, at any time, break and enter, or shall enter without breaking, any automobile, motorcar or bus, with intent to commit a felony or any larceny.[1]

To prove the commission of this offense the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. a. did break and enter
   b. did enter without breaking
3. any
   a. automobile
   b. motorcar
   c. bus
4. with intent to commit
   a. the felony of _____[2]
   b. any larceny.[3]

FOOTNOTES

[1] W.Va.Code, 61-3-12 (1923).

[2] Defined in separate instruction.

In prosecuting for breaking and entering with intent to commit larceny, an instruction is prejudicial if it does not sufficiently describe a larceny or any felony. State v. Belcher, 121 W.Va. 170, 2 S.E.2d 257 (1939). The felony or larceny need not be described with the same technical accuracy as in an indictment for those offenses.

[3] Defined in separate instruction.

BREAKING AND ENTERING
(Breaking and entering or entry without breaking auto, motorcar or bus).
UNDERLYING FELONY

_____ (felony) is the:

(Define underlying felony).

BREAKING AND ENTERING
(Breaking and entering or entry without breaking auto, motorcar or bus).
LARCENY

Larceny is the unlawful stealing, taking and carrying away of the personal property of another, against his will, with the intent to permanently deprive the owner of his property.[1]

FOOTNOTES

[1] State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1981).

GRAND LARCENY

Grand larceny is the unlawful and felonious stealing, taking and carrying away of another person's personal property of the value of two hundred dollars or more, against his will, with the felonious intent to permanently deprive the owner of his property.[1]

To prove the commission of grand larceny, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. unlawfully and
3. feloniously [2]
4. stole, took and carried away
5. _____, (describe property)
6. of the value of two hundred dollars or more,
7. the personal property of _____[3]
8. against _____'s will
9. with the felonious intent to permanently deprive _____ of the property.[4]

FOOTNOTES

[1] Crow v. Coiner, 323 F.Supp. 555 (N.D.W.Va. 1971); State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1981); See State v. Tharp, 184 W.Va. 292, 400 S.E.2d 300 (1990).

[2] Indictment must charge that acts were done feloniously. State ex rel. Harding v. Boles, 150 W.Va. 534, 148 S.E.2d 169 (1966), overruled on other grounds, State v. Manns, 174 W.Va. 793, 329 S.E.2d 865 (1985).

[3] The generally recognized rule relating to the conformity of proof in a larceny case is that the proof must show ownership of the property stolen in a person of the same name stated in the indictment, although an immaterial variance may be disregarded in the absence of prejudice to the accused. State v. Scarberry, 418 S.E.2d 3, 365 (W.Va. 1992).

[4] " 'The animus furandi, or the intent to take and deprive another of his property, is an essential element in the crimes of robbery and larceny.' Syl. pt. 2, State v. McCoy, 63 W.Va. 69, 59 S.E. 758 (1907)." Syl. pt. 1, State v. Wolfe, 166 W.Va. 815, 277 S.E.2d 640 (1981). State v. Simmons, 168 W.Va. 400, 285 S.E.2d 136 (1981).

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COMMENTS

1. Breaking and entering and larceny are distinct and separate offenses and indictment and conviction for both offenses even though they occurred close in time does not violate double jeopardy principles. State v. Johnson, 179 W.Va. 9, 371 S.E.2d 340 (1988).

2. "...The distinction between embezzlement and larceny is that embezzlement is the wrongful conversion of property without trespass, or where the original taking and possession is lawful. In order to constitute the offense, it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes." State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905). Quoted in State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980); State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53, 56 (1985).

Although a common law larceny indictment will support an embezzlement conviction, if the state proves the elements of embezzlement, it is a basic tenet of law that the jury must be instructed on the elements of embezzlement before a conviction can be sustained by proof of them. State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53 (1985).

PETIT LARCENY

Petit larceny is the unlawful stealing, taking and carrying away of another person's personal property of the value of less than two hundred dollars, against his will, with the intent to permanently deprive the owner of his property.[1]

To prove the commission of petit larceny, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. unlawfully
3. stole, took and carried away
4. _____, (describe property)
5. of the value of less than two hundred dollars
6. the personal property of _____[2]
7. against _____'s will
8. with the intent to permanently deprive _____ of the property.[3]

FOOTNOTES

[1] Crow v. Coiner, 323 F.Supp. 555 (N.D.W.Va. 1971); State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1981).

[2] The generally recognized rule relating to the conformity of proof in a larceny case is that the proof must show ownership of the property stolen in a person of the same name stated in the indictment, although an immaterial variance may be disregarded in the absence of prejudice to the accused. State v. Scarberry, 418 S.E.2d 3, 365 (W.Va. 1992).

[3] " 'The animus furandi, or the intent to take and deprive another of his property, is an essential element in the crimes of robbery and larceny.' Syl. pt. 2, State v. McCoy, 63 W.Va. 69, 59 S.E. 758 (1907)." Syl. pt. 1, State v. Wolfe, 166 W.Va. 815, 277 S.E.2d 640 (1981). State v. Simmons, 168 W.Va. 400, 285 S.E.2d 136 (1981).

COMMENTS

1. Breaking and entering and larceny are distinct and separate offenses and indictment and conviction for both offenses even though they occurred close in time does not violate double jeopardy principles. State v. Johnson, 179 W.Va. 9, 371 S.E.2d 340 (1988).

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2. "...The distinction between embezzlement and larceny is that embezzlement is the wrongful conversion of property without trespass, or where the original taking and possession is lawful. In order to constitute the offense, it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes." State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905). Quoted in State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980); State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53, 56 (1985).

Although a common law larceny indictment will support an embezzlement conviction, if the state proves the elements of embezzlement, it is a basic tenet of law that the jury must be instructed on the elements of embezzlement before a conviction can be sustained by proof of them. State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53 (1985).

3. When a person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he has been before sentenced in the United States for the like offense, he shall be sentenced to be confined in the penitentiary for the term of one year. W.Va.Code, 61-11-20. State ex rel. Roach v. Dietrick, 185 W.Va. 23, 404 S.E.2d 415 (1991).

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

EMBEZZLEMENT
(GRAND LARCENY)

Embezzlement is committed if any officer, agent, clerk or servant of this State, or of any county, district, school district, or municipal corporation, or other corporation, or any officer of public trust in this State, or any agent, clerk or servant of any firm or person, or company or association of persons not incorporated, embezzle or fraudulently convert to his own use, bullion, money, bank notes, drafts, security for money, or any effects or property of any other person, which shall have come into his possession, or been placed under his care or management, by virtue of his office, place or employment. [1]

In order to prove the commission of embezzlement, [2] the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. a. an officer, agent [3] clerk or servant of _____ (this State, or of any county, district, school district, or municipal corporation, or other corporation)
   b. an officer of public trust in this State
   c. an agent, [3] clerk or servant of any firm or person, or company or association of persons not incorporated
3. embezzled [4] or fraudulently converted [5] to his own use [6]
4. a. bullion, [7]
   b. money, [7]
   c. bank notes, [7]
   d. drafts, [7]
   e. security for money, [7]
   f. _____, (name any effects or property) [7]
5. of the value of two hundred dollars or more [8]
6. of _____ (any other person) [9]
7. which came into the defendant _____'s possession, [10] or was placed under the defendant _____'s care or management, by virtue of his office, place or employment [11]
8. with the intent to (permanently?) [12] deprive _____ (the other person) of the use and possession thereof. [13]

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FOOTNOTES

[1] This instruction leaves out the language "officer, agent, clerk or servant of any banking institution" found in this Code section. A separate instruction dealing with an officer, agent, clerk or servant of a banking institution has been drafted since the penalty for embezzlement by such person is stricter than the penalty for general embezzlement (which is tied to the larceny statute). W.Va.Code, 61-3-20 (1929).

[2] The crime of embezzlement is purely a statutory crime, the statutes being enacted to reach and punish fraudulent conversions which could not be reached under the common law pertaining to larceny. State v. Riley, 151 W.Va. 364, 151 S.E. 308 (1966); State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

"(I)n order to constitute the crime of embezzlement, it is necessary to show, (1) the trust relation of the person charged, and that he falls within that class of persons named; (2) that the property or thing claimed to have been embezzled or converted is such property as is embraced in the statute; (3) that it is the property of another person; (4) that it came into the possession, or was placed in the care, of the accused, under and by virtue of his office, place or employment; (5) that his manner of dealing with or disposing of the property, constituted a fraudulent conversion and an appropriation of the same to his own use, and (6) that the conversion of the property to his own use was with the intent to deprive the owner thereof." Syl. pt. 1, State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980), citing Syl. pt. 2 of State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

[3] Separate instruction on agency provided.

[4] Separate instruction on embezzlement provided.

[5] Separate instruction on conversion provided.

[6] To appropriate to one's own use, does not necessarily mean to one's personal use or advantage, State v. Cantor, 93 W.Va. 238, 116 S.E. 396 (1923).

[7] "...And it shall not be necessary to describe in the indictment, or to identify upon the trial, the particular bullion, money, bank note, draft or security for money which is so taken, converted to his own use, or embezzled..." W.Va.Code, 61-3-20.

[8] Our embezzlement statute, except for banking employees, is tied to the larceny statute for punishment. State v. Wetzel, 75 W.Va. 7, 83 S.E. 68 (1914). See W.Va.Code, 61-3-13 for distinction between and penalties for grand and petit larceny. (As of the date of this publication, May, 1991, simple larceny of goods or chattels of the value of two hundred dollars or more is grand larceny; simple larceny of goods or chattels of the value of less than two hundred dollars is petit larceny).

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[9] Separate instruction on ownership provided.

[10] Actual possession (by embezzler) not necessary. State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980), citing State v. Workman, 91 W.Va. 771, 114 S.E. 276 (1922).

[11] Separate instruction on trust relationship provided.

[12] See footnote 4, State v. Brown, 422 S.E.2d 489 (W.Va. 1992)

[13] Separate instruction on intent provided.

COMMENTS

1. "...The distinction between embezzlement and larceny is that embezzlement is the wrongful conversion of property without trespass, or where the original taking and possession is lawful. In order to constitute the offense, it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes." State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905). Quoted in State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980); State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53, 56 (1985).

Although a common law larceny indictment will support an embezzlement conviction, if the state proves the elements of embezzlement, it is a basic tenet of law that the jury must be instructed on the elements of embezzlement before a conviction can be sustained by proof of them. State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53 (1985).

2. "Where the State elects to cumulate separate acts of embezzlement in one indictment on the theory they were committed pursuant to a common design and common criminal intent, it must prove such common design and common criminal intent, and the question of whether the cumulative act is grand or petit larceny by embezzlement may depend on the proof and would be determined by the jury upon proper instruction." Syl. pt. 7, State ex rel. Cogar v. Kidd, 160 W.Va. 371, 234 S.E.2d 899 (1977).

EMBEZZLEMENT
(GRAND LARCENY)
AGENT [1]

The agency of one charged with the embezzlement of money or other property is sufficiently established by evidence showing that the agency related to the single transaction of entrusting the property embezzled to the defendant, and no previous relationship of principal and agent is necessary.

An agency is considered to come within the statute whether the contract of agency provides for compensation or not.

The agency relationship need not be a formalized agreement, but occurs as the result of a trust relationship where a person is entrusted with the possession of another's property.

"Agent" can be anyone entrusted with property by virtue of his position, and not simply an agent within the strict definition of the common law.

If at the time of a fraudulent conversion the accused was an agent for any purpose and the property appropriated was entrusted to him by virtue of such agency, embezzlement is committed. It is not the extent of the authority conferred, but the fact of the relationship which constitutes the agency, which is an essential element of the crime of embezzlement.

FOOTNOTES

[1] State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980).

EMBEZZLEMENT
(GRAND LARCENY)
EMBEZZLE

Embezzlement is a fraudulent appropriation or misapplication of the property of another by one in whose care it has been entrusted, with the intention of depriving the owner thereof.[1]

FOOTNOTES

[1] Syl. pt. 1, State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

EMBEZZLEMENT
(GRAND LARCENY)
CONVERSION

Conversion is the fraudulent appropriation of another's property to one's own use.[1]

Conversion is an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to alter their condition or exclude the owner's rights.[2]

FOOTNOTES

[1] State v. Holley, 115 W.Va. 464, 177 S.E. 302 (1934); State v. Pietranton, 140 W.Va. 444, 84 S.E.2d. 774 (1954).

[2] State v. Pietranton, 140 W.Va. 444, 84 S.E.2d 774 (1954); State v. De Berry, 75 W.Va. 632, 84 S.E. 508 (1915).

EMBEZZLEMENT
(GRAND LARCENY)
OWNERSHIP

The taking of the property need not be from the actual owner of the property, but may be from one who has lawful possession of it.[1]

FOOTNOTES

[1] State v. De Berry, 75 W.Va. 632, 84 S.E. 508 (1915); State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980).

EMBEZZLEMENT
(GRAND LARCENY)
TRUST RELATIONSHIP

In order for a taking to be embezzlement and not larceny, the money or property must have come into the possession of the accused lawfully, or with the consent of the owner, and a fiduciary relationship must have existed between the owner and the offender.[1]

The hallmark of embezzlement is the trust relationship and the subsequent conversion or appropriation of the entrusted property.[2]

FOOTNOTES

[1] State v. Smith, 97 W.Va. 313, 125 S.E. 90 (1924); State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

[2] State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980).

EMBEZZLEMENT
(GRAND LARCENY)
INTENT

To warrant a conviction for embezzlement, the accused must have had the present intent to commit the offense at the time.[1]

It is not necessary in cases of embezzlement that the defendant should have been guilty of trespass in removing personal property in the first instance, if after obtaining possession thereof lawfully he conceived the intent and purpose to deprive the owner thereof and effected a conversion of the goods, his crime was complete.[2]

FOOTNOTES

[1] State v. Smith, 97 W.Va. 313, 125 S.E. 90 (1924); State v. Cobb, 122 W.Va. 97, 7 S.E.2d 443 (1940).

[2] State v. De Berry, 75 W.Va. 632, 84 S.E. 508 (1915).

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

EMBEZZLEMENT
(PETIT LARCENY)

Embezzlement is committed if any officer, agent, clerk or servant of this State, or of any county, district, school district, or municipal corporation, or other corporation, or any officer of public trust in this State, or any agent, clerk or servant of any firm or person, or company or association of persons not incorporated, embezzle or fraudulently convert to his own use, bullion, money, bank notes, drafts, security for money, or any effects or property of any other person, which shall have come into his possession, or been placed under his care or management, by virtue of his office, place or employment.[1]

In order to prove the commission of embezzlement,[2] the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. a. an officer, agent[3] clerk or servant of _____ (this State, or of any county, district, school district, or municipal corporation, or other corporation)
   b. an officer of public trust in this State
   c. an agent,[3] clerk or servant of any firm or person, or company or association of persons not incorporated
3. embezzled[4] or fraudulently converted[5] to his own use[6]
4. a. bullion,[7]
   b. money,[7]
   c. bank notes,[7]
   d. drafts,[7]
   e. security for money,[7]
   f. _____, (name any effects or property)[7]
5. of the value of less than two hundred dollars[8]
6. of _____ (any other person)[9]
7. which came into the defendant _____'s possession,[10] or was placed under the defendant _____'s care or management, by virtue of his office, place or employment[11]
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[1] This instruction leaves out the language "officer, agent, clerk or servant of any banking institution" found in this Code section. A separate instruction dealing with an officer, agent, clerk or servant of a banking institution has been drafted since the penalty for embezzlement by such person is stricter than the penalty for general embezzlement (which is tied to the larceny statute), W.Va.Code, 61-3-20 (1929).

[2] The crime of embezzlement is purely a statutory crime, the statutes being enacted to reach and punish fraudulent conversions which could not be reached under the common law pertaining to larceny. State v. Riley, 151 W.Va. 364, 151 S.E. 308 (1966); State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

"(I)n order to constitute the crime of embezzlement, it is necessary to show, (1) the trust relation of the person charged, and that he falls within that class of persons named; (2) that the property or thing claimed to have been embezzled or converted is such property as is embraced in the statute; (3) that it is the property of another person; (4) that it came into the possession, or was placed in the care, of the accused, under and by virtue of his office, place or employment; (5) that his manner of dealing with or disposing of the property, constituted a fraudulent conversion and an appropriation of the same to his own use, and (6) that the conversion of the property to his own use was with the intent to deprive the owner thereof." Syl. pt. 1, State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980), citing Syl. pt. 2 of State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

[3] Separate instruction on agency provided.

[4] Separate instruction on embezzlement provided.

[5] Separate instruction on conversion provided.

[6] To appropriate to one's own use, does not necessarily mean to one's personal use or advantage, State v. Cantor, 93 W.Va. 238, 116 S.E. 396 (1923).

[7] "...And it shall not be necessary to describe in the indictment, or to identify upon the trial, the particular bullion, money, bank note, draft or security for money which is so taken, converted to his own use, or embezzled..." W.Va.Code, 61-3-20.

[8] Our embezzlement statute, except for banking employees, is tied to the larceny statute for punishment. State v. Wetzel, 75 W.Va. 7, 83 S.E. 68 (1914). See W.Va.Code, 61-3-13 for distinctions between and penalties for grand and petit larceny. (As of the date of this publication, May, 1991, a simple larceny of goods or chattels of the value of two hundred dollars or more is grand larceny; a simple larceny of goods or chattels of the value of less than two hundred dollars is petit larceny).

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[9] Separate instruction on ownership provided.

[10] Actual possession (by embezzler) not necessary. State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980), citing State v. Workman, 91 W.Va. 771, 114 S.E. 276 (1922).

[12] See footnote 4, State v. Brown, 422 S.E.2d 489 (W.Va. 1992).

[13] Separate instruction on intent provided.

COMMENTS

1. "...The distinction between embezzlement and larceny is that embezzlement is the wrongful conversion of property without trespass, or where the original taking and possession is lawful. In order to constitute the offense, it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes." State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905). Quoted in State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980); State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53, 56 (1985).

Although a common law larceny indictment will support an embezzlement conviction, if the state proves the elements of embezzlement, it is a basic tenet of law that the jury must be instructed on the elements of embezzlement before a conviction can be sustained by proof of them. State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53 (1985).

2. "Where the State elects to cumulate separate acts of embezzlement in one indictment on the theory they were committed pursuant to a common design and common criminal intent, it must prove such common design and common criminal intent, and the question of whether the cumulative act is grand or petit larceny by embezzlement may depend on the proof and would be determined by the jury upon proper instruction." Syl. pt. 7, State ex rel. Cogar v. Kidd, 160 W.Va. 371, 234 S.E.2d 899 (1977).

3. When a person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he has been before sentenced in the United States for the like offense, he shall be sentenced to be confined in the penitentiary for the term of one year. W.Va.Code, 61-11-20. State ex rel. Roach v. Dietrick, 185 W.Va. 23, 404 S.E.2d 415 (1991).

EMBEZZLEMENT
(PETIT LARCENY)
AGENT [1]

The agency of one charged with the embezzlement of money or other property is sufficiently established by evidence showing that the agency related to the single transaction of entrusting the property embezzled to the defendant, and no previous relationship of principal and agent is necessary.

An agency is considered to come within the statute whether the contract of agency provides for compensation or not.

The agency relationship need not be a formalized agreement, but occurs as the result of a trust relationship where a person is entrusted with the possession of another's property.

"Agent" can be anyone entrusted with property by virtue of his position, and not simply an agent within the strict definition of the common law.

If at the time of a fraudulent conversion the accused was an agent for any purpose and the property appropriated was entrusted to him by virtue of such agency, embezzlement is committed. It is not the extent of the authority conferred, but the fact of the relationship which constitutes the agency, which is an essential element of the crime of embezzlement.

FOOTNOTES

[1] State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980).

EMBEZZLEMENT
(PETIT LARCENY)
EMBEZZLE

Embezzlement is a fraudulent appropriation or misapplication of the property of another by one in whose care it has been entrusted, with the intention of depriving the owner thereof.[1]

FOOTNOTES

[1] Syl. pt. 1, State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

EMBEZZLEMENT
(PETIT LARCENY)
CONVERSION

Conversion is the fraudulent appropriation of another's property to one's own use.[1]

Conversion is an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to alter their condition or exclude the owner's rights. [2]

FOOTNOTES

[1] State v. Holley, 115 W.Va. 464, 177 S.E. 302 (1934); State v. Pietranton, 140 W.Va. 444, 84 S.E.2d. 774 (1954).

[2] State v. Pietranton, 140 W.Va. 444, 84 S.E.2d 774 (1954); State v. De Berry, 75 W.Va. 632, 84 S.E. 508 (1915).

EMBEZZLEMENT
(PETIT LARCENY)
OWNERSHIP

The taking of the property need not be from the actual owner of the property, but may be from one who has lawful possession of it.[1]

FOOTNOTES

[1] State v. De Berry, 75 W.Va. 632, 84 S.E. 508 (1915); State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980).

EMBEZZLEMENT
(PETIT LARCENY)
TRUST RELATIONSHIP

In order for a taking to be embezzlement and not larceny, the money or property must have come into the possession of the accused lawfully, or with the consent of the owner, and a fiduciary relationship must have existed between the owner and the offender.[1]

The hallmark of embezzlement is the trust relationship and the subsequent conversion or appropriation of the entrusted property.[2]

FOOTNOTES

[1] State v. Smith, 97 W.Va. 313, 125 S.E. 90 (1924); State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

[2] State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980).

EMBEZZLEMENT
(PETIT LARCENY)
INTENT

To warrant a conviction for embezzlement, the accused must have had the present intent to commit the offense at the time.[1]

It is not necessary in cases of embezzlement that defendant should have been guilty of trespass in removing personal property in the first instance, if after obtaining possession thereof lawfully he conceived the intent and purpose to deprive the owner thereof and effected a conversion of the goods, his crime was complete.[2]

FOOTNOTES

[1] State v. Smith, 97 W.Va. 313, 125 S.E. 90 (1924); State v. Cobb, 122 W.Va. 97, 7 S.E.2d 443 (1940).

[2] State v. De Berry, 75 W.Va. 632, 84 S.E. 508 (1915).

EMBEZZLEMENT
(By officer, agent, clerk or servant of a banking institution).

Embezzlement is committed if any officer, agent, clerk or servant of any banking institution embezzle or fraudulently convert to his own use, bullion, money, bank notes, drafts, security for money, or any effects or property of any other person, which shall have come into his possession, or been placed under his care or management, by virtue of his office, place or employment. [1]

In order to prove the commission of embezzlement, [2] the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. a. an officer,
   b. agent [3]
   c. clerk
   d. servant
3. of _____ (name banking institution)
4. embezzled [4] or fraudulently converted [5] to his own use [6]
5. a. bullion, [7]
   b. money, [7]
   c. bank notes, [7]
   d. drafts, [7]
   e. security for money, [7]
   f. _____, (name any effects or property) [7]
6. of _____ (any other person) [8]
7. which came into the defendant _____'s possession, [9] or was placed under the defendant _____'s care or management, by virtue of his office, place or employment [10]
8. with the intent to (permanently?) [12] deprive _____ (the other person) of the use and possession thereof. [11]

FOOTNOTES

[1] W.Va.Code, 61-3-20 (1929).

[2] The crime of embezzlement is purely a statutory crime, the statutes being enacted to reach and punish fraudulent conversions which could not be reached under the common law pertaining to larceny. State v. Riley, 151 W.Va. 364, 151 S.E. 308 (1966); State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

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"(I)n order to constitute the crime of embezzlement, it is necessary to show, (1) the trust relation of the person charged, and that he falls within that class of persons named; (2) that the property or thing claimed to have been embezzled or converted is such property as is embraced in the statute; (3) that it is the property of another person; (4) that it came into the possession, or was placed in the care, of the accused, under and by virtue of his office, place or employment; (5) that his manner of dealing with or disposing of the property, constituted a fraudulent conversion and an appropriation of the same to his own use, and (6) that the conversion of the property to his own use was with the intent to deprive the owner thereof." Syl. pt. 1, State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980), citing syl. pt. 2 of State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

[3] Separate instruction on agency provided.

[4] Separate instruction on embezzlement provided.

[5] Separate instruction on conversion provided.

[6] To appropriate to one's own use, does not necessariiy mean to one's personal use or advantage, State v. Cantor, 93 W.Va. 238, 116 S.E. 396 (1923).

[7] "...And it shall not be necessary to describe in the indictment, or to identify upon the trial, the particular bullion, money, bank note, draft or security for money which is so taken, converted to his own use, or embezzled..." W.Va.Code, 61-3-20.

[8] Separate instruction on ownership provided.

[9] Actual possession (by embezzler) not necessary. State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980), citing State v. Workman, 91 W.Va. 771, 114 S.E. 276 (1922).

[10] Separate instruction on trust relationship provided.

[11] See footnote 4, State v. Brown, 422 S.E.2d 489 (W.Va. 1992).

[12] Separate instruction on intent provided.

COMMENTS

1. "...The distinction between embezzlement and larceny is that embezzlement is the wrongful conversion of property without trespass, or where the original taking and possession is lawful. In order to constitute the offense, it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes." State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905). Quoted in State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980); State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53, 56 (1985).

Although a common law larceny indictment will support an embezzlement conviction, if the state proves the elements of embezzlement, it is a basic tenet of law that the jury must be instructed on the elements of embezzlement before a conviction can be sustained by proof of them. State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53 (1985).

EMBEZZLEMENT
(By officer, agent, clerk or servant of a banking institution).

AGENT [1]

The agency of one charged with the embezzlement of money or other property is sufficiently established by evidence showing that the agency related to the single transaction of entrusting the property embezzled to the defendant, and no previous relationship of principal and agent is necessary.

An agency is considered to come within the statute whether the contract of agency provides for compensation or not.

The agency relationship need not be a formalized agreement, but occurs as the result of a trust relationship where a person is entrusted with the possession of another's property.

"Agent" can be anyone entrusted with property by virtue of his position, and not simply an agent within the strict definition of the common law.

If at the time of a fraudulent conversion the accused was an agent for any purpose and the property appropriated was entrusted to him by virtue of such agency, embezzlement is committed. It is not the extent of the authority conferred, but the fact of the relationship which constitutes the agency, which is an essential element of embezzlement.

FOOTNOTES

[1] State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980).

EMBEZZLEMENT
(By officer, agent, clerk or servant of a banking institution).

EMBEZZLE

Embezzlement is a fraudulent appropriation or misapplication of the property of another by one in whose care it has been entrusted, with the intention of depriving the owner thereof.[1]

FOOTNOTES

[1] Syl. pt. 1, State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905).

EMBEZZLEMENT
(By officer, agent, clerk or servant of a banking institution).

CONVERSION

Conversion is the fraudulent appropriation of another's property to one's own use.[1]

Conversion is an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to alter their condition or exclude the owner's rights.[2]

FOOTNOTES

[1] State v. Holley, 115 W.Va. 464, 177 S.E. 302 (1934); State v. Pietranton, 140 W.Va. 444, 84 S.E.2d. 774 (1954).

[2] State v. Pietranton, 140 W.Va. 444, 84 S.E.2d 774 (1954); State v. De Berry, 75 W.Va. 632, 84 S.E. 508 (1915).

EMBEZZLEMENT
(By officer, agent, clerk or servant of a banking institution).

OWNERSHIP

The taking of the property need not be from the actual owner of the property, but may be from one who has lawful possession of it.[1]

FOOTNOTES

[1] State v. De Berry, 75 W.Va. 632, 84 S.E. 508 (1915); State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980).

EMBEZZLEMENT
(By officer, agent, clerk or servant of a banking institution).

TRUST RELATIONSHIP

In order for a taking to be embezzlement and not larceny, the money or property must have come into the possession of the accused lawfully, or with the consent of the owner, and a fiduciary relationship must have existed between the owner and the offender.[1]

The hallmark of embezzlement is the trust relationship and the subsequent conversion or appropriation of the entrusted property.[2]

FOOTNOTES

[1] State v. Smith, 97 W.Va. 313, 125 S.E. 90 (1924); State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (W.Va. 1905).

[2] State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980).

EMBEZZLEMENT
(By officer, agent, clerk or servant of a banking institution).

INTENT

To warrant a conviction for embezzlement, the accused must have had the present intent to commit the offense at the time.[1]

It is not necessary in cases of embezzlement that defendant should have been guilty of trespass in removing personal property in the first instance, if after obtaining possession thereof lawfully he conceived the intent and purpose to deprive the owner thereof and effected a conversion of the goods, his crime was complete.[2]

FOOTNOTES

[1] State v. Smith, 97 W.Va. 313, 125 S.E. 90 (1924); State v. Cobb, 122 W.Va. 97, 7 S.E.2d 443 (1940).

[2] State v. De Berry, 75 W.Va. 632, 84 S.E. 508 (1915).

EMBEZZLEMENT
(GRAND LARCENY)
(By a public official of public funds).[1]

Embezzlement is committed if any officer, agent, clerk or servant of this State, or of any county, district, school district, or municipal corporation, shall appropriate or use for his own benefit, or for the benefit of any other person, any bullion, money, bank notes, drafts, security for money, or funds, belonging to this State or to any such county, district, school district or municipal corporation.[2]

In order to prove the commission of embezzlement, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. a. an officer,
   b. agent,[3]
   c. clerk
   d. servant
3. of _____ (this State, or of any county, district, school district, or municipal corporation)
4. intentionally _____ (describe act or acts)[4]
5. that resulted in the appropriation or use for his own benefit, or for the benefit of any other person,
6. a. bullion,[5]
   b. money,[5]
   c. bank notes,[5]
   d. drafts,[5]
   e. security for money,[5]
   f. funds[5]
7. of the value of two hundred dollars or more[6]
8. belonging to _____ (this State or to any such county district, school district or municipal corporation).

FOOTNOTES

[1] It appears from a comparison of the two embezzlement crimes in -3-20 that the crime of embezzlement by a public official does not contain as many elements of proof as the general embezzlement crime.

It is generally recognized that the Legislature may set higher standards on public officials by defining embezzlement by public officials without all of the elements found in the general embezzlement statutes. (Cites omitted). Footnote 4, State ex rel. Cogar v. Kidd, 160 W.Va. 371, 234 S.E.2d 899 (1977).

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[2] W.Va.Code, 61-3-20 (1929).

[3] Separate instruction on agency provided.

[4] "The crime of embezzlement by a public official, as that offense is set forth in West Virginia Code § 61-3-20 (1989), is not a specific intent crime." Syl. pt. 1, State v. Brown, 422 S.E.2d 489 (W.Va. 1992).

"While proof of intent to steal or misappropriate is not required, proof that the public official intended to do the act or acts that resulted in the embezzlement is necessary to convict a public official of embezzlement pursuant to the second paragraph of West Virginia Code § 61-3-20 (1989)." Syl. pt. 2, State v. Brown, 422 S.E.2d 489 (W.Va. 1992).

[5] "...it shall not be necessary to describe in the indictment, or to identify upon the trial, the particular bullion, money, bank notes, drafts, security for money, or funds, appropriated or used for his own benefit or for the benefit of any other person." W.Va.Code, 61-3-20.

[6] Our embezzlement statute, except for banking employees, is tied to the larceny statute for punishment.

See W.Va.Code, 61-3-13 for the distinction between and penalties for grand and petit larceny. (As of the date of this publication, May, 1991, a simple larceny of goods or chattels of the value of two hundred dollars or more is grand larceny; a simple larceny of goods or chattels of the value of less than two hundred dollars is petit larceny).

COMMENTS

1. "...The distinction between embezzlement and larceny is that embezzlement is the wrongful conversion of property without trespass, or where the original taking and possession is lawful. In order to constitute the offense, it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes." State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905). Quoted in State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980); State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53, 56 (1985).

Although a common law larceny indictment will support an embezzlement conviction, if the state proves the elements of embezzlement, it is a basic tenet of law that the jury must be instructed on the elements of embezzlement before a conviction can be sustained by proof of them. State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53 (1985).

2. "Where the State elects to cumulate separate acts of embezzlement in one indictment on the theory they were committed pursuant to a common design and common criminal intent, it must prove such common design and common criminal intent, and the question of whether the cumulative act is grand or petit larceny by embezzlement may depend on the proof and would be determined by the jury upon proper instruction." Syl. pt. 7, State ex rel. Cogar v. Kidd, 160 W.Va. 371, 234 S.E.2d 899 (1977).

EMBEZZLEMENT
(GRAND LARCENY)
(By a public official of public funds).

AGENT [1]

The agency of one charged with the embezzlement of money or other property is sufficiently established by evidence showing that the agency related to the single transaction of entrusting the property embezzled to the defendant, and no previous relationship of principal and agent is necessary.

An agency is considered to come within the statute whether the contract of agency provides for compensation or not.

The agency relationship need not be a formalized agreement, but occurs as the result of a trust relationship where a person is entrusted with the possession of another's property.

"Agent" can be anyone entrusted with property by virtue of his position, and not simply an agent within the strict definition of the common law.

FOOTNOTES

[1] State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980).

EMBEZZLEMENT
(PETIT LARCENY)
(By a public official of public funds).[1]

Embezzlement is committed if any officer, agent, clerk or servant of this State, or of any county, district, school district, or municipal corporation, shall appropriate or use for his own benefit, or for the benefit of any other person, any bullion, money, bank notes, drafts, security for money, or funds, belonging to this State or to any such county, district, school district or municipal corporation.[2]

In order to prove the commission of embezzlement, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. a. an officer,
   b. agent, [3]
   c. clerk
   d. servant
3. of _____ (this State, or of any county, district, school district, or municipal corporation)
4. intentionally _____ (describe act or acts)[4]
5. that resulted in the appropriation or use for his own benefit, or for the benefit of any other person,
6. a. bullion, [5]
   b. money, [5]
   c. bank notes, [5]
   d. drafts, [5]
   e. security for money, [5]
   f. funds [5]
7. of the value of two hundred dollars or more [6]
8. belonging to _____ (this State or to any such county district, school district or municipal corporation).

FOOTNOTES

[1] It appears from a comparison of the two embezzlement crimes in -3-20 that the crime of embezzlement by a public official does not contain as many elements of proof as the general embezzlement crime. It is generally recognized that the Legislature may set higher standards on public officials by defining embezzlement by public officials without all of the elements found in the general embezzlement statutes. (Cites omitted). Footnote 4, State ex rel. Cogar v. Kidd, 160 W.Va. 371, 234 S.E.2d 899 (1977).

[2] W.Va.Code, 61-3-20 (1929).

[3] Separate instruction on agency provided.

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[4] "The crime of embezzlement by a public official, as that offense is set forth in West Virginia Code § 61-3-20 (1989), is not a specific intent crime." Syl. pt. 1, State v. Brown, 422 S.E.2d 489 (W.Va. 1992).

"While proof of intent to steal or misappropriate is not required, proof that the public official intended to do the act or acts that resulted in the embezzlement is necessary to convict a public official of embezzlement pursuant to the second paragraph of West Virginia Code, § 61-3-20 (1989)." Syl. pt. 2, State v. Brown, 422 S.E.2d 489 (W.Va. 1992).

[5] "...it shall not be necessary to describe in the indictment, or to identify upon the trial, the particular bullion, money, bank notes, drafts, security for money, or funds, appropriated or used for his own benefit or for the benefit of any other person." W.Va.Code, 61-3-20.

[6] Our embezzlement statute, except for banking employees, is tied to the larceny statute for punishment.

See W.Va.Code, 61-3-13 for the distinction between and penalties for grand and petit larceny. (As of the date of this publication, May, 1991, a simple larceny of goods or chattels of the value of two hundred dollars or more is grand larceny; a simple larceny of goods or chattels of the value of less than two hundred dollars is petit larceny).

COMMENTS

1. "...The distinction between embezzlement and larceny is that embezzlement is the wrongful conversion of property without trespass, or where the original taking and possession is lawful. In order to constitute the offense, it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose property he takes." State v. Moyer, 58 W.Va. 146, 52 S.E. 30 (1905). Quoted in State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980); State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53, 56 (1985).

Although a common law larceny indictment will support an embezzlement conviction, if the state proves the elements of embezzlement, it is a basic tenet of law that the jury must be instructed on the elements of embezzlement before a conviction can be sustained by proof of them. State v. Houdeyshell, 174 W.Va. 688, 329 S.E.2d 53 (1985).

2. "Where the State elects to cumulate separate acts of embezzlement in one indictment on the theory they were committed pursuant to a common design and common criminal intent, it must prove such common design and common criminal intent, and the question of whether the cumulative act is grand or petit larceny by embezzlement may depend on the proof and would be determined by the jury upon proper instruction." Syl. pt. 7, State ex rel. Cogar v. Kidd, 160 W.Va. 371, 234 S.E.2d 899 (1977).

3. When a person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he has been before sentenced in the United States for the like offense, he shall be sentenced to be confined in the penitentiary for the term of one year. W.Va.Code, 61-11-20. State ex rel. Roach v. Dietrick, 185 W.Va. 23, 404 S.E.2d 415 (1991).

EMBEZZLEMENT
(PETIT LARCENY)
(By a public official of public funds).[1]

AGENT [1]

The agency of one charged with the embezzlement of money or other property is sufficiently established by evidence showing that the agency related to the single transaction of entrusting the property embezzled to the defendant, and no previous relationship of principal and agent is necessary.

An agency is considered to come within the statute whether the contract of agency provides for compensation or not.

The agency relationship need not be a formalized agreement, but occurs as the result of a trust relationship where a person is entrusted with the possession of another's property.

"Agent" can be anyone entrusted with property by virtue of his position, and not simply an agent within the strict definition of the common law.

FOOTNOTES

[1] State v. Frasher, 164 W.Va. 572, 265 S.E.2d 43, 46 (1980).

BUYING OR RECEIVING STOLEN GOODS [1]
(GRAND LARCENY)

Buying or receiving stolen goods [2] is committed if any person buy or receive from another person any stolen goods or other thing of value, which he knows or has reason to believe has been stolen.

To prove the commission of buying or receiving stolen goods, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. bought or received
3. from _____ (another person) [3]
4. _____ (describe the property)
5. of the value of two hundred dollars or more [4]
6. which property belonged to _____
7. and was stolen by someone other than the defendant; [5]
8. at the time the defendant, _____, bought or received the property
9. he knew or had reason to believe the property was stolen [6]
10. and that he bought or received the property with a dishonest purpose. [7]

FOOTNOTES

[1] If any person buy or receive from another person, or aid in concealing, or transfer to a person other than the owner thereof, any stolen goods or other thing of value, which he knows or has reason to believe has been stolen, he shall be guilty of the larceny thereof, and may be prosecuted although the principal offender be not convicted. W.Va.Code, 61-3-18 (1923).

W.Va.Code, 61-3-18, contains a series of offenses which relate to stolen property and, despite some commonality in the elements, the offenses are separate and distinct...Syl. pt. 1, State v. Taylor, 176 W.Va. 671, 346 S.E.2d 822 (1986).

There is sufficient disparity between the crime of transferring stolen property from that of receiving or aiding in the concealing of stolen property to warrant the conclusion that it is a separate offense. State v. Tanner, 181 W.Va. 210, 382 S.E.2d 47 (1989).

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(NOTE - Under the principles set forth above, three separate instructions have been drafted: buying or receiving stolen goods; aiding in concealing stolen goods; and transferring stolen goods. (Note, however, syl. pt. 7, State v. Oldaker, 172 W.Va. 258, 304 S.E.2d 843 (1983) - Receiving or aiding in concealing a stolen item is the same offense for purposes of punishment, and it is incorrect to charge receiving stolen property in one count and concealing it in another for the same item of property). In footnote 8 of State v. Taylor, supra, the Court acknowledges the holding in State v. Oldaker, supra, although the holdings seem to be in conflict.

[2] "'The essential elements of the offense created by (W.Va.Code, 61-3-18 (1931)) are: (1) The property must have been previously stolen by some person other than the defendant; (2) the accused must have bought or received the property from another person or must have aided in concealing it; (3) he must have known, or had reason to believe, when he bought or received or aided in concealing the property, that it had been stolen; and (4) he must have bought or received or aided in concealing the property with a dishonest purpose.' State v. McGraw, 140 W.Va. 547, 550, 85 S.E.2d 849, 852 (1955)." Syl. pt. 3, State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986). Syl. pt. 6, State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982).

[3] Prior delivery to the defendant from another person is a necessary element of this offense. The mere discovery and appropriation of stolen goods by a person does not constitute a crime under this section. State v. Fowler, 117 W.Va. 7, 188 S.E. 137 (1936).

An indictment must allege the name of the person or persons from whom the stolen goods were bought or received, or that such goods were bought or received from a person or persons unknown to the grand jury. State v. Smith, 98 W.Va. 185, 126 S.E. 703 (1925).

[4] Violation of this section is punishable as larceny. State v. Oldaker, 172 W.Va. 258, 304 S.E.2d 843 (1983).

See W.Va.Code, 61-3-13 for the distinction between and penalties for grand and petit larceny. (As of the date of this publication, May, 1991, a simple larceny of goods or chattels of the value of two hundred dollars or more is grand larceny; a simple larceny of goods or chattels of the value of less than two hundred dollars is petit larceny).

If one is indicted for a simple larceny and upon the trial it appears that he did not actually steal the property but did receive it with knowledge of the theft, he is nevertheless guilty of the larceny and amenable to the same penalties. State v. West, 157 W.Va. 209, 200 S.E.2d 859 (1973).

[5] The first element requires that the property be stolen by some person other than the defendant. This is to prevent a person who is charged with theft of the property from also being charged with concealing it as well...State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982).

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[6] There are two ways that the offense may be committed: First by receiving goods knowing them to have been stolen, and second, by receiving goods with reason to believe that they were stolen. State v. Lewis, 117 W.Va. 670, 187 S.E. 315 (1936); State v. Mounts, 120 W.Va. 6, 200 S.E. 53 (1938).

Where one is charged with the crime is operating a legitimate business, it must be shown that actual knowledge had been brought home to him that the seller of the article was the thief or that the property had been stolen. State v. Wallace, 118 W.Va. 127, 189 S.E. 104 (1936).

[7] In a prosecution under this section for buying or receiving stolen goods, a jury must find beyond a reasonable doubt that the accused acted with a "dishonest purpose" before it can find him guilty of the offense, and the accused is entitled to have the jury properly instructed on the question of his intent. State v. Tanner, 181 W.Va. 210, 382 S.E.2d 47 (1989); State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986); State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976).

In Barker, supra, the appellant was charged with receiving stolen goods. The Court found having a dishonest purpose, at the time a defendant receives stolen property, is an essential element of the crime charged. The element of dishonest purpose is distinct from the element of knowledge. The Court, at 349, quotes the following from Lafave and Scott Handbook on Criminal Law, section 93 (5th Reprint 1980):

"It is not enough for guilt that one receives stolen property with knowledge that it is stolen...Some sort of a bad state of mind in addition to the guilty knowledge, is required..."

"The necessary intent, as in the related crime of larceny, is an intent to deprive the owner of his property. The receiver's purpose is generally, of course, to deprive the owner by benefiting himself. But he is equally guilty though his purpose is to deprive the owner, not by benefiting himself but rather by aiding the thief, as by hiding the stolen property for him..."

COMMENTS

1. While (W.Va.Code, 61-3-18) provides that one who unlawfully buys or receives stolen goods shall be deemed guilty of the larceny thereof, the traditional offense of larceny and the offense created by the statute are separate and distinct offenses. There was no evidence to support a larceny instruction, and it was error, though not reversible in this case, to give the instruction. State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976).

2. An indictment for larceny must state the name of the owner of the stolen property or that it is the property of some unknown person or persons; but the crime of buying or receiving, or aiding in concealing, stolen property by a

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person knowing or having reason to believe that the property has been stolen is based upon a prior commission of the crime of larceny and presupposes but does not include larceny. For this reason the elements of the crime of larceny are not the elements of the crime of buying or receiving, or aiding in concealing, stolen property by a person who knows or has reason to believe that it has been stolen. State v. McGraw, 140 W.Va. 547, 85 S.E.2d 849 (1955).

3. In his petition, appellant contended an indictment for receiving stolen property cannot support a conviction of grand larceny, because grand larceny is not a lesser included offense of receiving stolen property. The assignment of error was waived since it was neither briefed nor argued, but the Court noted receiving stolen property and larceny are separate and distinct offenses. Footnote 2, State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986).

4. "Where the defendant is charged with larceny and receiving stolen goods in two counts of an indictment, even though they are related crimes, the jury cannot find the defendant guilty in separate verdicts on both charges, and the court should instruct the jury that it can return a verdict of guilty on either count, but not both." Syl. pt. 4, State v. Koton, 157 W.Va. 558, 202 S.E.2d 823 (1974).

5. "Under the provisions of W.Va.Code, 61-3-18 (1931) where the State proves that a defendant received or aided in the concealment of property which was stolen from different owners on different occasions, but does not prove that the defendant received or aided in the concealment of the property at different times or different places then such defendant may be convicted of only one offense of receiving or aiding in the concealment of stolen property". Syl. pt. 9, State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982).

BUYING OR RECEIVING STOLEN GOODS
(GRAND LARCENY)
PRIOR DELIVERY OR APPROPRIATION

Prior delivery to the defendant from another person is a necessary element of this offense. The mere discovery and appropriation of stolen goods by a person does not constitute a crime under this section.[1]

FOOTNOTES

[1] State v. Fowler, 117 W.Va. 7, 188 S.E. 137 (1936).

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

BUYING OR RECEIVING STOLEN GOODS (GRAND LARCENY) DISHONEST PURPOSE

In a prosecution for buying or receiving stolen goods, you must find beyond a reasonable doubt that the accused acted with a "dishonest purpose" before you can find him guilty of the offense...[1]

FOOTNOTES

[1] In a prosecution under this section for buying or receiving stolen goods, a jury must find beyond a reasonable doubt that the accused acted with a "dishonest purpose" before it can find him guilty of the offense, and the accused is entitled to have the jury properly instructed on the question of his intent. State v. Tanner, 181 W.Va. 210, 382 S.E.2d 47 (1989); State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986); State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976).

In Barker, supra, the appellant was charged with receiving stolen goods. The Court found having a dishonest purpose, at the time a defendant receives stolen property, is an essential element of the crime charged. The element of dishonest purpose is distinct from the element of knowledge. The Court, at 349, quotes the following from Lafave and Scott Handbook on Criminal Law, section 93 (5th Reprint 1980):

"It is not enough for guilt that one receives stolen property with knowledge that it is stolen...Some sort of a bad state of mind in addition to the guilty knowledge, is required..."

"The necessary intent, as in the related crime of larceny, is an intent to deprive the owner of his property. The receiver's purpose is generally, of course, to deprive the owner by benefiting himself. But he is equally guilty though his purpose is to deprive the owner, not by benefiting himself but rather by aiding the thief, as by hiding the stolen property for him..."

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

BUYING OR RECEIVING STOLEN GOODS [1] (PETIT LARCENY)

Buying or receiving stolen goods [2] is committed if any person buy or receive from another person any stolen goods or other thing of value, which he knows or has reason to believe has been stolen.

To prove the commission of buying or receiving stolen goods, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. bought or received
3. from _____ (another person) [3]
4. _____ (describe the property)
5. of the value of less than two hundred dollars [4]
6. which property belonged to _____
7. and was stolen by someone other than the defendant; [5]
8. at the time the defendant, _____, bought or received the property
9. he knew or had reason to believe the property was stolen [6]
10. and that he bought or received the property with a dishonest purpose.[7]

FOOTNOTES

[1] If any person buy or receive from another person, or aid in concealing, or transfer to a person other than the owner thereof, any stolen goods or other thing of value, which he knows or has reason to believe has been stolen, he shall be guilty of the larceny thereof, and may be prosecuted although the principal offender be not convicted. W.Va.Code, 61-3-18 (1923).

W.Va.Code, 61-3-18, contains a series of offenses which relate to stolen property and, despite some commonality in the elements, the offenses are separate and distinct...Syl. pt. 1, State v. Taylor, 176 W.Va. 671, 346 S.E.2d 822 (1986).

There is sufficient disparity between the crime of transferring stolen property from that of receiving or aiding in the concealing of stolen property to warrant the conclusion that it is a separate offense. State v. Tanner, 181 W.Va. 210, 382 S.E.2d 47 (1989).

(NOTE - Under the principles set forth above, three separate instructions have been drafted: buying or receiving stolen goods; aiding in concealing stolen goods; and transferring stolen goods. (Note, however, syl. pt. 7, State v.

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Oldaker, 172 W.Va. 258, 304 S.E.2d 843 (1983) - Receiving or aiding in concealing a stolen item is the same offense for purposes of punishment, and it is incorrect to charge receiving stolen property in one count and concealing it in another for the same item of property). In footnote 8 of State v. Taylor, supra, the Court acknowledges the holding in State v. Oldaker, supra, although the holdings of the two cases seem to be in conflict.

[2] "'The essential elements of the offense created by (W.Va.Code, 61-3-18 (1931)) are: (1) The property must have been previously stolen by some person other than the defendant; (2) the accused must have bought or received the property from another person or must have aided in concealing it; (3) he must have known, or had reason to believe, when he bought or received or aided in concealing the property, that it had been stolen; and (4) he must have bought or received or aided in concealing the property with a dishonest purpose.' State v. McGraw, 140 W.Va. 547, 550, 85 S.E.2d 849, 852 (1955)." Syl. pt. 3, State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986). Syl. pt. 6, State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982).

[3] Prior delivery to the defendant from another person is a necessary element of this offense. The mere discovery and appropriation of stolen goods by a person does not constitute a crime under this section. State v. Fowler, 117 W.Va. 7, 188 S.E. 137 (1936).

An indictment must allege the name of the person or persons from whom the stolen goods were bought or received, or that such goods were bought or received from a person or persons unknown to the grand jury. State v. Smith, 98 W.Va. 185, 126 S.E. 703 (1925).

[4] Violation of this section is punishable as larceny. State v. Oldaker, 172 W.Va. 258, 304 S.E.2d 843 (1983).

See W.Va.Code, 61-3-13 for the distinction between and penalties for grand and petit larceny. (As of the date of this publication, May, 1991, a simple larceny of goods or chattels of the value of two hundred dollars or more is grand larceny; a simple larceny of goods or chattels of the value of less than two hundred dollars is petit larceny.

If one is indicted for a simple larceny and upon the trial it appears that he did not actually steal the property but did receive it with knowledge of the theft, he is nevertheless guilty of the larceny and amenable to the same penalties. State v. West, 157 W.Va. 209, 200 S.E.2d 859 (1973).

[5] The first element requires that the property be stolen by some person other than the defendant. This is to prevent a person who is charged with theft of the property from also being charged with concealing it as well...State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982).

[6] There are two ways that the offense may be committed: First by receiving goods knowing them to have been stolen, and second, by receiving goods with reason to believe that they were stolen. State v. Lewis, 117 W.Va. 670, 187 S.E. 315 (1936); State v. Mounts, 120 W.Va. 6, 200 S.E. 53 (1938).

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Where one is charged with the crime is operating a legitimate business, it must be shown that actual knowledge had been brought home to him that the seller of the article was the thief or that the property had been stolen. State v. Wallace, 118 W.Va. 127, 189 S.E. 104 (1936).

[7] In a prosecution under this section for buying or receiving stolen goods, a jury must find beyond a reasonable doubt that the accused acted with a "dishonest purpose" before it can find him guilty of the offense, and the accused is entitled to have the jury properly instructed on the question of his intent. State v. Tanner, 181 W.Va. 210, 382 S.E.2d 47 (1989); State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986); State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976).

In Barker, supra, the appellant was charged with receiving stolen goods. The Court found having a dishonest purpose, at the time a defendant receives stolen property, is an essential element of the crime charged. The element of dishonest purpose is distinct from the element of knowledge. The Court, at 349, quotes the following from Lafave and Scott Handbook on Criminal Law, section 93 (5th Reprint 1980):

"It is not enough for guilt that one receives stolen property with knowledge that it is stolen...Some sort of a bad state of mind in addition to the guilty knowledge, is required..."

"The necessary intent, as in the related crime of larceny, is an intent to deprive the owner of his property. The receiver's purpose is generally, of course, to deprive the owner by benefiting himself. But he is equally guilty though his purpose is to deprive the owner, not by benefiting himself but rather by aiding the thief, as by hiding the stolen property for him..."

COMMENTS

1. While (W.Va.Code, 61-3-18) provides that one who unlawfully buys or receives stolen goods shall be deemed guilty of the larceny thereof, the traditional offense of larceny and the offense created by the statute are separate and distinct offenses. There was no evidence to support a larceny instruction, and it was error, though not reversible, to give the instruction. State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976).

2. An indictment for larceny must state the name of the owner of the stolen property or that it is the property of some unknown person or persons; but the crime of buying or receiving, or aiding in concealing, stolen property by a person knowing or having reason to believe that the property has been stolen is based upon a prior commission of the crime of larceny and presupposes but does not include larceny. For this reason the elements of the crime of larceny are not the elements of the crime of buying or receiving, or aiding in concealing, stolen property by a person who knows or has reason to believe that it has been stolen. State v. McGraw, 140 W.Va. 547, 85 S.L.2d 849 (1955).

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3. In his petition, appellant contended an indictment for receiving stolen property cannot support a conviction of grand larceny, because grand larceny is not a lesser included offense of receiving stolen property. The assignment of error was waived since it was neither briefed nor argued, but the Court noted receiving stolen property and larceny are separate and distinct offenses. Footnote 2, State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986).

4. "Where the defendant is charged with larceny and receiving stolen goods in two counts of an indictment, even though they are related crimes, the jury cannot find the defendant guilty in separate verdicts on both charges, and the court should instruct the jury that it can return a verdict of guilty on either count, but not both." Syl. pt. 4, State v. Koton, 157 W.Va. 558, 202 S.E.2d 823 (1974).

5. "Under the provisions of W.Va.Code, 61-3-18 (1931) where the State proves that a defendant received or aided in the concealment of property which was stolen from different owners on different occasions, but does not prove that the defendant received or aided in the concealment of the property at different times or different places then such defendant may be convicted of only one offense of receiving or aiding in the concealment of stolen property." Syl. pt. 9, State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982).

6. When a person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he has been before sentenced in the United States for the like offense, he shall be sentenced to be confined in the penitentiary for the term of one year. W.Va.Code, 61-11-20. State ex rel. Roach v. Dietrick, 185 W.Va. 23, 404 S.E.2d 415 (1991).

BUYING OR RECEIVING STOLEN GOODS
(PETIT LARCENY)
PRIOR DELIVERY OR APPROPRIATION

Prior delivery to the defendant from another person is a necessary element of this offense. The mere discovery and appropriation of stolen goods by a person does not constitute a crime under this section.[1]

FOOTNOTES

[1] State v. Fowler, 117 W.Va. 7, 188 S.E. 137 (1936).

BUYING OR RECEIVING STOLEN GOODS
(PETIT LARCENY)
DISHONEST PURPOSE

In a prosecution for buying or receiving stolen goods, you must find beyond a reasonable doubt that the accused acted with a "dishonest purpose" before you can find him guilty of the offense...[1]

FOOTNOTES

[1] In a prosecution under this section for buying or receiving stolen goods, a jury must find beyond a reasonable doubt that the accused acted with a "dishonest purpose" before it can find him guilty of the offense, and the accused is entitled to have the jury properly instructed on the question of his intent. State v. Tanner, 181 W.Va. 210, 382 S.E.2d 47 (1989); State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986); State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976).

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"The necessary intent, as in the related crime of larceny, is an intent to deprive the owner of his property. The receiver's purpose is generally, of course, to deprive the owner by benefiting himself. But he is equally guilty though his purpose is to deprive the owner, not by benefiting himself but rather by aiding the thief, as by hiding the stolen property for him..."

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

AIDING IN CONCEALING STOLEN GOODS [1]
(GRAND LARCENY)

Aiding in concealing any stolen goods or other thing of value, which one knows or has reason to believe has been stolen is a crime.

To prove the commission of aiding in concealing stolen goods, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. aided in concealing [3]
3. _____ (describe the property)
4. of the value of two hundred dollars or more [4]
5. which property belonged to _____
6. and was stolen by someone other than the defendant; [5]
7. at the time the defendant, _____, aided in concealing the property
9. he knew or had reason to believe the property was stolen [6]
10. and he aided in concealing the property with a dishonest purpose. [7]

FOOTNOTES

[1] If any person buy or receive from another person, or aid in concealing, or transfer to a person other than the owner thereof, any stolen goods or other thing of value, which he knows or has reason to believe has been stolen, he shall be guilty of the larceny thereof, and may be prosecuted although the principal offender be not convicted. W.Va.Code, 61-3-18 (1923).

W.Va.Code, 61-3-18, contains a series of offenses which relate to stolen property and, despite some commonality in the elements, the offenses are separate and distinct...Syl. pt. 1, State v. Taylor, 176 W.Va. 671, 346 S.E.2d 822 (1986).

There is sufficient disparity between the crime of transferring stolen property from that of receiving or aiding in the concealing of stolen property to warrant the conclusion that it is a separate offense. State v. Tanner, 181 W.Va. 210, 382 S.E.2d 47 (1989).

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NOTE - Under the principles set forth above, three separate instructions have been drafted: buying or receiving stolen goods; aiding in concealing stolen goods; and transferring stolen goods. (Note, however, syl. pt. 7, State v. Oldaker, 172 W.Va. 258, 304 S.E.2d 843 (1983) - Receiving or aiding in concealing a stolen item is the same offense for purposes of punishment, and it is incorrect to charge receiving stolen property in one count and concealing it in another for the same item of property). In footnote 8 of State v. Taylor, supra, the Court acknowledges the holding in State v. Oldaker, supra, although the holdings of the two cases seem to be in conflict.

[2] "'The essential elements of the offense created by [W.Va.Code, 61-3-18 (1931)] are: (1) The property must have been previously stolen by some person other than the defendant; (2) the accused must have bought or received the property from another person or must have aided in concealing it; (3) he must have known, or had reason to believe, when he bought or received or aided in concealing the property, that it had been stolen; and (4) he must have bought or received or aided in concealing the property with a dishonest purpose.' Syl. pt. 6, State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982). State v. McGraw, 140 W.Va. 547, 550, 85 S.E.2d 849, 852 (1955)." Syl. pt. 3, State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986).

Where the charge is aiding in concealing stolen property, it is not necessary that a defendant had bought or received the property from another person. State v. Taylor, 176 W.Va. 671, 346 S.E.2d 822 (1986). State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982).

[3] It is not always necessary to physically hide stolen property before a person may be said to conceal it. It is just as much of a concealment if someone hinders the return of the property to its rightful owner...State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982); State v. Oldaker, 172 W.Va. 258, 304 S.E.2d 843 (1983).

[4] Violation of this section is punishable as larceny. State v. Oldaker, 172 W.Va. 258, 304 S.E.2d 843 (1983).

See W.Va.Code, 61-3-13 for the distinction between and penalties for grand and petit larceny. (As of the date of this publication, May, 1991, a simple larceny of goods or chattels of the value of two hundred dollars or more is grand larceny; a simple larceny of goods or chattels of the value of less than two hundred dollars is petit larceny).

If one is indicted for a simple larceny and upon the trial it appears that he did not actually steal the property but did receive it with knowledge of the theft, he is nevertheless guilty of the larceny and amenable to the same penalties. State v. West, 157 W.Va. 209, 200 S.E.2d 859 (1973).

[5] The first element requires that the property be stolen by some person other than the defendant. This is to prevent a person who is charged with theft of the property from also being charged with concealing it as well...State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982). State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986).

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[6] Where the man who is charged with crime is operating a legitimate business, it must be shown that actual knowledge had been brought home to him that the seller of the article was the thief or that the property had been stolen. State v. Wallace, 118 W.Va. 127, 189 S.E. 104 (1936).

[7] In a prosecution under this section for buying or receiving stolen goods, a jury must find beyond a reasonable doubt that the accused acted with a "dishonest purpose" before it can find him guilty of the offense, and the accused is entitled to have the jury properly instructed on the question of his intent. State v. Tanner, 181 W.Va. 210, 382 S.E.2d 47 (1989); State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986); State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976).

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"It is not enough for guilt that one receives stolen property with knowledge that it is stolen...Some sort of a bad state of mind in addition to the guilty knowledge, is required..."

"The necessary intent, as in the related crime of larceny, is an intent to deprive the owner of his property. The receiver's purpose is generally, of course, to deprive the owner by benefiting himself. But he is equally guilty though his purpose is to deprive the owner, not by benefiting himself but rather by aiding the thief, as by hiding the stolen property for him..."

COMMENTS

1. While (W.Va.Code, 61-3-18) provides that one who unlawfully buys or receives stolen goods shall be deemed guilty of the larceny thereof, the traditional offense of larceny and the offense created by the statute are separate and distinct offenses. There was no evidence to support a larceny instruction, and it was error, though not reversible in this case, to give the instruction. State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976).

2. An indictment for larceny must state the name of the owner of the stolen property or that it is the property of some unknown person or persons; but the crime of buying or receiving, or aiding in concealing, stolen property by a person knowing or having reason to believe that the property has been stolen is based upon a prior commission of the crime of larceny and presupposes but does not include larceny. For this reason the elements of the crime of larceny are not the elements of the crime of buying or receiving, or aiding in concealing, stolen property by a person who knows or has reason to believe that it has been stolen. State v. McGraw, 140 W.Va. 547, 85 S.E.2d 849 (1955).

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3. In his petition, appellant contended an indictment for receiving stolen property cannot support a conviction of grand larceny, because grand larceny is not a lesser included offense of receiving stolen property. The assignment of error was waived since it was neither briefed nor argued, but the Court noted receiving stolen property and larceny are separate and distinct offenses. Footnote 2, State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986).

4. "Where a defendant is charged with larceny and receiving stolen goods in two counts of an indictment, even though they are related crimes, the jury cannot find the defendant guilty in separate verdicts on both charges, and the court should instruct the jury that it can return a verdict of guilty on either count, but not both." Syl. pt. 4, State v. Koton, 157 W.Va. 558, 202 S.E.2d 823 (1974).

5. "Under the provisions of W.Va.Code, 61-3-18 [1931] where the State proves that a defendant received or aided in the concealment of property which was stolen from different owners on different occasions, but does not prove that the defendant received or aided in the concealment of the property at different times or different places then such defendant may be convicted of only one offense of receiving or aiding in the concealment of stolen property." Syl. pt. 9, State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982).

AIDING IN CONCEALING STOLEN PROPERTY
(GRAND LARCENY)
DISHONEST PURPOSE

You must find beyond a reasonable doubt that the accused acted with a "dishonest purpose" before you can find him guilty of the offense...[1]

FOOTNOTES

[1] In a prosecution under this section for buying or receiving stolen goods, a jury must find beyond a reasonable doubt that the accused acted with a "dishonest purpose" before it can find him guilty of the offense, and the accused is entitled to have the jury properly instructed on the question of his intent. State v. Tanner, 181 W.Va. 210, 382 S.E.2d 47 (1989); State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986); State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976).

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AIDING IN CONCEALING STOLEN GOODS [1]
(PETIT LARCENY)

Aiding in concealing stolen goods [2] is committed if any person aid in concealing any stolen goods or other thing of value, which he knows or has reason to believe have been stolen.

To prove the commission of aiding in concealing stolen goods, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. aided in concealing [3]
3. _____ (describe the property)
4. of the value of less than two hundred dollars [4]
5. which property belonged to _____
6. and was stolen by someone other than the defendant; [5]
7. at the time the defendant, _____, aided in concealing the property
9. he knew or had reason to believe the property was stolen [6]
10. and he aided in concealing the property with a dishonest purpose. [7]

FOOTNOTES

[1] If any person buy or receive from another person, or aid in concealing, or transfer to a person other than the owner thereof, any stolen goods or other thing of value, which he knows or has reason to believe has been stolen, he shall be guilty of the larceny thereof, and may be prosecuted although the principal offender be not convicted. W.Va.Code, 61-3-18 (1923).

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4. "Where the defendant is charged with larceny and receiving stolen goods in two counts of an indictment, even though they are related crimes, the jury cannot find the defendant guilty in separate verdicts on both charges, and the court should instruct the jury that it can return a verdict of guilty on either count, but not both." Syl. pt. 4, State v. Koton, 157 W.Va. 558, 202 S.E.2d 823 (1974).

5. "Under the provisions of W.Va.Code, 61-3-18 [1931] where the State proves that a defendant received or aided in the concealment of property which was stolen from different owners on different occasions, but does not prove that the defendant received or aided in the concealment of the property at different times or different places then such defendant may be convicted of only one offense of receiving or aiding in the concealment of stolen property." Syl. pt. 9, State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982).

6. When a person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he has been before sentenced in the United States for the like offense, he shall be sentenced to be confined in the penitentiary for the term of one year. W.Va.Code, 61-11-20. State ex rel. Roach v. Dietrick, 185 W.Va. 23, 404 S.E.2d 415 (1991).

AIDING IN CONCEALING STOLEN PROPERTY
(PETIT LARCENY)
DISHONEST PURPOSE

You must find beyond a reasonable doubt that the accused acted with a "dishonest purpose" before you can find him guilty of the offense...[1]

FOOTNOTES

[1] State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986); State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976).

In Barker, supra, the appellant was charged with receiving stolen goods. The Court found having a dishonest purpose, at the time a defendant receives stolen property, is an essential element of the crime charged. The element of dishonest purpose is distinct from the element of knowledge. The Court, at 349, quotes the following from Lafave and Scott Handbook on Criminal Law, section 93 (5th Reprint 1980):

"It is not enough for guilt that one receives stolen property with knowledge that it is stolen...Some sort of a bad state of mind in addition to the guilty knowledge, is required..."

"The necessary intent, as in the related crime of larceny, is an intent to deprive the owner of his property. The receiver's purpose is generally, of course, to deprive the owner by benefiting himself. But he is equally guilty though his purpose is to deprive the owner, not by benefiting himself but rather by aiding the thief, as by hiding the stolen property for him..."

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

TRANSFERRING STOLEN GOODS [1]
(GRAND LARCENY)

Transferring stolen goods [2] is committed if any person transfers to a person other than the owner thereof, any stolen goods or other thing of value, which he knows or has reason to believe have been stolen.

To prove the commission of transferring stolen goods, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. transferred
3. to _____, a person other than the owner thereof
4. _____ (describe the property)
5. of the value of two hundred dollars or more [3]
6. which property belonged to _____
7. and was stolen by someone other than the defendant; [4]
8. at the time the defendant, _____, transferred the property
9. he knew or had reason to believe the property was stolen [5]
10. and he transferred the property with a dishonest purpose. [6]

FOOTNOTES

[1] If any person buy or receive from another person, or aid in concealing, or transfer to a person other than the owner thereof, any stolen goods or other thing of value, which he knows or has reason to believe has been stolen, he shall be guilty of the larceny thereof, and may be prosecuted although the principal offender be not convicted. W.Va.Code, 61-3-18 (1923).

W.Va.Code, 61-3-18, contains a series of offenses which relate to stolen property and, despite some commonality in the elements, the offenses are separate and distinct...Syl. pt. 1, State v. Taylor, 176 W.Va. 671, 346 S.E.2d 822 (1986).

There is sufficient disparity between the crime of transferring stolen property from that of receiving or aiding in the concealing of stolen property to warrant the conclusion that it is a separate offense. State v. Tanner, 181 W.Va. 210, 382 S.E.2d 47 (1989).

(NOTE - Under the principles set forth above, three separate instructions have been drafted: buying or receiving stolen goods; aiding in concealing

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stolen goods; and transferring stolen goods. (Note, however, syl. pt. 7, State v. Oldaker, 172 W.Va. 258, 304 S.E.2d 843 (1983) - "Receiving or aiding in concealing a stolen item is the same offense for purposes of punishment, and it is incorrect to charge receiving stolen property in one count and concealing it in another for the same item of property.") In footnote 8 of State v. Taylor, supra, the Court acknowledges the holding in State v. Oldaker, supra, although the holdings of the two cases seem to be in conflict.

[2] The elements of transferring stolen property are: (1) the property must have been stolen by someone other than the accused; (2) the accused must have transferred the property knowing or having reason to believe that the property was stolen; (3) the property must have been transferred to someone other than the owner; and (4) the accused must have transferred the property with a dishonest purpose. State v. Taylor, 176 W.Va. 671, 346 S.E.2d 822 (1986).

In an indictment for transferring stolen goods, it is not necessary to aver that the defendant obtained the goods from another person before he transferred them as this is not an element of the crime. Taylor, supra.

[3] Violation of this section is punishable as larceny. State v. Oldaker, 172 W.Va. 258, 304 S.E.2d 843 (1983).

See W.Va.Code, 61-3-13 for the distinction between and penalties for grand and petit larceny. (As of the date of this publication, May, 1991, a simple larceny of goods or chattels of the value of two hundred dollars or more is grand larceny; a simple larceny of goods or chattels of the value of less than two hundred dollars is petit larceny).

[4] The first element requires that the property be stolen by some person other than the defendant. This is to prevent a person who is charged with theft of the property from also being charged with concealing it as well...State v. Hall, 171 W.Va. 212, 298 S.E.2d 246 (1982).

[5] State v. Taylor, supra.

Where one is charged with crime is operating a legitimate business, it must be shown that actual knowledge had been brought home to him that the seller of the article was the thief or that the property had been stolen. State v. Wallace, 118 W.Va. 127, 189 S.E. 104 (1936).

[6] In a prosecution under this section for buying or receiving stolen goods, a jury must find beyond a reasonable doubt that the accused acted with a "dishonest purpose" before it can find him guilty of the offense, and the accused is entitled to have the jury properly instructed on the question of his intent. State v. Tanner, 181 W.Va. 210, 382 S.E.2d 47 (1989); State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986); State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976).

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"It is not enough for guilt that one receives stolen property with knowledge that it is stolen...Some sort of a bad state of mind in addition to the guilty knowledge, is required..."

"The necessary intent, as in the related crime of larceny, is an intent to deprive the owner of his property. The receiver's purpose is generally, of course, to deprive the owner by benefiting himself. But he is equally guilty though his purpose is to deprive the owner, not by benefiting himself but rather by aiding the thief, as by hiding the stolen property for him..."

COMMENTS

1. While (W.Va.Code, 61-3-18) provides that one who unlawfully buys or receives stolen goods shall be deemed guilty of the larceny thereof, the traditional offense of larceny and the offense created by the statute are separate and distinct offenses. There was no evidence to support a larceny instruction, and it was error, though not reversible, to give the instruction. State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976).

2. An indictment for larceny must state the name of the owner of the stolen property or that it is the property of some unknown person or persons; but the crime of buying or receiving, or aiding in concealing, stolen property by a person knowing or having reason to believe that the property has been stolen is based upon a prior commission of the crime of larceny and presupposes but does not include larceny. For this reason the elements of the crime of larceny are not the elements of the crime of buying or receiving, or aiding in concealing, stolen property by a person who knows or has reason to believe that it has been stolen. State v. McGraw, 140 W.Va. 547, 85 S.E.2d 849 (1955).

3. In his petition, appellant contended an indictment for receiving stolen property cannot support a conviction of grand larceny, because grand larceny is not a lesser included offense of receiving stolen property. The assignment of error was waived since it was neither briefed nor argued, but the Court noted receiving stolen property and larceny are separate and distinct offenses. State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986).

4. "Where the defendant is charged with larceny and receiving stolen goods in two counts of an indictment, even though they are related crimes, the jury cannot find the defendant guilty in separate verdicts on both charges, and the court should instruct the jury that it can return a verdict of guilty on either count, but not both." Syl. pt. 4, State v. Koton, 157 W.Va. 558, 202 S.E.2d 823 (1974).

5. "Under the provisions of W.Va.Code, 61-3-18 [1931] where the State proves that a defendant received or aided in the concealment of property which was stolen from different owners on different occasions, but does not prove that the defendant received or aided in the concealment of the property at different times or different places then such defendant may be convicted of only one offense of receiving or aiding in the concealment of stolen property." Syl. pt. 9, State v. Hall, 171, W.Va. 212, 298 S.E.2d 246 (1982).

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

TRANSFERRING STOLEN PROPERTY
(GRAND LARCENY)
DISHONEST PURPOSE

You must find beyond a reasonable doubt that the accused acted with a "dishonest purpose" before you can find him guilty of the offense...[1]

FOOTNOTES

[1] In a prosecution under this section for buying or receiving stolen goods, a jury must find beyond a reasonable doubt that the accused acted with a "dishonest purpose" before it can find him guilty of the offense, and the accused is entitled to have the jury properly instructed on the question of his intent. State v. Tanner, 181 W.Va. 210, 382 S.E.2d 47 (1989); State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986); State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976).

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TRANSFERRING STOLEN GOODS [1]
(PETIT LARCENY)

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1. the defendant, _____,
2. transferred
3. to _____, a person other than the owner thereof
4. _____ (describe the property)
5. of the value of less than two hundred dollars [3]
6. which property belonged to _____
7. and was stolen by someone other than the defendant; [4]
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COMMENTS

1. While (W.Va.Code, 61-3-18) provides that one who unlawfully buys or receives stolen goods is guilty of the larceny thereof, the traditional offense of larceny and the offense created by the statute are separate and distinct offenses. There was no evidence to support a larceny instruction, and it was error, though not reversible, to give the instruction. State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976).

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PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

TRANSFERRING STOLEN GOODS [1]
(PETIT LARCENY)
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FOOTNOTES

[1] In a prosecution under this section for buying or receiving stolen goods, a jury must find beyond a reasonable doubt that the accused acted with a "dishonest purpose" before it can find him guilty of the offense, and the accused is entitled to have the jury properly instructed on the question of his intent. State v. Tanner, 181 W.Va. 210, 382 S.E.2d 47 (1989); State v. Barker, 176 W.Va. 553, 346 S.E.2d 344 (1986); State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976).

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"The necessary intent, as in the related crime of larceny, is an intent to deprive the owner of his property. The receiver's purpose is generally, of course, to deprive the owner by benefiting himself. But he is equally guilty though his purpose is to deprive the owner, not by benefiting himself but rather by aiding the thief, as by hiding the stolen property for him..."

OBTAINING MONEY, GOODS OR PROPERTY BY FALSE PRETENSE [1] (GRAND LARCENY)

Obtaining money, goods or property by false pretense is committed if any person obtain from another by any false pretense, token or representation, with intent to defraud, money, goods or other property which may be the subject of larceny.[2]

To prove the commission of obtaining money, goods or property by false pretense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. with intent at the time to defraud [3]
3. obtained from _____
4. possession and title to [4]
5. _____ (describe money, goods or other property which may be the subject of larceny).
6. of the value of two hundred dollars or more [5]
7. belonging to _____
8. by false pretense, [6] token or representation,
9. and that such false pretense, token or representation induced _____ to part with such (money, goods or property). [7]

FOOTNOTES

[1] W.Va.Code, 61-3-24(a) (1988) - the statute makes this offense a form of larceny.

[2] Under this section it is necessary to allege and prove the essential elements constituting the offense, namely: (1) the intent to defraud; (2) actual fraud; (3) the false pretense was used to accomplish the objective, and, (4) the fraud was accomplished by means of the false pretense, that is, the false pretense must be in some degree the cause, if not the controlling cause, which induced the owner to part with his property. State v. Pishner, 72 W.Va. 603, 78 S.E. 752 (1913); State v. Moore, 166 W.Va. 97, 273 S.E.2d 821 (1980); State v. Barnes, 177 W.Va. 510, 354 S.E.2d 606 (1987).

[3] Separate instruction on intent provided.

To warrant conviction for larceny, embezzlement or of obtaining goods or money by false pretense the accused must have had the present intent to commit the offense at the time he obtained possession or custody; and an instruction to the jury omitting this element is erroneous. State v. Smith, 97 W.Va. 313, 125 S.E. 90 (1924).

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[4] The distinction between the crimes of obtaining by false pretense and larceny lies in the intention with which the owner parts with the property. If the owner intends to invest the accused with the title as well as the possession the accused has committed the crime of obtaining the property by false pretense. If the owner intends to invest the accused with the mere possession of the property, and the accused with the requisite intent receives it and converts it to his own use, it is larceny. State v. Martin, 103 W.Va. 446, 137 S.E. 885 (1927); footnote 4, State v. Barnes, 177 W.Va. 510, 354 S.E.2d 606 (1987); State v. Edwards, 51 W.Va. 220, 41 S.E. 429 (1902).

[5] W.Va.Code, 61-3-24 (1988).

[6] Separate instruction defining false pretense provided.

[7] Separate instruction on causation provided.

COMMENTS

1. The crime of obtaining money or property by false pretenses is complete when the fraud intended is consummated by obtaining title to and possession of property by means of a knowing false representation or pretense. The crime is not purged by the ultimate restoration or payment to the victim; it is sufficient if the fraud has put the victim in such a position that he or she may eventually suffer loss, State v. Barnes, 177 W.Va. 510, 354 S.E.2d 606 (1987).

Pecuniary loss by victim was not required for conviction of obtaining money by false pretenses.

2. Within the true meaning of this section one cannot be held guilty of procuring money by false pretense, with intent to defraud, when one collects a debt justly due even though in making the collection he has used false pretense. State v. Williams, 68 W.Va. 86, 69 S.E. 474 (1910); State v. Hurst, 11 W.Va. 54 (1877).

OBTAINING MONEY, GOODS OR PROPERTY BY FALSE PRETENSE [1]
(GRAND LARCENY)
INTENT

To warrant conviction for obtaining goods or money by false pretense the accused must have had the present intent to commit the offense at the time he obtained possession or custody.[1]

FOOTNOTES

[1] State v. Smith, 97 W.Va. 313, 125 S.E. 90 (1924).

OBTAINING MONEY, GOODS OR PROPERTY BY FALSE PRETENSE (GRAND LARCENY) FALSE PRETENSE

A criminal false pretense is "the false representation of a past or existing fact, whether by oral words, written words, or conduct, calculated or intended to deceive, which does in fact deceive, and by means of which one person obtains value from another without compensation.[1]

In order to support a conviction of obtaining money or goods by false pretenses, the false statement or representation alleged to have been made must relate to existing facts or past events.[2]

When one makes a promise to perform in the future with the intent to cheat, defraud, or deceive, such promise constitutes a misrepresentation of existing fact which is a "false pretense".[2]

FOOTNOTES

[1] Hubbard v. Com., 201 Va. 61, 109 S.E.2d 100 (1959).

[2] State v. Moore, 166 W.Va. 97, 273 S.E.2d 821 (1980); State v. Barnes, 177 W.Va. 510, 354 S.E.2d 606 (1987).

OBTAINING MONEY, GOODS OR PROPERTY BY FALSE PRETENSE (GRAND LARCENY) CAUSATION

The fraud must be accomplished by means of the false pretense, that is, the false pretense must be in some degree the cause, if not the controlling cause, which induced the owner to part with his property.[1]

FOOTNOTES

[1] State v. Pishner, 72 W.Va. 603, 78 S.E. 752 (1913); State v. Moore, 166 W.Va. 97, 273 S.E.2d 821 (1980); State v. Barnes, 177 W.Va. 510, 354 S.E.2d 606 (1987).

OBTAINING MONEY, GOODS OR PROPERTY BY FALSE PRETENSE [1] (PETIT LARCENY)

Obtaining money, goods or property by false pretense is committed if any person obtain from another by any false pretense, token or representation, with intent to defraud, money, goods or other property which may be the subject of larceny.[2]

To prove the commission of obtaining money, goods or property by false pretense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. with intent at the time to defraud [3]
3. obtained from _____
4. possession and title to [4]
5. _____ (describe money, goods or other property which may be the subject of larceny).
6. of the value of less than two hundred dollars [5]
7. belonging to _____
8. by false pretense, [6] token or representation,
9. and that such false pretense, token or representation induced _____ to part with such (money, goods or property). [7]

FOOTNOTES

[1] W.Va.Code, 61-3-24(a) (1988) - the statute makes this offense a form of larceny.

[2] Under this section it is necessary to allege and prove the essential elements constituting the offense, namely: (1) the intent to defraud; (2) actual fraud; (3) the false pretense was used to accomplish the objective, and, (4) the fraud was accomplished by means of the false pretense, that is, the false pretense must be in some degree the cause, if not the controlling cause, which induced the owner to part with his property. State v. Pishner, 72 W.Va. 603, 78 S.E. 752 (1913); State v. Moore, 166 W.Va. 97, 273 S.E.2d 821 (1980); State v. Barnes, 177 W.Va. 510, 354 S.E.2d 606 (1987).

[3] Separate instruction on intent provided.

To warrant conviction for larceny, embezzlement or of obtaining goods or money by false pretense the accused must have had the present intent to commit the offense at the time he obtained possession or custody; and an instruction to the jury omitting this element is erroneous. State v. Smith, 97 W.Va. 313, 125 S.E. 90 (1924).

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[5] W.Va.Code, 61-3-24 (1988).

[6] Separate instruction defining false pretense provided.

[7] Separate instruction on causation provided.

COMMENTS

1. The crime of obtaining money or property by false pretenses is complete when the fraud intended is consummated by obtaining title to and possession of property by means of knowingly false representation or pretense. The crime is not purged by ultimate restoration or payment to the victim; it is sufficient if the fraud of the accused has put the victim in such a position that he or she may eventually suffer loss, State v. Barnes, 177 W.Va. 510, 354 S.E.2d 606 (1987).

Pecuniary loss by victim was not required for conviction of obtaining money by false pretenses.

2. Within the true meaning of this section one cannot be held guilty of procuring money by false pretense, with intent to defraud, when one collects a debt justly due, even though in making the collection he has used false pretense. State v. Williams, 68 W.Va. 86, 69 S.E. 474 (1910); State v. Hurst, 11 W.Va. 54 (1877).

3. When a person is convicted of petit larceny, and it is alleged in the indictment on which he is convicted, and admitted, or by the jury found, that he has been before sentenced in the United States for the like offense, he shall be sentenced to be confined in the penitentiary for the term of one year. W.Va.Code, 61-11-20. State ex rel. Roach v. Dietrick, 185 W.Va. 23, 404 S.E.2d 415 (1991).

OBTAINING MONEY, GOODS OR PROPERTY BY FALSE PRETENSE [1]
(PETIT LARCENY)
INTENT

To warrant conviction for obtaining goods or money by false pretense the accused must have had the present intent to commit the offense at the time he obtained possession or custody.[1]

FOOTNOTES

[1] State v. Smith, 97 W.Va. 313, 125 S.E. 90 (1924).

OBTAINING MONEY, GOODS OR PROPERTY BY FALSE PRETENSE [1]
(PETIT LARCENY)
FALSE PRETENSE

A criminal false pretense is "the false representation of a past or existing fact, whether by oral words, written words, or conduct, calculated or intended to deceive, which does in fact deceive, and by means of which one person obtains value from another without compensation.[1]

In order to support a conviction of obtaining money or goods by false pretenses, the false statement or representation alleged to have been made must relate to existing facts or past events.[2]

When one makes a promise to perform in the future with intent to cheat, defraud, or deceive, such promise constitutes a misrepresentation of existing fact which is a "false pretense".[2]

FOOTNOTES

[1] Hubbard v. Com., 201 Va. 61, 109 S.E.2d 100 (1959).

[2] State v. Moore, 166 W.Va. 97, 273 S.E.2d 821 (1980); State v. Barnes, 177 W.Va. 510, 354 S.E.2d 606 (1987).

OBTAINING MONEY, GOODS OR PROPERTY BY FALSE PRETENSE [1]
(PETIT LARCENY)
CAUSATION

The fraud must be accomplished by means of the false pretense, that is, the false pretense must be in some degree the cause, if not the controlling cause, which induced the owner to part with his property.[1]

FOOTNOTES

[1] State v. Pishner, 72 W.Va. 603, 78 S.E. 752 (1913); State v. Moore, 166 W.Va. 97, 273 S.E.2d 821 (1980); State v. Barnes, 177 W.Va. 510, 354 S.E.2d 606 (1987).

OBTAINING PROPERTY IN RETURN FOR WORTHLESS CHECK (LESS THAN $200) [1]

Obtaining property in return for a worthless check is committed if any person, firm or corporation obtains money, services, goods or other property or thing of value by means of a check, draft or order for the payment of money or its equivalent upon any bank or other depository, knowing at the time of the making, drawing, issuing, uttering or delivering of such check, draft or order that there are insufficient funds on deposit in or credit with such bank or other depository with which to pay the same upon presentation.[2]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant _____ (person, firm or corporation)
2. (with intent to defraud?)[3]
3. obtained _____ (money, services, goods or other property or thing of value)
4. from _____
5. by means of a check, draft or order for payment of money or its equivalent
6. in the amount of _____ (specify amount less than two hundred dollars)
7. drawn upon _____ (bank or other depository)
8. knowing at the time of the making, drawing, issuing and delivering of such check, draft or order there are insufficient funds on deposit in or credit with such bank or other depository with which to pay the same upon presentation,
9. and at the time of the making, drawing issuing and delivering of such check that there were insufficient funds on deposit in or credit with such bank with which to pay the same upon presentation; [5]
10. and further _____ (the payee or holder of the check) did not know, or was not notified prior to the acceptance of the check, or had no reason to believe (or could not have known by exercising ordinary prudence, using means readily at hand), [6] that the defendant did not have on deposit or to his/her credit with the bank or depository sufficient funds to insure payment of the check; [6]
11. and the check, draft or order was not postdated. [6]

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FOOTNOTES

[1] It is a misdemeanor if the amount of the check, draft or order is less than two hundred dollars; a felony if it is two hundred dollars or more. W.Va.Code, 61-3-39 (1977).

[2] W.Va.Code, 61-3-39 (1977).

[3] The instruction set forth in footnote 4 of State v. Griffith, 168 W.Va. 718, 285 S.E.2d 469 (1981) does not include intent to defraud, nor is fraud an element set forth in W.Va.Code, 61-3-39 (1977). The Court in State v. Orth, 178 W.Va. 303, 359 S.E.2d 136 (1987), however, finds "fraud is the gravamen of the offense proscribed by section thirty-nine" and cites State v. McGinnis, 116 W.Va. 473, 181 S.E. 820 (1935). (The statute set forth "intent to defraud" as an element of the offense at the time McGinnis was written).

[4] W.Va.Code, 61-3-39 (1977) proscribes issuing worthless checks in order to obtain "property or [a] thing of value [,] "... State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 621 (1991)."

Appellant obtained an interest in a commercial lease by issuing a worthless check for a security deposit. The Court found "[c]learly this lease represented 'property or [a] thing of value' as that phrase is used in W.Va.Code, 61-3-39 (1977)." State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991).

[5] This language is not in W.Va.Code, 61-3-39 (1977) but is included in the instruction set forth in footnote 4 State v. Griffith, 168 W.Va. 718, 285 S.E.2d 469 (1981).

[6] When the payee or holder accepting a check knows there are not sufficient funds on deposit, he cannot be the victim of fraud and no offense is committed under this section. Syl. pt. 1, State v. Orth, 178 W.Va. 303, 359 S.E.2d 136 (1987).

"When the payee or holder accepting a check knows there are not sufficient funds on deposit, he cannot be the victim of fraud and, thus, no offense is committed under West Virginia Code, § 61-3-39 (1984 Replacement Vol.)." Syl. pt. 1, State v. Orth, 178 W.Va. 303, 359 S.E.2d 136 (1987).

"A payee or holder accepting a check cannot be defrauded by representations he knows to be untrue or could have known to be untrue by exercising ordinary prudence, using means readily at hand." Syl. pt. 2, State v. Orth, 178 W.Va. 303, 359 S.E.2d 136 (1987).

This section shall not apply to any such check, draft or order when the payee or holder knows or has been expressly notified prior to the acceptance of same or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment as aforesaid, nor shall this section apply to any postdated check, draft or order. W.Va.Code, 61-3-39 (1977).

NOTE: IF THE ABOVE ARE DEFENSES TO THE CHARGE, DO THEY NEED TO BE INCLUDED IN THE INSTRUCTION? SHOULD THEY ONLY BE INCLUDED IF THE DEFENDANT OFFERS EVIDENCE OF PAYEE'S KNOWLEDGE, ETC.?

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COMMENTS

SHOULD THE FOLLOWING "PRESUMPTIONS" BE INCLUDED IN THE INSTRUCTIONS?

1. It shall be the duty of the drawee of any check, draft or order, before refusing to pay the same to the holder thereof upon presentation, to cause to be written, printed or stamped in plain language thereon or attached thereto, the reason for drawee's dishonor or refusal to pay same. In all prosecutions under section 61-3-39 or 61-3-39a, the introduction in evidence of any unpaid and dishonored check, draft or other written order, having the drawee's refusal to pay stamped or written thereon, or attached thereto, with the reason therefore as aforesaid:

a. shall be prima facie evidence of the making or uttering of said check, draft or other written order, and the due presentation to the drawee for payment and the dishonor thereof, and that the same was properly dishonored for the reasons written, stamped or attached by the drawee on such dishonored checks, drafts or orders; and

b. shall be prima facie evidence, as against the maker or drawer thereof, of the withdrawing from deposit with the drawee named in the check, draft or other written order, of the funds on deposit with such drawee necessary to insure payment of said check, draft or other written order upon presentation within a reasonable time after negotiation; and

c. shall be prima facie evidence of the drawing, making, uttering or delivering of a check, draft or written order with the knowledge or insufficient funds in or credit with such drawee. W.Va.Code, 61-3-39c (1977).

2. (a) In any prosecution under 61-3-39...the making, drawing, uttering or delivery of a check, draft or order, the payment of which is refused by the drawee because of lack of funds or credit, shall be prima facie evidence that the drawer has knowledge at the time of making, drawing, issuing, uttering or delivering such check, draft or order that there is not sufficient funds or credit to pay the same, unless the check, draft or order is paid along with any charges or costs authorized by this article. W.Va.Code, 61-3-39d (1977).

SUMMARY OF PRESUMPTIONS

If a check, draft or order is dishonored, the drawee must give the reason for refusing to pay. In any prosecution under W.Va.Code, 61-3-39 or W.Va.Code, 61-3-39a, the introduction in evidence of the dishonored check, draft or order with the reason for refusal stamped, printed or written thereon, is prima facie evidence of:

1. the making or uttering of the check, draft or order;
2. the presentation to the drawee for payment;
3. dishonor for the reason given;
4. the maker's knowledge of insufficient funds or credit to pay upon presentation. W.Va.Code, 61-3-39c (1977).

In any prosecution under W.Va.Code, 61-3-39 (1977), the "presumption" of knowledge of insufficient funds is dissipated if payment, plus costs, is made. W.Va.Code, 61-3-39d (1977).

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See, State ex rel. Walls v. Noland, 433 S.E.2d 541 at 544 (W.Va. 1993), for a discussion of the rationale behind the permissive inference relevant to state of mind in bad check cases.

3. Permits (requires, if not multiple offender? - see 61-3-39j, 39k - requires notice which advises drawer may pay and avoid any further action) dismissal of criminal misdemeanor charges upon payment of the check plus costs. W.Va.Code, 61-3-39g (1979).

Payment is a defense to charges brought under W.Va.Code, 61-3-39a. W.Va.Code, 61-3-39b.

4. "...the making, drawing, issuing, uttering or delivery of any such check, draft or order, for or on behalf of any corporation, or its name, by any officer or agent of such corporation, shall subject such officer or agent to the penalties of this section to the same extent as though such check, draft or order was his own personal act, when such agent or officer knows that such corporation does not have sufficient funds on deposit in or credit with such bank or depository from which such check, draft or order can legally be paid upon presentment. W.Va.Code, 61-3-39 (1977).

5. Bank ledgers of a customer's account are probative and admissible evidence, though not conclusive, that the customer had knowledge of lack of funds when he or she drew checks on the account. State v. Griffith, 168 W.Va. 718, 285 S.E.2d 469 (1981).

6. Where the giving of a bad check only results in the entry of an item of credit on the pre-existing debt of the person giving the check, no money or property of value passes from the creditor to the debtor, and such giving does not constitute a crime under this section. State v. Stout, 142 W.Va. 182, 95 S.E.2d 639 (1956).

7. The failure of the payee in a check to present it within a reasonable time will not affect the liability of the drawer of such check to indictment, under this section, for obtaining goods or other property by giving a check therefore without having sufficient funds to meet the same, where it appears that the drawer of the check did not lose anything by reason of the failure to present the same earlier than it was actually presented. State v. Price, 83 W.Va. 71, 97 S.E. 582, 5 ALR 1247 (1918).

8. The making, issuance and delivery of a check on a bank in payment of a pre-existing debt, to his creditor, by one who has no funds or insufficient funds to his credit in such bank to pay the same is not an offense under this section. State v. Pishner, 72 W.Va. 603, 78 S.E. 752 (1913).

9. It is not necessary that the indictment identify with specificity the entity in whose name the account was held; however, where the indictment identifies the defendant individually as the holder of the account, the prosecution is required to prove that the defendant individually did not have sufficient funds on deposit with the bank to cover the subject check at the time he wrote it. State v. Pruitt, 178 W.Va. 147, 358 S.E.2d 231 (1987).

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10. W.Va.Code, 61-3-39 [1977] and W.Va.Code, 61-3-39a [1977] are not unconstitutionally vague in violation of U.S. Const. amend. XIV, § 1, or W.Va. Const. art. III. § 10. Syl. pt. 2, State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991).

11. A violation of W.Va.Code, 61-3-39a [1977] is not a lesser included offense of W.Va.Code, 61-3-39 [1977]. Consequently, a defendant who is accused of violating W.Va.Code, 61-3-39 [1977] is not entitled to a "lesser included offense" instruction reflecting the elements of W.Va.Code, 61-3-39a [1977]. Syl. pt. 5, State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991).

12. See footnote 7, State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991) for discussion of whether or not conviction of violating W.Va.Code, 61-3-39 and W.Va.Code, 61-3-39a upon the same facts would violate double jeopardy principles.

13. Permitting an accused to respond prior to the issuance of a warrant provides a reasonable assurance against misidentification. State ex rel. Walls v. Noland, 433 S.E.2d 541, 544 (W.Va. 1993).

OBTAINING PROPERTY IN RETURN FOR WORTHLESS CHECK ($200 OR MORE) [1]

Obtaining property in return for worthless check is committed if any person, firm or corporation obtains money, services, goods or other property or thing of value by means of a check, draft or order for the payment of money or its equivalent upon any bank or other depository, knowing at the time of the making, drawing, issuing, uttering or delivering of such check, draft or order that there are insufficient funds on deposit in or credit with such bank or other depository with which to pay the same upon presentation.[2]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant _____ (person, firm or corporation)
2. (with intent to defraud?)[3]
3. obtained _____ (money, services, goods or other property or thing of value)[4]
4. from _____
5. by means of a check, draft or order for payment of money or its equivalent
6. in the amount of _____ (specify amount less than two hundred dollars)
7. drawn upon _____ (bank or other depository)
8. knowing at the time of the making, drawing, issuing and delivering of such check, draft or order there are insufficient funds on deposit in or credit with such bank or other depository with which to pay the same upon presentation,
9. and at the time of the making, drawing issuing and delivering of such check that there were insufficient funds on deposit in or credit with such bank with which to pay the same upon presentation; [5]
10. and further _____ (the payee or holder of the check) did not know, or was not notified prior to the acceptance of the check, or had no reason to believe (or could not have known by exercising ordinary prudence, using means readily at hand), [6] that the defendant did not have on deposit or to his/her credit with the bank or depository sufficient funds to insure payment of the check; [6]
11. and the check, draft or order was not postdated. [6]

FOOTNOTES

[1] It is a misdemeanor if the amount of the check, draft or order is less than two hundred dollars; a felony if two hundred dollars or more. W.Va.Code, 61-3-39 (1977).

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[2] W.Va.Code, 61-3-39 (1977).

[3] The instruction set forth in footnote 4 of State v. Griffith, 168 W.Va. 718, 285 S.E.2d 469 (1981) does not include intent to defraud, nor is fraud an element set forth in W.Va.Code, 61-3-39. The Court in State v. Orth, 178 W.Va. 303, 359 S.E.2d 136 (1987), however, finds "fraud is the gravamen of the offense proscribed by section thirty-nine" and cites State v. McGinnis, 116 W.Va. 473, 181 S.E. 820 (1935). (The statute set forth "intent to defraud" as an element of the offense at the time McGinnis was written).

[4] W.Va.Code, 61-3-39 (1977) proscribes issuing worthless checks in order to obtain "property or [a] thing of value [,] "... State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 621 (1991)."

Appellant obtained an interest in a commercial lease by issuing a worthless check for a security deposit. The Court found "[c]learly this lease represented 'property or [a] thing of value' as that phrase is used in W.Va.Code, 61-3-39 (1977)." State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991).

[5] This language is not in W.Va.Code, 61-3-39 (1977), but is included in the instruction set forth in footnote 4, State v. Griffith, 168 W.Va. 718, 285 S.E.2d 469 (1981).

[6] When the payee or holder accepting a check knows there are not sufficient funds on deposit, he cannot be the victim of fraud and no offense is committed under this section. Syl. pt. 1, State v. Orth, 178 W.Va. 303, 359 S.E.2d 136 (1987).

"When the payee or holder accepting a check knows there are not sufficient funds on deposit, he cannot be the victim of fraud and, thus, no offense is committed under West Virginia Code, § 61-3-39 (1984 Replacement Vol.)." Syl. pt. 1, State v. Orth, 178 W.Va. 303, 359 S.E.2d 136 (1987).

"A payee or holder accepting a check cannot be defrauded by representations he knows to be untrue or could have known to be untrue by exercising ordinary prudence, using means readily at hand." Syl. pt. 2, State v. Orth, 178 W.Va. 303, 359 S.E.2d 136 (1987).

This section shall not apply to any such check, draft or order when the payee or holder knows or has been expressly notified prior to the acceptance of same or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment as aforesaid, nor shall this section apply to any postdated check, draft or order. W.Va.Code, 61-3-39 (1977).

IF THE ABOVE ARE DEFENSES TO THE CHARGE, DO THEY NEED TO BE INCLUDED IN THE INSTRUCTION? SHOULD THEY ONLY BE INCLUDED IF THE DEFENDANT OFFERS EVIDENCE OF PAYEE'S KNOWLEDGE, ETC.?

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COMMENTS

SHOULD THE FOLLOWING "PRESUMPTIONS" BE INCLUDED IN THE INSTRUCTIONS?

1. It shall be the duty of the drawee of any check, draft or order, before refusing to pay the same to the holder thereof upon presentation, to cause to be written, printed or stamped in plain language thereon or attached thereto, the reason for drawee's dishonor or refusal to pay same. In all prosecutions under section 61-3-39 or 61-3-39a, the introduction in evidence of any unpaid and dishonored check, draft or other written order, having the drawee's refusal to pay stamped or written thereon, or attached thereto, with the reason therefore as aforesaid:

a. shall be prima facie evidence of the making or uttering of said check, draft or other written order, and the due presentation to the drawee for payment and the dishonor thereof, and that the same was properly dishonored for the reasons written, stamped or attached by the drawee on such dishonored checks, drafts or orders; and

b. shall be prima facie evidence, as against the maker or drawer thereof, of the withdrawing from deposit with the drawee named in the check, draft or other written order, of the funds on deposit with such drawee necessary to insure payment of said check, draft or other written order upon presentation within a reasonable time after negotiation; and

c. shall be prima facie evidence of the drawing, making, uttering or delivering of a check, draft or written order with the knowledge of insufficient funds in or credit with such drawee. W.Va.Code, 61-3-39c (1977).

2. (a) In any prosecution under 61-3-39...the making, drawing, uttering or delivery of a check, draft or order, the payment of which is refused by the drawee because of lack of funds or credit, shall be prima facie evidence that the drawer has knowledge at the time of making, drawing, issuing, uttering or delivering such check, draft or order that there is not sufficient funds or credit to pay the same, unless the check, draft or order is paid along with any charges or costs authorized by this article. W.Va.Code, 61-3-39d (1977).

SUMMARY OF PRESUMPTIONS

If a check, draft or order is dishonored, the drawee must give the reason for refusing to pay. In any prosecution under W.Va.Code, 61-3-39 or W.Va.Code, 61-3-39a, the introduction in evidence of the dishonored check, draft or order with the reason for refusal stamped, printed or written thereon, is prima facie evidence of:

1. the making or uttering of the check, draft or order;
2. the presentation to the drawee for payment;
3. dishonor for the reason given;
4. the maker's knowledge of insufficient funds or credit to pay upon presentation. W.Va.Code, 61-3-39c (1977).

In any prosecution under W.Va.Code, 61-3-39, the "presumption" of knowledge of insufficient funds is dissipated if payment, plus costs, is made. W.Va.Code, 61-3-39d (1977).

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See, State ex rel. Walls v. Noland, 433 S.E.2d 541 at 544 (W.Va. 1993), for a discussion of the rationale behind the permissive inference relevant to state of mind in bad check cases.

3. Permits (requires, if not multiple offender? - see 61-3-39j, 39k - requires notice which advises drawer may pay and avoid any further action) dismissal of criminal misdemeanor charges upon payment of the check plus costs. W.Va.Code, 61-3-39g (1979).

Payment is a defense to charges brought under W.Va.Code, 61-3-39a. W.Va.Code, 61-3-39b.

4. "...the making, drawing, issuing, uttering or delivery of any such check, draft or order, for or on behalf of any corporation, or its name, by any officer or agent of such corporation, shall subject such officer or agent to the penalties of this section to the same extent as though such check, draft or order was his own personal act, when such agent or officer knows that such corporation does not have sufficient funds on deposit in or credit with such bank or depository from which such check, draft or order can legally be paid upon presentment." W.Va.Code, 61-3-39 (1977).

5. Bank ledgers of a customer's account are probative and admissible evidence, though certainly not conclusive, that the customer had knowledge of lack of funds when he or she drew checks on the account. State v. Griffith, 168 W.Va. 718, 285 S.E.2d 469 (1981).

6. Where the giving of a bad check only results in the entry of an item of credit on the pre-existing debt of the person giving the check, no money or property of value passes from the creditor to the debtor, and such giving does not constitute a crime under this section. State v. Stout, 142 W.Va. 182, 95 S.E.2d 639 (1956).

7. The failure of the payee in a check to present it within a reasonable time will not affect the liability of the drawer of such check to indictment, under this section, for obtaining goods or other property by giving a check therefore without having sufficient funds to meet the same, where it appears that the drawer of the check did not lose anything by reason of the failure to present the same earlier than it was actually presented. State v. Price, 83 W.Va. 71, 97 S.E. 582, 5 ALR 1247 (1918).

8. The making, issuance and delivery of a check on a bank in payment of a pre-existing debt, to his creditor, by one who has no funds or insufficient funds to his credit in such bank to pay the same is not an offense under this section. State v. Pishner, 72 W.Va. 603, 78 S.E. 752 (1913).

9. It is not necessary that the indictment identify with specificity the entity in whose name the account was held; however, where the indictment identifies the defendant individually as the holder of the account, the prosecution is required to prove that the defendant individually did not have sufficient funds on deposit with the bank to cover the subject check at the time he wrote it. State v. Pruitt, 178 W.Va. 147, 358 S.E.2d 231 (1987).

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10. W.Va.Code, 61-3-39 [1977] and W.Va.Code, 61-3-39a [1977] are not unconstitutionally vague in violation of U.S. Const. amend. XIV, § 1, or W.Va. Const. art. III. § 10. Syl. pt. 2, State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991).

11. A violation of W.Va.Code, 61-3-39a [1977] is not a lesser included offense of W.Va.Code, 61-3-39 [1977]. Consequently, a defendant who is accused of violating W.Va.Code, 61-3-39 [1977] is not entitled to a "lesser included offense' instruction reflecting the elements of W.Va.Code, 61-3-39a [1977]. Syl. pt. 5, State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991).

12. See footnote 7, State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991) for discussion of whether or not conviction of violating W.Va.Code, 61-3-39 and W.Va.Code, 61-3-39a upon the same facts would violate double jeopardy principles.

13. Permitting an accused to respond prior to the issuance of a warrant provides a reasonable assurance against misidentification. State ex rel. Walls v. Noland, 433 S.E.2d 541, 544 (W.Va. 1993).

MAKING, ISSUING WORTHLESS CHECKS [1]

Making or issuing worthless checks is committed if any person, firm or corporation make, draw, issue, utter or deliver any check, draft or order for the payment of money or its equivalent upon any bank or other depository, knowing or having reason to know there are insufficient funds on deposit in or credit with such bank or other depository with which to pay the same upon presentation.

In order to prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant _____ (person, firm or corporation)
2. in order to satisfy a preexisting debt, [2]
3. made, drew, issued, uttered or delivered
4. any check, draft or order
5. to _____
6. in the amount (specify amount less than two hundred dollars)
7. drawn upon _____ (bank or other depository)
8. knowing at the time of the making, drawing, issuing and delivering of such check, draft or order there are insufficient funds on deposit in or credit with such bank or other depository with which to pay the same upon presentation,
9. (and at the time of the making, drawing issuing and delivering of such check that there were insufficient funds on deposit in or credit with such bank with which to pay the same upon presentation);[3]
10. and further _____ (the payee or holder of the check) did not know, or was not notified prior to the acceptance of the check, or had no reason to believe (or could not have known by exercising ordinary prudence, using means readily at hand), [4] that the defendant did not have on deposit or to his/her credit with the bank or depository sufficient funds to insure payment of the check; [5]
11. and the check, draft or order was not postdated.[5]
12. the insufficiency of funds or credit was not caused by any adjustment to the drawer's account by the bank or other depository without notice to the drawer; [5]
13. and the insufficiency of funds or credit was not caused by the dishonoring of any check, draft or order deposited in the account unless there is knowledge or reason to believe such check, draft or order would be so dishonored.[5]

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FOOTNOTES

[1] W.Va.Code, 61-3-39a (1977).

[2] "W.Va.Code, 61-3-39a [1977] proscribes issuing a worthless check in order to satisfy a preexisting debt." State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991).

"Nothing in W.Va.Code, 61-3-39a [1977] indicates that a security deposit for a commercial lease is a preexisting debt under that section. Despite the passing of several months between the time that the appellant issued the worthless check for the security deposit and the time that he finally made payment therefor, the appellant committed a violation of W.Va.Code, 61-3-39 [1977]. This violation occurred at the time that the appellant issued the worthless check in exchange for the security deposit. In other words, the security deposit in this case never became a preexisting debt under W.Va.Code, 61-3-39a [1977]." State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 621 (1991).

[3] This language is not in W.Va.Code, 61-3-39a (1977), but see instruction set forth in footnote 4, State v. Griffith, 168 W.Va. 718, 285 S.E.2d 469 (1981) which refers to W.Va.Code, 61-3-39.

[4] State v. Orth, 178 W.Va. 303, 359 S.E.2d 136 (1987) adds this proviso but did not refer to this section of the Code.

[5] This section shall not apply to any such check, draft or order when the payee or holder knows or has been expressly notified prior to the acceptance of same or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment as aforesaid, nor shall this section apply to any postdated check, draft or order. W.Va.Code, 61-3-39a (1977).

This section shall not apply when such insufficiency of funds or credit is caused by any adjustment to the drawer's account by the bank of other depository without notice to the drawer or is caused by the dishonoring of any check, draft or order deposited in the account unless there is knowledge or reason to believe that such check, draft or order would be so dishonored.

NOTE: IF THE ABOVE ARE DEFENSES TO THE CHARGE, DO THEY NEED TO BE INCLUDED IN THE INSTRUCTION? SHOULD THEY ONLY BE INCLUDED IF THE DEFENDANT OFFERS EVIDENCE OF PAYEE'S KNOWLEDGE, ETC.?

COMMENTS

SHOULD THE FOLLOWING "PRESUMPTIONS" BE INCLUDED IN THE INSTRUCTIONS?

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1. It shall be the duty of the drawee of any check, draft or order, before refusing to pay the same to the holder thereof upon presentation, to cause to be written, printed or stamped in plain language thereon or attached thereto, the reason for drawee's dishonor or refusal to pay same. In all prosecutions under W.Va.Code, 61-3-39 or W.Va.Code, 61-3-39a, the introduction in evidence of any unpaid and dishonored check, draft or other written order, having the drawee's refusal to pay stamped or written thereon, or attached thereto, with the reason therefore as aforesaid:

a. shall be prima facie evidence of the making or uttering of said check, draft or other written order, and the due presentation to the drawee for payment and the dishonor thereof, and that the same was property dishonored for the reasons written, stamped or attached by the drawee on such dishonored checks, drafts or orders; and

b. shall be prima facie evidence, as against the maker or drawer thereof, of the withdrawing from deposit with the drawee named in the check, draft or other written order, of the funds on deposit with such drawee necessary to insure payment of said check, draft or other written order upon presentation within a reasonable time after negotiation; and

c. shall be prima facie evidence of the drawing, making, uttering or delivering of a check, draft or written order with the knowledge of insufficient funds in or credit with such drawee. W.Va.Code, 61-3-39c (1977).

2. (b) In any prosecution under 61-3-39a...it shall constitute prima facie evidence of the identity of the drawer of a check, draft or order if at the time of acceptance of such check, draft or order there is obtained the following information: Name and residence, business or mailing address and either a valid motor vehicle operator's number or the drawer's home or work phone number or place of employment. Such information may be recorded on the check, draft or order itself or may be retained on file by the payee and referred to on the check, draft or order by identifying number or other similar means. W.Va.Code, 61-3-39d (1977).

SUMMARY OF PRESUMPTIONS

If a check, draft or order is dishonored, the drawee must give the reason for refusing to pay. In any prosecution under W.Va.Code, 61-3-39 or W.Va.Code, 61-3-39a, the introduction in evidence of the dishonored check, draft or order with the reason for refusal stamped, printed or written thereon, is prima facie evidence of:

1. the making or uttering of the check, draft or order;
2. the presentation to the drawee for payment;
3. dishonor for the reason given;
4. the maker's knowledge of insufficient funds or credit to pay upon presentation. W.Va.Code, 61-3-39c (1977).

See, State ex rel. Walls v. Noland, 433 S.E.2d 541, 544 (W.Va. 1993) for a discussion of the rationale behind the permissive inference relevant to state of mind in bad check cases.

3. Payment of a dishonored check, including any authorized charges or costs, shall constitute a defense or grounds for dismissal of charges brought under section thirty-nine-a of this article. W.Va.Code, 61-3-39b (1977).

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4. The making, drawing, issuing, uttering or delivering of any such check, draft or order, for or on behalf of any corporation, or its name, by any officer or agent of such corporation, shall subject such officer or agent to the penalties of this section to the same extent as though such check, draft or order was his own personal act. 61-3-39a (1977).

5. Permits dismissal of criminal misdemeanor charges upon payment of the check plus costs. W.Va.Code, 61-3-39g (1979).

6. W.Va.Code, 61-3-39 [1977] and W.Va.Code, 61-3-39a [1977] are not unconstitutionally vague in violation of U.S. Const. amend. XIV, § 1, or W.Va. Const. art. III. § 10. Syl. pt. 2, State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991).

7. A violation of W.Va.Code, 61-3-39a [1977] is not a lesser included offense of W.Va.Code, 61-3-39 [1977]. Consequently, a defendant who is accused of violating W.Va.Code, 61-3-39 [1977] is not entitled to a "lesser included offense' instruction reflecting the elements of W.Va.Code, 61-3-39a [1977]. Syl. pt. 5, State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991).

8. See footnote 7, State v. Hays, 185 W.Va. 664, 408 S.E.2d 614, 620 (1991) for discussion of whether or not conviction of violating W.Va.Code, 61-3-39 and W.Va.Code, 61-3-39a upon the same facts would violate double jeopardy principles.

9. Permitting an accused to respond prior to the issuance of a warrant provides a reasonable assurance against misidentification. State ex rel. Walls v. Noland, 433 S.E.2d 541, 544 (W.Va. 1993).

10. The statutory complaint form in W.Va.Code § 61-3-39f is constitutionally sound; it requires a detailed itemization of the relevant facts and provides a sufficient basis for an independent determination of whether there is probable cause to proceed with a worthless check prosecution. Syl., State ex rel. Walls v. Noland, 433 S.E.2d 541 (W.Va. 1993).

SHOPLIFTING [1]
CONCEALMENT OF MERCHANDISE
($100 OR LESS)

Shoplifting is committed if any person, alone or in concert with another, knowingly, and with intent to appropriate merchandise without paying the merchant's stated price for the merchandise, conceals the merchandise upon his or her person or in another manner.

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant
2. alone, or in concert with another person,
3. a. knowingly concealed on his or her person
   b. _____ (describe other manner of concealment)[2]
4. _____ (describe merchandise)[3]
5. offered for sale by _____ (name mercantile establishment)[4]
6. and valued at one hundred dollars or less [5]
7. with the intent to appropriate the _____ (describe merchandise)
8. without paying to _____ (name mercantile establishment)
9. the merchant's[6] stated price for the merchandise.

FOOTNOTES

[1] W.Va.Code, 61-3A-1 (1981).

[2] "Conceal" means to hide, hold or carry merchandise so that, although there may be some notice of its presence, it is not visible through ordinary observation. W.Va.Code, 61-3A-6(a) (1981).

[3] "Merchandise" means any goods, foodstuffs, wares or personal property, or any part or portion thereof of any type or description displayed, held or offered for sale, or a shopping cart. W.Va.Code, 61-3A-6(d) (1981).

[4] "Mercantile establishment" means any place where merchandise is displayed, held or offered for sale, either at retail or wholesale. "Mercantile establishment" does not include adjoining parking lots or adjoining areas of common use with other establishments. W.Va.Code, 61-3A-6(d) (1981).

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[5] "Value of the merchandise" means the merchant's stated price of the merchandise, or in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the retail value of the merchandise, as defined in section one (section 61-3A-1) of this article, the difference between the merchant's stated price of the merchandise and the altered price. W.Va.Code, 61-3A-6(e) (1981).

[6] "Merchant" means an owner or operator of any mercantile establishment, and includes the merchant's employees, servants, security agents or other agents. W.Va.Code, 61-3A-6(b) (1981).

COMMENTS

1. Shoplifting constitutes a breach of peace and the owner of merchandise or his agent or employee or any law enforcement officer who has reasonable grounds to believe a person has committed shoplifting, may detain in a reasonable manner for a reasonable time not to exceed 30 minutes to investigate. The detention is not an arrest. W.Va.Code, 61-3A-4 (1981).

2. "An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest." Syl. pt. 1, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

"Constitutional protections apply to those arrested by privately employed security officers acting pursuant to statutory authority." Syl. pt. 2, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

3. The penalties for shoplifting set forth in W.Va.Code, 61-3A-3 (1981) are contingent upon whether the conviction is for a first, second, third or subsequent offense.

SHOPLIFTING [1]
CONCEALMENT OF MERCHANDISE
(MORE THAN $100)

Shoplifting is committed if any person, alone or in concert with another, knowingly, and with intent to appropriate merchandise without paying the merchant's stated price for the merchandise, conceals the merchandise upon his or her person or in another manner.

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant
2. alone, or in concert with another person,
3. a. knowingly concealed on his or her person
   b. _____ (describe other manner of concealment)[2]
4. _____ (describe merchandise)[3]
5. offered for sale by _____ (name mercantile establishment)[4]
6. and valued at more than one hundred dollars [5]
7. with the intent to appropriate the _____ (describe merchandise)
8. without paying to _____ (name mercantile establishment)
9. the merchant's[6] stated price for the merchandise.

FOOTNOTES

[1] W.Va.Code, 61-3A-1 (1981).

[2] "Conceal" means to hide, hold or carry merchandise so that, although there may be some notice of its presence, it is not visible through ordinary observation. W.Va.Code, 61-3A-6(a) (1981).

[3] "Merchandise" means any goods, foodstuffs, wares or personal property, or any part or portion thereof of any type or description displayed, held or offered for sale, or a shopping cart. W.Va.Code, 61-3A-6(d) (1981).

[4] "Mercantile establishment" means any place where merchandise is displayed, held or offered for sale, either at retail or wholesale. "Mercantile establishment" does not include adjoining parking lots or adjoining areas of common use with other establishments. W.Va.Code, 61-3A-6(d) (1981).

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[5] "Value of the merchandise" means the merchant's stated price of the merchandise, or in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the retail value of the merchandise, as defined in section one (section 61-3A-1) of this article, the difference between the merchant's stated price of the merchandise and the altered price. W.Va.Code, 61-3A-6(e) (1981).

[6] "Merchant" means an owner or operator of any mercantile establishment, and includes the merchant's employees, servants, security agents or other agents. W.Va.Code, 61-3A-6(b) (1981).

COMMENTS

1. Shoplifting constitutes a breach of peace and the owner of merchandise or his agent or employee or any law enforcement officer who has reasonable grounds to believe a person has committed shoplifting may detain in a reasonable manner for a reasonable time not to exceed 30 minutes to investigate. The detention is not an arrest. W.Va.Code, 61-3A-4 (1981).

2. "An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest." Syl. pt. 1, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

"Constitutional protections apply to those arrested by privately employed security officers acting pursuant to statutory authority." Syl. pt. 2, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

3. The penalties for shoplifting set forth in W.Va.Code, 61-3A-3 (1981) are contingent upon whether the conviction is for a first, second, third or subsequent offense.

SHOPLIFTING [1]
REMOVAL OF MERCHANDISE
($100 OR LESS)

Shoplifting is committed if any person, alone or in concert with another, knowingly, and with intent to appropriate merchandise without paying the merchant's stated price for the merchandise, removes or causes the removal of merchandise from the mercantile establishment or beyond the last station for payment.

To prove the commission of this offense the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant
2. alone, or in concert with another person,
3. a. knowingly removed
   b. caused the removal
4. a. from _____ (name mercantile establishment)[2]
   b. beyond the last station for payment at _____ (name mercantile establishment)
5. _____ (describe merchandise)[3]
6. offered for sale by _____ (name mercantile establishment)
7. and valued at one hundred dollars or less [4]
8. with the intent to appropriate the _____ (describe merchandise)
9. without paying to _____ (name mercantile establishment)
10. the merchant's[5] stated price for the merchandise.

FOOTNOTES

[1] W.Va.Code, 61-3A-1 (1981).

[2] "Mercantile establishment" means any place where merchandise is displayed, held or offered for sale, either at retail or wholesale. "Mercantile establishment" does not include adjoining parking lots or adjoining areas of common use with other establishments. W.Va.Code, 61-3A-6(d) (1981).

[3] "Merchandise" means any goods, foodstuffs, wares or personal property, or any part or portion thereof of any type or description displayed, held or offered for sale, or a shopping cart. W.Va.Code, 61-3A-6(d) (1981).

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[4] "Value of the merchandise" means the merchant's stated price of the merchandise, or in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the retail value of the merchandise, as defined in section one (section 61-3A-1) of this article, the difference between the merchant's stated price of the merchandise and the altered price. W.Va.Code, 61-3A-6(e) (1981).

[5] "Merchant" means an owner or operator of any mercantile establishment, and includes the merchant's employees, servants, security agents or other agents. W.Va.Code, 61-3A-6(b) (1981).

COMMENTS

1. Shoplifting constitutes a breach of peace and the owner of merchandise or his agent or employee or any law enforcement officer who has reasonable grounds to believe a person has committed shoplifting may detain in a reasonable manner for a reasonable time not to exceed 30 minutes to investigate. The detention is not an arrest. W.Va.Code, 61-3A-4 (1981).

2. "An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest." Syl. pt. 1, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

"Constitutional protections apply to those arrested by privately employed security officers acting pursuant to statutory authority." Syl. pt. 2, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

3. The penalties for shoplifting set forth in W.Va.Code, 61-3A-3 (1981) are contingent upon whether the conviction is for a first, second, third or subsequent offense.

SHOPLIFTING [1]
REMOVAL OF MERCHANDISE
(MORE THAN $100)

Shoplifting is committed if any person, alone or in concert with another, knowingly, and with intent to appropriate merchandise without paying the merchant's stated price for the merchandise, removes or causes the removal of merchandise from the mercantile establishment or beyond the last station for payment.

To prove the commission of this offense the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant
2. alone, or in concert with another person,
3. a. knowingly removed
   b. caused the removal
4. a. from _____ (name mercantile establishment)[2]
   b. beyond the last station for payment at _____ (name mercantile establishment)
5. _____ (describe merchandise)[3]
6. offered for sale by _____ (name mercantile establishment)
7. and valued at more than one hundred dollars [4]
8. with the intent to appropriate the _____ (describe merchandise)
9. without paying to _____ (name mercantile establishment)
10. the merchant's[5] stated price for the merchandise.

FOOTNOTES

[1] W.Va.Code, 61-3A-1 (1981).

[2] "Mercantile establishment" means any place where merchandise is displayed, held or offered for sale, either at retail or wholesale. "Mercantile establishment" does not include adjoining parking lots or adjoining areas of common use with other establishments. W.Va.Code, 61-3A-6(d) (1981).

[3] "Merchandise" means any goods, foodstuffs, wares or personal property, or any part or portion thereof of any type or description displayed, held or offered for sale, or a shopping cart. W.Va.Code, 61-3A-6(d) (1981).

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[4] "Value of the merchandise" means the merchant's stated price of the merchandise, or in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the retail value of the merchandise, as defined in section one (section 61-3A-1) of this article, the difference between the merchant's stated price of the merchandise and the altered price. W.Va.Code, 61-3A-6(e) (1981).

[5] "Merchant" means an owner or operator of any mercantile establishment, and includes the merchant's employees, servants, security agents or other agents. W.Va.Code, 61-3A-6(b) (1981).

COMMENTS

1. Shoplifting constitutes a breach of peace and the owner of merchandise or his agent or employee or any law enforcement officer who has reasonable grounds to believe a person has committed shoplifting may detain in a reasonable manner for a reasonable time not to exceed 30 minutes to investigate. The detention is not an arrest. W.Va.Code, 61-3A-4 (1981).

2. "An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest." Syl. pt. 1, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

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3. The penalties for shoplifting set forth in W.Va.Code, 61-3A-3 (1981) are contingent upon whether the conviction is for a first, second, third or subsequent offense.

SHOPLIFTING [1]
ALTERING, TRANSFERRING OR REMOVAL OF PRICE
($100 OR LESS)

Shoplifting is committed if any person, alone or in concert with another, knowingly, and with intent to appropriate merchandise without paying the merchant's stated price for the merchandise, alters, transfers or removes any price marking affixed to the merchandise.

To prove the commission of this offense the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant
2. alone, or in concert with another person,
3. knowingly altered, transferred or removed any price marking
4. affixed to _____ (describe merchandise)[2]
5. offered for sale by _____ (name mercantile establishment)[3]
6. with the intent to appropriate the _____ (describe merchandise)
7. without paying to _____ (name mercantile establishment)
8. the merchant's [4] stated price for the merchandise,
9. and the difference between the merchant's stated price of the _____ (describe merchandise) and the altered price was $100 or less.

FOOTNOTES

[1] W.Va.Code, 61-3A-1 (1981).

[2] "Merchandise" means any goods, foodstuffs, wares or personal property, or any part or portion thereof of any type or description displayed, held or offered for sale, or a shopping cart. W.Va.Code, 61-3A-6(d) (1981).

[3] "Mercantile establishment" means any place where merchandise is displayed, held or offered for sale, either at retail or wholesale. "Mercantile establishment" does not include adjoining parking lots or adjoining areas of common use with other establishments. W.Va.Code, 61-3A-6(d) (1981).

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[4] "Merchant" means an owner or operator of any mercantile establishment, and includes the merchant's employees, servants, security agents or other agents. W.Va.Code, 61-3A-6(b) (1981).

[5] "Value of the merchandise" means the merchant's stated price of the merchandise, or in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the retail value of the merchandise, as defined in section one (section 61-3A-1) of this article, the difference between the merchant's stated price of the merchandise and the altered price. W.Va.Code, 61-3A-6(e) (1981).

COMMENTS

1. Shoplifting constitutes a breach of peace and the owner of merchandise or his agent or employee or any law enforcement officer who has reasonable grounds to believe a person has committed shoplifting may detain in a reasonable manner for a reasonable time not to exceed 30 minutes to investigate. The detention is not an arrest. W.Va.Code, 61-3A-4 (1981).

2. "An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest." Syl. pt. 1, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

"Constitutional protections apply to those arrested by privately employed security officers acting pursuant to statutory authority." Syl. pt. 2, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

3. The penalties for shoplifting set forth in W.Va.Code, 61-3A-3 (1981) are contingent upon whether the conviction is for a first, second, third or subsequent offense.

SHOPLIFTING [1]
ALTERING, TRANSFERRING OR REMOVAL OF PRICE
(MORE THAN $100)

Shoplifting is committed if any person, alone or in concert with another, knowingly, and with intent to appropriate merchandise without paying the merchant's stated price for the merchandise, alters, transfers or removes any price marking affixed to the merchandise.

To prove the commission of this offense the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant
2. alone, or in concert with another person,
3. knowingly altered, transferred or removed any price marking
4. affixed to _____ (describe merchandise)[2]
5. offered for sale by _____ (name mercantile establishment)[3]
6. with the intent to appropriate the _____ (describe merchandise)
7. without paying to _____ (name mercantile establishment)
8. the merchant's [4] stated price for the merchandise.
9. and the difference between the merchant's stated price of the _____ (describe merchandise) and the altered price was more than $100.

FOOTNOTES

[1] W.Va.Code, 61-3A-1 (1981).

[2] "Merchandise" means any goods, foodstuffs, wares or personal property, or any part or portion thereof of any type or description displayed, held or offered for sale, or a shopping cart. W.Va.Code, 61-3A-6(d) (1981).

[3] "Mercantile establishment" means any place where merchandise is displayed, held or offered for sale, either at retail or wholesale. "Mercantile establishment" does not include adjoining parking lots or adjoining areas of common use with other establishments. W.Va.Code, 61-3A-6(d) (1981).

[4] "Merchant" means an owner or operator of any mercantile establishment, and includes the merchant's employees, servants, security agents or other agents. W.Va.Code, 61-3A-6(b) (1981).

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[5] "Value of the merchandise" means the merchant's stated price of the merchandise, or in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the retail value of the merchandise, as defined in section one (section 61-3A-1) of this article, the difference between the merchant's stated price of the merchandise and the altered price. W.Va.Code, 61-3A-6(e) (1981).

COMMENTS

1. Shoplifting constitutes a breach of peace and the owner of merchandise or his agent or employee or any law enforcement officer who has reasonable grounds to believe a person has committed shoplifting may detain in a reasonable manner for a reasonable time not to exceed 30 minutes to investigate. The detention is not an arrest. W.Va.Code, 61-3A-4 (1981).

2. "An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest." Syl. pt. 1, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

"Constitutional protections apply to those arrested by privately employed security officers acting pursuant to statutory authority." Syl. pt. 2, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

3. The penalties for shoplifting set forth in W.Va.Code, 61-3A-3 (1981) are contingent upon whether the conviction is for a first, second, third or subsequent offense.

SHOPLIFTING [1]
TRANSFERRING MERCHANDISE FROM ONE CONTAINER TO ANOTHER ($100 OR LESS)

Shoplifting is committed if any person, alone or in concert with another, knowingly, and with intent to appropriate merchandise without paying the merchant's stated price for the merchandise, transfers the merchandise from one container to another.

To prove the commission of this offense the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant
2. alone, or in concert with another person,
3. knowingly transferred from one container to another
4. _____ (describe merchandise)[2]
5. offered for sale by _____ (name mercantile establishment)[3]
6. and valued at one hundred dollars or less [4]
7. with the intent to appropriate the _____ (describe merchandise)
8. without paying to _____ (name mercantile establishment)
9. the merchant's [5] stated price for the merchandise.

FOOTNOTES

[1] W.Va.Code, 61-3A-1 (1981).

[2] "Merchandise" means any goods, foodstuffs, wares or personal property, or any part or portion thereof of any type or description displayed, held or offered for sale, or a shopping cart. W.Va.Code, 61-3A-6(d) (1981).

[3] "Mercantile establishment" means any place where merchandise is displayed, held or offered for sale, either at retail or wholesale. "Mercantile establishment" does not include adjoining parking lots or adjoining areas of common use with other establishments. W.Va.Code, 61-3A-6(d) (1981).

[4] "Value of the merchandise" means the merchant's stated price of the merchandise, or in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the retail value of the merchandise, as defined in section one (section 61-3A-1) of this article, the difference between the merchant's stated price of the merchandise and the altered price. W.Va.Code, 61-3A-6(e) (1981).

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[5] "Merchant" means an owner or operator of any mercantile establishment, and includes the merchant's employees, servants, security agents or other agents. W.Va.Code, 61-3A-6(b) (1981).

COMMENTS

1. Shoplifting constitutes a breach of peace and the owner of merchandise or his agent or employee or any law enforcement officer who has reasonable grounds to believe a person has committed shoplifting may detain in a reasonable manner for a reasonable time not to exceed 30 minutes to investigate. The detention is not an arrest. W.Va.Code, 61-3A-4 (1981).

2. "An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest." Syl. pt. 1, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

"Constitutional protections apply to those arrested by privately employed security officers acting pursuant to statutory authority." Syl. pt. 2, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

3. The penalties for shoplifting set forth in W.Va.Code, 61-3A-3 (1981) are contingent upon whether the conviction is for a first, second, third or subsequent offense.

SHOPLIFTING [1]
TRANSFERRING MERCHANDISE FROM ONE CONTAINER TO ANOTHER
(MORE THAN $100)

Shoplifting is committed if any person, alone or in concert with another, knowingly, and with intent to appropriate merchandise without paying the merchant's stated price for the merchandise, transfers the merchandise from one container to another.

To prove the commission of this offense the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant
2. alone, or in concert with another person,
3. knowingly transferred from one container to another
4. _____ (describe merchandise)[2]
5. offered for sale by _____ (name mercantile establishment) [3]
6. and valued at more than one hundred dollars [4]
7. with the intent to appropriate the _____ (describe merchandise)
8. without paying to _____ (name mercantile establishment)
9. the merchant's [5] stated price for the merchandise.

FOOTNOTES

[1] W.Va.Code, 61-3A-1 (1981).

[2] "Merchandise" means any goods, foodstuffs, wares or personal property, or any part or portion thereof of any type or description displayed, held or offered for sale, or a shopping cart. W.Va.Code, 61-3A-6(d) (1981).

[3] "Mercantile establishment" means any place where merchandise is displayed, held or offered for sale, either at retail or wholesale. "Mercantile establishment" does not include adjoining parking lots or adjoining areas of common use with other establishments. W.Va.Code, 61-3A-6(d) (1981).

[4] "Value of the merchandise" means the merchant's stated price of the merchandise, or in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the retail value of the merchandise, as defined in section one (section 61-3A-1) of this article, the difference between the merchant's stated price of the merchandise and the altered price. W.Va.Code, 61-3A-6(e) (1981).

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[5] "Merchant" means an owner or operator of any mercantile establishment, and includes the merchant's employees, servants, security agents or other agents. W.Va.Code, 61-3A-6(b) (1981).

COMMENTS

1. Shoplifting constitutes a breach of peace and the owner of merchandise or his agent or employee or any law enforcement officer who has reasonable grounds to believe a person has committed shoplifting may detain in a reasonable manner for a reasonable time not to exceed 30 minutes to investigate. The detention is not an arrest. W.Va.Code, 61-3A-4 (1981).

2. "An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest." Syl. pt. 1, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

"Constitutional protections apply to those arrested by privately employed security officers acting pursuant to statutory authority." Syl. pt. 2, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

3. The penalties for shoplifting set forth in W.Va.Code, 61-3A-3 (1981) are contingent upon whether the conviction is for a first, second, third or subsequent offense.

SHOPLIFTING [1]
CAUSING SALES RECORDING DEVICE TO REFLECT LOWER PRICE ($100 OR LESS)

Shoplifting is committed if any person, alone or in concert with another, knowingly, and with intent to appropriate merchandise without paying the merchant's stated price for the merchandise, causes the cash register or other sales recording device to reflect less than the merchant's stated price for the merchandise.

To prove the commission of this offense the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant
2. alone, or in concert with another person,
3. knowingly caused the cash register or other sales recording device
4. at _____ (name mercantile establishment)[2]
5. to reflect less than the merchant's[3] stated price
6. for _____ (describe merchandise)
7. with the intent to appropriate the _____ (describe merchandise)
8. without paying to _____ (name mercantile establishment)
9. the merchant's stated price for the merchandise, [4]
10. and the difference between the merchant's stated price of the _____ (describe merchandise) and the altered price is $100 or less.

FOOTNOTES

[1] W.Va.Code, 61-3A-1 (1981).

[2] "Mercantile establishment" means any place where merchandise is displayed, held or offered for sale, either at retail or wholesale. "Mercantile establishment" does not include adjoining parking lots or adjoining areas of common use with other establishments. W.Va.Code, 61-3A-6(d) (1981).

[3] "Merchant" means an owner or operator of any mercantile establishment, and includes the merchant's employees, servants, security agents or other agents. W.Va.Code, 61-3A-6(b) (1981).

[4] "Merchandise" means any goods, foodstuffs, wares or personal property, or any part or portion thereof of any type or description displayed, held or offered for sale, or a shopping cart. W.Va.Code, 61-3A-6(d) (1981).

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[5] "Value of the merchandise" means the merchant's stated price of the merchandise, or in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the retail value of the merchandise, as defined in section one (section 61-3A-1) of this article, the difference between the merchant's stated price of the merchandise and the altered price. W.Va.Code, 61-3A-6(e) (1981).

COMMENTS

1. Shoplifting constitutes a breach of peace and the owner of merchandise or his agent or employee or any law enforcement officer who has reasonable grounds to believe a person has committed shoplifting may detain in a reasonable manner for a reasonable time not to exceed 30 minutes to investigate. The detention is not an arrest. W.Va.Code, 61-3A-4 (1981).

2. "An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest." Syl. pt. 1, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

"Constitutional protections apply to those arrested by privately employed security officers acting pursuant to statutory authority." Syl. pt. 2, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

3. The penalties for shoplifting set forth in W.Va.Code, 61-3A-3 (1981) are contingent upon whether the conviction is for a first, second, third or subsequent offense.

SHOPLIFTING [1]
CAUSING SALES RECORDING DEVICE TO REFLECT LOWER PRICE
(MORE THAN $100)

Shoplifting is committed if any person, alone or in concert with another, knowingly, and with intent to appropriate merchandise without paying the merchant's stated price for the merchandise, causes the cash register or other sales recording device to reflect less than the merchant's stated price for the merchandise.

To prove the commission of this offense the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant
2. alone, or in concert with another person,
3. knowingly caused the cash register or other sales recording device
4. at _____ (name mercantile establishment)[2]
5. to reflect less than the merchant's[3] stated price
6. for _____ (describe merchandise)
7. with the intent to appropriate the _____ (describe merchandise)
8. without paying to _____ (name mercantile establishment)
9. the merchant's stated price for the merchandise, [4]
10. and the difference between the merchant's stated price of the _____ (describe merchandise) and the altered price is more than $100.

FOOTNOTES

[1] W.Va.Code, 61-3A-1 (1981).

[2] "Mercantile establishment" means any place where merchandise is displayed, held or offered for sale, either at retail or wholesale. "Mercantile establishment" does not include adjoining parking lots or adjoining areas of common use with other establishments. W.Va.Code, 61-3A-6(d) (1981).

[3] "Merchant" means an owner or operator of any mercantile establishment, and includes the merchant's employees, servants, security agents or other agents. W.Va.Code, 61-3A-6(b) (1981).

[4] "Merchandise" means any goods, foodstuffs, wares or personal property, or any part or portion thereof of any type or description displayed, held or offered for sale, or a shopping cart. W.Va.Code, 61-3A-6(d) (1981).

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[5] "Value of the merchandise" means the merchant's stated price of the merchandise, or in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the retail value of the merchandise, as defined in section one (section 61-3A-1) of this article, the difference between the merchant's stated price of the merchandise and the altered price. W.Va.Code, 61-3A-6(e) (1981).

COMMENTS

1. Shoplifting constitutes a breach of peace and the owner of merchandise or his agent or employee or any law enforcement officer who has reasonable grounds to believe a person has committed shoplifting may detain in a reasonable manner for a reasonable time not to exceed 30 minutes to investigate. The detention is not an arrest. W.Va.Code, 61-3A-4 (1981).

2. "An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest." Syl. pt. 1, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

"Constitutional protections apply to those arrested by privately employed security officers acting pursuant to statutory authority." Syl. pt. 2, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

3. The penalties for shoplifting set forth in W.Va.Code, 61-3A-3 (1981) are contingent upon whether the conviction is for a first, second, third or subsequent offense.

SHOPLIFTING [1]
EXCHANGE OR REFUND
($100 OR LESS)

Shoplifting is committed if any person, alone or in concert with another person, knowingly and with intent obtains an exchange or refund or attempts to obtain an exchange or refund for merchandise which has not been purchased from the mercantile establishment.

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant
2. alone, or in concert with another person
3. knowingly
4. and with intent
5. obtained or attempted to obtain an exchange or refund
6. from _____ (name mercantile establishment)[2]
7. for _____ (describe merchandise)[3]
8. valued at one hundred dollars or less [4]
9. which merchandise had not been purchased from _____ (name mercantile establishment).

FOOTNOTES

[1] W.Va.Code, 61-3A-1 (1981).

[2] "Mercantile establishment" means any place where merchandise is displayed, held or offered for sale, either at retail or wholesale. "Mercantile establishment" does not include adjoining parking lots or adjoining areas of common use with other establishments. W.Va.Code, 61-3A-6(d) (1981).

[3] "Merchandise" means any goods, foodstuffs, wares or personal property, or any part or portion thereof of any type or description displayed, held or offered for sale, or a shopping cart. W.Va.Code, 61-3A-6(d) (1981).

[4] "Value of merchandise" means the merchant's stated price of the merchandise, or in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the retail value of the merchandise, as defined in section one (section 61-3A-1) of this article, the difference between the merchant's stated price of the merchandise and the altered price. W.Va.Code, 61-3A-6(e) (1981).

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COMMENTS

1. Shoplifting constitutes a breach of peace and the owner of merchandise or his agent or employee or any law enforcement officer who has reasonable grounds to believe a person has committed shoplifting may detain in a reasonable manner for a reasonable time not to exceed 30 minutes to investigate. The detention is not an arrest. W.Va.Code, 61-3A-4 (1981).

2. "An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest." Syl. pt. 1, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

"Constitutional protections apply to those arrested by privately employed security officers acting pursuant to statutory authority." Syl. pt. 2, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

3. The penalties for shoplifting set forth in W.Va.Code, 61-3A-3 (1981) are contingent upon whether the conviction is for a first, second, third or subsequent offense.

SHOPLIFTING [1]
EXCHANGE OR REFUND
(MORE THAN $100)

Shoplifting is committed if any person, alone or in concert with another person, knowingly and with intent obtains an exchange or refund or attempts to obtain an exchange or refund for merchandise which has not been purchased from the mercantile establishment.

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant
2. alone, or in concert with another person,
3. knowingly
4. and with intent
5. obtained or attempted to obtain an exchange or refund
6. from _____ (name mercantile establishment)[2]
7. for _____ (describe merchandise)[3]
8. valued at more than one hundred dollars [4]
9. which merchandise had not been purchased from _____ (name mercantile establishment).

FOOTNOTES

[1] W.Va.Code, 61-3A-1 (1981).

[2] "Mercantile establishment" means any place where merchandise is displayed, held or offered for sale, either at retail or wholesale. "Mercantile establishment" does not include adjoining parking lots or adjoining areas of common use with other establishments. W.Va.Code, 61-3A-6(d) (1981).

[3] "Merchandise" means any goods, foodstuffs, wares or personal property, or any part or portion thereof of any type or description displayed, held or offered for sale, or a shopping cart. W.Va.Code, 61-3A-6(d) (1981).

[4] "Value of merchandise" means the merchant's stated price of the merchandise, or in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the retail value of the merchandise, as defined in section one (section 61-3A-1) of this article, the difference between the merchant's stated price of the merchandise and the altered price. W.Va.Code, 61-3A-6(e) (1981).

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COMMENTS

1. Shoplifting constitutes a breach of peace and the owner of merchandise or his agent or employee or any law enforcement officer who has reasonable grounds to believe a person has committed shoplifting may detain in a reasonable manner for a reasonable time not to exceed 30 minutes to investigate. The detention is not an arrest. W.Va.Code, 61-3A-4 (1981).

2. "An arrest is the detaining of the person of another by any act or speech that indicates an intention to take him into custody and that subjects him to the actual control and will of the person making the arrest." Syl. pt. 1, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

"Constitutional protections apply to those arrested by privately employed security officers acting pursuant to statutory authority." Syl. pt. 2, State v. Muegge, 178 W.Va. 439, 360 S.E.2d 216 (1987).

3. The penalties for shoplifting set forth in W.Va.Code, 61-3A-3 (1981) are contingent upon whether the conviction is for a first, second, third or subsequent offense.

SHOPLIFTING [1]
CONCEAL

"Conceal" means to hide, hold or carry merchandise so that, although there may be some notice of its presence, it is not visible through ordinary observation.[2]

FOOTNOTES

[1] W.Va.Code, 61-3A-1 (1981).

[2] W.Va.Code, 61-3A-6(a) (1981).

SHOPLIFTING [1]
MERCHANT

"Merchant" means an owner or operator of any mercantile establishment, including his employees, servants, security agents or other agents.[2]

FOOTNOTES

[1] W.Va.Code, 61-3A-1 (1981).

[2] W.Va.Code, 61-3A-6(b) (1981).

SHOPLIFTING [1]
MERCANTILE ESTABLISHMENT

"Mercantile establishment" means any place where merchandise is displayed, held or offered for sale, either at retail or wholesale. "Mercantile establishment" does not include adjoining parking lots or adjoining areas of common use with other establishments.[2]

FOOTNOTES

[1] W.Va.Code, 61-3A-1 (1981).

[2] W.Va.Code, 61-3A-6(c) (1981).

SHOPLIFTING [1]
MERCHANDISE

"Merchandise" means any goods, foodstuffs, wares or personal property, or any part thereof of any type or description displayed, held or offered for sale, or a shopping cart.[2]

FOOTNOTES

[1] W.Va.Code, 61-3A-1 (1981).

[2] W.Va.Code, 61-3A-6(d) (1981).

SHOPLIFTING [1]
VALUE OF THE MERCHANDISE

"Value of the merchandise" means the merchant's stated price of the merchandise, or, in the event of altering, transferring or removing a price marking or causing a cash register or other sales device to reflect less than the retail value of the merchandise, [2] the difference between the merchant's stated price and the altered price.[3]

FOOTNOTES

[1] W.Va.Code, 61-3A-1 (1981).

[2] As defined in section one (61-3A-1) of this article.

[3] W.Va.Code, 61-3A-6(e) (1981).

ARSON
FIRST DEGREE

First degree arson is committed if any person willfully and maliciously sets fire to, burns, causes to be burned, or aids, counsels or procures the burning of any dwelling house, whether occupied, unoccupied or vacant, or kitchen, shop, barn, stable or other outhouse that is parcel thereof, belonging to or adjoining thereto, regardless of whether he owns the property.[1]

To prove the commission of first degree arson, the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant
2. willfully [2]
3. and maliciously [2]
4. a. set fire to
   b. burned
   c. caused to be burned
   d. aided the burning of
   e. counseled the burning of
   f. procured the burning of
5. any dwelling house, [3] whether occupied, unoccupied or vacant, or any
   a. kitchen
   b. shop
   c. barn
   d. stable
   e. _____ (specify other outhouse)
   that is parcel of, belonging to or adjoining the dwelling house
6. whether the property of the defendant or of another.[4]

FOOTNOTES

[1] W.Va.Code, 61-3-1 (1935).

[2] "The phrase "willfully and maliciously" in our arson statutes is common to arson statutes in other states. Courts have rather uniformly held that this phrase means an intentional as distinguished from an accidental burning and without lawful reason, cause, or excuse." Syl. pt. 4, State v. Davis, 178 W.Va. 87, 357 S.E.2d 769 (1987).

[3] The value of the dwelling house is not material. Hicks v. Boles, 276 F.Supp. 161 (N.D.W.Va. 1967).

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"A building that contains an apartment intended for habitation, whether occupied, unoccupied, or vacant, is a 'dwelling house' for purposes of W.Va.Code, 61-3-1, as amended." Syl. pt. 3, State v. Mullins, 181 W.Va. 415, 383 S.E.2d 47 (1989).

See, State v. Mullins, supra, at 51, 52 for discussion of the meaning of "dwelling house".

"...Arson is an offense against the security of the habitation, alluding to possession, not property. Daniels v. Commonwealth, 172 Va. 583, 588, 1 S.E.2d 333, 336 (1939). See also 2A M.J. Arson sec.1 (1980). Because a part of the building burned in this case was intended for habitation, and therefore was a dwelling, the security of the habitation was affected." State v. Mullins, supra, at 52.

[4] Ownership of the property is not essential as an element of the crime. Hicks v. Boles, 276 F.Supp. 161 (N.D.W.Va. 1967).

COMMENTS

1. Defendant was indicted for and convicted of arson in the first degree. The Court concluded arson in the third degree is a lesser included offense of arson in the first degree. Based upon the evidence submitted at trial, petitioner was entitled to an instruction upon arson in the third degree as a lesser included offense under the indictment. State v. Jones, 174 W.Va. 700, 329 S.E.2d 65 (1985).

Appellant contends he was entitled to an instruction on the misdemeanor offense of destruction of property as a lesser included offense under the indictment. W.Va.Code, 61-3-30 (1975). The Court found that the offense of destruction of property may be a lesser included offense of arson, but the evidence did not warrant the giving of such an instruction. Footnote 8, State v. Jones, supra.

2. "To sustain a conviction of arson, when the evidence offered at trial is circumstantial evidence, the evidence must show that the fire was of an incendiary origin and the defendant must be connected with the actual commission of the crime." Syl. pt. 5, State v. Mullins, 181 W.Va. 415, 383 S.E.2d 47 (1989). See, State v. Hanson, 181 W.Va. 353, 382 S.E.2d 547 (1989); State v. Gebhart, 70 W.Va. 232, 73 S.E. 964 (1912).

ARSON
FIRST DEGREE
WILLFUL AND MALICIOUS

The phrase "willful and malicious" means an intentional as distinguished from an accidental burning and without lawful reason, cause, or excuse.[1]

FOOTNOTES

[1] State v. Davis, 178 W.Va. 87, 357 S.E.2d 769 (1987).

ARSON
SECOND DEGREE

Arson in the second degree is committed if any person willfully and maliciously sets fire to, burns, causes to be burned, or aids, counsels or procures the burning of any building or structure which is not a dwelling house, or kitchen, shop, barn, stable or other outhouse that is parcel thereof, belonging to or adjoining thereto, regardless of whether he owns the property.[1]

To prove the commission of arson in the second degree, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. willfully [2]
3. and maliciously [2]
4. a. set fire to
   b. burned
   c. caused to be burned
   d. aided the burning of
   e. counseled the burning of
   f. procured the burning of
5. _____ (describe), a building or structure,
6. whether the property of the defendant or another, [5]
7. and that such building or structure was not a dwelling house, whether occupied, unoccupied or vacant, kitchen, shop, barn, stable, or other outhouse that is parcel of, belonging to or adjoining a dwelling house.

FOOTNOTES

[1] W.Va.Code, 61-3-2 (1935).

[2] "The phrase "willfully and maliciously" in our arson statutes is common to arson statutes in other states. Courts have rather uniformly held that this phrase means an intentional as distinguished from an accidental burning and without lawful reason, cause, or excuse." Syl. pt. 4, State v. Davis, 178 W.Va. 87, 357 S.E.2d 769 (1987).

[3] "A building that contains an apartment intended for habitation, whether occupied, unoccupied, or vacant, is a 'dwelling house' for purposes of W.Va.Code, 61-3-1, as amended." Syl. pt. 3, State v. Mullins, 181 W.Va. 415, 383 S.E.2d 47 (1989).

See, State v. Mullins, supra, at 51, 52 for discussion of the meaning of "dwelling house".

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"...Arson is an offense against the security of the habitation, alluding to possession, not property. Daniels v. Commonwealth, 172 Va. 583, 588, 1 S.E.2d 333, 336 (1939). See also 2A M.J. Arson sec.1 (1980). Because a part of the building burned in this case was intended for habitation, and therefore was a dwelling, the security of the habitation was affected." State v. Mullins, supra, at 52.

[4] Ownership of the property is not essential as an element of the crime. Hicks v. Boles, 276 F.Supp. 161 (N.D.W.Va. 1967).

COMMENTS

1. Defendant was indicted for and convicted of arson in the first degree. The Court concluded arson in the third degree is a lesser included offense of arson in the first degree. Based upon the evidence submitted at trial, petitioner was entitled to an instruction upon arson in the third degree as a lesser included offense under the indictment. State v. Jones, 174 W.Va. 700, 329 S.E.2d 65 (1985).

Appellant contends he was entitled to an instruction upon the misdemeanor offense of destruction of property, as a lesser included offense under the indictment. W.Va.Code, 61-3-30 (1975). The Court found the offense of destruction of property may be a lesser included offense of arson, but the evidence did not warrant the giving of such an instruction. Footnote 8, State v. Jones, supra.

2. "To sustain a conviction of arson, when the evidence offered at trial is circumstantial evidence, the evidence must show that the fire was of an incendiary origin and the defendant must be connected with the actual commission of the crime." Syl. pt. 5, State v. Mullins, 181 W.Va. 415, 383 S.E.2d 47 (1989). See, State v. Hanson, 181 W.Va. 353, 382 S.E.2d 547 (1989); State v. Gebhart, 70 W.Va. 232, 73 S.E. 964 (1912).

ARSON
SECOND DEGREE
WILLFUL AND MALICIOUS

The phrase "willful and malicious" means an intentional as distinguished from an accidental burning and without lawful reason, cause, or excuse.[1]

FOOTNOTES

[1] State v. Davis, 178 W.Va. 87, 357 S.E.2d 769 (1987).

ARSON
THIRD DEGREE

Arson in the third degree is committed if any person willfully and maliciously sets fire to, burns, causes to be burned, or aids, counsels or procures the burning of any other person's personal property valued at fifty dollars or more.[1]

To prove the commission of arson in the third degree, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. willfully [2]
3. and maliciously [2]
4. a. set fire to
   b. burned
   c. caused to be burned
   d. aided the burning of
   e. counseled the burning of
   f. procured the burning of
5. _____ (describe personal property)
6. belonging to a person other than the defendant and
7. valued at $50 or more.

FOOTNOTES

[1] W.Va.Code, 61-3-3 (1957).

[2] "The phrase "willfully and maliciously" in our arson statutes is common to arson statutes in other states. Courts have rather uniformly held that this phrase means an intentional as distinguished from an accidental burning and without lawful reason, cause, or excuse." Syl. pt. 4, State v. Davis, 178 W.Va. 87, 357 S.E.2d 769 (1987).

COMMENTS

1. Defendant was indicted for and convicted of arson in the first degree. The Court concluded arson in the third degree is a lesser included offense of arson in the first degree. Based upon the evidence submitted at trial, petitioner was entitled to an instruction upon arson in the third degree as a lesser included offense under the indictment. State v. Jones, 174 W.Va. 700, 329 S.E.2d 65 (1985).

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Appellant contends he was entitled to an instruction upon the misdemeanor offense of destruction of property, as a lesser included offense under the indictment. W.Va.Code, 61-3-30 (1975). The Court found the offense of destruction of property may be a lesser included offense of arson, but the evidence did not warrant the giving of such an instruction. Footnote 8, State v. Jones, supra.

2. To sustain a conviction of arson, by circumstantial evidence, the evidence must show that the fire was of an incendiary origin and the defendant must be connected with the actual commission of the crime. Syl. pt. 5, State v. Mullins, 181 W.Va. 415, 383 S.E.2d 47 (1989). See, State v. Hanson, 181 W.Va. 353, 382 S.E.2d 547 (W.Va. 1989); State v. Gebhart, 70 W.Va. 232, 73 S.E. 964 (1912).

ARSON
THIRD DEGREE
WILLFUL AND MALICIOUS

The phrase "willful and malicious" means an intentional as distinguished from an accidental burning and without lawful reason, cause, or excuse.[1]

FOOTNOTES

[1] State v. Davis, 178 W.Va. 87, 357 S.E.2d 769 (1987).

ARSON
FOURTH DEGREE (ATTEMPTED ARSON)

Fourth degree arson is committed if any person willfully and maliciously attempts to set fire to, or attempts to burn, or to aid, counsel or procure the burning of any dwelling house, whether occupied, unoccupied or vacant, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto, whether owned by him or another; any building or structure of any class or character, whether owned by him or another, or any other person's personal property of a value of fifty dollars or more or commits any act preliminary thereto, or in furtherance thereof.[1]

To prove the commission of fourth degree arson, the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant,
2. willfully [2]
3. and maliciously [2]
4. attempted to, [3]
   a. set fire to
   b. burn
   c. aid the burning of
   d. counsel the burning of
   e. procure the burning of
5. a. any dwelling house, whether occupied, unoccupied or vacant, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto, whether owned by the defendant or another;
   b. any building or structure of any class or character, whether owned by the defendant or another;
   c. any other person's personal property valued at fifty dollars or more,
6. or committed any act preliminary thereto or in furtherance thereof.

FOOTNOTES

[1] W.Va.Code, 61-3-4 (1935).

[2] "The phrase "willfully and maliciously" in our arson statutes is common to arson statutes in other states. Courts have rather uniformly held that this phrase means an intentional as distinguished from an accidental burning and without lawful reason, cause, or excuse." Syl. pt. 4, State v. Davis, 178 W.Va. 87, 357 S.E.2d 769 (1987).

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[3] Attempt defined in separate instruction.

COMMENTS

1. "The property distinctions that are relevant to determine the degree of other arson charges are irrelevant under our attempted arson statute, W.Va.Code, 61-3-4, which specifically incorporates 'any of the buildings of property mentioned in the foregoing sections.' Thus attempted arson is not confined to a dwelling." Syl. pt. 6, State v. Davis, 178 W.Va. 87, 357 S.E.2d 769 (1987).

2. In State v. Davis, supra, the defendant was convicted of attempted arson. He contended the State failed to prove any intent or motive for the fire.

For arson, as distinguished from attempted arson, the fire must be of an incendiary origin and the defendant must be personally connected to the fire.

For purposes of an attempted arson, the requisite proof for the State to show under State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219 (1978), is a specific intent to commit the underlying crime, i.e., arson, and an overt act toward its completion.

Here, the jury was instructed that each of the elements of fourth degree arson, including that the defendant willfully and maliciously attempted to set the fire, must be proven by the State beyond a reasonable doubt. In a separate instruction, the court defined "willful and malicious" to mean a "deliberate and intentional attempt to set fire to or burn a building as contrasted with an accidental or unintentional attempt to set fire to or burn a building." The Court found the jury was properly instructed on intent.

ARSON
FOURTH DEGREE
WILLFUL AND MALICIOUS

The phrase "willful and malicious" means intentional as distinguished from accidental and without lawful reason, cause, or excuse.[1]

FOOTNOTES

[1] State v. Davis, 178 W.Va. 87, 357 S.E.2d 769 (1987).

ARSON
FOURTH DEGREE
ATTEMPT

"In order to constitute the crime of attempt, two requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime."[1]

FOOTNOTES

[1] Syl. pt. 2, State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219 (1978); State v. Burd, 419 S.E.2d 676 (W.Va. 1991); Syl. pt. 4, State v. Mayo, (No. 21760) (3/25/94).

COMMENTS

1. Where formation of criminal intent is accompanied by preparation to commit the crime of murder and a direct overt and substantial act toward its perpetration, it constitutes the offense of attempted murder. Syl. pt. 2, State v. Burd, 419 S.E.2d 676 (W.Va. 1991).

ARSON
FOURTH DEGREE
PLACING OF EXPLOSIVES

The placing or distributing of any inflammable, explosive or combustible material or substance, or any device in any building or property...[1] in an arrangement or preparation with intent to eventually, willfully and maliciously set fire to or burn same, or to procure the setting fire to or burning of same is an attempt to burn the building or property.[2]

FOOTNOTES

[1] ... mentioned in the foregoing sections...

[2] W.Va.Code, 61-3-4(b) (1935).

ARSON
BURNING, OR ATTEMPTING TO BURN INSURED PROPERTY

Burning or attempting to burn insured property is committed if any person willfully and with intent to injure or defraud the insurer sets fire to or burns; or attempts to set fire to or burn or cause to be burned; or aids, counsels or procures the burning of any building, structure or personal property, whether or not he owns the property.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant
2. willfully [2]
3. and with intent to injure or defraud _____ (name the insurer)
4. a. set fire to
   b. burned
   c. attempted to set fire to
   d. attempted to burn
   e. attempted to cause to be burned
   f. aided the burning of
   g. counseled the burning of
   h. procured the burning of
5. _____ (describe the building, structure or personal property)
6. whether the property of himself or another;
7. and that the _____ (building, structure or personal property) was at the time insured against loss or damage by fire
8. by _____ (name insurer).

FOOTNOTES

[1] W.Va.Code, 61-3-5 (1935).

[2] Defined in separate instruction.

ARSON
BURNING OR ATTEMPTING TO BURN INSURED PROPERTY
WILLFULLY

"Willfully" means purposely, deliberately or intentionally.[1]

FOOTNOTES

[1] See, State v. Davis, 178 W.Va. 87, 357 S.E.2d 769 (1987).

ARSON
SETTING FIRE ON LANDS

Setting fire on lands is committed if any person unlawfully [2] and maliciously [3] sets fire to any woods, fence, grass, straw or other thing capable of spreading fire on lands.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant
2. unlawfully
3. and maliciously [2]
4. set fire to
5. a. woods
   b. fence
   c. grass
   d. straw
   e. _____ (describe other thing capable of spreading fire on lands)
6. capable of spreading fire on public lands.

FOOTNOTES

[1] W.Va.Code, 61-3-6 (1988).

[2] Defined in separate instruction.

ARSON
SETTING FIRE ON LANDS
MALICIOUSLY

"Maliciously" denotes that malice which characterizes all acts done with an evil disposition or a wrong and unlawful motive or purpose. It denotes a state of mind which results in conduct injurious to others without lawful reason, cause or excuse.[1]

FOOTNOTES

[1] See, State v. Davis, 178 W.Va. 87, 357 S.E.2d 769 (1987).

ARSON
PLACING EXPLOSIVES WITH CRIMINAL INTENT

Placing explosives with criminal intent is committed if any person places in, upon, under, against, or near to any coal mine, building, car, vessel or other structure, gunpowder, dynamite, nitroglycerine or any other explosive substance, with intent to destroy, throw down, or injure the whole or any part thereof, under such circumstances, that, if the intent were accomplished, human life or safety would be endangered thereby, although no actual damage is done.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant
2. placed
3. a. in
   b. upon
   c. under
   d. against
   e. near
4. to any
   a. coal mine
   b. building
   c. car
   d. vessel
   e. _____ (name other structure)
5. a. gunpowder
   b. dynamite
   c. nitroglycerine
   d. _____ (name other explosive substance)
6. with the intent to
7. a. destroy
   b. throw down
   c. injure
8. the whole or any part thereof;
9. and even if no actual damage was done, if the defendant _____'s intent had been accomplished, human life or safety would have been endangered.

FOOTNOTES

[1] W.Va.Code, 61-3-7 (1933).

ARSON
POSSESSING EXPLOSIVES WITH CRIMINAL INTENT [1]

Possessing explosives with criminal intent is committed if any person carries or possesses a bomb, bombshell or other explosive substance with the intent to use the same unlawfully against the person or property of another.

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. _____, the defendant
2. a. carried
   b. possessed
3. a. a bomb
   b. a bombshell
   c. _____ (describe other explosive substance)
4. with the intent to use the
   a. bomb
   b. bombshell
   c. _____ (other explosive substance)
6. (a) against _____ (name person)
   (b) against the property of _____ (name person).

FOOTNOTES

[1] W.Va.Code, 61-3-7 (1933).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
(serious bodily injury/deadly weapon)

Sexual assault in the first degree is committed when a person engages in (sexual intercourse) (or) (sexual intrusion) with another person and, in so doing, (inflicts serious bodily injury upon anyone) (or) (employs a deadly weapon in the commission of the act).[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. engaged in
   a. sexual intercourse [2]
   b. sexual intrusion [3]
3. with _____ (another person)
4. without _____,s consent [4]
5. and, in so doing
   a. inflicted serious bodily injury [5] upon _____
   b. employed a deadly weapon [6] in the commission of the act.

FOOTNOTES

[1] W.Va.Code, 61-8B-3(a)(1) (1991).

[2] Separate instruction provided. See W.Va.Code, 61-8B-1(7) (1986).

[3] Separate instruction provided. See W.Va.Code, 61-8B-1(8) (1986).

[4] Separate instruction provided. Lack of consent is not specifically set forth in W.Va.Code, 61-8B-3(a)(1) (1991). However, see W.Va.Code, 61-8B-2 (1984):

(a) Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.
(b) Lack of consent results from:
(1) Forcible compulsion; or
(2) Incapacity to consent; or
(3) If the offense charged is sexual abuse, any circumstances in addition to the forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.
(c) A person is deemed incapable of consent when such person is:

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(1) Less than sixteen years old; or
(2) Mentally defective; or
(3) Mentally incapacitated; or
(4) Physically helpless.

State v. Woodall, 182 W.Va. 15, 385 S.E.2d 253, 265 (1989) - "'...A conviction for first-degree sexual assault requires proof of non-consensual sexual intercourse when serious bodily injury is inflicted or when the defendant employs a deadly weapon in the commission of the act...' W.Va.Code, 61-8B-3 (1984)..."

[5] Separate instruction provided. See W.Va.Code, 61-8B-1(10) (1986).

[6] Separate instruction provided. See W.Va.Code, 61-8B-1(11) (1986).

COMMENTS

1. See W.Va.Code, 61-8B-12 (1984).

2. The sexual abuse statute involving parents, custodians, or guardians, W.Va.Code, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, W.Va.Code, 61-8B-1, et seq., for purposes of punishment. State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992); State v. George W.H., 439 S.E.2d 423 (W.Va. 1993).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
(serious bodily injury/deadly weapon)
LACK OF CONSENT [1]
(forcible compulsion)[2]

It is an element of this offense that the (sexual act - specify) was committed without the consent of the victim. Lack of consent results from forcible compulsion.

"Forcible compulsion" means:

Physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or

Threat or intimidation, expressed or implied, placing a person in fear of immediate death or bodily injury to himself or another person or in fear that he or another person will be kidnapped; or

Fear by a child under sixteen years of age caused by intimidation, expressed or implied, by another person four years older than the victim.

For the purposes of this definition "resistance" includes physical resistance or any clear communication of the victim's lack of consent.

FOOTNOTES

[1] W.Va.Code, 61-8B-2 (1984). Use if applicable.

[2] W.Va.Code, 61-8B-1 (1986).

COMMENTS

1. Where evidence conclusively establishes that the victim of a sexual assault offered no resistance to his attacker, was neither struck dumb with fear during the assault, nor attempted to utter any plea for assistance, no "earnest resistance" to "forcible compulsion" exists under W.Va.Code, 61-8B-1(a)(1)(iii) (1976). Syl. pt. 1, State v. Hartshorn, 175 W.Va. 274, 332 S.E.2d 574 (1985).

The Court found the complainant did not offer the degree of "earnest resistance" to the sexual assault contemplated by W.Va.Code, 61-8B-3(a)(iii) (1976) and necessary to sustain a conviction for sexual assault in the first degree.

See case for definition of "forcible compulsion" as defined under 1976 law.

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2. In determining whether the victim of a sexual assault exercised "earnest resistance" as defined in W.Va.Code, 61-8B-1(1) (1976), the following factors should be considered: the age and mental and physical conditions of the complainant as well as those of the defendant, together with the circumstances leading up to and surrounding the assault. Syl. pt. 4, State v. Miller, 175 W.Va. 616, 336 S.E.2d 910 (1985).

See Miller Supra, at 918, for further discussion of "earnest resistance."

3. State v. Green, 163 W.Va. 681, 260 S.E.2d 257 (1979) - Trial court correctly refused defendant's instruction on "forcible compulsion" in the second degree sexual assault prosecution where the instruction wholly ignored or misstated W.Va.Code, 61-8B-1.

4. State v. Wallace, 175 W.Va. 663, 337 S.E.2d 321, 323 (1985) - "... the term "forcible compulsion" is statutorily defined as indicating a victim's lack of consent. W.Va.Code, 61-8B-2(b). The term "forcible compulsion" also relates to the amount of force used as set out in W.Va.Code, 61-8B-1(1)..."

5. Evidence that a defendant committed violent or turbulent acts toward a rape victim or toward others of which she is aware, is relevant to establish her fear of her attacker that is a major element of proof of first-degree sexual assault. W.Va.Code, 61-8B-1(1)(b). Syl. pt. 4, State v. Pancake, 170 W.Va. 690, 296 S.E.2d 37 (1982).

6. State v. Miller, 175 W.Va. 616, 336 S.E.2d 910 (1985) - The Court found the circumstances that may be considered in determining forcible compulsion include acts of violence or other misconduct committed by the defendant that would be relevant in establishing the victim's fear of his attacker.

7. See State v. Dolin, 347 S.E.2d 208 (W.Va. 1986), footnote 13.

8. Ex post facto principles prohibited application of statute defining "forcible compulsion" (amended to include "fear by child under sixteen ... caused by intimidation... by (one) ... four years older ...") to sexual abuse prosecution based on events occurring before amendment's effective date. State v. Hensler, 187 W.Va. 81, 415 S.E.2d 885 (1992); State v. George W.H., 439 S.E.2d 423 (W.Va. 1993) (Sexual assault prosecution).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
(serious bodily injury/deadly weapon)
LACK OF CONSENT [1]
(incapacity to consent)

It is an element of this offense that the (sexual act - specify) was committed without the consent of the victim. Lack of consent results from incapacity to consent. A person is deemed in capable of consent when such person is (less than sixteen years old) (mentally defective)[2] (mentally incapacitated)[3] (physically helpless).[4]

FOOTNOTES

[1] W.Va.Code, 61-8B-2 (1984). Use if applicable.

[2] "Mentally defective" means that a person suffers from a mental disease or defect which renders such person incapable of appraising the nature of his conduct. W.Va.Code, 61-8B-1(3) (1986). Offer instruction if applicable.

[3] "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct as a result of the influence of a controlled or intoxicating substance administered to such person without his or her consent or as a result of any other act committed upon such person without his or her consent. W.Va.Code, 61-8B-1(4) (1986). Offer instruction if applicable.

[4] "Physically helpless" means that a person is unconscious or for any reason is physically unable to communicate unwillingness to an act. W.Va.Code, 61-8B-1(5) (1986). Offer instruction if applicable.

COMMENTS

1. W.Va.Code, 61-8B-12 (1984).

> (a) In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.
>
> (b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three [§ 61-8B-3]; and under subdivision (3), subsection (a), section seven [§ 61-8B-7] of this article.

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
SEXUAL INTERCOURSE [1]

"Sexual intercourse" means any act between persons not married [2] to each other involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.

FOOTNOTES

[1] W.Va.Code, 61-8B-1(7) (1986).

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

COMMENTS

1. W.Va.Code, 61-8B-1(7), defining sexual intercourse, when read in conjunction with W.Va.Code, 61-8B-3, defining sexual assault in the first degree, indicates that an act of forcible oral intercourse and an act of forcible anal intercourse are separate and distinct offenses. Syl. pt. 1, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

Where a defendant commits separate acts of our statutorily defined term "sexual intercourse" in different ways, each act may be prosecuted and punished as a separate offense. Syl. pt. 2, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

(Defendant was convicted on two counts of first degree sexual assault. The Court found this case distinguishable from State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981).

2. State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982) - States instruction 3-A defined "sexual intercourse" following the provisions of W.Va.Code, 61-8B-1(7). The State had originally offered its Instruction 3 which defined sexual intercourse using only the statutory language applicable to the facts proved. The defendant objected because the instruction did not set out all of th language in the statute. The trial court granted the objection and the state then offered Instruction 3-A. The Court found:

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Furthermore, the fact that State's Instruction No. 3-A was broader than it needed to be since it included all of the acts that make up the statutory definition of "sexual intercourse," does not mean that it was fatally defective and, therefore, reversible error. It was not an erroneous statement of our law but rather one that might be confusing in view of the fact that it covered legal definitions of sexual intercourse that were not presented in the evidence. Certainly, some of the confusion was clarified by Defense Instruction No. 1 which defined "sexual intercourse" solely under the facts presented. In Syllabus Point 4 State v. Stone, 165 W.Va. 266, 268 S.E.2d 50 (1980), we stated:

> "The giving of confusing or incomplete instructions does not constitute reversible error where a reading and consideration of the instructions as a whole cure any defects in the complained of instructions."

In view of the foregoing, we decline to find the State's Instruction No. 3-A constituted reversible error.

3. State v. Barker, 178 W.Va. 736, 364 S.E.2d 264 (1987). Appellant was convicted of sexual assault in the first degree. He contends the trial court erred by not directing a verdict of acquittal, because the evidence presented was insufficient, as a matter of law, to convict the appellant. In so arguing, the appellant asserts that because Dr. Cox's testimony reported that there was no physical evidence of penetration, a sexual assault had not occurred on the victim. W.Va.Code, 61-8B-1(7) [1986] defines "sexual intercourse" as "involving penetration however slight, of the female organ." Dr. Cox's findings did not rule out a sexual assault of the victim involving a slight penetration of her sex organ which would be consistent with the victim's description of the appellant's conduct.

"A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury." Syl. pt. 5, State v. Beck, 167 W.Va. 830, 286 S.E.2d 234 (1981). The victim knew the appellant, a neighbor who was a social friend of her mother and her mother's boyfriend. She was capable of describing to the jury the conduct of the appellant in a clear and credible fashion. In addition, the victim's testimony is corroborated by Dr. Cox's testing which revealed the presence of an organism which is normally transmitted only through sexual contact and therefore is rarely found in children such as the victim.

4. "To constitute the crime of rape, there must be some degree of penetration of the female genital organ by the male genital organ, but any penetration, however slight, of the labia or external lips of the vulva of the female is all that is necessary. The hymen need not be ruptured to sustain a conviction for rape." Point 8, syllabus, State v. Brady, 104 W.Va. 523, (140 S.E. 546 (1927)). Syl. pt. 1, State v. Vance, 146 W.Va. 925, 124 S.E.2d 252 (1962), overruled on other grounds, State ex rel. Grob v. Blair, 158 W.Va. 647, 214 S.E.2d 330 (1975).

5. Syl. pt. 1, State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991) quotes Syl. pt. 2, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

6. Applying syl. pt. 2 of State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981), the Court found the defendant engaged in two separate acts of sexual intercourse as those terms are statutorily understood under W.Va.Code, 61-8B-1(7) (1986). State v. Koon, 440 S.E.2d 442 (W.Va. 1993).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
SEXUAL INTRUSION [1]

"Sexual intrusion" means any act between persons not married [2] to each other involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.[3]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(8) (1986).

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

[3] State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981) - Defendant was convicted of sexual misconduct and sexual abuse in the first degree.

The defendant contends the statutory offense of sexual abuse is void for vagueness. Under W.Va.Code, 61-8B-1 (1976), the definition of sexual contact, the defendant contends the language "done for the purpose of gratifying the sexual desire of either party" is unconstitutionally vague because there is no definition of "sexual gratification" or "sexual desire". The Court found the terms are both plain and unambiguous on their face.

COMMENTS

1. See State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991).

2. See State v. Mitter, 168 W.Va. 531, 285 S.E.2d 376 (1981); called into doubt, footnote 5, State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1990).

3. W.Va.Code, 61-8B-7 (1984), which defines sexual abuse in the first degree, involves "sexual contact" with another person. The term "sexual contact" is defined in W.Va.Code, 61-8B-1(6) (1986), and identifies several different acts which constitute sexual contact. Each act requires proof of a fact which the other does not. Consequently, a defendant who commits two or more of the separate acts of sexual contact on a victim may be convicted of each separate act without violation of double jeopardy principles. Syl. pt. 5, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993).

See footnote 13, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993) for discussion of double jeopardy analysis of the different acts which constitute "sexual intrusion".

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
SERIOUS BODILY INJURY

"Serious bodily injury" means bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.[1]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(10) (1986).

COMMENTS

1. Psychological injury is not a "serious bodily injury" under W.Va.Code, 61-8B-3(a)(1)(i) (1976). Syl. pt. 2, State v. Hartshorn, 175 W.Va. 274, 332 S.E.2d 574 (1985).

The Court noted the statutory definition in W.Va. of "serious bodily injury" is the definition recommended by the MPC. In the MPC definition, psychological injuries were specifically excluded.

The Court found that until the Legislature defines a serious personal injury expansively to include "mental anguish or trauma" it would be improvident to enlarge upon the statutory definition of a serious bodily injury. The Court found the statute is very specific in its definition and it excludes psychological injury.

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
DEADLY WEAPON

"Deadly weapon" means any instrument, device or thing capable of inflicting death or serious bodily injury, and designed or specially adapted for use as a weapon, or possessed, carried or used as a weapon.[1]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(11) (1986).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
(defendant 14 or older, victim 11 or younger)

Sexual assault in the first degree is committed when a person, being fourteen years old or more, engages in (sexual intercourse) (or) (sexual intrusion) with another person who is eleven years old or less.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. being fourteen years old or more, (at the time), (specify?)
3. engaged in
   a. sexual intercourse [2]
   b. sexual intrusion [3]
4. with _____
5. who was eleven years old or less (at the time).[4] (specify?)

FOOTNOTES

[1] W.Va.Code, 61-8B-3(a)(2) (1991).

[2] Separate instruction provided. See W.Va.Code, 61-8B-1(7) (1986).

[3] Separate instruction provided. See W.Va.Code, 61-8B-1(8) (1986).

[4] LACK OF CONSENT

(a) Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.
(b) Lack of consent results from:
(1) Forcible compulsion; or
(2) Incapacity to consent; or
(3) If the offense charged is sexual abuse, any circumstances in addition to the forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.
(c) A person is deemed incapable of consent when such person is:
(1) Less than sixteen years old; or
(2) Mentally defective; or
(3) Mentally incapacitated; or
(4) Physically helpless.

W.Va.Code, 61-8B-2 (1984).

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COMMENTS

1. The affirmative defense set forth in W.Va.Code, 61-8B-12(a) is not available in a prosecution for this offense. W.Va.Code, 61-8B-12(b) (1984).

2. Where the exact age is not required to be proved, the defendant's physical appearance may be considered by the jury in determining age but there must be some additional evidence suggesting the defendant's age. Syl. pt. 6, State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982).

3. State v. Dellinger, 178 W.Va. 265, 358 S.E.2d 826 (1987) - The defendant was charged with sexually assaulting an eight-year old girl by forcing her to perform oral sex on him. He was convicted of first degree sexual assault. He contends the court erred in failing to give an instruction permitting the jury to find him guilty of sexual abuse in the first degree. (The defendant was indicted under former W.Va.Code, 61-8B-3(3) (1976)).

Applying the two-part test set forth in syl. pt. 1, State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1982) and syl. pt. 2, State v. Neider, 170 W.Va. 662, 295 S.E.2d 902 (1982) to the facts of this case, the Court concluded the defendant was entitled to an instruction on sexual abuse in the first degree. The Court found it was legally impossible to commit the first degree sexual assault charged in this case without committing sexual abuse in the first degree. The Court found there were no elements in the sexual abuse statute not required for first degree sexual assault under W.Va.Code, 61-8B-3(3) [1976].

4. State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991) - The appellant was convicted of two counts of first degree sexual assault. She contends the conviction of first degree sexual assault as a principal in the first degree and the conviction of first degree sexual assault as a principal in the second degree result from the same conduct and violate double jeopardy principles. The Court found two separate and distinct acts were committed and found no error.

5. State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981) - Appellant was convicted in November 1977 of first degree sexual assault. He contends he was entitled to an instruction on third degree sexual assault. The Court found this contention meritless.

6. The sexual abuse statute involving parents, custodians, or guardians, W.Va.Code, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, W.Va.Code, 61-8B-1, et seq., for purposes of punishment. State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992); State v. George W.H., 439 S.E.2d 423 (W.Va. 1993).

7. The offense of first degree sexual assault under W.Va.Code, 61-8B-3(a)(2) (1984), involves violence to a person and is, therefore, subject to the provisions of W.Va.Code, 62-1C-1(b) (1983), with regard to post-conviction bail. Syl., State ex rel. Spaulding v. Watt, 423 S.E.2d 217 (W.Va. 1992).

The Court held that although forcible compulsion is not an element of the crime of sexual assault in the first degree when the victim is eleven years old or younger, the crime does involve violence to the person precluding the grant of post conviction bail.

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
(Defendant 14 or older, victim 11 or younger)
LACK OF CONSENT [1]

It is an element of this offense that the (sexual act - specify) was committed without the consent of the victim.[2] Lack of consent results from incapacity to consent.[3] A person is deemed incapable of consent when such person is less than sixteen years old.[4]

FOOTNOTES

[1] (a) Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.
(b) Lack of consent results from:
(1) Forcible compulsion; or
(2) Incapacity to consent; or
(3) If the offense charged is sexual abuse, any circumstances in addition to the forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.
(c) A person is deemed incapable of consent when such person is:
(1) Less than sixteen years old; or
(2) Mentally defective; or
(3) Mentally incapacitated; or
(4) Physically helpless.

W.Va.Code, 61-8B-2 (1984).

A third degree sexual assault, more commonly referred to as statutory rape, is committed when a person sixteen years old or older engages in sexual intercourse or sexual intrusion with a person who is less than sixteen years old and is also at least four years younger than the person committing the act. Consent to the act is irrelevant. However, consent is not irrelevant to a charge of second-degree sexual assault because forcible compulsion is a necessary element of this crime. Syl. pt. 5, State v. Sayre, 183 W.Va. 376, 395 S.E.2d 799 (1990).

[2] W.Va.Code, 61-8B-2(a) (1984).

[3] W.Va.Code, 61-8B-2(b) (1984).

[4] W.Va.Code, 61-8B-2(c)(1) (1984).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
(defendant 14 or older, victim 11 or younger)
SEXUAL INTERCOURSE [1]

"Sexual intercourse" means any act between persons not married [2] to each other involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.

FOOTNOTES

[1] W.Va.Code, 61-8B-1(7) (1986).

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

COMMENTS

1. W.Va.Code, 61-8B-1(7), defining sexual intercourse, when read in conjunction with W.Va.Code, 61-8B-3, defining sexual assault in the first degree, indicates that an act of forcible oral intercourse and an act of forcible anal intercourse are separate and distinct offenses. Syl. pt. 1, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

Where a defendant commits separate acts of our statutorily defined term "sexual intercourse" in different ways, each act may be prosecuted and punished as a separate offense. Syl. pt. 2, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

(Defendant was convicted on two counts of first degree sexual assault. The Court found this case distinguishable from State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981).

2. State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982) - States instruction 3-A defined "sexual intercourse" following the provisions of W.Va.Code, 61-8B-1(7). The State had originally offered its Instruction 3 which defined sexual intercourse using only the statutory language applicable to the facts proved. The defendant objected because the instruction did not set out all of the language in the statute. The trial court granted the objection and the state then offered Instruction 3-A. The Court found:

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Furthermore, the fact that State's Instruction No. 3-A was broader than it needed to be since it included all of the acts that make up the statutory definition of "sexual intercourse," does not mean that it was fatally defective and, therefore, reversible error. It was not an erroneous statement of our law but rather one that might be confusing in view of the fact that it covered legal definitions of sexual intercourse that were not presented in the evidence. Certainly, some of the confusion was clarified by Defense Instruction No. 1 which defined "sexual intercourse" solely under the facts presented. In Syllabus Point 4 State v. Stone, 165 W.Va. 266, 268 S.E.2d 50 (1980), we stated:

> "The giving of confusing or incomplete instructions does not constitute reversible error where a reading and consideration of the instructions as a whole cure any defects in the complained of instructions."

In view of the foregoing, we decline to find the State's Instruction No. 3-A constituted reversible error.

3. State v. Barker, 178 W.Va. 736, 364 S.E.2d 264 (1987). Appellant was convicted of sexual assault in the first degree. He contends the trial court erred by not directing a verdict of acquittal, because the evidence presented was insufficient, as a matter of law, to convict the appellant. In so arguing, the appellant asserts that because Dr. Cox's testimony reported that there was no physical evidence of penetration, a sexual assault had not occurred on the victim. W.Va.Code, 61-8B-1(7) [1986] defines "sexual intercourse" as "involving penetration however slight, of the female organ." Dr. Cox's findings did not rule out a sexual assault of the victim involving a slight penetration of her sex organ which would be consistent with the victim's description of the appellant's conduct.

"A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury." Syl. pt. 5, State v. Beck, 167 W.Va. 830, 286 S.E.2d 234 (1981). The victim knew the appellant, a neighbor who was a social friend of her mother and her mother's boyfriend. She was capable of describing to the jury the conduct of the appellant in a clear and credible fashion. In addition, the victim's testimony is corroborated by Dr. Cox's testing which revealed the presence of an organism which is normally transmitted only through sexual contact and therefore is rarely found in children such as the victim.

4. "To constitute the crime of rape, there must be some degree of penetration of the female genital organ by the male genital organ, but any penetration, however slight, of the labia or external lips of the vulva of the female is all that is necessary. The hymen need not be ruptured to sustain a conviction for rape." Point 8, syllabus, State v. Brady, 104 W.Va. 523, (140 S.E. 546 (1927)). Syl. pt. 1, State v. Vance, 146 W.Va. 925, 124 S.E.2d 252 (1962), overruled on other grounds, State ex rel. Grob v. Blair, 158 W.Va. 647, 214 S.E.2d 330 (1975).

5. Syl. pt. 1, State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991) quotes Syl. pt. 2, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

6. Applying syl. pt. 2 of State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981), the Court found the defendant engaged in two separate acts of sexual intercourse as those terms are statutorily understood under W.Va.Code, 61-8B-1(7) (1986). State v. Koon, 440 S.E.2d 442 (W.Va. 1993).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE FIRST DEGREE
(defendant 14 or older, victim 11 or younger)
SEXUAL INTRUSION [1]

"Sexual intrusion" means any act between persons not married [2] to each other involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.[3]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(8) (1986).

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

[3] State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981) - Defendant was convicted of sexual misconduct and sexual abuse in the first degree.

The defendant contends the statutory offense of sexual abuse is void for vagueness. Under W.Va.Code, 61-8B-1 (1976), the definition of sexual contact, the defendant contends the language "done for the purpose of gratifying the sexual desire of either party" is unconstitutionally vague because there is no definition of "sexual gratification" or "sexual desire". The Court found the terms are both plain and unambiguous on their face.

COMMENTS

1. See State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991).

2. See State v. Mitter, 168 W.Va. 531, 285 S.E.2d 376 (1981); called into doubt, footnote 5, State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1990).

3. W.Va.Code, 61-8B-7 (1984), which defines sexual abuse in the first degree, involves "sexual contact" with another person. The term "sexual contact" is defined in W.Va.Code, 61-8B-1(6) (1986), and identifies several different acts which constitute sexual contact. Each act requires proof of a fact which the other does not. Consequently, a defendant who commits two or more of the separate acts of sexual contact on a victim may be convicted of each separate act without violation of double jeopardy principles. Syl. pt. 5, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993).

See footnote 13, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993) for discussion of double jeopardy analysis of the different acts which constitute "sexual intrusion".

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

SEXUAL ASSAULT IN THE SECOND DEGREE
(sexual intercourse or sexual intrusion by forcible compulsion)

Sexual assault in the second degree is committed when a person engages in (sexual intercourse) (sexual intrusion) with another person without the person's consent, and the lack of consent results from forcible compulsion.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. engaged in
   a. sexual intercourse [2]
   b. sexual intrusion [3]
3. with _____,
4. without _____'s consent [4]
5. and the lack of consent resulted from forcible compulsion.[5]

FOOTNOTES

[1] W.Va.Code, 61-8B-4(a)(1) (1991).

[2] Separate instruction provided. See, W.Va.Code, 61-8B-1(7) (1986).

[3] Separate instruction provided. See, W.Va.Code, 61-8B-1(8) (1986).

[4] Separate instruction provided. See, W.Va.Code, 61-8B-1(1) (1986).

[5] Separate instruction provided. See, W.Va.Code, 61-8B-2 (1984).

COMMENTS

1. The affirmative defense set forth in W.Va.Code, 61-8B-12(a) (1984) is not available in a prosecution for this offense.

2. State v. Woodall, 182 W.Va. 15, 385 S.E.2d 253, 265 (1989) - "' ...A conviction for first degree sexual assault requires proof of non-consensual sexual intercourse when serious bodily injury is inflicted or when the defendant employs a deadly weapon in the commission of the act.' W.Va.Code, 61-8B-3 (1984) ...A charge of sexual assault in the second degree requires no showing of an injury or a weapon..."

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3. State v. Sayre, 183 W.Va. 376, 395 S.E.2d 799 (1990) - Appellant was convicted of second-degree sexual assault. The same act of sexual intercourse also resulted in the appellant's conviction of third-degree sexual assault. He contends the two convictions constitute double jeopardy because they are for the same offense.

The Court found the two convictions do not impugn double jeopardy protection.

The Court found:

> Contrary to the appellant's assertion, lack of consent is not an element of both second and third-degree sexual assault. A third-degree sexual assault, more commonly referred to as statutory rape, is committed when a person sixteen years old or older engages in sexual intercourse or sexual intrusion with a person who is less than sixteen years old and is also at least four years younger than the person committing the act. Consent to the act is irrelevant. However, consent is not irrelevant to a charge of second-degree sexual assault because forcible compulsion is a necessary element of this crime.
>
> In this case, the jury found that the twenty-five-year-old appellant forced a fifteen-year-old girl to have sexual intercourse with him. Under these particular facts, it is true that it would have been impossible for the jury to find that the appellant committed second-degree sexual assault without also finding him guilty of third-degree sexual assault. Once the appellant admitted that he had sexual intercourse with the fifteen-year-old and their ages were established, the fact that he was guilty of statutory rape was beyond dispute. However, the issue of whether force was involved, so as to also make the appellant guilty of second-degree sexual assault, remained to be determined by the jury.
>
> Sayre, supra, at 803,

4. A third-degree sexual assault, more commonly referred to as statutory rape, is committed when a person sixteen years old or older engages in sexual intercourse or sexual intrusion with a person who is less than sixteen years old and is also at least four years younger than the person committing the act. Consent to the act is irrelevant. However, consent is not irrelevant to a charge of second-degree sexual assault because forcible compulsion is a necessary element of this crime. Syl. pt. 5, State v. Sayre, 183 W.Va. 376, 395 S.E.2d 799 (1990).

5. The sexual abuse statute involving parents, custodians, or guardians, W.Va.Code, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, W.Va.Code, 61-8B-1, et seq., for purposes of punishment. State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992); State v. George W.H., 439 S.E.2d 423 (W.Va. 1993).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE SECOND DEGREE
(sexual intercourse or sexual intrusion by forcible compulsion)
SEXUAL INTERCOURSE [1]

"Sexual intercourse" means any act between persons not married [2] to each other involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.

FOOTNOTES

[1] W.Va.Code, 61-8B-1(7) (1986).

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

COMMENTS

1. W.Va.Code, 61-8B-1(7), defining sexual intercourse, when read in conjunction with W.Va.Code, 61-8B-3, defining sexual assault in the first degree, indicates that an act of forcible oral intercourse and an act of forcible anal intercourse are separate and distinct offenses. Syl. pt. 1, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

Where a defendant commits separate acts of our statutorily defined term "sexual intercourse" in different ways, each act may be prosecuted and punished as a separate offense. Syl. pt. 2, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

(Defendant was convicted on two counts of first degree sexual assault. The Court found this case distinguishable from State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981).

2. State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982) - States instruction 3-A defined "sexual intercourse" following the provisions of W.Va.Code, 61-8B-1(7). The State had originally offered its Instruction 3 which defined sexual intercourse using only the statutory language applicable to the facts proved. The defendant objected because the instruction did not set out all of the language in the statute. The trial court granted the objection and the state then offered Instruction 3-A. The Court found:

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Furthermore, the fact that State's Instruction No. 3-A was broader than it needed to be since it included all of the acts that make up the statutory definition of "sexual intercourse," does not mean that it was fatally defective and therefore, reversible error. It was not an erroneous statement of our law but rather one that might be confusing in view of the fact that it covered legal definitions of sexual intercourse that were not presented in the evidence. Certainly, some of the confusion was clarified by Defense Instruction No. 1 which defined "sexual intercourse" solely under the facts presented. In Syllabus Point 4 State v. Stone, 165 W.Va. 266, 268 S.E.2d 50 (1980), we stated:

> "The giving of confusing or incomplete instructions does not constitute reversible error where a reading and consideration of the instructions as a whole cure any defects in the complained of instructions."

In view of the foregoing, we decline to find the State's Instruction No. 3-A constituted reversible error.

3. State v. Barker, 178 W.Va. 736, 364 S.E.2d 264 (1987). Appellant was convicted of sexual assault in the first degree. He contends the trial court erred by not directing a verdict of acquittal, because the evidence presented was insufficient, as a matter of law, to convict the appellant. In so arguing, the appellant asserts that because Dr. Cox's testimony reported that there was no physical evidence of penetration, a sexual assault had not occurred on the victim. W.Va.Code, 61-8B-1(7) [1986] defines "sexual intercourse" as "involving penetration however slight, of the female organ." Dr. Cox's findings did not rule out a sexual assault of the victim involving a slight penetration of her sex organ which would be consistent with the victim's description of the appellant's conduct.

"A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury." Syl. pt. 5, State v. Beck, 167 W.Va. 830, 286 S.E.2d 234 (1981). The victim knew the appellant, a neighbor who was a social friend of her mother and her mother's boyfriend. She was capable of describing to the jury the conduct of the appellant in a clear and credible fashion. In addition, the victim's testimony is corroborated by Dr. Cox's testing which revealed the presence of an organism which is normally transmitted only through sexual contact and therefore is rarely found in children such as the victim.

4. "To constitute the crime of rape, there must be some degree of penetration of the female genital organ by the male genital organ, but any penetration, however slight, of the labia or external lips of the vulva of the female is all that is necessary. The hymen need not be ruptured to sustain a conviction for rape." Point 8, syllabus, State v. Brady, 104 W.Va. 523, (140 S.E. 546 (1927)). Syl. pt. 1, State v. Vance, 146 W.Va. 925, 124 S.E.2d 252 (1962), overruled on other grounds, State ex rel. Grob v. Blair, 158 W.Va. 647, 214 S.E.2d 330 (1975).

5. Syl. pt. 1, State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991) quotes Syl. pt. 2, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

6. Applying syl. pt. 2 of State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981), the Court found the defendant engaged in two separate acts of sexual intercourse as those terms are statutorily understood under W.Va.Code, 61-8B-1(7) (1986). State v. Koon, 440 S.E.2d 442 (W.Va. 1993).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE SECOND DEGREE
(sexual intercourse or sexual intrusion by forcible compulsion)
SEXUAL INTRUSION [1]

"Sexual intrusion" means any act between persons not married [2] to each other involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.[3]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(8) (1986).

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

[3] State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981) - Defendant was convicted of sexual misconduct and sexual abuse in the first degree.

The defendant contends the statutory offense of sexual abuse is void for vagueness. Under W.Va.Code, 61-8B-1 (1976), the definition of sexual contact, the defendant contends the language "done for the purpose of gratifying the sexual desire of either party" is unconstitutionally vague because there is no definition of "sexual gratification" or "sexual desire". The Court found the terms are both plain and unambiguous on their face.

COMMENTS

1. See State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991).

2. See State v. Mitter, 168 W.Va. 531, 285 S.E.2d 376 (1981); called into doubt, footnote 5, State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1990).

3. W.Va.Code, 61-8B-7 (1984), which defines sexual abuse in the first degree, involves "sexual contact" with another person. The term "sexual contact" is defined in W.Va.Code, 61-8B-1(6) (1986), and identifies several different acts which constitute sexual contact. Each act requires proof of a fact which the other does not. Consequently, a defendant who commits two or more of the separate acts of sexual contact on a victim may be convicted of each separate act without violation of double jeopardy principles. Syl. pt. 5, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993).

See footnote 13, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993) for discussion of double jeopardy analysis of the different acts which constitute "sexual intrusion".

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE SECOND DEGREE
(sexual intercourse or sexual intrusion by forcible compulsion)
FORCIBLE COMPULSION [1]

It is an element of this offense that the (sexual act - specify) was committed without the consent of the victim, and the lack of consent result from forcible compulsion.[2]

"Forcible compulsion" means:

Physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or

Threat or intimidation, expressed or implied, placing a person in fear of immediate death or bodily injury to himself or another person or in fear that he or another person will be kidnapped; or

Fear by a child under sixteen years of age caused by intimidation, expressed or implied, by another person four years older than the victim.

For the purposes of this definition "resistance" includes physical resistance or any clear communication of the victim's lack of consent.

FOOTNOTES

[1] W.Va.Code, 61-8B-1 (1986).

[2] W.Va.Code, 61-8B-4(a)(1) (1991).

COMMENTS

1. Where evidence conclusively establishes that the victim of a sexual assault offered no resistance to his attacker, was neither struck dumb with fear during the assault, nor attempted to utter any plea for assistance, no "earnest resistance" to "forcible compulsion" exists under W.Va.Code, 61-8B-1(a)(1)(iii) (1976). Syl. pt. 1, State v. Hartshorn, 175 W.Va. 274, 332 S.E.2d 574 (1985).

The Court found the complainant did not offer the degree of "earnest resistance" to the sexual assault contemplated by W.Va.Code, 61-8B-3(a)(iii) (1976) and necessary to sustain a conviction for sexual assault in the first degree.

See case for definition of "forcible compulsion" as defined under 1976 law.

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2. In determining whether the victim of a sexual assault exercised "earnest resistance" as defined in W.Va.Code, 61-8B-1(1) (1976), the following factors should be considered: the age and mental and physical conditions of the complainant as well as those of the defendant, together with the circumstances leading up to and surrounding the assault. Syl. pt. 4, State v. Miller, 175 W.Va. 616, 336 S.E.2d 910 (1985).

See Miller, supra, at 918, for further discussion of "earnest resistance."

3. State v. Green, 163 W.Va. 681, 260 S.E.2d 257 (1979) - Trial court correctly refused defendant's instruction on "forcible compulsion" in the second degree sexual assault prosecution where the instruction wholly ignored or misstated W.Va.Code, 61-8B-1.

4. State v. Wallace, 175 W.Va. 663, 337 S.E.2d 321, 323 (1985) - "... the term "forcible compulsion" is statutorily defined as indicating a victim's lack of consent. W.Va.Code, 61-8B-2(b). The term "forcible compulsion" also relates to the amount of force used as set out in W.Va.Code, 61-8B-1(1)..."

5. Evidence that a defendant committed violent or turbulent acts toward a rape victim or toward others of which she is aware, is relevant to establish her fear of her attacker that is a major element of proof of first-degree sexual assault. W.Va.Code, 61-8B-1(1)(b). Syl. pt. 4, State v. Pancake, 170 W.Va. 690, 296 S.E.2d 37 (1982).

6. State v. Miller, 175 W.Va. 616, 336 S.E.2d 910 (1985) - The Court found the circumstances that may be considered in determining forcible compulsion include acts of violence or other misconduct committed by the defendant that would be relevant in establishing the victim's fear of his attacker.

7. See State v. Dolin, 347 S.E.2d 208 (W.Va. 1986), footnote 13.

8. Ex post facto principles prohibited application of statute defining "forcible compulsion" (amended to include "fear by child under sixteen ... caused by intimidation... by (one) ... four years older ...") to sexual abuse prosecution based on events occurring before amendment's effective date. State v. Hensler, 187 W.Va. 81, 415 S.E.2d 885 (1992); State v. George W.H., 439 S.E.2d 423 (W.Va. 1993) (Sexual assault prosecution).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE SECOND DEGREE
(sexual intercourse or sexual intrusion with one who is physically helpless)

Sexual assault in the second degree is committed when a person engages in (sexual intercourse) (sexual intrusion) with another person who is physically helpless.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. engaged in
   a. sexual intercourse [2]
   b. sexual intrusion [3]
3. with _____,
4. and _____ was physically helpless.[4]

FOOTNOTES

[1] W.Va.Code, 61-8B-4(a)(2) (1991).

[2] Separate instruction provided. See W.Va.Code, 61-8B-1(7) (1986).

[3] Separate instruction provided. See W.Va.Code, 61-8B-1(8) (1986).

[4] Separate instruction provided. See W.Va.Code, 61-8B-1(5) (1986).

COMMENTS

DEFENSE

1. (a) In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.

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(b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three (sec. 61-8B-3, and under subdivision (3), subsection (a), section seven (sec. 61-8B-7) of this article.

W.Va.Code, 61-8B-12(a) (1984).

2. The sexual abuse statute involving parents, custodians, or guardians, W.Va.Code, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, W.Va.Code, 61-8B-1, et seq., for purposes of punishment. State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992); State v. George W.H., 439 S.E.2d 423 (W.Va. 1993).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE SECOND DEGREE
(sexual intercourse or sexual intrusion with one who is physically helpless)
SEXUAL INTERCOURSE [1]

"Sexual intercourse" means any act between persons not married [2] to each other involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.

FOOTNOTES

[1] W.Va.Code, 61-8B-1(7) (1986).

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

COMMENTS

1. W.Va.Code, 61-8B-1(7), defining sexual intercourse, when read in conjunction with W.Va.Code, 61-8B-3, defining sexual assault in the first degree, indicates that an act of forcible oral intercourse and an act of forcible anal intercourse are separate and distinct offenses. Syl. pt. 1, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

Where a defendant commits separate acts of our statutorily defined term "sexual intercourse" in different ways, each act may be prosecuted and punished as a separate offense. Syl. pt. 2, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

(Defendant was convicted on two counts of first degree sexual assault. The Court found this case distinguishable from State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981).

2. State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982) - States instruction 3-A defined "sexual intercourse" following the provisions of W.Va.Code, 61-8B-1(7). The State had originally offered its Instruction 3 which defined sexual intercourse using only the statutory language applicable to the facts proved. The defendant objected because the instruction did not set out all of the language in the statute. The trial court granted the objection and the state then offered Instruction 3-A. The Court found:

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Furthermore, the fact that State's Instruction No. 3-A was broader than it needed to be since it included all of the acts that make up the statutory definition of "sexual intercourse," does not mean that it was fatally defective and, therefore, reversible error. It was not an erroneous statement of our law but rather one that might be confusing in view of the fact that it covered legal definitions of sexual intercourse that were not presented in the evidence. Certainly, some of the confusion was clarified by Defense Instruction No. 1 which defined "sexual intercourse" solely under the facts presented. In Syllabus Point 4 State v. Stone, 165 W.Va. 266, 268 S.E.2d 50 (1980), we stated:

> "The giving of confusing or incomplete instructions does not constitute reversible error where a reading and consideration of the instructions as a whole cure any defects in the complained of instructions."

In view of the foregoing, we decline to find the State's Instruction No. 3-A constituted reversible error.

3. State v. Barker, 178 W.Va. 736, 364 S.E.2d 264 (1987). Appellant was convicted of sexual assault in the first degree. He contends the trial court erred by not directing a verdict of acquittal, because the evidence presented was insufficient, as a matter of law, to convict the appellant. In so arguing, the appellant asserts that because Dr. Cox's testimony reported that there was no physical evidence of penetration, a sexual assault had not occurred on the victim. W.Va.Code, 61-8B-1(7) [1986] defines "sexual intercourse" as "involving penetration however slight, of the female organ." Dr. Cox's findings did not rule out a sexual assault of the victim involving a slight penetration of her sex organ which would be consistent with the victim's description of the appellant's conduct.

"A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury." Syl. pt. 5, State v. Beck, 167 W.Va. 830, 286 S.E.2d 234 (1981). The victim knew the appellant, a neighbor who was a social friend of her mother and her mother's boyfriend. She was capable of describing to the jury the conduct of the appellant in a clear and credible fashion. In addition, the victim's testimony is corroborated by Dr. Cox's testing which revealed the presence of an organism which is normally transmitted only through sexual contact and therefore is rarely found in children such as the victim.

4. "To constitute the crime of rape, there must be some degree of penetration of the female genital organ by the male genital organ, but any penetration, however slight, of the labia or external lips of the vulva of the female is all that is necessary. The hymen need not be ruptured to sustain a conviction for rape." Point 8, syllabus, State v. Brady, 104 W.Va. 523, (140 S.E. 546 (1927)). Syl. pt. 1, State v. Vance, 146 W.Va. 925, 124 S.E.2d 252 (1962), overruled on other grounds, State ex rel. Grob v. Blair, 158 W.Va. 647, 214 S.E.2d 330 (1975).

5. Syl. pt. 1, State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991) quotes Syl. pt. 2, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

6. Applying syl. pt. 2 of State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981), the Court found the defendant engaged in two separate acts of sexual intercourse as those terms are statutorily understood under W.Va.Code, 61-8B-1(7) (1986). State v. Koon, 440 S.E.2d 442 (W.Va. 1993).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE SECOND DEGREE
(sexual intercourse or sexual intrusion with one who is physically helpless)
SEXUAL INTRUSION [1]

"Sexual intrusion" means any act between persons not married [2] to each other involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.[3]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(8) (1986).

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

[3] State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981) - Defendant was convicted of sexual misconduct and sexual abuse in the first degree.

The defendant contends the statutory offense of sexual abuse is void for vagueness. Under W.Va.Code, 61-8B-1 (1976), the definition of sexual contact, the defendant contends the language "done for the purpose of gratifying the sexual desire of either party" is unconstitutionally vague because there is no definition of "sexual gratification" or "sexual desire". The Court found the terms are both plain and unambiguous on their face.

COMMENTS

1. See State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991).

2. See State v. Mitter, 168 W.Va. 531, 285 S.E.2d 376 (1981); called into doubt, footnote 5, State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1990).

3. W.Va.Code, 61-8B-7 (1984), which defines sexual abuse in the first degree, involves "sexual contact" with another person. The term "sexual contact" is defined in W.Va.Code, 61-8B-1(6) (1986), and identifies several different acts which constitute sexual contact. Each act requires proof of a fact which the other does not. Consequently, a defendant who commits two or more of the separate acts of sexual contact on a victim may be convicted of each separate act without violation of double jeopardy principles. Syl. pt. 5, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993).

See footnote 13, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993) for discussion of double jeopardy analysis of the different acts which constitute "sexual intrusion".

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE SECOND DEGREE
(sexual intercourse or sexual intrusion with one who is physically helpless)
LACK OF CONSENT [1]

It is an element of this offense that the (sexual act - specify) was committed without the consent of the victim. Lack of consent results from incapacity to consent. A person is deemed incapable of consent when such person is physically helpless.

FOOTNOTES

[1] (a) Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.
(b) Lack of consent results from:
(1) Forcible compulsion; or
(2) Incapacity to consent; or
(3) If the offense charged is sexual abuse, any circumstances in addition to the forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.
(c) A person is deemed incapable of consent when such person is:
(1) Less than sixteen years old; or
(2) Mentally defective; or
(3) Mentally incapacitated; or
(4) Physically helpless.

W.Va.Code, 61-8B-2 (1984).

A third degree sexual assault, more commonly referred to as statutory rape, is committed when a person sixteen years old or older engages in sexual intercourse or sexual intrusion with a person who is less than sixteen years old and is also at least four years younger than the person committing the act. Consent to the act is irrelevant. However, consent is not irrelevant to a charge of second-degree sexual assault because forcible compulsion is a necessary element of this crime. Syl. pt. 5, State v. Sayre, 183 W.Va. 376, 395 S.E.2d 799 (1990).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE SECOND DEGREE
(sexual intercourse or sexual intrusion with one who is physically helpless)
PHYSICALLY HELPLESS

"Physically helpless" means that a person is unconscious or for any reason is physically unable to communicate unwillingness to an act.[1]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(5) (1986).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE THIRD DEGREE
(sexual intercourse or sexual intrusion with one who is mentally defective or mentally incapacitated)

Sexual assault in the third degree is committed when a person engages in (sexual intercourse) (sexual intrusion) with another person who is (mentally defective) (mentally incapacitated).[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. engaged in
   a. sexual intercourse [2]
   b. sexual intrusion [3]
3. with _____,
4. and _____ was
   a. mentally defective [4]
   b. mentally incapacitated [5]

FOOTNOTES

[1] W.Va.Code, 61-8B-5(a)(1) (1984).

[2] Separate instruction provided. See W.Va.Code, 61-8B-1(7) (1986).

[3] Separate instruction provided. See W.Va.Code, 61-8B-1(8) (1986).

[4] Separate instruction provided. See W.Va.Code, 61-8B-1(3) (1986).

[5] Separate instruction provided. See W.Va.Code, 61-8B-1(4) (1986).

COMMENTS

DEFENSE

1. (a) In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.

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(b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three (sec. 61-8B-3), and under subdivision (3), subsection (a), section seven (sec. 61-8B-7) of this article.

W.Va.Code, 61-8B-12 (1984).

2. The sexual abuse statute involving parents, custodians, or guardians, W.Va.Code, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, W.Va.Code, 61-8B-1, et seq., for purposes of punishment. State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992); State v. George W.H., 439 S.E.2d 423 (W.Va. 1993).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE THIRD DEGREE
(sexual intercourse or sexual intrusion with one who is mentally defective or mentally incapacitated)
SEXUAL INTERCOURSE [1]

"Sexual intercourse" means any act between persons not married [2] to each other involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.

FOOTNOTES

[1] W.Va.Code, 61-8B-1(7) (1986).

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

COMMENTS

1. W.Va.Code, 61-8B-1(7), defining sexual intercourse, when read in conjunction with W.Va.Code, 61-8B-3, defining sexual assault in the first degree, indicates that an act of forcible oral intercourse and an act of forcible anal intercourse are separate and distinct offenses. Syl. pt. 1, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

Where a defendant commits separate acts of our statutorily defined term "sexual intercourse" in different ways, each act may be prosecuted and punished as a separate offense. Syl. pt. 2, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

(Defendant was convicted on two counts of first degree sexual assault. The Court found this case distinguishable from State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981).

2. State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982) - States instruction 3-A defined "sexual intercourse" following the provisions of W.Va.Code, 61-8B-1(7). The State had originally offered its Instruction 3 which defined sexual intercourse using only the statutory language applicable to the facts proved. The defendant objected because the instruction did not set out all of the language in the statute. The trial court granted the objection and the state then offered Instruction 3-A. The Court found:

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Furthermore, the fact that State's Instruction No. 3-A was broader than it needed to be since it included all of the acts that make up the statutory definition of "sexual intercourse," does not mean that it was fatally defective and, therefore, reversible error. It was not an erroneous statement of our law but rather one that might be confusing in view of the fact that it covered legal definitions of sexual intercourse that were not presented in the evidence. Certainly, some of the confusion was clarified by Defense Instruction No. 1 which defined "sexual intercourse" solely under the facts presented. In Syllabus Point 4 State v. Stone, 165 W.Va. 266, 268 S.E.2d 50 (1980), we stated:

> "The giving of confusing or incomplete instructions does not constitute reversible error where a reading and consideration of the instructions as a whole cure any defects in the complained of instructions."

In view of the foregoing, we decline to find the State's Instruction No. 3-A constituted reversible error.

3. State v. Barker, 178 W.Va. 736, 364 S.E.2d 264 (1987). Appellant was convicted of sexual assault in the first degree. He contends the trial court erred by not directing a verdict of acquittal, because the evidence presented was insufficient, as a matter of law, to convict the appellant. In so arguing, the appellant asserts that because Dr. Cox's testimony reported that there was no physical evidence of penetration, a sexual assault had not occurred on the victim. W.Va.Code, 61-8B-1(7) [1986] defines "sexual intercourse" as "involving penetration however slight, of the female organ." Dr. Cox's findings did not rule out a sexual assault of the victim involving a slight penetration of her sex organ which would be consistent with the victim's description of the appellant's conduct.

"A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury." Syl. pt. 5, State v. Beck, 167 W.Va. 830, 286 S.E.2d 234 (1981). The victim knew the appellant, a neighbor who was a social friend of her mother and her mother's boyfriend. She was capable of describing to the jury the conduct of the appellant in a clear and credible fashion. In addition, the victim's testimony is corroborated by Dr. Cox's testing which revealed the presence of an organism which is normally transmitted only through sexual contact and therefore is rarely found in children such as the victim.

4. "To constitute the crime of rape, there must be some degree of penetration of the female genital organ by the male genital organ, but any penetration, however slight, of the labia or external lips of the vulva of the female is all that is necessary. The hymen need not be ruptured to sustain a conviction for rape." Point 8, syllabus, State v. Brady, 104 W.Va. 523, (140 S.E. 546 (1927)). Syl. pt. 1, State v. Vance, 146 W.Va. 925, 124 S.E.2d 252 (1962), overruled on other grounds, State ex rel. Grob v. Blair, 158 W.Va. 647, 214 S.E.2d 330 (1975).

5. Syl. pt. 1, State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991) quotes Syl. pt. 2, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

6. Applying syl. pt. 2 of State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981), the Court found the defendant engaged in two separate acts of sexual intercourse as those terms are statutorily understood under W.Va.Code, 61-8B-1(7) (1986). State v. Koon, 440 S.E.2d 442 (W.Va. 1993).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE THIRD DEGREE
(sexual intercourse or sexual intrusion with one who is mentally defective or mentally incapacitated)
SEXUAL INTRUSION [1]

"Sexual intrusion" means any act between persons not married [2] to each other involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.[3]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(8) (1986).

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

[3] State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981) - Defendant was convicted of sexual misconduct and sexual abuse in the first degree.

The defendant contends the statutory offense of sexual abuse is void for vagueness. Under W.Va.Code, 61-8B-1 (1976), the definition of sexual contact, the defendant contends the language "done for the purpose of gratifying the sexual desire of either party" is unconstitutionally vague because there is no definition of "sexual gratification" or "sexual desire". The Court found the terms are both plain and unambiguous on their face.

COMMENTS

1. See State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991).

2. See State v. Mitter, 168 W.Va. 531, 285 S.E.2d 376 (1981); called into doubt, footnote 5, State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1990).

3. W.Va.Code, 61-8B-7 (1984), which defines sexual abuse in the first degree, involves "sexual contact" with another person. The term "sexual contact" is defined in W.Va.Code, 61-8B-1(6) (1986), and identifies several different acts which constitute sexual contact. Each act requires proof of a fact which the other does not. Consequently, a defendant who commits two or more of the separate acts of sexual contact on a victim may be convicted of each separate act without violation of double jeopardy principles. Syl. pt. 5, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993).

See footnote 13, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993) for discussion of double jeopardy analysis of the different acts which constitute "sexual intrusion".

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE THIRD DEGREE
(sexual intercourse or sexual intrusion with one who is mentally defective or mentally incapacitated)
LACK OF CONSENT [1]

It is an element of this offense that the (sexual act - specify) was committed without the consent of the victim. Lack of consent results from incapacity to consent. A person is deemed incapable of consent when such person is (mentally defective) (mentally incapacitated).

FOOTNOTES

[1] (a) Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.
(b) Lack of consent results from:
(1) Forcible compulsion; or
(2) Incapacity to consent; or
(3) If the offense charged is sexual abuse, any circumstances in addition to the forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.
(c) A person is deemed incapable of consent when such person is:
(1) Less than sixteen years old; or
(2) Mentally defective; or
(3) Mentally incapacitated; or
(4) Physically helpless.

W.Va.Code, 61-8B-2 (1984).

A third degree sexual assault, more commonly referred to as statutory rape, is committed when a person sixteen years old or older engages in sexual intercourse or sexual intrusion with a person who is less than sixteen years old and is also at least four years younger than the person committing the act. Consent to the act is irrelevant. However, consent is not irrelevant to a charge of second-degree sexual assault because forcible compulsion is a necessary element of this crime. Syl. pt. 5, State v. Sayre, 183 W.Va. 376, 395 S.E.2d 799 (1990).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE THIRD DEGREE
(sexual intercourse or sexual intrusion with one who is mentally defective or mentally incapacitated)
MENTALLY DEFECTIVE

"Mentally defective" means that a person suffers from a mental disease or defect which renders such person incapable of appraising the nature of his conduct.[1]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(3) (1986).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE THIRD DEGREE
(sexual intercourse or sexual intrusion with one who is mentally defective or mentally incapacitated)
MENTALLY INCAPACITATED

"Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct as a result of the influence of a controlled or intoxicating substance administered to such person without his or her consent or as a result of any other act committed upon such person without his or her consent.[1]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(4) (1986).

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE THIRD DEGREE
(defendant 16 years old or older; victim less than 16 years old and at least four years younger than defendant)

Sexual assault in the third degree is committed when a person, being sixteen years old or more, engages in (sexual intercourse) (sexual intrusion) with another person who is less than sixteen years old and who is at least four years younger than the defendant.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. being sixteen years old or older, (at the time) (specify?)
3. engaged in
   a. sexual intercourse [2]
   b. sexual intrusion [3]
4. with _____,
5. that _____, was less than sixteen years old (at the time) (specify?)
6. and that _____ was at least four years younger than the defendant, _____ (at the time).

FOOTNOTES

[1] W.Va.Code, 61-8B-5(a)(2) (1984). See, State v. Koon, 440 S.E.2d 442 (W.Va. 1993).

[2] Separate instruction provided. See, W.Va.Code, 61-8B-1(7) (1986).

[3] Separate instruction provided. See, W.Va.Code, 61-8B-1(8) (1986).

COMMENTS

DEFENSE

1. (a) In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.

(b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three (sec. 61-8B-3), and under subdivision (3), subsection (a), section seven (sec. 61-8B-7) of this article.

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W.Va.Code, 61-8B-12 (1984).

2. State v. Sayre, 183 W.Va. 376, 395 S.E.2d 799 (1990) - Appellant was convicted of second-degree sexual assault. The same act of sexual intercourse also resulted in the appellant's conviction of third-degree sexual assault. He contends the two convictions constitute double jeopardy because they are for the same offense.

The Court found the two convictions do not impugn double jeopardy protection.

The Court found:

> Contrary to the appellant's assertion, lack of consent is not an element of both second and third-degree sexual assault. A third-degree sexual assault, more commonly referred to as statutory rape, is committed when a person sixteen years old or older engages in sexual intercourse or sexual intrusion with a person who is less than sixteen years old and is also at least four years younger than the person committing the act. Consent to the act is irrelevant. However, consent is not irrelevant to a charge of second-degree sexual assault because forcible compulsion is a necessary element of this crime.
>
> In this case, the jury found that the twenty-five-year-old appellant forced a fifteen-year-old girl to have sexual intercourse with him. Under these particular facts, it is true that it would have been impossible for the jury to find that the appellant committed second-degree sexual assault without also finding him guilty of third-degree sexual assault. Once the appellant admitted that he had sexual intercourse with the fifteen-year-old and their ages were established, the fact that he was guilty of statutory rape was beyond dispute. However, the issue of whether force was involved, so as to also make the appellant guilty of second-degree sexual assault, remained to be determined by the jury.

3. Where the exact age is not required to be proved, the defendant's physical appearance may be considered by the jury in determining age but there must some additional evidence suggesting the defendant's age. Syl. pt. 6, State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982).

4. State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981) - Appellant was convicted in November 1977 of first degree sexual assault. He contends he was entitled to an instruction on third degree sexual assault. The Court found this contention meritless.

5. The sexual abuse statute involving parents, custodians, or guardians, W.Va.Code, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, W.Va.Code, 61-8B-1, et seq., for purposes of punishment. State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992); State v. George W.H., 439 S.E.2d 423 (W.Va. 1993).

6. The Court found the evidence established all elements required for a conviction of third degree sexual assault under W.Va.Code, 61-8B-5 (1984). State v. Koon, 440 S.E.2d 442 (W.Va. 1993).

SEXUAL ASSAULT IN THE THIRD DEGREE
(defendant 16 years old or older; victim less than 16 years old and at least four years younger than defendant)
SEXUAL INTERCOURSE [1]

"Sexual intercourse" means any act between persons not married [2] to each other involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of another person.

FOOTNOTES

[1] W.Va.Code, 61-8B-1(7) (1986).

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1. W.Va.Code, 61-8B-1(7), defining sexual intercourse, when read in conjunction with W.Va.Code, 61-8B-3, defining sexual assault in the first degree, indicates that an act of forcible oral intercourse and an act of forcible anal intercourse are separate and distinct offenses. Syl. pt. 1, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

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2. State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982) - States instruction 3-A defined "sexual intercourse" following the provisions of W.Va.Code, 61-8B-1(7). The State had originally offered its Instruction 3 which defined sexual intercourse using only the statutory language applicable to the facts proved. The defendant objected because the instruction did not set out all of the language in the statute. The trial court granted the objection and the state then offered Instruction 3-A. The Court found:

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Furthermore, the fact that State's Instruction No. 3-A was broader than it needed to be since it included all of the acts that make up the statutory definition of "sexual intercourse," does not mean that it was fatally defective and, therefore, reversible error. It was not an erroneous statement of our law but rather one that might be confusing in view of the fact that it covered legal definitions of sexual intercourse that were not presented in the evidence. Certainly, some of the confusion was clarified by Defense Instruction No. 1 which defined "sexual intercourse" solely under the facts presented. In Syllabus Point 4 State v. Stone, 165 W.Va. 266, 268 S.E.2d 50 (1980), we stated:

> "The giving of confusing or incomplete instructions does not constitute reversible error where a reading and consideration of the instructions as a whole cure any defects in the complained of instructions."

In view of the foregoing, we decline to find the State's Instruction No. 3-A constituted reversible error.

3. State v. Barker, 178 W.Va. 736, 364 S.E.2d 264 (1987). Appellant was convicted of sexual assault in the first degree. He contends the trial court erred by not directing a verdict of acquittal, because the evidence presented was insufficient, as a matter of law, to convict the appellant. In so arguing, the appellant asserts that because Dr. Cox's testimony reported that there was no physical evidence of penetration, a sexual assault had not occurred on the victim. W.Va.Code, 61-8B-1(7) [1986] defines "sexual intercourse" as "involving penetration however slight, of the female organ." Dr. Cox's findings did not rule out a sexual assault of the victim involving a slight penetration of her sex organ which would be consistent with the victim's description of the appellant's conduct.

"A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury." Syl. pt. 5, State v. Beck, 167 W.Va. 830, 286 S.E.2d 234 (1981). The victim knew the appellant, a neighbor who was a social friend of her mother and her mother's boyfriend. She was capable of describing to the jury the conduct of the appellant in a clear and credible fashion. In addition, the victim's testimony is corroborated by Dr. Cox's testing which revealed the presence of an organism which is normally transmitted only through sexual contact and therefore is rarely found in children such as the victim.

4. "To constitute the crime of rape, there must be some degree of penetration of the female genital organ by the male genital organ, but any penetration, however slight, of the labia or external lips of the vulva of the female is all that is necessary. The hymen need not be ruptured to sustain a conviction for rape." Point 8, syllabus, State v. Brady, 104 W.Va. 523, (140 S.E. 546 (1927)). Syl. pt. 1, State v. Vance, 146 W.Va. 925, 124 S.E.2d 252 (1962), overruled on other grounds, State ex rel. Grob v. Blair, 158 W.Va. 647, 214 S.E.2d 330 (1975).

5. Syl. pt. 1, State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991) quotes Syl. pt. 2, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

6. Applying syl. pt. 2 of State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981), the Court found the defendant engaged in two separate acts of sexual intercourse as those terms are statutorily understood under W.Va.Code, 61-8B-1(7) (1986). State v. Koon, 440 S.E.2d 442 (W.Va. 1993).

SEXUAL ASSAULT IN THE THIRD DEGREE
(defendant 16 years old or older; victim less than 16 years old and at least four years younger than defendant)
SEXUAL INTRUSION [1]

"Sexual intrusion" means any act between persons not married [2] to each other involving penetration, however slight, of the female sex organ or of the anus of any person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.[3]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(8) (1986).

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

[3] State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981) - Defendant was convicted of sexual misconduct and sexual abuse in the first degree.

The defendant contends the statutory offense of sexual abuse is void for vagueness. Under W.Va.Code, 61-8B-1 (1976), the definition of sexual contact, the defendant contends the language "done for the purpose of gratifying the sexual desire of either party" is unconstitutionally vague because there is no definition of "sexual gratification" or "sexual desire". The Court found the terms are both plain and unambiguous on their face.

COMMENTS

1. See State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991).

2. See State v. Mitter, 168 W.Va. 531, 285 S.E.2d 376 (1981); called into doubt, footnote 5, State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1990).

3. W.Va.Code, 61-8B-7 (1984), which defines sexual abuse in the first degree, involves "sexual contact" with another person. The term "sexual contact" is defined in W.Va.Code, 61-8B-1(6) (1986), and identifies several different acts which constitute sexual contact. Each act requires proof of a fact which the other does not. Consequently, a defendant who commits two or more of the separate acts of sexual contact on a victim may be convicted of each separate act without violation of double jeopardy principles. Syl. pt. 5, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993).

See footnote 13, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993) for discussion of double jeopardy analysis of the different acts which constitute "sexual intrusion".

SEXUAL OFFENSES
SEXUAL ASSAULT IN THE THIRD DEGREE
(defendant 16 years old or older; victim less than 16 years old and at least four years younger than defendant)
LACK OF CONSENT [1]

It is an element of this offense that the (sexual act - specify) was committed without the consent of the victim. Lack of consent results from incapacity to consent. A person is deemed incapable of consent when such person is less than sixteen years old.

FOOTNOTES

[1] (a) Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.
(b) Lack of consent results from:
(1) Forcible compulsion; or
(2) Incapacity to consent; or
(3) If the offense charged is sexual abuse, any circumstances in addition to the forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.
(c) A person is deemed incapable of consent when such person is:
(1) Less than sixteen years old; or
(2) Mentally defective; or
(3) Mentally incapacitated; or
(4) Physically helpless.

W.Va.Code, 61-8B-2 (1984).

A third degree sexual assault, more commonly referred to as statutory rape, is committed when a person sixteen years old or older engages in sexual intercourse or sexual intrusion with a person who is less than sixteen years old and is also at least four years younger than the person committing the act. Consent to the act is irrelevant. However, consent is not irrelevant to a charge of second-degree sexual assault because forcible compulsion is a necessary element of this crime. Syl. pt. 5, State v. Sayre, 183 W.Va. 376, 395 S.E.2d 799 (1990).

SEXUAL OFFENSES
SEXUAL ASSAULT OF A SPOUSE
(forcible compulsion)

Sexual assault of a spouse is committed when a person engages in (sexual penetration) (sexual intrusion) with (his) (her) spouse without the consent of such spouse; and the lack of consent results from forcible compulsion.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. engaged in
   a. sexual penetration [2]
   b. sexual intrusion [3]
3. with _____, (his) (her) spouse [4]
4. without the consent of such spouse
5. and the lack of consent resulted from forcible compulsion [5]

FOOTNOTES

[1] W.Va.Code, 61-8B-6(b) (1984).

[2] Separate instruction on sexual intercourse (not penetration) provided. See W.Va.Code, 61-8B-6(a)(1) (1984).

[3] Separate instruction provided. See W.Va.Code, 61-8B-6(a)(2) (1984).

[4] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

[5] W.Va.Code, 61-8B-6(b)(i) (1984). Separate instruction provided. See, W.Va.Code, 61-8B-1(1) (1986).

COMMENTS

1. See W.Va.Code, 61-8B-12 (1984).

SEXUAL OFFENSES
SEXUAL ASSAULT OF A SPOUSE
(forcible compulsion)
SEXUAL INTERCOURSE [1]

"Sexual intercourse" means any act between persons married [2] to each other involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of his or her spouse.

FOOTNOTES

[1] W.Va.Code, 61-8B-6(a)(1) (1984). (Use if applicable. Note that sexual intercourse is defined, not sexual penetration.)

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

COMMENTS

1. W.Va.Code, 61-8B-1(7), defining sexual intercourse, when read in conjunction with W.Va.Code, 61-8B-3, defining sexual assault in the first degree, indicates that an act of forcible oral intercourse and an act of forcible anal intercourse are separate and distinct offenses. Syl. pt. 1, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

Where a defendant commits separate acts of our statutorily defined term "sexual intercourse" in different ways, each act may be prosecuted and punished as a separate offense. Syl. pt. 2, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

(Defendant was convicted on two counts of first degree sexual assault. The Court found this case distinguishable from State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981).

2. State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982) - States instruction 3-A defined "sexual intercourse" following the provisions of W.Va.Code, 61-8B-1(7). The State had originally offered its Instruction 3 which defined sexual intercourse using only the statutory language applicable to the facts proved. The defendant objected because the instruction did not set out all of the language in the statute. The trial court granted the objection and the state then offered Instruction 3-A. The Court found:

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Furthermore, the fact that State's Instruction No. 3-A was broader than it needed to be since it included all of the acts that make up the statutory definition of "sexual intercourse," does not mean that it was fatally defective and, therefore, reversible error. It was not an erroneous statement of our law but rather one that might be confusing in view of the fact that it covered legal definitions of sexual intercourse that were not presented in the evidence. Certainly, some of the confusion was clarified by Defense Instruction No. 1 which defined "sexual intercourse" solely under the facts presented. In Syllabus Point 4 State v. Stone, 165 W.Va. 266, 268 S.E.2d 50 (1980), we stated:

> "The giving of confusing or incomplete instructions does not constitute reversible error where a reading and consideration of the instructions as a whole cure any defects in the complained of instructions."

In view of the foregoing, we decline to find the State's Instruction No. 3-A constituted reversible error.

3. State v. Barker, 178 W.Va. 736, 364 S.E.2d 264 (1987). Appellant was convicted of sexual assault in the first degree. He contends the trial court erred by not directing a verdict of acquittal, because the evidence presented was insufficient, as a matter of law, to convict the appellant. In so arguing, the appellant asserts that because Dr. Cox's testimony reported that there was no physical evidence of penetration, a sexual assault had not occurred on the victim. W.Va.Code, 61-8B-1(7) [1986] defines "sexual intercourse" as "involving penetration however slight, of the female organ." Dr. Cox's findings did not rule out a sexual assault of the victim involving a slight penetration of her sex organ which would be consistent with the victim's description of the appellant's conduct.

"A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury." Syl. pt. 5, State v. Beck, 167 W.Va. 830, 286 S.E.2d 234 (1981). The victim knew the appellant, a neighbor who was a social friend of her mother and her mother's boyfriend. She was capable of describing to the jury the conduct of the appellant in a clear and credible fashion. In addition, the victim's testimony is corroborated by Dr. Cox's testing which revealed the presence of an organism which is normally transmitted only through sexual contact and therefore is rarely found in children such as the victim.

4. "To constitute the crime of rape, there must be some degree of penetration of the female genital organ by the male genital organ, but any penetration, however slight, of the labia or external lips of the vulva of the female is all that is necessary. The hymen need not be ruptured to sustain a conviction for rape." Point 8, syllabus, State v. Brady, 104 W.Va. 523, (140 S.E. 546 (1927)). Syl. pt. 1, State v. Vance, 146 W.Va. 925, 124 S.E.2d 252 (1962), overruled on other grounds, State ex rel. Grob v. Blair, 158 W.Va. 647, 214 S.E.2d 330 (1975).

5. Syl. pt. 1, State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991) quotes Syl. pt. 2, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

6. Applying syl. pt. 2 of State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981), the Court found the defendant engaged in two separate acts of sexual intercourse as those terms are statutorily understood under W.Va.Code, 61-8B-1(7) (1986). State v. Koon, 440 S.E.2d 442 (W.Va. 1993).

SEXUAL OFFENSES
SEXUAL ASSAULT OF A SPOUSE
(forcible compulsion)
SEXUAL INTRUSION [1]

"Sexual intrusion" means any act between persons married [2] to each other involving penetration of the female sex organ or of the anus of either person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.

FOOTNOTES

[1] W.Va.Code, 61-8B-6(a)(2) (1984).

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

[3] State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981) - Defendant was convicted of sexual misconduct and sexual abuse in the first degree.

The defendant contends the statutory offense of sexual abuse is void for vagueness. Under W.Va.Code, 61-8B-1 (1976), the definition of sexual contact, the defendant contends the language "done for the purpose of gratifying the sexual desire of either party" is unconstitutionally vague because there is no definition of "sexual gratification" or "sexual desire". The Court found the terms are both plain and unambiguous on their face.

COMMENTS

1. See State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991).

2. See State v. Mitter, 168 W.Va. 531, 285 S.E.2d 376 (1981); called into doubt, footnote 5, State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1990).

3. W.Va.Code, 61-8B-7 (1984), which defines sexual abuse in the first degree, involves "sexual contact" with another person. The term "sexual contact" is defined in W.Va.Code, 61-8B-1(6) (1986), and identifies several different acts which constitute sexual contact. Each act requires proof of a fact which the other does not. Consequently, a defendant who commits two or more of the separate acts of sexual contact on a victim may be convicted of each separate act without violation of double jeopardy principles. Syl. pt. 5, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993).

See footnote 13, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993) for discussion of double jeopardy analysis of the different acts which constitute "sexual intrusion".

SEXUAL OFFENSES
SEXUAL ASSAULT OF A SPOUSE
(forcible compulsion)
FORCIBLE COMPULSION [1]

It is an element of this offense that the (sexual act - specify) was committed without the consent of the victim and the lack of consent result from forcible compulsion.[2]

"Forcible compulsion" means:

Physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or

Threat or intimidation, expressed or implied, placing a person in fear of immediate death or bodily injury to himself or another person or in fear that he or another person will be kidnapped; or

Fear by a child under sixteen years of age caused by intimidation, expressed or implied, by another person four years older than the victim.

For the purposes of this definition "resistance" includes physical resistance or any clear communication of the victim's lack of consent.

FOOTNOTES

[1] W.Va.Code, 61-8B-1(1) (1986). Use if applicable.

[2] W.Va.Code, 61-8B-6(b)(i) (1984).

COMMENTS

1. Where evidence conclusively establishes that the victim of a sexual assault offered no resistance to his attacker, was neither struck dumb with fear during the assault, nor attempted to utter any plea for assistance, no "earnest resistance" to "forcible compulsion" exists under W.Va.Code, 61-8B-1(a)(1)(iii) (1976). Syl. pt. 1, State v. Hartshorn, 175 W.Va. 274, 332 S.E.2d 574 (1985).

The Court found the complainant did not offer the degree of "earnest resistance" to the sexual assault contemplated by W.Va.Code, 61-8B-3(a)(iii) (1976) and necessary to sustain a conviction for sexual assault in the first degree.

See case for definition of "forcible compulsion" as defined under 1976 law.

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2. In determining whether the victim of a sexual assault exercised "earnest resistance" as defined in W.Va.Code, 61-8B-1(1) (1976), the following factors should be considered: the age and mental and physical conditions of the complainant as well as those of the defendant, together with the circumstances leading up to and surrounding the assault. Syl. pt. 4, State v. Miller, 175 W.Va. 616, 336 S.E.2d 910 (1985).

See Miller, supra, at 918, for further discussion of "earnest resistance."

3. State v. Green, 163 W.Va. 681, 260 S.E.2d 257 (1979) - Trial court correctly refused defendant's instruction on "forcible compulsion" in the second degree sexual assault prosecution where the instruction wholly ignored or misstated W.Va.Code, 61-8B-1.

4. State v. Wallace, 175 W.Va. 663, 337 S.E.2d 321, 323 (1985) - "... the term "forcible compulsion" is statutorily defined as indicating a victim's lack of consent. W.Va.Code, 61-8B-2(b). The term "forcible compulsion" also relates to the amount of force used as set out in W.Va.Code, 61-8B-1(1)..."

5. Evidence that a defendant committed violent or turbulent acts toward a rape victim or toward others of which she is aware, is relevant to establish her fear of her attacker that is a major element of proof of first-degree sexual assault. W.Va.Code, 61-8B-1(1)(b). Syl. pt. 4, State v. Pancake, 170 W.Va. 690, 296 S.E.2d 37 (1982).

6. State v. Miller, 175 W.Va. 616, 336 S.E.2d 910 (1985) - The Court found the circumstances that may be considered in determining forcible compulsion include acts of violence or other misconduct committed by the defendant that would be relevant in establishing the victim's fear of his attacker.

7. See State v. Dolin, 347 S.E.2d 208 (W.Va. 1986) footnote 13.

8. Ex post facto principles prohibited application of statute defining "forcible compulsion" (amended to include "fear by child under sixteen ... caused by intimidation... by (one) ... four years older ...") to sexual abuse prosecution based on events occurring before amendment's effective date. State v. Hensler, 187 W.Va. 81, 415 S.E.2d 885 (1992); State v. George W.H., 439 S.E.2d 423 (W.Va. 1993) (Sexual assault prosecution).

SEXUAL OFFENSES
SEXUAL ASSAULT OF A SPOUSE
(serious bodily injury/employs a deadly weapon)

Sexual assault of a spouse is committed when a person engages in (sexual penetration) (sexual intrusion) with (his) (her) spouse without the consent of such spouse; and (such person inflicts serious bodily injury upon anyone) (such person employs a deadly weapon in the commission of the offense).[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. engaged in
   a. sexual penetration [2]
   b. sexual intrusion [3]
3. with _____, (his) (her) spouse [4]
4. without the consent of such spouse [5]
5. and
   a. the defendant inflicted serious bodily injury [6] upon _____ [7]
   b. the defendant employed a deadly weapon [8] in the commission of the (specify).[9]

FOOTNOTES

[1] W.Va.Code, 61-8B-6(b) (1984).

[2] Separate instruction on sexual intercourse (not penetration) provided. See W.Va.Code, 61-8B-6(a)(1) (1984).

[3] Separate instruction provided. See W.Va.Code, 61-8B-6(a)(2) (1984).

[4] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

[5] Separate instruction provided.

[6] Separate instruction provided. See W.Va.Code, 61-8B-1(10) (1986).

[7] W.Va.Code, 61-8B-6 (b)(ii) (1984).

[8] Separate instruction provided. See W.Va.Code, 61-8B-1(11) (1986).

[9] W.Va.Code, 61-8B-6 (b)(iii) (1984).

SEXUAL OFFENSES
SEXUAL ASSAULT OF A SPOUSE
(serious bodily injury/employs a deadly weapon)
SEXUAL INTERCOURSE [1]

"Sexual intercourse" means any act between persons married [2] to each other involving penetration, however slight, of the female sex organ by the male sex organ or involving contact between the sex organs of one person and the mouth or anus of his or her spouse.

FOOTNOTES

[1] W.Va.Code, 61-8B-6(a)(1) (1984). (Use if applicable. Note that sexual intercourse is defined, not sexual penetration.)

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

COMMENTS

1. W.Va.Code, 61-8B-1(7), defining sexual intercourse, when read in conjunction with W.Va.Code, 61-8B-3, defining sexual assault in the first degree, indicates that an act of forcible oral intercourse and an act of forcible anal intercourse are separate and distinct offenses. Syl. pt. 1, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

Where a defendant commits separate acts of our statutorily defined term "sexual intercourse" in different ways, each act may be prosecuted and punished as a separate offense. Syl. pt. 2, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

(Defendant was convicted on two counts of first degree sexual assault. The Court found this case distinguishable from State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981).

2. State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982) - States instruction 3-A defined "sexual intercourse" following the provisions of W.Va.Code, 61-8B-1(7). The State had originally offered its Instruction 3 which defined sexual intercourse using only the statutory language applicable to the facts proved. The defendant objected because the instruction did not set out all of the language in the statute. The trial court granted the objection and the state then offered Instruction 3-A. The Court found:

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Furthermore, the fact that State's Instruction No. 3-A was broader than it needed to be since it included all of the acts that make up the statutory definition of "sexual intercourse," does not mean that it was fatally defective and, therefore, reversible error. It was not an erroneous statement of our law but rather one that might be confusing in view of the fact that it covered legal definitions of sexual intercourse that were not presented in the evidence. Certainly, some of the confusion was clarified by Defense Instruction No. 1 which defined "sexual intercourse" solely under the facts presented. In Syllabus Point 4 State v. Stone, 165 W.Va. 266, 268 S.E.2d 50 (1980), we stated:

> "The giving of confusing or incomplete instructions does not constitute reversible error where a reading and consideration of the instructions as a whole cure any defects in the complained of instructions."

In view of the foregoing, we decline to find the State's Instruction No. 3-A constituted reversible error.

3. State v. Barker, 178 W.Va. 736, 364 S.E.2d 264 (1987). Appellant was convicted of sexual assault in the first degree. He contends the trial court erred by not directing a verdict of acquittal, because the evidence presented was insufficient, as a matter of law, to convict the appellant. In so arguing, the appellant asserts that because Dr. Cox's testimony reported that there was no physical evidence of penetration, a sexual assault had not occurred on the victim. W.Va.Code, 61-8B-1(7) [1986] defines "sexual intercourse" as "involving penetration however slight, of the female organ." Dr. Cox's findings did not rule out a sexual assault of the victim involving a slight penetration of her sex organ which would be consistent with the victim's description of the appellant's conduct.

"A conviction for any sexual offense may be obtained on the uncorroborated testimony of the victim, unless such testimony is inherently incredible, the credibility is a question for the jury." Syl. pt. 5, State v. Beck, 167 W.Va. 830, 286 S.E.2d 234 (1981). The victim knew the appellant, a neighbor who was a social friend of her mother and her mother's boyfriend. She was capable of describing to the jury the conduct of the appellant in a clear and credible fashion. In addition, the victim's testimony is corroborated by Dr. Cox's testing which revealed the presence of an organism which is normally transmitted only through sexual contact and therefore is rarely found in children such as the victim.

4. "To constitute the crime of rape, there must be some degree of penetration of the female genital organ by the male genital organ, but any penetration, however slight, of the labia or external lips of the vulva of the female is all that is necessary. The hymen need not be ruptured to sustain a conviction for rape." Point 8, syllabus, State v. Brady, 104 W.Va. 523, (140 S.E. 546 (1927)). Syl. pt. 1, State v. Vance, 146 W.Va. 925, 124 S.E.2d 252 (1962), overruled on other grounds, State ex rel. Grob v. Blair, 158 W.Va. 647, 214 S.E.2d 330 (1975).

5. Syl. pt. 1, State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991) quotes Syl. pt. 2, State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981).

6. Applying syl. pt. 2 of State v. Carter, 168 W.Va. 90, 282 S.E.2d 277 (1981), the Court found the defendant engaged in two separate acts of sexual intercourse as those terms are statutorily understood under W.Va.Code, 61-8B-1(7) (1986). State v. Koon, 440 S.E.2d 442 (W.Va. 1993).

SEXUAL OFFENSES
SEXUAL ASSAULT OF A SPOUSE
(serious bodily injury/employs a deadly weapon)
SEXUAL INTRUSION [1]

"Sexual intrusion" means any act between persons married [2] to each other involving penetration of the female sex organ or of the anus of either person by an object for the purpose of degrading or humiliating the person so penetrated or for gratifying the sexual desire of either party.[3]

FOOTNOTES

[1] W.Va.Code, 61-8B-6(a)(2) (1984).

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

[3] State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981) - Defendant was convicted of sexual misconduct and sexual abuse in the first degree.

The defendant contends the statutory offense of sexual abuse is void for vagueness. Under W.Va.Code, 61-8B-1 (1976), the definition of sexual contact, the defendant contends the language "done for the purpose of gratifying the sexual desire of either party" is unconstitutionally vague because there is no definition of "sexual gratification" or "sexual desire". The Court found the terms are both plain and unambiguous on their face.

COMMENTS

1. See State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991).

2. See State v. Mitter, 168 W.Va. 531, 285 S.E.2d 376 (1981); called into doubt, footnote 5, State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1990).

3. W.Va.Code, 61-8B-7 (1984), which defines sexual abuse in the first degree, involves "sexual contact" with another person. The term "sexual contact" is defined in W.Va.Code, 61-8B-1(6) (1986), and identifies several different acts which constitute sexual contact. Each act requires proof of a fact which the other does not. Consequently, a defendant who commits two or more of the separate acts of sexual contact on a victim may be convicted of each separate act without violation of double jeopardy principles. Syl. pt. 5, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993).

See footnote 13, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993) for discussion of double jeopardy analysis of the different acts which constitute "sexual intrusion".

SEXUAL OFFENSES
SEXUAL ASSAULT OF A SPOUSE
(Serious bodily injury/employs a deadly weapon)
LACK OF CONSENT
(forcible compulsion)[1]

It is an element of this offense that the (sexual act - specify) was committed without the consent of the victim and the lack of consent resulted from forcible compulsion.

"Forcible compulsion" means:

Physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or

Threat or intimidation, expressed or implied, placing a person in fear of immediate death or bodily injury to himself or another person or in fear that he or another person will be kidnapped; or

Fear by a child under sixteen years of age caused by intimidation, expressed or implied, by another person four years older than the victim.

For the purposes of this definition "resistance" includes physical resistance or any clear communication of the victim's lack of consent.

FOOTNOTES

[1] Use if applicable.
(a) Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.
(b) Lack of consent results from:
(1) Forcible compulsion; or
(2) Incapacity to consent; or
(3) If the offense charged is sexual abuse, any circumstances in addition to the forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.
(c) A person is deemed incapable of consent when such person is:
(1) Less than sixteen years old; or
(2) Mentally defective; or
(3) Mentally incapacitated; or
(4) Physically helpless.

W.Va.Code, 61-8B-2 (1984).

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COMMENTS

1. Where evidence conclusively establishes that the victim of a sexual assault offered no resistance to his attacker, was neither struck dumb with fear during the assault, nor attempted to utter any plea for assistance, no "earnest resistance" to "forcible compulsion" exists under W.Va.Code, 61-8B-1(a)(1)(iii) (1976). Syl. pt. 1, State v. Hartshorn, 175 W.Va. 274, 332 S.E.2d 574 (1985).

The Court found the complainant did not offer the degree of "earnest resistance" to the sexual assault contemplated by W.Va.Code, 61-8B-3(a)(iii) (1976) and necessary to sustain a conviction for sexual assault in the first degree.

See case for definition of "forcible compulsion" as defined under 1976 law.

2. In determining whether the victim of a sexual assault exercised "earnest resistance" as defined in W.Va.Code, 61-8B-1(1) (1976), the following factors should be considered: the age and mental and physical conditions of the complainant as well as those of the defendant, together with the circumstances leading up to and surrounding the assault. Syl. pt. 4, State v. Miller, 175 W.Va. 616, 336 S.E.2d 910 (1985).

See Miller, supra, at 918, for further discussion of "earnest resistance."

3. State v. Green, 163 W.Va. 681, 260 S.E.2d 257 (1979) - Trial court correctly refused defendant's instruction on "forcible compulsion" in the second degree sexual assault prosecution where the instruction wholly ignored or misstated W.Va.Code, 61-8B-1.

4. State v. Wallace, 175 W.Va. 663, 337 S.E.2d 321, 323 (1985) - "... the term "forcible compulsion" is statutorily defined as indicating a victim's lack of consent. W.Va.Code, 61-8B-2(b). The term "forcible compulsion" also relates to the amount of force used as set out in W.Va.Code, 61-8B-1(1)..."

5. Evidence that a defendant committed violent or turbulent acts toward a rape victim or toward others of which she is aware, is relevant to establish her fear of her attacker that is a major element of proof of first-degree sexual assault. W.Va.Code, 61-8B-1(1)(b). Syl. pt. 4, State v. Pancake, 170 W.Va. 690, 296 S.E.2d 37 (1982).

6. State v. Miller, 175 W.Va. 616, 336 S.E.2d 910 (1985) - The Court found the circumstances that may be considered in determining forcible compulsion include acts of violence or other misconduct committed by the defendant that would be relevant in establishing the victim's fear of his attacker.

7. See State v. Dolin, 347 S.E.2d 208 (W.Va. 1986) footnote 13.

8. Ex post facto principles prohibited application of statute defining "forcible compulsion" (amended to include "fear by child under sixteen ... caused by intimidation... by (one) ... four years older ...") to sexual abuse prosecution based on events occurring before amendment's effective date. State v. Hensler, 187 W.Va. 81, 415 S.E.2d 885 (1992); State v. George W.H., 439 S.E.2d 423 (W.Va. 1993) (Sexual assault prosecution).

SEXUAL OFFENSES
SEXUAL ASSAULT OF A SPOUSE
(serious bodily injury/deadly weapon)
LACK OF CONSENT
(incapacity to consent)[1]

It is an element of this offense that the (sexual act - specify) was committed without the consent of the victim. Lack of consent results from incapacity to consent. A person is deemed in capable of consent when such person is (less than sixteen years old) (mentally defective)[2] (mentally incapacitated)[3] (physically helpless).[4]

FOOTNOTES

[1] Use if applicable.
(a) Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.
(b) Lack of consent results from:
(1) Forcible compulsion; or
(2) Incapacity to consent; or
(3) If the offense charged is sexual abuse, any circumstances in addition to the forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.
(c) A person is deemed incapable of consent when such person is:
(1) Less than sixteen years old; or
(2) Mentally defective; or
(3) Mentally incapacitated; or
(4) Physically helpless.

W.Va.Code, 61-8B-2 (1984).

[2] "Mentally defective" means that a person suffers from a mental disease or defect which renders such person incapable of appraising the nature of his conduct. W.Va.Code, 61-8B-1(3) (1986). Offer instruction if applicable.

[3] "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct as a result of the influence of a controlled or intoxicating substance administered to such person without his or her consent or as a result of any other act committed upon such person without his or her consent. W.Va.Code, 61-8B-1(4) (1986). Offer instruction if applicable.

[4] "Physically helpless" means that a person is unconscious or for any reason is physically unable to communicate unwillingness to an act. W.Va.Code, 61-8B-1(5) (1986). Offer instruction if applicable.

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COMMENTS

1. W.Va.Code, 61-8B-12 (1984).

(a) In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.

(b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three [§ 61-8B-3], and under subdivision (3), subsection (a), section seven [§ 61-8B-7] of this article.

SEXUAL OFFENSES
SEXUAL ASSAULT OF A SPOUSE
(serious bodily injury/employs a deadly weapon)
SERIOUS BODILY INJURY

"Serious bodily injury" means bodily injury which creates a substantial risk of death, which causes serious or prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.[1]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(10) (1986). Use if applicable.

COMMENTS

1. Syl. pt. 2 - Psychological injury is not a "serious bodily injury" under W.Va.Code, 61-8B-3(a)(1)(i) (1976). State v. Hartshorn, 175 W.Va. 274, 332 S.E.2d 574 (1985).

The Court noted the statutory definition in W.Va. of "serious bodily injury" is the definition recommended by the MPC. In the MPC definition, psychological injuries were specifically excluded.

The Court found that until the Legislature defines a serious personal injury expansively to include "mental anguish or trauma" this Court feels that it would be improvident to enlarge upon the statutory definition of a serious bodily injury. The Court found the statute is very specific in its definition and it excludes psychological injury.

SEXUAL OFFENSES
SEXUAL ASSAULT OF A SPOUSE
(serious bodily injury/employs a deadly weapon)
DEADLY WEAPON

"Deadly weapon" means any instrument, device or thing capable of inflicting death or serious bodily injury, and designed or specially adapted for use as a weapon, or possessed, carried or used as a weapon.[1]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(11) (1986). Use if applicable.

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

SEXUAL OFFENSES
SEXUAL ABUSE IN THE FIRST DEGREE
(forcible compulsion)

Sexual abuse in the first degree is committed when a person subjects another person to sexual contact without their consent and the lack of consent results from forcible compulsion.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. subjected _____,
3. to sexual contact [2]
4. without _____,s consent
5. and the lack of consent resulted from forcible compulsion.[3]

FOOTNOTES

[1] W.Va.Code, 61-8B-7(a)(1) (1984).

[2] Separate instruction provided. See, W.Va.Code, 61-8B-1(6) (1986).

[3] Separate instruction provided. See, W.Va.Code, 61-8B-1(1) (1986).

COMMENTS

1. The affirmative defense set forth under W.Va.Code, 61-8B-12 (1984) is not applicable here.

2. The sexual abuse statute involving parents, custodians, or guardians, W.Va.Code, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, W.Va.Code, 61-8B-1, et seq., for purposes of punishment. State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992); State v. George W.H., 439 S.E.2d 423 (W.Va. 1993).

SEXUAL OFFENSES
SEXUAL ABUSE IN THE FIRST DEGREE
(forcible compulsion)
SEXUAL CONTACT [1]

"Sexual contact" means any intentional touching, either directly or through clothing, of the anus or any part of the sex organs of another person, or the breasts of a female or intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married [2] to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.[3]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(6) (1986).

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

[3] State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981) - Defendant was convicted of sexual misconduct and sexual abuse in the first degree.

The defendant contends the statutory offense of sexual abuse is void for vagueness. Under W.Va.Code, 61-8B-1 (1976), the definition of sexual contact, the defendant contends the language "done for the purpose of gratifying the sexual desire of either party" is unconstitutionally vague because there is no definition of "sexual gratification" or "sexual desire". The Court found the terms are both plain and unambiguous on their face.

COMMENTS

1. See State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991).

2. See State v. Mitter, 168 W.Va. 531, 285 S.E.2d 376 (1981); called into doubt, footnote 5, State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1990).

3. W.Va.Code, 61-8B-7 (1984), which defines sexual abuse in the first degree, involves "sexual contact" with another person. The term "sexual contact" is defined in W.Va.Code, 61-8B-1(6) (1986), and identifies several different acts which constitute sexual contact. Each act requires proof of a fact which the other does not. Consequently, a defendant who commits two or more of the separate acts of sexual contact on a victim may be convicted of each separate act without violation of double jeopardy principles. Syl. pt. 5, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993).

The Court held the defendant was not subjected to unconstitutional double jeopardy when he was convicted of two counts of sexual abuse in the first degree for separately and unlawfully touching his victim's breasts and sex organ in a single criminal episode. (See footnote 16 for hypothetical where defendant touches both of the victims's breasts at the same time.)

SEXUAL OFFENSES
SEXUAL ABUSE IN THE FIRST DEGREE
(forcible compulsion)
FORCIBLE COMPULSION [1]

It is an element of this offense that the sexual contact was committed without the consent of the victim and the lack of consent resulted from forcible compulsion.[2]

"Forcible compulsion" means:

Physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or

Threat or intimidation, expressed or implied, placing a person in fear of immediate death or bodily injury to himself or another person or in fear that he or another person will be kidnapped; or

Fear by a child under sixteen years of age caused by intimidation, expressed or implied, by another person four years older than the victim.

For the purposes of this definition "resistance" includes physical resistance or any clear communication of the victim's lack of consent.

FOOTNOTES

[1] W.Va.Code, 61-8B-1(1) (1986).

[2] W.Va.Code, 61-8B-7(a)(1) (1984).

COMMENTS

1. Where evidence conclusively establishes that the victim of a sexual assault offered no resistance to his attacker, was neither struck dumb with fear during the assault, nor attempted to utter any plea for assistance, no "earnest resistance" to "forcible compulsion" exists under W.Va.Code, 61-8B-1(a)(1)(iii) (1976). Syl. pt. 1, State v. Hartshorn, 175 W.Va. 274, 332 S.E.2d 574 (1985).

The Court found the complainant did not offer the degree of "earnest resistance" to the sexual assault contemplated by W.Va.Code, 61-8B-3(a)(iii) (1976) and necessary to sustain a conviction for sexual assault in the first degree.

See case for definition of "forcible compulsion" as defined under 1976 law.

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2. In determining whether the victim of a sexual assault exercised "earnest resistance" as defined in W.Va.Code, 61-8B-1(1) (1976), the following factors should be considered: the age and mental and physical conditions of the complainant as well as those of the defendant, together with the circumstances leading up to and surrounding the assault. Syl. pt. 4, State v. Miller, 175 W.Va. 616, 336 S.E.2d 910 (1985).

See Miller, supra, at 918, for further discussion of "earnest resistance."

3. State v. Green, 163 W.Va. 681, 260 S.E.2d 257 (1979) - Trial court correctly refused defendant's instruction on "forcible compulsion" in the second degree sexual assault prosecution where the instruction wholly ignored or misstated W.Va.Code, 61-8B-1.

4. State v. Wallace, 175 W.Va. 663, 337 S.E.2d 321, 323 (1985) - "... the term "forcible compulsion" is statutorily defined as indicating a victim's lack of consent. W.Va.Code, 61-8B-2(b). The term "forcible compulsion" also relates to the amount of force used as set out in W.Va.Code, 61-8B-1(1)..."

5. Evidence that a defendant committed violent or turbulent acts toward a rape victim or toward others of which she is aware, is relevant to establish her fear of her attacker that is a major element of proof of first-degree sexual assault. W.Va.Code, 61-8B-1(1)(b). Syl. pt. 4, State v. Pancake, 170 W.Va. 690, 296 S.E.2d 37 (1982).

6. State v. Miller, 175 W.Va. 616, 336 S.E.2d 910 (1985) - The Court found the circumstances that may be considered in determining forcible compulsion include acts of violence or other misconduct committed by the defendant that would be relevant in establishing the victim's fear of his attacker.

7. See State v. Dolin, 347 S.E.2d 208 (W.Va. 1986) footnote 13.

8. Ex post facto principles prohibited application of statute defining "forcible compulsion" (amended to include "fear by child under sixteen ... caused by intimidation... by (one) ... four years older ...") to sexual abuse prosecution based on events occurring before amendment's effective date. State v. Hensler, 187 W.Va. 81, 415 S.E.2d 885 (1992); State v. George W.H., 439 S.E.2d 423 (W.Va. 1993) (Sexual assault prosecution).

SEXUAL OFFENSES
SEXUAL ABUSE IN THE FIRST DEGREE
(physically helpless)

Sexual abuse in the first degree is committed when a person subjects another person to sexual contact who is physically helpless.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. subjected _____,
3. to sexual contact [2]
4. and _____ was physically helpless.[3]

FOOTNOTES

[1] W.Va.Code, 61-8B-7(a)(2) (1984).

[2] Separate instruction provided. See, W.Va.Code, 61-8B-1(5) (1986).

[3] Separate instruction provided. See, W.Va.Code, 61-8B-1(6) (1986).

COMMENTS

1. (a) In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.

(b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three (sec. 61-8B-3, and under subdivision (3), subsection (a), section seven (sec. 61-8B-7) of this article.

W.Va.Code, 61-8B-12(a) (1984).

SEXUAL OFFENSES
SEXUAL ABUSE IN THE FIRST DEGREE
(physically helpless)
PHYSICALLY HELPLESS

"Physically helpless" means that a person is unconscious or for any reason is physically unable to communicate unwillingness to an act.[1]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(5) (1986).

SEXUAL OFFENSES
SEXUAL ABUSE IN THE FIRST DEGREE
(physically helpless)
SEXUAL CONTACT [1]

"Sexual contact" means any intentional touching, either directly or through clothing, of the anus or any part of the sex organs of another person, or the breasts of a female or intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married [2] to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.[3]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(6) (1986).

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

[3] State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981) - Defendant was convicted of sexual misconduct and sexual abuse in the first degree.

The defendant contends the statutory offense of sexual abuse is void for vagueness. Under W.Va.Code, 61-8B-1 (1976), the definition of sexual contact, the defendant contends the language "done for the purpose of gratifying the sexual desire of either party" is unconstitutionally vague because there is no definition of "sexual gratification" or "sexual desire". The Court found the terms are both plain and unambiguous on their face.

COMMENTS

1. See State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991).

2. See State v. Mitter, 168 W.Va. 531, 285 S.E.2d 376 (1981); called into doubt, footnote 5, State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1990).

3. W.Va.Code, 61-8B-7 (1984), which defines sexual abuse in the first degree, involves "sexual contact" with another person. The term "sexual contact" is defined in W.Va.Code, 61-8B-1(6) (1986), and identifies several different acts which constitute sexual contact. Each act requires proof of a fact which the other does not. Consequently, a defendant who commits two or more of the separate acts of sexual contact on a victim may be convicted of each separate act without violation of double jeopardy principles. Syl. pt. 5, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993).

The Court held the defendant was not subjected to unconstitutional double jeopardy when he was convicted of two counts of sexual abuse in the first degree for separately and unlawfully touching his victim's breasts and sex organ in a single criminal episode. (See footnote 16 for hypothetical where defendant touches both of the victims's breasts at the same time.)

SEXUAL OFFENSES
SEXUAL ABUSE IN THE FIRST DEGREE
(physically helpless)
LACK OF CONSENT [1]

It is an element of this offense that the sexual contact was committed without the consent of the victim. Lack of consent results from incapacity to consent. A person is deemed incapable of consent when such person is physically helpless. Lack of consent also results from any circumstances in addition to incapacity to consent in which the victim does not expressly or impliedly acquiesce in the (actor's) conduct.

FOOTNOTES

[1] (a) Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.
(b) Lack of consent results from:
(1) Forcible compulsion; or
(2) Incapacity to consent; or
(3) If the offense charged is sexual abuse, any circumstances in addition to the forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.
(c) A person is deemed incapable of consent when such person is:
(1) Less than sixteen years old; or
(2) Mentally defective; or
(3) Mentally incapacitated; or
(4) Physically helpless.

W.Va.Code, 61-8B-2 (1984).

A third degree sexual assault, more commonly referred to as statutory rape, is committed when a person sixteen years old or older engages in sexual intercourse or sexual intrusion with a person who is less than sixteen years old and is also at least four years younger than the person committing the act. Consent to the act is irrelevant. However, consent is not irrelevant to a charge of second-degree sexual assault because forcible compulsion is a necessary element of this crime. Syl. pt. 5, State v. Sayre, 183 W.Va. 376, 395 S.E.2d 799 (1990).

SEXUAL OFFENSES
SEXUAL ABUSE IN THE FIRST DEGREE
(defendant 14 years old or older, victim 11 years old or younger)

Sexual abuse in the first degree is committed when a person, being fourteen years old or more, subjects another person to sexual contact who is eleven years old or less.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. being fourteen years old, (at the time), or more (specify?)
3. subjected _____
4. who was eleven years old or less (at the time) (specify?)
5. to sexual contact.[2]

FOOTNOTES

[1] W.Va.Code, 61-8B-7(a)(3) (1984).

[2] Separate instruction provided. See, W.Va.Code, 61-8B-1(6) (1986).

COMMENTS

1. DEFENSE (not available here. See, W.Va.Code, 61-8B-12 (1984)).

2. State v. Greenlief, 168 W.Va. 561, 568, 285 S.E.2d 391 (1981) - The elements of the offense to which the defendant was found guilty are (1) that he being fourteen years or more old (2) subjects another person to sexual contact who is incapable of consent because she is less than eleven years old. W.Va.Code, § 61-8B-6 (1977 Replacement Vol.). Sexual contact is defined as "any touching of the anus or any part of the sex organs of another person ... where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.

3. Where the exact age is not required to be proved, the defendant's physical appearance may be considered by the jury in determining age but there must be some additional evidence suggesting the defendant's age. Syl. pt. 6, State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982).

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4. State v. Dellinger, 178 W.Va. 265, 358 S.E.2d 826 (1987) - The defendant was charged with sexually assaulting an eight-year old girl by forcing her to perform oral sex on him. He was convicted of first degree sexual assault. He contends the court erred in failing to give an instruction permitting the jury to find him guilty of sexual abuse in the first degree. (The defendant was indicted under former W.Va.Code, 61-8B-3(3) (1976)).

Applying the two-part test set forth in syl. pt. 1, State v. Louk, 169 W.Va. 24, 285 S.E.2d 432 (1982) and syl. pt. 2, State v. Neider, 170 W.Va. 662, 295 S.E.2d 902 (1982) to the facts of this case, the Court concluded the defendant was entitled to an instruction on sexual abuse in the first degree. The Court found it was legally impossible to commit the first degree sexual assault charged in this case without committing sexual abuse in the first degree. The Court found there were no elements in the sexual abuse statute not required for first degree sexual assault under W.Va.Code, 61-8B-3(3) [1976].

5. State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991) - The appellant was convicted of two counts of first degree sexual assault. She contends the conviction of first degree sexual assault as a principal in the first degree and the conviction of first degree sexual assault as a principal in the second degree result from the same conduct and violate double jeopardy principles. The Court found two separate and distinct acts were committed and found no error.

6. State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981) - Appellant was convicted in November 1977 of first degree sexual assault. He contends he was entitled to an instruction on third degree sexual assault. The Court found this contention meritless.

7. The sexual abuse statute involving parents, custodians, or guardians, W.Va.Code, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, W.Va.Code, 61-8B-1, et seq., for purposes of punishment. State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992); State v. George W.H., 439 S.E.2d 423 (W.Va. 1993).

SEXUAL OFFENSES
SEXUAL ABUSE IN THE FIRST DEGREE
(defendant 14 years old or older, victim 11 years old or younger)
SEXUAL CONTACT [1]

"Sexual contact" means any intentional touching, either directly or through clothing, of the anus or any part of the sex organs of another person, or the breasts of a female or intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married [2] to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.[3]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(6) (1986).

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

[3] State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981) - Defendant was convicted of sexual misconduct and sexual abuse in the first degree.

The defendant contends the statutory offense of sexual abuse is void for vagueness. Under W.Va.Code, 61-8B-1 (1976), the definition of sexual contact, the defendant contends the language "done for the purpose of gratifying the sexual desire of either party" is unconstitutionally vague because there is no definition of "sexual gratification" or "sexual desire". The Court found the terms are both plain and unambiguous on their face.

COMMENTS

1. See State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991).

2. See State v. Mitter, 168 W.Va. 531, 285 S.E.2d 376 (1981); called into doubt, footnote 5, State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1990).

3. W.Va.Code, 61-8B-7 (1984), which defines sexual abuse in the first degree, involves "sexual contact" with another person. The term "sexual contact" is defined in W.Va.Code, 61-8B-1(6) (1986), and identifies several different acts which constitute sexual contact. Each act requires proof of a fact which the other does not. Consequently, a defendant who commits two or more of the separate acts of sexual contact on a victim may be convicted of each separate act without violation of double jeopardy principles. Syl. pt. 5, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993).

The Court held the defendant was not subjected to unconstitutional double jeopardy when he was convicted of two counts of sexual abuse in the first degree for separately and unlawfully touching his victim's breasts and sex organ in a single criminal episode. (See footnote 16 for hypothetical where defendant touches both of the victims's breasts at the same time.)

SEXUAL OFFENSES
SEXUAL ABUSE IN THE FIRST DEGREE
(defendant 14 years old or older, victim 11 years old or younger)
LACK OF CONSENT [1]

It is an element of this offense that the sexual contact was committed without the consent of the victim. Lack of consent results from incapacity to consent. A person is deemed incapable of consent when such person is less than sixteen years old. Lack of consent also results from any circumstances in addition to incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.

FOOTNOTES

[1] (a) Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.
(b) Lack of consent results from:
(1) Forcible compulsion; or
(2) Incapacity to consent; or
(3) If the offense charged is sexual abuse, any circumstances in addition to the forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.
(c) A person is deemed incapable of consent when such person is:
(1) Less than sixteen years old; or
(2) Mentally defective; or
(3) Mentally incapacitated; or
(4) Physically helpless.

W.Va.Code, 61-8B-2 (1984).

A third degree sexual assault, more commonly referred to as statutory rape, is committed when a person sixteen years old or older engages in sexual intercourse or sexual intrusion with a person who is less than sixteen years old and is also at least four years younger than the person committing the act. Consent to the act is irrelevant. However, consent is not irrelevant to a charge of second-degree sexual assault because forcible compulsion is a necessary element of this crime. Syl. pt. 5, State v. Sayre, 183 W.Va. 376, 395 S.E.2d 799 (1990).

SEXUAL OFFENSES
SEXUAL ABUSE IN THE SECOND DEGREE

Sexual abuse in the second degree is committed when a person subjects another person to sexual contact who is (mentally defective) (mentally incapacitated).[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. subjected _____,
3. to sexual contact[2]
4. and _____ was
   a. mentally defective[3]
   b. mentally incapacitated.[4]

FOOTNOTES

[1] W.Va.Code, 61-8B-8(a) (1984).

[2] Separate instruction provided. See, W.Va.Code, 61-8B-1(6) (1986).

[3] Separate instruction provided. See, W.Va.Code, 61-8B-1(3) (1986).

[4] Separate instruction provided. See, W.Va.Code, 61-8B-1(4) (1986).

COMMENTS

DEFENSE

1. (a) In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant, at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.

(b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three (sec. 61-8B-3, and under subdivision (3), subsection (a), section seven (sec. 61-8B-7) of this article.

W.Va.Code, 61-8B-12(a) (1984).

2. The sexual abuse statute involving parents, custodians, or guardians, W.Va.Code, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, W.Va.Code, 61-8B-1, et seq., for purposes of punishment. State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992); State v. George W.H., 439 S.E.2d 423 (W.Va. 1993).

SEXUAL OFFENSES
SEXUAL ABUSE IN THE SECOND DEGREE
SEXUAL CONTACT [1]

"Sexual contact" means any intentional touching, either directly or through clothing, of the anus or any part of the sex organs of another person, or the breasts of a female or intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married [2] to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.[3]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(6) (1986).

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

[3] State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981) - Defendant was convicted of sexual misconduct and sexual abuse in the first degree.

The defendant contends the statutory offense of sexual abuse is void for vagueness. Under W.Va.Code, 61-8B-1 (1976), the definition of sexual contact, the defendant contends the language "done for the purpose of gratifying the sexual desire of either party" is unconstitutionally vague because there is no definition of "sexual gratification" or "sexual desire". The Court found the terms are both plain and unambiguous on their face.

COMMENTS

1. See State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991).

2. See State v. Mitter, 168 W.Va. 531, 285 S.E.2d 376 (1981); called into doubt, footnote 5, State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1990).

3. W.Va.Code, 61-8B-7 (1984), which defines sexual abuse in the first degree, involves "sexual contact" with another person. The term "sexual contact" is defined in W.Va.Code, 61-8B-1(6) (1986), and identifies several different acts which constitute sexual contact. Each act requires proof of a fact which the other does not. Consequently, a defendant who commits two or more of the separate acts of sexual contact on a victim may be convicted of each separate act without violation of double jeopardy principles. Syl. pt. 5, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993).

The Court held the defendant was not subjected to unconstitutional double jeopardy when he was convicted of two counts of sexual abuse in the first degree for separately and unlawfully touching his victim's breasts and sex organ in a single criminal episode. (See footnote 16 for hypothetical where defendant touches both of the victims's breasts at the same time.)

SEXUAL OFFENSES
SEXUAL ABUSE IN THE SECOND DEGREE
LACK OF CONSENT [1]

It is an element of this offense that the sexual contact was committed without the consent of the victim. Lack of consent results from incapacity to consent. A person is deemed incapable of consent when such person is (mentally defective) (mentally incapacitated). Lack of consent also results from any circumstances in addition to incapacity to consent in which the victim does not expressly or impliedly acquiesce in the (actor's) conduct.

FOOTNOTES

[1] (a) Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.
(b) Lack of consent results from:
(1) Forcible compulsion; or
(2) Incapacity to consent; or
(3) If the offense charged is sexual abuse, any circumstances in addition to the forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.
(c) A person is deemed incapable of consent when such person is:
(1) Less than sixteen years old; or
(2) Mentally defective; or
(3) Mentally incapacitated; or
(4) Physically helpless.

W.Va.Code, 61-8B-2 (1984).

A third degree sexual assault, more commonly referred to as statutory rape, is committed when a person sixteen years old or older engages in sexual intercourse or sexual intrusion with a person who is less than sixteen years old and is also at least four years younger than the person committing the act. Consent to the act is irrelevant. However, consent is not irrelevant to a charge of second-degree sexual assault because forcible compulsion is a necessary element of this crime. Syl. pt. 5, State v. Sayre, 183 W.Va. 376, 395 S.E.2d 799 (1990).

SEXUAL OFFENSES
SEXUAL ABUSE IN THE SECOND DEGREE
MENTALLY DEFECTIVE

"Mentally defective" means that a person is suffers from a mental disease or defect which renders such person incapable of appraising the nature of his conduct.[1]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(3) (1986).

SEXUAL OFFENSES
SEXUAL ABUSE IN THE SECOND DEGREE
MENTALLY INCAPACITATED

"Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct as a result of the influence of a controlled or intoxicating substance administered to such person without his or her consent or as a result of any other act committed upon such person without his or her consent.[1]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(4) (1986).

SEXUAL OFFENSES
SEXUAL ABUSE IN THE THIRD DEGREE

Sexual abuse in the third degree is committed when a person subjects another person to sexual contact without the latter's consent, when such lack of consent is due to the victim's incapacity to consent by reason of being less than sixteen years old.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. subjected _____,
3. to sexual contact [2]
4. without _____'s consent
5. and the lack of consent was due to _____'s incapacity to consent by reason that ____ was less than sixteen years old at the time.

FOOTNOTES

[1] W.Va.Code, 61-8B-9(a) (1984).

[2] Separate instruction provided. See, W.Va.Code, 61-8B-1(6) (1986).

COMMENTS

DEFENSES

1. (a) In any prosecution under this article in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense that the defendant at the time he or she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for such incapacity to consent, unless the defendant is reckless in failing to know such facts or conditions.

(b) The affirmative defense provided in subsection (a) of this section shall not be available in any prosecution under subdivision (2), subsection (a), section three [§ 61-8B-3], and under subdivision (3), subsection (a), section seven [§ 61-8B-7] of this article.

W.Va.Code, 61-8B-12 (1984).

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2. (b) In any prosecution under this section it is a defense that: (1) the defendant was less than sixteen years old;

W.Va.Code, 61-8B-9(b)(1) (1984).

3. (b) In any prosecution under this section it is a defense that: (2) the defendant was less than four years older than the victim.

W.Va.Code, 61-8B-9(b)(2) (1984).

4. Where the exact age is not required to be proved, the defendant's physical appearance may be considered by the jury in determining age but there must be some additional evidence suggesting the defendant's age. Syl. pt. 6, State v. Richey, 171 W.Va. 342, 298 S.E.2d 879 (1982).

5. The sexual abuse statute involving parents, custodians, or guardians, W.Va.Code, 61-8D-5, is a separate and distinct crime from the general sexual offenses statute, W.Va.Code, 61-8B-1, et seq., for purposes of punishment. State v. Gill, 187 W.Va. 136, 416 S.E.2d 253 (1992); State v. George W.H., 439 S.E.2d 423 (W.Va. 1993).

SEXUAL OFFENSES
SEXUAL ABUSE IN THE THIRD DEGREE
SEXUAL CONTACT [1]

"Sexual contact" means any intentional touching, either directly or through clothing, of the anus or any part of the sex organs of another person, or the breasts of a female or intentional touching of any part of another person's body by the actor's sex organs, where the victim is not married [2] to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.[3]

FOOTNOTES

[1] W.Va.Code, 61-8B-1(6) (1986).

[2] "Married" for the purposes of this article in addition to its legal meaning, includes persons living together as husband and wife regardless of the legal status of their relationship. W.Va.Code, 61-8B-1(2) (1986).

[3] State v. Reed, 166 W.Va. 558, 276 S.E.2d 313 (1981) - Defendant was convicted of sexual misconduct and sexual abuse in the first degree.

The defendant contends the statutory offense of sexual abuse is void for vagueness. Under W.Va.Code, 61-8B-1 (1976), the definition of sexual contact, the defendant contends the language "done for the purpose of gratifying the sexual desire of either party" is unconstitutionally vague because there is no definition of "sexual gratification" or "sexual desire". The Court found the terms are both plain and unambiguous on their face.

COMMENTS

1. See State v. Lola Mae C., 185 W.Va. 452, 408 S.E.2d 31 (1991).

2. See State v. Mitter, 168 W.Va. 531, 285 S.E.2d 376 (1981); called into doubt, footnote 5, State v. Dietz, 182 W.Va. 544, 390 S.E.2d 15 (1990).

3. W.Va.Code, 61-8B-7 (1984), which defines sexual abuse in the first degree, involves "sexual contact" with another person. The term "sexual contact" is defined in W.Va.Code, 61-8B-1(6) (1986), and identifies several different acts which constitute sexual contact. Each act requires proof of a fact which the other does not. Consequently, a defendant who commits two or more of the separate acts of sexual contact on a victim may be convicted of each separate act without violation of double jeopardy principles. Syl. pt. 5, State v. Rummer, 432 S.E.2d 39 (W.Va. 1993).

The Court held the defendant was not subjected to unconstitutional double jeopardy when he was convicted of two counts of sexual abuse in the first degree for separately and unlawfully touching his victim's breasts and sex organ in a single criminal episode. (See footnote 16 for hypothetical where defendant touches both of the victims's breasts at the same time.)

SEXUAL OFFENSES
SEXUAL ABUSE IN THE THIRD DEGREE
LACK OF CONSENT [1]

It is an element of this offense that the sexual contact was committed without the consent of the victim. Lack of consent results from incapacity to consent. A person is deemed incapable of consent when such person is less than sixteen years old. Lack of consent also results from any circumstances in addition to the incapacity to consent in which the victim does not expressly or impliedly acquiesce in the (actor's) conduct.

FOOTNOTES

[1] (a) Whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim.
(b) Lack of consent results from:
(1) Forcible compulsion; or
(2) Incapacity to consent; or
(3) If the offense charged is sexual abuse, any circumstances in addition to the forcible compulsion or incapacity to consent in which the victim does not expressly or impliedly acquiesce in the actor's conduct.
(c) A person is deemed incapable of consent when such person is:
(1) Less than sixteen years old; or
(2) Mentally defective; or
(3) Mentally incapacitated; or
(4) Physically helpless.

W.Va.Code, 61-8B-2 (1984).

A third degree sexual assault, more commonly referred to as statutory rape, is committed when a person sixteen years old or older engages in sexual intercourse or sexual intrusion with a person who is less than sixteen years old and is also at least four years younger than the person committing the act. Consent to the act is irrelevant. However, consent is not irrelevant to a charge of second-degree sexual assault because forcible compulsion is a necessary element of this crime. Syl. pt. 5, State v. Sayre, 183 W.Va. 376, 395 S.E.2d 799 (1990).

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

DRIVING UNDER THE INFLUENCE CAUSING A DEATH FELONY

Any person who drives a vehicle in this State while under the influence of (alcohol), (any controlled substance), (any other drug) or (under the combined influence of alcohol and any controlled substance, or any other drug) or (has an alcohol concentration in his blood of ten hundredths of one percent or more, by weight), and when so driving, does (any act forbidden by law) or (fails to perform any duty imposed by law) in the driving of such vehicle, which (act) or (failure) proximately causes the death of any person within one year next following such (act) or (failure) and commits such (act) or (failure) in reckless disregard of the safety of others, and the influence of (alcohol), (controlled substances) or (drugs) is a contributing cause to such death is guilty of a criminal offense.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. drove a vehicle in this state [2]
3. a. while under the influence of alcohol [3]
   b. while under the influence of any controlled substance (specify)
   c. while under the influence of any other drug (specify)
   d. while under the combined influence of alcohol and any controlled substance or any other drug (specify)
   e. while having an alcohol concentration in his blood of ten hundredths of one percent or more, by weight
4. and when so driving
   a. did any act forbidden by law in the driving of such vehicle (specify)[4]
   b. failed to perform any duty imposed by law in the driving of such vehicle (specify)[4]
5. in reckless disregard [5] of the safety of others
6. which
   a. act
   b. failure
7. proximately caused the death of _____
8. within one year next
9. following such
   a. act
   b. failure
10. and the influence of
    a. alcohol
    b. controlled substances
    c. drugs
11. was a contributing cause [6] to such death.

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FOOTNOTES

[1] W.Va.Code, 17C-5-2(a) (1986).

[2] For purposes of this article and five-A [§ 17C-5A-1 et seq.] of this chapter, the phrase "in this State" shall mean anywhere within the physical boundaries of this State, including, but not limited to, publicly maintained streets and highways, and subdivision streets or other areas not publicly maintained but nonetheless open to the use of the public for purposes of vehicular travel. W.Va.Code, 17C-5-2a(a) (1983).

[3] (b) When used in this Code, the terms or phrases "driving under the influence of intoxicating liquor," "driving or operating a motor vehicle while intoxicated," "for any person who is under the influence of intoxicating liquor to drive any vehicle," or any similar term or phrase shall be construed to mean and be synonymous with the term or phrase "while under the influence of alcohol ... drives a vehicle" as the latter term or phrase is used in section two [§ 17C-5-2] of this article. W.Va.Code, 17C-5-2a(b) (1983).
(c) From and after the effective date [September 1, 1981] of this section a warrant or indictment which charges or alleges an offense, prohibited by the provisions of section two [§ 17C-5-2] of this article, and which warrant or indictment uses any of the terms or phrases set forth in subsection (b) of this section, shall not thereby be fatally defective if such warrant or indictment otherwise informs the person so accused of the charges against him. W.Va.Code, 17C-5-2a(c) (1983).

[4] State v. Dyer, 177 W.Va. 567, 355 S.E.2d 356 (1987) - The appellant was convicted of causing a death while driving under the influence of alcohol under W.Va.Code, 17C-5-2(a) (1983).

The appellant contends the State failed to allege and prove an essential element of the offense of which he was convicted. Neither the indictment nor the instructions offered by the State concerning the elements of this offense specified the act or omission which the appellant was alleged to have committed in reckless disregard of the safety of others. The court did instruct the jury as to the elements of reckless driving.

The Court found no error in the trial court's refusal to require the State to specify the act or omission relied upon in its instruction as to the elements of the offense with which the appellant was charged since the jury was instructed as to that act or omission by separate instruction.

[5] The following instruction, offered by the defendant, was refused by the trial court in State v. Bartlett, 177 W.Va. 663, 355 S.E.2d 913 (1987).

> The term reckless disregard of the safety of others requires proof of conduct indicating an entire absence of care for the safety of others which exhibits an indifference to the consequences of a persons actions. Such conduct is more than negligence or even gross negligence.

A term which is widely used and which is readily comprehensible to the average person without further definition or refinement need not have a defining instruction. Syl. pt. 2, State v. Bartlett, 177 W.Va. 663, 355 S.E.2d 913 (1987).

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[6] The following definition of contributing cause was given by the trial court in State v. Bartlett, 177 W.Va. 663, 355 S.E.2d 913 (1987):

> The term contributing cause as used in these instructions means that the operation of a motor vehicle while under the influence of alcohol was one of the precipitating causes of the accident occurring and the resultant death of (the victim).

In a prosecution under W.Va.Code, 17C-5-2(a) (1983), the prosecution need not put on medical or scientific evidence of a causal link between the accused's intoxication and the accident in which the accused was involved. The jury may infer such a causal link once it has been shown that the driver was intoxicated, that the vehicle was driven in a negligent manner, and that an accident occurred. Syl. pt. 3, State v. Bartlett, 177 W.Va. 663, 355 S.E.2d 913 (1987).

The Court took judicial notice of the fact that the ingestion of alcohol had an adverse affect on one's ability to drive.

COMMENTS

1. Offer instruction on following "presumption" if applicable.

Upon trial for the offense of driving a motor vehicle in this State while under the influence of alcohol, controlled substances or drugs, or upon the trial of any civil or criminal action arising out of acts alleged to have been committed by any person driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, evidence of the amount of alcohol in the person's blood at the time of the arrest or of the acts alleged, as shown by chemical analysis of his blood, breath or urine, is admissible, if the sample or specimen was taken within two hours from and after the time of arrest or of the acts alleged, and shall give rise to the following presumptions or have the following effect:

(a) Evidence that there was, at that time, five hundredths of one percent or less, by weight, of alcohol in his blood, shall be prima facie evidence that the person was not under the influence of alcohol;

(b) Evidence that there was, at that time, more than five hundredths of one percent and less than ten hundredths of one percent, by weight, of alcohol in the person's blood shall be relevant evidence, but it is not to be given prima facie effect in indicating whether the person was under the influence of alcohol;

(c) Evidence that there was, at that time, ten hundredths of one percent or more, by weight, of alcohol in his blood, shall be admitted as prima facie evidence that the person was under the influence of alcohol.

Percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per one hundred cubic centimeters of blood.

A chemical analysis of a person's blood, breath or urine, in order to give rise to the presumptions or to have the effect provided for in subdivisions (a), (b) and (c) of this section, must be performed in accordance with methods and standards approved by the state department of health. A chemical analysis of blood or urine to determine the alcoholic content of blood shall be conducted by a qualified laboratory or by the state police scientific laboratory of the criminal identification bureau of the department of public safety.

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The provisions of this article shall not limit the introduction in any administrative or judicial proceeding of any other competent evidence bearing on the question of whether the person was under the influence of alcohol, controlled substances or drugs.

W.Va.Code, 17C-5-8 (1983).

See State v. Hood, 155 W.Va. 337, 184 S.E.2d 334 (1971); State v. Byers, 159 W.Va. 596, 224 S.E.2d 726 (1976); State v. Dyer, 160 W.Va. 166, 233 S.E.2d 309 (1977); State ex rel. Betts v. Scott, 165 W.Va. 73, 267 S.E.2d 173 (1980); State v. Ball, 164 W.Va. 588, 264 S.E.2d 844 (1980); State v. Keeton, 166 W.Va. 77, 272 S.E.2d 817 (1980); Albrecht v. State, 173 W.Va. 268, 314 S.E.2d 859 (1984); State v. Franklin, 174 W.Va. 469, 327 S.E.2d 449 (1985); Cunningham v. Bechtold, 186 W.Va. 474, 413 S.E.2d 129 (1991); W.Va.Code, 17C-5-4; W.Va.Code, 17C-5-5; W.Va.Code, 17C-5-6; W.Va.Code, 17C-5-9; State v. York, 175 W.Va. 740, 338 S.E.2d 219 (1985); Moczek v. Bechtold, 178 W.Va. 553, 363 S.E.2d 238 (1987); State v. Conrad, 187 W.Va. 658, 421 S.E.2d 41 (1992). Mitchell v. Cline, 412 S.E.2d 733 (W.Va. 1991); Chapman v. W.Va. Department of Motor Vehicles, 423 S.E.2d 619 (W.Va. 1992).

2. In certain circumstances, evidence of a defendant's refusal to take a breathalyzer test will be admissible in a criminal trial for driving under the influence of alcohol as evidence of the defendant's guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge upon request by either the State or the defendant, should hold an in camera hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect. Syl. pt. 3, State v. Cozart, 177 W.Va. 400, 352 S.E.2d 152 (1986).

A cautionary instruction is warranted where evidence of the refusal of the defendant to take a breathalyzer test has been admitted. The instruction should explain that this refusal evidence has only a slight tendency to prove guilt because such refusal does not have a direct bearing on the issue of guilt. Syl. pt. 4, State v. Cozart, 177 W.Va. 400, 253 S.E.2d 152 (1986).

Footnote 7, State v. Cozart, 177 W.Va. 400, 253 S.E.2d 152, 158 (1986): We propose the following cautionary instruction where refusal evidence is admitted:

> "The Court instructs the jury that evidence of the refusal of the defendant to take a breathalyzer test is competent evidence along with other facts and circumstances on the defendant's guilt. However, the jury should consider any evidence of the refusal to take a breathalyzer with caution since such evidence has only a slight tendency to prove guilt because the refusal may be attributed to a number of reasons other than the defendant's consciousness of guilt."

3. State v. Dyer, 177 W.Va. 567, 355 S.E.2d 356 (1987) - The appellant was found guilty of causing a death while driving under the influence of alcohol under W.Va.Code, 17C-5-2(a). At pretrial proceedings, the appellant moved to suppress evidence of the results of the blood-alcohol tests on the ground that the blood sample was not drawn within two hours of his arrest or of the alleged offense. The trial court found the specimen had not been taken within the two-hour period, but concluded the results were admissible as long as they were not used a prima facie evidence of intoxication.

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The Supreme Court found the admission of the blood test results did not amount to reversible error. The test results were not used at trial in conjunction with the statutory presumptions regarding intoxication or as direct evidence that the appellant was under the influence of alcohol at the time of the alleged offense. The State's expert witness was not questioned nor did he offer an opinion as to the appellant's probable blood alcohol level at the time of the alleged offense or whether he was, in fact, intoxicated at the time. The evidence was relied on to show appellant had consumed alcoholic beverages in substantial amounts on the day in question and was, therefore, relevant evidence of a probative fact. The Court found in view of the peculiar circumstances of this case, there was no error in the admission of the results of the blood test which would warrant reversal of the conviction. See case for additional facts.

4. The fact that any person charged with a violation of subsection (a), (b), (c), (d) or (e) of this section, or any person permitted to drive as described under subsection (f) or (g) of this section, is or has been legally entitled to use alcohol, a controlled substance or a drug shall not constitute a defense against any charge of violating subsection (a), (b), (c), (d), (e), (f) or (g) of this section. W.Va.Code, 17C-5-2(k) (1986).

5. For purposes of this section, the term "controlled substance" shall have the meaning ascribed to it in chapter sixty-a (60A-1-101 et seq.) of this code. W.Va.Code, 17C-5-2 (l) (1986).

6. The reenactment of this section in the regular session of the Legislature during the year one thousand nine hundred eighty-three, shall not in any way add to or subtract from the elements of the offenses set forth herein and earlier defined in the prior enactment of this section. W.Va.Code, 17C-5-2(n) (1986).

7. State v. Bartlett, 177 W.Va. 663, 355 S.E.2d 913 (1987) - Petitioner was convicted of violating W.Va.Code, 17C-5-2(a) - felony driving under the influence and causing a death. He contends the instructions were incomplete because they did not instruct the jury that he could be convicted of the lesser included offense of violation of W.Va.Code, 17C-5-2(b) (1983) the misdemeanor version of W.Va.Code, 17C-5-2(a) (1983).

The two elements of W.Va.Code, 17C-5-2(a) (1983) lacking in W.Va.Code, 17C-5-2(b) (1983) are reckless disregard for the safety of others and alcohol being a contributing cause to a death.

The Court found in the absence of a request by petitioner's counsel, the trial court was not obliged to give an instruction on W.Va.Code, 17C-5-2(b) (1983).

8. To constitute driving of an automobile, within the meaning of section 2 of Article 5, Chapter 129 of the 1951 Acts of the Legislature, as amended, there must be an intentional movement of the automobile by the defendant. Syl. pt. 1, State v. Taft, 143 W.Va. 365, 102 S.E.2d 152 (1958), affirmed 110 S.E.2d 727 (1959).

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

DRIVING UNDER THE INFLUENCE CAUSING A DEATH MISDEMEANOR

Any person who drives a vehicle in this State while under the influence of alcohol, any controlled substance, any other drug or under the combined influence of alcohol and any controlled substance, or any other drug or has an alcohol concentration in his blood of ten hundredths of one percent or more, by weight, and when so driving, does any act forbidden by law or fails to perform any duty imposed by law in the driving of such vehicle, which act or failure proximately causes the death of any person within one year next following such act or failure is guilty of a criminal offense.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. drove a vehicle in this state [2]
3. a. while under the influence of alcohol [3]
   b. while under the influence of any controlled substance (specify)
   c. while under the influence of any other drug (specify)
   d. while under the combined influence of alcohol and any controlled substance or any other drug (specify)
   e. while having an alcohol concentration in his blood of ten hundredths of one percent or more, by weight
4. and when so driving
   a. did any act forbidden by law in the driving of such vehicle (specify) [4]
   b. failed to perform any duty imposed by law in the driving of such vehicle (specify) [4]
5. which
   a. act
   b. failure
6. proximately caused the death of _____
7. within one year next
8. following such
   a. act
   b. failure

FOOTNOTES

[1] W.Va.Code, 17C-5-2(b) (1986).

[2] For purposes of this article and five-A [§ 17C-5A-1 et seq.] of this chapter, the phrase "in this State" shall mean anywhere within the physical boundaries of this State, including, but not limited to, publicly maintained streets and highways, and subdivision streets or other areas not publicly maintained but nonetheless open to the use of the public for purposes of vehicular travel. W.Va.Code, 17C-5-2a(a) (1983).

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[3] (b) When used in this Code, the terms or phrases "driving under the influence of intoxicating liquor," "driving or operating a motor vehicle while intoxicated," "for any person who is under the influence of intoxicating liquor to drive any vehicle," or any similar term or phrase shall be construed to mean and be synonymous with the term or phrase "while under the influence of alcohol ... drives a vehicle" as the latter term or phrase is used in section two [§ 17C-5-2] of this article. W.Va.Code, 17C-5-2a(b) (1983).
(c) From and after the effective date [September 1, 1981] of this section a warrant or indictment which charges or alleges an offense, prohibited by the provisions of section two [§ 17C-5-2] of this article, and which warrant or indictment uses any of the terms or phrases set forth in subsection (b) of this section, shall not thereby be fatally defective if such warrant or indictment otherwise informs the person so accused of the charges against him. W.Va.Code, 17C-5-2a(c) (1983).

[4] State v. Dyer, 177 W.Va. 557, 355 S.E.2d 356 (1987) - The appellant was convicted of causing a death while driving under the influence of alcohol under W.Va.Code, 17C-5-2(a) (1983).

The appellant contends the State failed to allege and prove an essential element of the offense of which he was convicted. Neither the indictment nor the instructions offered by the State concerning the elements of this offense specified the act or omission which the appellant was alleged to have committed in reckless disregard of the safety of others. The court did instruct the jury as to the elements of reckless driving.

The Court found no error in the trial court's refusal to require the State to specify the act or omission relied upon in its instruction as to the elements of the offense with which the appellant was charged since the jury was instructed as to that act or omission by separate instruction.

COMMENTS

1. Offer instruction on following "presumption" if applicable.

Upon trial for the offense of driving a motor vehicle in this State while under the influence of alcohol, controlled substances or drugs, or upon the trial of any civil or criminal action arising out of acts alleged to have been committed by any person driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, evidence of the amount of alcohol in the person's blood at the time of the arrest or of the acts alleged, as shown by chemical analysis of his blood, breath or urine, is admissible, if the sample or specimen was taken within two hours from and after the time of arrest or of the acts alleged, and shall give rise to the following presumptions or have the following effect:
(a) Evidence that there was, at that time, five hundredths of one percent or less, by weight, of alcohol in his blood, shall be prima facie evidence that the person was not under the influence of alcohol;

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(b) Evidence that there was, at that time, more than five hundredths of one percent and less than ten hundredths of one percent, by weight, of alcohol in the person's blood shall be relevant evidence, but it is not to be given prima facie effect in indicating whether the person was under the influence of alcohol;

(c) Evidence that there was, at that time, ten hundredths of one percent or more, by weight, of alcohol in his blood, shall be admitted as prima facie evidence that the person was under the influence of alcohol.

Percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per one hundred cubic centimeters of blood.

A chemical analysis of a person's blood, breath or urine, in order to give rise to the presumptions or to have the effect provided for in subdivisions (a), (b) and (c) of this section, must be performed in accordance with methods and standards approved by the state department of health. A chemical analysis of blood or urine to determine the alcoholic content of blood shall be conducted by a qualified laboratory or by the state police scientific laboratory of the criminal identification bureau of the department of public safety.

The provisions of this article shall not limit the introduction in any administrative or judicial proceeding of any other competent evidence bearing on the question of whether the person was under the influence of alcohol, controlled substances or drugs.

W.Va.Code, 17C-5-8 (1983).

See State v. Hood, 155 W.Va. 337, 184 S.E.2d 334 (1971); State v. Byers, 159 W.Va. 596, 224 S.E.2d 726 (1976); State v. Dyer, 160 W.Va. 166, 233 S.E.2d 309 (1977); State ex rel. Betts v. Scott, 165 W.Va. 73, 267 S.E.2d 173 (1980); State v. Ball, 164 W.Va. 588, 264 S.E.2d 844 (1980); State v. Keeton, 166 W.Va. 77, 272 S.E.2d 817 (1980); Albrecht v. State, 173 W.Va. 268, 314 S.E.2d 859 (1984); State v. Franklin, 174 W.Va. 469, 327 S.E.2d 449 (1985); Cunningham v. Bechtold, 186 W.Va. 474, 413 S.E.2d 129 (1991); W.Va.Code, 17C-5-4; W.Va.Code, 17C-5-5; W.Va.Code, 17C-5-6; W.Va.Code, 17C-5-9; State v. York, 175 W.Va. 740, 338 S.E.2d 219 (1985); Moczek v. Bechtold, 178 W.Va. 553, 363 S.E.2d 238 (1987); State v. Conrad, 187 W.Va. 658, 421 S.E.2d 41 (1992). Mitchell v. Cline, 412 S.E.2d 733 (W.Va. 1991); Chapman v. W.Va. Department of Motor Vehicles, 423 S.E.2d 619 (W.Va. 1992).

2. In certain circumstances, evidence of a defendant's refusal to take a breathalyzer test will be admissible in a criminal trial for driving under the influence of alcohol as evidence of the defendant's guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge upon request by either the State or the defendant, should hold an in camera hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect. Syl. pt. 3, State v. Cozart, 177 W.Va. 400, 352 S.E.2d 152 (1986).

A cautionary instruction is warranted where evidence of the refusal of the defendant to take a breathalyzer test has been admitted. The instruction should explain that this refusal evidence has only a slight tendency to prove guilt because such refusal does not have a direct bearing on the issue of guilt. Syl. pt. 4, State v. Cozart, 177 W.Va. 400, 253 S.E.2d 152 (1986).

Footnote 7, State v. Cozart, 177 W.Va. 400, 253 S.E.2d 152 (1986): We propose the following cautionary instruction where refusal evidence is admitted:

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"The Court instructs the jury that evidence of the refusal of the defendant to take a breathalyzer test is competent evidence along with other facts and circumstances on the defendant's guilt. However, the jury should consider any evidence of the refusal to take a breathalyzer with caution since such evidence has only a slight tendency to prove guilt because the refusal may be attributed to a number of reasons other than the defendant's consciousness of guilt."

3. State v. Dyer, 177 W.Va. 567, 355 S.E.2d 356 (1987) - The appellant was found guilty of causing a death while driving under the influence of alcohol under W.Va.Code, 17C-5-2(a). At pretrial proceedings, the appellant moved to suppress evidence of the results of the blood-alcohol tests on the ground that the blood sample was not drawn within two hours of his arrest or of the alleged offense. The trial court found the specimen had not been taken within the two-hour period, but concluded the results were admissible as long as they were not used a prima facie evidence of intoxication.

The Supreme Court found the admission of the blood test results did not amount to reversible error. The test results were not used at trial in conjunction with the statutory presumptions regarding intoxication or as direct evidence that the appellant was under the influence of alcohol at the time of the alleged offense. The State's expert witness was not questioned nor did he offer an opinion as to the appellant's probable blood alcohol level at the time of the alleged offense or whether he was, in fact, intoxicated at the time. The evidence was relied on to show appellant had consumed alcoholic beverages in substantial amounts on the day in question and was, therefore, relevant evidence of a probative fact. The Court found in view of the peculiar circumstances of this case, there was no error in the admission of the results of the blood test which would warrant reversal of the conviction. See case for additional facts.

4. A person violating any provision of subsection (b), (c), (d), (e), (f) or (g) of this section shall, for the second offense under this section, be guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the county jail for a period of not less than six months nor more than one year, and the court may, in its discretion, impose a fine of not less than one thousand dollars nor more than three thousand dollars. W.Va.Code, 17C-5-2(h) (1986)

See, State v. Conrad, 187 W.Va. 658, 421 S.E.2d 41 (1992).

A person violating any provisions of subsection (b), (c), (d), (e), (f) or (g) of this section shall, for the third or any subsequent offense under this section, be guilty of a felony, and upon conviction thereof, shall be imprisoned in the penitentiary for not less than one nor more than three years, and the court may, in its discretion, impose a fine of not less than three thousand dollars nor more than five thousand dollars. W.Va.Code, 17C-5-2(i) (1986).

See, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

5. State v. Satterfield, 182 W.Va. 365, 387 S.E.2d 832 (1989) - The defendant contends the circuit court's dismissal of a felony indictment for third offense DUI was justified because the indictment was defective on its face in failing to state the dates and counts of defendant's previous DUI convictions.

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"In Syllabus Point 3, State v. Loy, 146 W.Va. 308, 119 S.E.2d 826 (1961), we required that an indictment alleging a prior DUI conviction aver 'the former conviction with such particularity as to reasonably indicate the nature and character of the former offense, the court wherein the conviction was had and identif(y) the person so convicted as the person subsequently indicted.' Loy's requirement of particularity in a DUI indictment reflects a need to provide the defendant with specific information in the indictment to advise him or her of the nature of the charge and to allow adequate plea and defense preparation."

"Although we have upheld indictments that lacked some information, indictments to be sufficient must plainly advise the defendant of the nature of the charge. In State v. Masters, 179 W.Va. 752, 373 S.E.2d 173, 177 (1988) (a recidivist proceeding based on an indictment containing an incorrect criminal docket number for the prior felony conviction), we refused to find the indictment facially inadequate because the 'defendant was clearly and plainly advised of the offense charged' and he was not hampered in preparing his defense. In State v. Boggess, 163 W.Va. 320, 256 S.E.2d 325 (1979), we refused to quash an indictment for a felony DUI because the indictment alleged the dates of prior convictions rather than the dates of the offenses were committed. In Boggess, id., at 322, 256 S.E.2d at 326, we noted that the statute did not require the dates of prior offenses be specified. See State v. Nester, 175 W.Va. 539, 336 S.E.2d 187 (1985)."

"Here the indictment failed to provide the defendant with any information concerning her previous convictions and, thus, was insufficient. The prosecutor can seek another indictment. The indictment would include sufficient information on the defendant's prior DUI convictions to insure that she is clearly and plainly advised of the offense charged and so that her plea and defense are not hampered."

6. State v. Wilkinson, 181 W.Va. 126, 381 S.E.2d 241 (1989) - The defendant contends the trial court erred in permitting the prosecutor to introduce evidence of his earlier conviction for DUI. The defendant was charged with second offense driving under the influence. It was necessary for the State to prove that he was convicted a first time in order to prove the second offense. As indicated in State v. Cozart, 177 W.Va. 400, 352 S.E.2d 152 (1986), evidence of the first offense was clearly admissible under the circumstances.

See State v. Cozart.

7. See W.Va.Code, 17C-5-11 (1983).

8. State v. Barker, 179 W.Va. 194, 366 S.E.2d 642 (1988) - Appellant was convicted of third offense driving under the influence. He contends the trial court erred in admitting evidence of his prior convictions for driving under the influence of alcohol. Appellant pleaded guilty to DUI on August 6, 1982 and was fined and sentenced to a twenty-four hour jail term. On August 22, 1983, he again pleaded guilty to first offense DUI as the result of a plea bargain reducing the offense charged from the second offense DUI to first offense DUI.

Appellant contends his pleas to the two prior offenses were not made voluntarily and intelligently because it was not made clear to him in 1983 that as a consequence of his plea to first offense DUI, his next DUI offense would constitute third offense DUI. He argues he cannot be convicted of third offense DUI because he has not been convicted of second offense DUI.

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The Supreme Court found a conviction for third offense DUI requires only two prior DUI convictions and that a prior conviction of second offense DUI is not a prerequisite for conviction of third offense DUI.

9. See W.Va.Code, 17C-5-2-(j) (1986) for the types of convictions which shall be regarded as convictions for purposes of W.Va.Code, 17C-5-2-(h) (1986) and W.Va.Code, 17C-5-2(i) (1986).

See, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

10. The fact that any person charged with a violation of subsection (a), (b), (c), (d), or (e) of this section, or any person permitted to drive as described under subsection (f) or (g) of this section, is or has been legally entitled to use alcohol, a controlled substance or a drug shall not constitute a defense against any charge of violating subsection (a), (b), (c), (d), (e), (f) or (g) of this section. W.Va.Code, 17C-5-2(k) (1986).

11. For purposes of this section, the term "controlled substance" shall have the meaning ascribed to it in chapter sixty-a (60A-1-101 et seq.) of this code. W.Va.Code, 17C-5-2(l) (1986).

12. The reenactment of this section in the regular session of the Legislature during the year one thousand nine hundred eighty-three, shall not in any way add to or subtract from the elements of the offenses set forth herein and earlier defined in the prior enactment of this section. W.Va.Code, 17C-5-2(n) (1986).

13. To constitute driving of an automobile, within the meaning of section 2 of Article 5, Chapter 129 of the 1951 Acts of the Legislature, as amended, there must be an intentional movement of the automobile by the defendant. Syl. pt. 1, State v. Taft, 143 W.Va. 365, 102 S.E.2d 152 (1958), affirmed 110 S.E.2d 727 (1959).

14. Proof that a defendant has been convicted of the offense of driving under the influence of alcohol in another state is similar to proof of any other material fact in a criminal prosecution; once the State has introduced sufficient evidence to lead impartial minds to conclude that the defendant had once before been convicted of driving under the influence of alcohol, the State has made a prima facie case. Syl. pt. 1, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

A person convicted of driving under the influence of alcohol under an Ohio statute that makes it an offense to operate a motor vehicle with a "a concentration of ten hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath" has committed an offense with "the same elements" as the offense set forth in W.Va.Code 17C-5-2(d)(1)(E) of operating a motor vehicle with "an alcohol concentration in his blood of ten hundredths of one percent or more, by weight." Syl. pt. 2, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

DRIVING UNDER THE INFLUENCE CAUSING BODILY INJURY

Any person who drives a vehicle in this State while under the influence of alcohol, any controlled substance, any other drug or under the combined influence of alcohol and any controlled substance, or any other drug or has an alcohol concentration in his blood of ten hundredths of one percent or more, by weight, and when so driving, does any act forbidden by law or fails to perform any duty imposed by law in the driving of such vehicle, which act or failure proximately caused bodily injury to any person is guilty of a criminal offense.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. drove a vehicle in this state [2]
3. a. while under the influence of alcohol [3]
   b. while under the influence of any controlled substance (specify)
   c. while under the influence of any other drug (specify)
   d. while under the combined influence of alcohol and any controlled substance or any other drug (specify)
   e. while having an alcohol concentration in his blood of ten hundredths of one percent or more, by weight
4. and when so driving
   a. did any act forbidden by law in the driving of such vehicle (specify) [4]
   b. failed to perform any duty imposed by law in the driving of such vehicle (specify) [4]
5. which
   a. act
   b. failure
6. proximately caused bodily injury to _____

FOOTNOTES

[1] W.Va.Code, 17C-5-2(c) (1986).

[2] For purposes of this article and five-A [§ 17C-5A-1 et seq.] of this chapter, the phrase "in this State" shall mean anywhere within the physical boundaries of this State, including, but not limited to, publicly maintained streets and highways, and subdivision streets or other areas not publicly maintained but nonetheless open to the use of the public for purposes of vehicular travel. W.Va.Code, 17C-5-2a(a) (1983).

[3] (b) When used in this Code, the terms or phrases "driving under the influence of intoxicating liquor," "driving or operating a motor vehicle while intoxicated," "for any person who is under the influence of intoxicating liquor to drive any vehicle," or any similar term or phrase shall be construed to mean

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and be synonymous with the term or phrase "while under the influence of alcohol . . . drives a vehicle" as the latter term or phrase is used in section two [§ 17C-5-2] of this article. W.Va.Code, 17C-5-2a(b) (1983).

(c) From and after the effective date [September 1, 1981] of this section a warrant or indictment which charges or alleges an offense, prohibited by the provisions of section two [§ 17C-5-2] of this article, and which warrant or indictment uses any of the terms or phrases set forth in subsection (b) of this section, shall not thereby be fatally defective if such warrant or indictment otherwise informs the person so accused of the charges against him. W.Va.Code, 17C-5-2a(c) (1983).

[4] State v. Dyer, 177 W.Va. 567, 355 S.E.2d 356 (1987) - The appellant was convicted of causing a death while driving under the influence of alcohol under W.Va.Code, 17C-5-2(a) (1983).

The appellant contends the State failed to allege and prove an essential element of the offense of which he was convicted. Neither the indictment nor the instructions offered by the State concerning the elements of this offense specified the act or omission which the appellant was alleged to have committed in reckless disregard of the safety of others. The court did instruct the jury as to the elements of reckless driving.

The Court found no error in the trial court's refusal to require the State to specify the act or omission relied upon in its instruction as to the elements of the offense with which the appellant was charged since the jury was instructed as to that act or omission by separate instruction.

COMMENTS

1. Offer instruction on following "presumption" if applicable.

Upon trial for the offense of driving a motor vehicle in this State while under the influence of alcohol, controlled substances or drugs, or upon the trial of any civil or criminal action arising out of acts alleged to have been committed by any person driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, evidence of the amount of alcohol in the person's blood at the time of the arrest or of the acts alleged, as shown by chemical analysis of his blood, breath or urine, is admissible, if the sample or specimen was taken within two hours from and after the time of arrest or of the acts alleged, and shall give rise to the following presumptions or have the following effect:

(a) Evidence that there was, at that time, five hundredths of one percent or less, by weight, of alcohol in his blood, shall be prima facie evidence that the person was not under the influence of alcohol;

(b) Evidence that there was, at that time, more than five hundredths of one percent and less than ten hundredths of one percent, by weight, of alcohol in the person's blood shall be relevant evidence, but it is not to be given prima facie effect in indicating whether the person was under the influence of alcohol;

(c) Evidence that there was, at that time, ten hundredths of one percent or more, by weight, of alcohol in his blood, shall be admitted as prima facie evidence that the person was under the influence of alcohol.

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Percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per one hundred cubic centimeters of blood.

A chemical analysis of a person's blood, breath or urine, in order to give rise to the presumptions or to have the effect provided for in subdivisions (a), (b) and (c) of this section, must be performed in accordance with methods and standards approved by the state department of health. A chemical analysis of blood or urine to determine the alcoholic content of blood shall be conducted by a qualified laboratory or by the state police scientific laboratory of the criminal identification bureau of the department of public safety.

The provisions of this article shall not limit the introduction in any administrative or judicial proceeding of any other competent evidence bearing on the question of whether the person was under the influence of alcohol, controlled substances or drugs.

W.Va.Code, 17C-5-8 (1983).

See State v. Hood, 155 W.Va. 337, 184 S.E.2d 334 (1971); State v. Byers, 159 W.Va. 596, 224 S.E.2d 726 (1976); State v. Dyer, 160 W.Va. 166, 233 S.E.2d 309 (1977); State ex rel. Betts v. Scott, 165 W.Va. 73, 267 S.E.2d 173 (1980); State v. Ball, 164 W.Va. 588, 264 S.E.2d 844 (1980); State v. Keeton, 166 W.Va. 77, 272 S.E.2d 817 (1980); Albrecht v. State, 173 W.Va. 268, 314 S.E.2d 859 (1984); State v. Franklin, 174 W.Va. 469, 327 S.E.2d 449 (1985); Cunningham v. Bechtold, 186 W.Va. 474, 413 S.E.2d 129 (1991); W.Va.Code, 17C-5-4; W.Va.Code, 17C-5-5; W.Va.Code, 17C-5-6; W.Va.Code, 17C-5-9; State v. York, 175 W.Va. 740, 338 S.E.2d 219 (1985); Moczek v. Bechtold, 178 W.Va. 553, 363 S.E.2d 238 (1987); State v. Conrad, 187 W.Va. 658, 421 S.E.2d 41 (1992). Mitchell v. Cline, 412 S.E.2d 733 (W.Va. 1991); Chapman v. W.Va. Department of Motor Vehicles, 423 S.E.2d 619 (W.Va. 1992).

2. In certain circumstances, evidence of a defendant's refusal to take a breathalyzer test will be admissible in a criminal trial for driving under the influence of alcohol as evidence of the defendant's guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge upon request by either the State or the defendant, should hold an in camera hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect. Syl. pt. 3, State v. Cozart, 177 W.Va. 400, 352 S.E.2d 152 (1986).

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Footnote 7, State v. Cozart, 177 W.Va. 400, 253 S.E.2d 152, 158 (1986): We propose the following cautionary instruction where refusal evidence is admitted:

"The Court instructs the jury that evidence of the refusal of the defendant to take a breathalyzer test is competent evidence along with other facts and circumstances on the defendant's guilt. However, the jury should consider any evidence of the refusal to take a breathalyzer with caution since such evidence has only a slight tendency to prove guilt because the refusal may be attributed to a number of reasons other than the defendant's consciousness of guilt."

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The Supreme Court found the admission of the blood test results did not amount to reversible error. The test results were not used at trial in conjunction with the statutory presumptions regarding intoxication or as direct evidence that the appellant was under the influence of alcohol at the time of the alleged offense. The State's expert witness was not questioned nor did he offer an opinion as to the appellant's probable blood alcohol level at the time of the alleged offense or whether he was, in fact, intoxicated at the time. The evidence was relied on to show appellant had consumed alcoholic beverages in substantial amounts on the day in question and was, therefore, relevant evidence of a probative fact. The Court found in view of the peculiar circumstances of this case, there was no error in the admission of the results of the blood test which would warrant reversal of the conviction. See case for additional facts.

4. A person violating any provision of subsection (b), (c), (d), (e), (f) or (g) of this section shall, for the second offense under this section, be guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the county jail for a period of not less than six months nor more than one year, and the court may, in its discretion, impose a fine of not less than one thousand dollars nor more than three thousand dollars. W.Va.Code, 17C-5-2(h) (1986).

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A person violating any provisions of subsection (b), (c), (d), (e), (f) or (g) of this section shall, for the third or any subsequent offense under this section, be guilty of a felony, and upon conviction thereof, shall be imprisoned in the penitentiary for not less than one nor more than three years, and the court may, in its discretion, impose a fine of not less than three thousand dollars nor more than five thousand dollars. W.Va.Code, 17C-5-2(i) (1986).

See, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

5. State v. Satterfield, 182 W.Va. 365, 387 S.E.2d 832 (1989) - The defendant contends the circuit court's dismissal of a felony indictment for third offense DUI was justified because the indictment was defective on its face in failing to state the dates and counts of defendant's previous DUI convictions.

"In Syllabus Point 3, State v. Loy, 146 W.Va. 308, 119 S.E.2d 826 (1961), we required that an indictment alleging a prior DUI conviction aver 'the former conviction with such particularity as to reasonably indicate the nature and character of the former offense, the court wherein the conviction was had and identif(y) the person so convicted as the person subsequently indicted.' Loy's requirement of particularity in a DUI indictment reflects a need to provide the defendant with specific information in the indictment to advise him or her of the nature of the charge and to allow adequate plea and defense preparation."

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"Here the indictment failed to provide the defendant with any information concerning her previous convictions and, thus, was insufficient. The prosecutor can seek another indictment. The indictment would include sufficient information on the defendant's prior DUI convictions to insure that she is clearly and plainly advised of the offense charged and so that her plea and defense are not hampered."

6. State v. Wilkinson, 181 W.Va. 126, 381 S.E.2d 241 (1989) - The defendant contends the trial court erred in permitting the prosecutor to introduce evidence of his earlier conviction for DUI. The defendant was charged with second offense driving under the influence. It was necessary for the State to prove that he was convicted a first time in order to prove the second offense. As indicated in State v. Cozart, 177 W.Va. 400, 352 S.E.2d 152 (1986), evidence of the first offense was clearly admissible under the circumstances.

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7. See W.Va.Code, 17C-5-11 (1983).

8. State v. Barker, 179 W.Va. 194, 366 S.E.2d 642 (1988) - Appellant was convicted of third offense driving under the influence. He contends the trial court erred in admitting evidence of his prior convictions for driving under the influence of alcohol. Appellant pleaded guilty to DUI on August 6, 1982 and was fined and sentenced to a twenty-four hour jail term. On August 22, 1983, he again pleaded guilty to first offense DUI as the result of a plea bargain reducing the offense charged from the second offense DUI to first offense DUI.

Appellant contends his pleas to the two prior offenses were not made voluntarily and intelligently because it was not made clear to him in 1983 that as a consequence of his plea to first offense DUI, his next DUI offense would constitute third offense DUI. He argues he cannot be convicted of third offense DUI because he has not been convicted of second offense DUI.

The Supreme Court found a conviction for third offense DUI requires only two prior DUI convictions and that a prior conviction of second offense DUI is not a prerequisite for conviction of third offense DUI.

9. See W.Va.Code, 17C-5-2-(j) (1986) for the types of convictions which shall be regarded as convictions for purposes of W.Va.Code, 17C-5-2-(h) (1986) and W.Va.Code, 17C-5-2(i) (1986).

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See, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

10. The fact any person charged with a violation of subsection (a), (b), (c), (d), or (e) of this section, or any person permitted to drive as described under subsection (f) or (g) of this section, is or has been legally entitled to use alcohol, a controlled substance or a drug shall not constitute a defense against any charge of violating subsection (a), (b), (c), (d), (e) (f) or (g) of this section. W.Va.Code, 17C-5-2(k) (1986).

11. For purposes of this section, the term "controlled substance" shall have the meaning ascribed to it in chapter sixty-a (60A-1-101 et seq.) of this code. W.Va.Code, 17C-5-2(l) (1986).

12. The reenactment of this section in the regular session of the Legislature during the year one thousand nine hundred eighty-three, shall not in any way add to or subtract from the elements of the offenses set forth herein and earlier defined in the prior enactment of this section. W.Va.Code, 17C-5-2(n) (1986).

13. To constitute driving of an automobile, within the meaning of section 2 of Article 5, Chapter 129 of the 1951 Acts of the Legislature, as amended, there must be an intentional movement of the automobile by the defendant. Syl. pt. 1, State v. Taft, 143 W.Va. 365, 102 S.E.2d 152 (1958), affirmed 110 S.E.2d 727 (1959).

14. Proof that a defendant has been convicted of the offense of driving under the influence of alcohol in another state is similar to proof of any other material fact in a criminal prosecution; once the State has introduced sufficient evidence to lead impartial minds to conclude that the defendant had once before been convicted of driving under the influence of alcohol, the State has made a prima facie case. Syl. pt. 1, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

A person convicted of driving under the influence of alcohol under an Ohio statute that makes it an offense to operate a motor vehicle with a "a concentration of ten hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath" has committed an offense with "the same elements" as the offense set forth in W.Va.Code 17C-5-2(d)(1)(E) of operating a motor vehicle with "an alcohol concentration in his blood of ten hundredths of one percent or more, by weight." Syl. pt. 2, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

DRIVING UNDER THE INFLUENCE

Any person who drives a vehicle in this State while under the influence of alcohol, any controlled substance, any other drug or under the combined influence of alcohol and any controlled substance, or other drug or has an alcohol concentration in his blood of ten hundredths of one percent or more, by weight is guilty of a criminal offense.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. drove a vehicle in this state [2]
3. a. while under the influence of alcohol [3]
   b. while under the influence of any controlled substance (specify)
   c. while under the influence of any other drug (specify)
   d. while under the combined influence of alcohol and any controlled substance or any other drug (specify)
   e. while having an alcohol concentration in his blood of ten hundredths of one percent or more, by weight

FOOTNOTES

[1] W.Va.Code, 17C-5-2(d) (1986).

[2] For purposes of this article and five-A [§ 17C-5A-1 et seq.] of this chapter, the phrase "in this State" shall mean anywhere within the physical boundaries of this State, including, but not limited to, publicly maintained streets and highways, and subdivision streets or other areas not publicly maintained but nonetheless open to the use of the public for purposes of vehicular travel. W.Va.Code, 17C-5-2a(a) (1983).

[3] (b) When used in this Code, the terms or phrases "driving under the influence of intoxicating liquor," "driving or operating a motor vehicle while intoxicated," "for any person who is under the influence of intoxicating liquor to drive any vehicle," or any similar term or phrase shall be construed to mean and be synonymous with the term or phrase "while under the influence of alcohol ... drives a vehicle" as the latter term or phrase is used in section two [§ 17C-5-2] of this article. W.Va.Code, 17C-5-2a(b) (1983).
(c) From and after the effective date [September 1, 1981] of this section a warrant or indictment which charges or alleges an offense, prohibited by the provisions of section two [§ 17C-5-2] of this article, and which warrant or indictment uses any of the terms or phrases set forth in subsection (b) of this section, shall not thereby be fatally defective if such warrant or indictment otherwise informs the person so accused of the charges against him. W.Va.Code, 17C-5-2a(c) (1983).

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COMMENTS

1. Offer instruction on following "presumption" if applicable.

Upon trial for the offense of driving a motor vehicle in this State while under the influence of alcohol, controlled substances or drugs, or upon the trial of any civil or criminal action arising out of acts alleged to have been committed by any person driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, evidence of the amount of alcohol in the person's blood at the time of the arrest or of the acts alleged, as shown by chemical analysis of his blood, breath or urine, is admissible, if the sample or specimen was taken within two hours from and after the time of arrest or of the acts alleged, and shall give rise to the following presumptions or have the following effect:

(a) Evidence that there was, at that time, five hundredths of one percent or less, by weight, of alcohol in his blood, shall be prima facie evidence that the person was not under the influence of alcohol;

(b) Evidence that there was, at that time, more than five hundredths of one percent and less than ten hundredths of one percent, by weight, of alcohol in the person's blood shall be relevant evidence, but it is not to be given prima facie effect in indicating whether the person was under the influence of alcohol;

(c) Evidence that there was, at that time, ten hundredths of one percent or more, by weight, of alcohol in his blood, shall be admitted as prima facie evidence that the person was under the influence of alcohol.

Percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per one hundred cubic centimeters of blood.

A chemical analysis of a person's blood, breath or urine, in order to give rise to the presumptions or to have the effect provided for in subdivisions (a), (b) and (c) of this section, must be performed in accordance with methods and standards approved by the state department of health. A chemical analysis of blood or urine to determine the alcoholic content of blood shall be conducted by a qualified laboratory or by the state police scientific laboratory of the criminal identification bureau of the department of public safety.

The provisions of this article shall not limit the introduction in any administrative or judicial proceeding of any other competent evidence bearing on the question of whether the person was under the influence of alcohol, controlled substances or drugs.

W.Va.Code, 17C-5-8 (1983).

See State v. Hood, 155 W.Va. 337, 184 S.E.2d 334 (1971); State v. Byers, 159 W.Va. 596, 224 S.E.2d 726 (1976); State v. Dyer, 160 W.Va. 166, 233 S.E.2d 309 (1977); State ex rel. Betts v. Scott, 165 W.Va. 73, 267 S.E.2d 173 (1980); State v. Ball, 164 W.Va. 588, 264 S.E.2d 844 (1980); State v. Keeton, 166 W.Va. 77, 272 S.E.2d 817 (1980); Albrecht v. State, 173 W.Va. 268, 314 S.E.2d 859 (1984); State v. Franklin, 174 W.Va. 469, 327 S.E.2d 449 (1985); Cunningham v. Bechtold, 186 W.Va. 474, 413 S.E.2d 129 (1991); W.Va.Code, 17C-5-4; W.Va.Code, 17C-5-5; W.Va.Code, 17C-5-6; W.Va.Code, 17C-5-9; State v. York, 175 W.Va. 740, 338 S.E.2d 219 (1985); Moczek v. Bechtold, 178 W.Va. 553, 363 S.E.2d 238 (1987); State v. Conrad, 187 W.Va. 658, 421 S.E.2d 41 (1992). Mitchell v. Cline, 412 S.E.2d 733 (W.Va. 1991); Chapman v. W.Va. Department of Motor Vehicles, 423 S.E.2d 619 (W.Va. 1992).

2. In certain circumstances, evidence of a defendant's refusal to take a breathalyzer test will be admissible in a criminal trial for driving under the

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influence of alcohol as evidence of the defendant's guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge upon request by either the State or the defendant, should hold an in camera hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect. Syl. pt. 3, State v. Cozart, 177 W.Va. 400, 352 S.E.2d 152 (1986).

A cautionary instruction is warranted where evidence of the refusal of the defendant to take a breathalyzer test has been admitted. The instruction should explain that this refusal evidence has only a slight tendency to prove guilt because such refusal does not have a direct bearing on the issue of guilt. Syl. pt. 4, State v. Cozart, 177 W.Va. 400, 253 S.E.2d 152 (1986).

Footnote 7, State v. Cozart, 177 W.Va. 400, 253 S.E.2d 152, 158 (1986): We propose the following cautionary instruction where refusal evidence is admitted:

> "The Court instructs the jury that evidence of the refusal of the defendant to take a breathalyzer test is competent evidence along with other facts and circumstances on the defendant's guilt. However, the jury should consider any evidence of the refusal to take a breathalyzer with caution since such evidence has only a slight tendency to prove guilt because the refusal may be attributed to a number of reasons other than the defendant's consciousness of guilt."

3. State v. Dyer, 177 W.Va. 567, 355 S.E.2d 356 (1987) - The appellant was found guilty of causing a death while driving under the influence of alcohol under W.Va.Code, 17C-5-2(a). At pretrial proceedings, the appellant moved to suppress evidence of the results of the blood-alcohol tests on the ground that the blood sample was not drawn within two hours of his arrest or of the alleged offense. The trial court found the specimen had not been taken within the two-hour period, but concluded the results were admissible as long as they were not used a prima facie evidence of intoxication.

The Supreme Court found the admission of the blood test results did not amount to reversible error. The test results were not used at trial in conjunction with the statutory presumptions regarding intoxication or as direct evidence that the appellant was under the influence of alcohol at the time of the alleged offense. The State's expert witness was not questioned nor did he offer an opinion as to the appellant's probable blood alcohol level at the time of the alleged offense or whether he was, in fact, intoxicated at the time. The evidence was relied on to show appellant had consumed alcoholic beverages in substantial amounts on the day in question and was, therefore, relevant evidence of a probative fact. The Court found in view of the peculiar circumstances of this case, there was no error in the admission of the results of the blood test which would warrant reversal of the conviction. See case for additional facts.

4. A person violating any provision of subsection (b), (c), (d), (e), (f) or (g) of this section shall, for the second offense under this section, be guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the county jail for a period of not less than six months nor more than one year, and the court may, in its discretion, impose a fine of not less than one thousand dollars nor more than three thousand dollars. W.Va.Code, 17C-5-2(h) (1986).

See, State v. Conrad, 187 W.Va. 658, 421 S.E.2d 41 (1992).

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A person violating any provisions of subsection (b), (c), (d), (e), (f) or (g) of this section shall, for the third or any subsequent offense under this section, be guilty of a felony, and upon conviction thereof, shall be imprisoned in the penitentiary for not less than one nor more than three years, and the court may, in its discretion, impose a fine of not less than three thousand dollars nor more than five thousand dollars. W.Va.Code, 17C-5-2(i) (1986).

See, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

5. State v. Satterfield, 182 W.Va. 365, 387 S.E.2d 832 (1989) - The defendant contends the circuit court's dismissal of a felony indictment for third offense DUI was justified because the indictment was defective on its face in failing to state the dates and counts of defendant's previous DUI convictions.

"In Syllabus Point 3, State v. Loy, 146 W.Va. 308, 119 S.E.2d 826 (1961), we required that an indictment alleging a prior DUI conviction aver 'the former conviction with such particularity as to reasonably indicate the nature and character of the former offense, the court wherein the conviction was had and identif(y) the person so convicted as the person subsequently indicted.' Loy's requirement of particularity in a DUI indictment reflects a need to provide the defendant with specific information in the indictment to advise him or her of the nature of the charge and to allow adequate plea and defense preparation."

"Although we have upheld indictments that lacked some information, indictments to be sufficient must plainly advise the defendant of the nature of the charge. In State v. Masters, 179 W.Va. 752, 373 S.E.2d 173, 177 (1988) (a recidivist proceeding based on an indictment containing an incorrect criminal docket number for the prior felony conviction), we refused to find the indictment facially inadequate because the 'defendant was clearly and plainly advised of the offense charged' and he was not hampered in preparing his defense. In State v. Boggess, 163 W.Va. 320, 256 S.E.2d 325 (1979), we refused to quash an indictment for a felony DUI because the indictment alleged the dates of prior convictions rather than the dates of the offenses were committed. In Boggess, id., at 322, 256 S.E.2d at 326, we noted that the statute did not require the dates of prior offenses be specified. See State v. Nester, 175 W.Va. 539, 336 S.E.2d 187 (1985)."

"Here the indictment failed to provide the defendant with any information concerning her previous convictions and, thus, was insufficient. The prosecutor can seek another indictment. The indictment would include sufficient information on the defendant's prior DUI convictions to insure that she is clearly and plainly advised of the offense charged and so that her plea and defense are not hampered."

6. State v. Wilkinson, 181 W.Va. 126, 381 S.E.2d 241 (1989) - The defendant contends the trial court erred in permitting the prosecutor to introduce evidence of his earlier conviction for DUI. The defendant was charged with second offense driving under the influence. It was necessary for the State to prove that he was convicted a first time in order to prove the second offense. As indicated in State v. Cozart, 177 W.Va. 400, 352 S.E.2d 152 (1986), evidence of the first offense was clearly admissible under the circumstances.

See State v. Cozart.

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7. See W.Va.Code, 17C-5-11 (1983).

8. State v. Barker, 179 W.Va. 194, 366 S.E.2d 642 (1988) - Appellant was convicted of third offense driving under the influence. He contends the trial court erred in admitting evidence of his prior convictions for driving under the influence of alcohol. Appellant pleaded guilty to DUI on August 6, 1982 and was fined and sentenced to a twenty-four hour jail term. On August 22, 1983, he again pleaded guilty to first offense DUI as the result of a plea bargain reducing the offense charged from the second offense DUI to first offense DUI.

Appellant contends his pleas to the two prior offenses were not made voluntarily and intelligently because it was not made clear to him in 1983 that as a consequence of his plea to first offense DUI, his next DUI offense would constitute third offense DUI. He argues he cannot be convicted of third offense DUI because he has not been convicted of second offense DUI.

The Supreme Court found a conviction for third offense DUI requires only two prior DUI convictions and that a prior conviction of second offense DUI is not a prerequisite for conviction of third offense DUI.

9. See W.Va.Code, 17C-5-2-(j) (1986) for the types of convictions which shall be regarded as convictions for purposes of W.Va.Code, 17C-5-2-(h) (1986) and W.Va.Code, 17C-5-2(i) (1986).

See, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

10. The fact any person charged with a violation of subsection (a), (b), (c), (d), or (e) of this section, or any person permitted to drive as described under subsection (f) or (g) of this section, is or has been legally entitled to use alcohol, a controlled substance or a drug shall not constitute a defense against any charge of violating subsection (a), (b), (c), (d), (e) (f) or (g) of this section. W.Va.Code, 17C-5-2(k) (1986).

11. For purposes of this section, the term "controlled substance" shall have the meaning ascribed to it in chapter sixty-a (60A-1-101 et seq.) of this code. W.Va.Code, 17C-5-2(l) (1986).

12. The reenactment of this section in the regular session of the Legislature during the year one thousand nine hundred eighty-three, shall not in any way add to or subtract from the elements of the offenses set forth herein and earlier defined in the prior enactment of this section. W.Va.Code, 17C-5-2(n) (1986).

13. To constitute driving of an automobile, within the meaning of section 2 of Article 5, Chapter 129 of the 1951 Acts of the Legislature, as amended, there must be an intentional movement of the automobile by the defendant. Syl. pt. 1, State v. Taft, 143 W.Va. 365, 102 S.E.2d 152 (1958), affirmed 110 S.E.2d 727 (1959).

14. Proof that a defendant has been convicted of the offense of driving under the influence of alcohol in another state is similar to proof of any other material fact in a criminal prosecution; once the State has introduced sufficient evidence to lead impartial minds to conclude that the defendant had once before been convicted of driving under the influence of alcohol, the State has made a prima facie case. Syl. pt. 1, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

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A person convicted of driving under the influence of alcohol under an Ohio statute that makes it an offense to operate a motor vehicle with a "a concentration of ten hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath" has committed an offense with "the same elements" as the offense set forth in W.Va.Code 17C-5-2(d)(1)(E) of operating a motor vehicle with "an alcohol concentration in his blood of ten hundredths of one percent or more, by weight." Syl. pt. 2, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

DRIVING UNDER THE INFLUENCE
HABITUAL USER

Any person who, being an habitual user of narcotic drugs or amphetamine or any derivative thereof, drives a vehicle in this state is guilty of a criminal offense.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. drove a vehicle
3. in this state [2]
4. while he was an habitual user of (narcotic drugs) or (amphetamines) or (any derivative thereof). (specify)

FOOTNOTES

[1] W.Va.Code, 17C-5-2(e) (1986).

[2] For purposes of this article and five-A [§ 17C-5A-1 et seq.] of this chapter, the phrase "in this State" shall mean anywhere within the physical boundaries of this State, including, but not limited to, publicly maintained streets and highways, and subdivision streets or other areas not publicly maintained but nonetheless open to the use of the public for purposes of vehicular travel. W.Va.Code, 17C-5-2a(a) (1983).

COMMENTS

1. Offer instruction on following "presumption" if applicable.

Upon trial for the offense of driving a motor vehicle in this State while under the influence of alcohol, controlled substances or drugs, or upon the trial of any civil or criminal action arising out of acts alleged to have been committed by any person driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, evidence of the amount of alcohol in the person's blood at the time of the arrest or of the acts alleged, as shown by chemical analysis of his blood, breath or urine, is admissible, if the sample or specimen was taken within two hours from and after the time of arrest or of the acts alleged, and shall give rise to the following presumptions or have the following effect:

(a) Evidence that there was, at that time, five hundredths of one percent or less, by weight, of alcohol in his blood, shall be prima facie evidence that the person was not under the influence of alcohol;

(b) Evidence that there was, at that time, more than five hundredths of one percent and less than ten hundredths of one percent, by weight, of alcohol in the person's blood shall be relevant evidence, but it is not to be given prima facie effect in indicating whether the person was under the influence of alcohol;

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(c) Evidence that there was, at that time, ten hundredths of one percent or more, by weight, of alcohol in his blood, shall be admitted as prima facie evidence that the person was under the influence of alcohol.

Percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per one hundred cubic centimeters of blood.

A chemical analysis of a person's blood, breath or urine, in order to give rise to the presumptions or to have the effect provided for in subdivisions (a), (b) and (c) of this section, must be performed in accordance with methods and standards approved by the state department of health. A chemical analysis of blood or urine to determine the alcoholic content of blood shall be conducted by a qualified laboratory or by the state police scientific laboratory of the criminal identification bureau of the department of public safety.

The provisions of this article shall not limit the introduction in any administrative or judicial proceeding of any other competent evidence bearing on the question of whether the person was under the influence of alcohol, controlled substances or drugs.

W.Va.Code, 17C-5-8 (1983).

See State v. Hood, 155 W.Va. 337, 184 S.E.2d 334 (1971); State v. Byers, 159 W.Va. 596, 224 S.E.2d 726 (1976); State v. Dyer, 160 W.Va. 166, 233 S.E.2d 309 (1977); State ex rel. Betts v. Scott, 165 W.Va. 73, 267 S.E.2d 173 (1980); State v. Ball, 164 W.Va. 588, 264 S.E.2d 844 (1980); State v. Keeton, 166 W.Va. 77, 272 S.E.2d 817 (1980); Albrecht v. State, 173 W.Va. 268, 314 S.E.2d 859 (1984); State v. Franklin, 174 W.Va. 469, 327 S.E.2d 449 (1985); Cunningham v. Bechtold, 186 W.Va. 474, 413 S.E.2d 129 (1991); W.Va.Code, 17C-5-4; W.Va.Code, 17C-5-5; W.Va.Code, 17C-5-6; W.Va.Code, 17C-5-9; State v. York, 175 W.Va. 740, 338 S.E.2d 219 (1985); Moczek v. Bechtold, 178 W.Va. 553, 363 S.E.2d 238 (1987); State v. Conrad, 187 W.Va. 658, 421 S.E.2d 41 (1992). Mitchell v. Cline, 412 S.E.2d 733 (W.Va. 1991); Chapman v. W.Va. Department of Motor Vehicles, 423 S.E.2d 619 (W.Va. 1992).

2. In certain circumstances, evidence of a defendant's refusal to take a breathalyzer test will be admissible in a criminal trial for driving under the influence of alcohol as evidence of the defendant's guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge upon request by either the State or the defendant, should hold an in camera hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect. Syl. pt. 3, State v. Cozart, 177 W.Va. 400, 352 S.E.2d 152 (1986).

A cautionary instruction is warranted where evidence of the refusal of the defendant to take a breathalyzer test has been admitted. The instruction should explain that this refusal evidence has only a slight tendency to prove guilt because such refusal does not have a direct bearing on the issue of guilt. Syl. pt. 4, State v. Cozart, 177 W.Va. 400, 253 S.E.2d 152 (1986).

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> "The Court instructs the jury that evidence of the refusal of the defendant to take a breathalyzer test is competent evidence along with other facts and circumstances on the defendant's guilt. However, the

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jury should consider any evidence of the refusal to take a breathalyzer with caution since such evidence has only a slight tendency to prove guilt because the refusal may be attributed to a number of reasons other than the defendant's consciousness of guilt."

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The Supreme Court found the admission of the blood test results did not amount to reversible error. The test results were not used at trial in conjunction with the statutory presumptions regarding intoxication or as direct evidence that the appellant was under the influence of alcohol at the time of the alleged offense. The State's expert witness was not questioned nor did he offer an opinion as to the appellant's probable blood alcohol level at the time of the alleged offense or whether he was, in fact, intoxicated at the time. The evidence was relied on to show appellant had consumed alcoholic beverages in substantial amounts on the day in question and was, therefore, relevant evidence of a probative fact. The Court found in view of the peculiar circumstances of this case, there was no error in the admission of the results of the blood test which would warrant reversal of the conviction. See case for additional facts.

4. A person violating any provision of subsection (b), (c), (d), (e), (f) or (g) of this section shall, for the second offense under this section, be guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the county jail for a period of not less than six months nor more than one year, and the court may, in its discretion, impose a fine of not less than one thousand dollars nor more than three thousand dollars. W.Va.Code, 17C-5-2(h) (1986).

See, State v. Conrad, 187 W.Va. 658, 421 S.E.2d 41 (1992).

A person violating any provisions of subsection (b), (c), (d), (e), (f) or (g) of this section shall, for the third or any subsequent offense under this section, be guilty of a felony, and upon conviction thereof, shall be imprisoned in the penitentiary for not less than one nor more than three years, and the court may, in its discretion, impose a fine of not less than three thousand dollars nor more than five thousand dollars. W.Va.Code, 17C-5-2(i) (1986).

See, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

5. State v. Satterfield, 182 W.Va. 365, 387 S.E.2d 832 (1989) - The defendant contends the circuit court's dismissal of a felony indictment for third offense DUI was justified because the indictment was defective on its face in failing to state the dates and counts of defendant's previous DUI convictions.

"In Syllabus Point 3, State v. Loy, 146 W.Va. 308, 119 S.E.2d 826 (1961), we required that an indictment alleging a prior DUI conviction aver 'the former conviction with such particularity as to reasonably indicate the nature and character of the former offense, the court wherein the conviction was had and identif(y) the person subsequently indicted.' Loy's requirement of particularity

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in a DUI indictment reflects a need to provide the defendant with specific information in the indictment to advise him or her of the nature of the charge and to allow adequate plea and defense preparation."

"Although we have upheld indictments that lacked some information, indictments to be sufficient must plainly advise the defendant of the nature of the charge. In State v. Masters, 179 W.Va. 752, 373 S.E.2d 173, 177 (1988) (a recidivist proceeding based on an indictment containing an incorrect criminal docket number for the prior felony conviction), we refused to find the indictment facially inadequate because the 'defendant was clearly and plainly advised of the offense charged' and he was not hampered in preparing his defense. In State v. Boggess, 163 W.Va. 320, 256 S.E.2d 325 (1979), we refused to quash an indictment for a felony DUI because the indictment alleged the dates of prior convictions rather than the dates of the offenses were committed. In Boggess, id., at 322, 256 S.E.2d at 326, we noted that the statute did not require the dates of prior offenses be specified. See State v. Nester, 175 W.Va. 539, 336 S.E.2d 187 (1985)."

"Here the indictment failed to provide the defendant with any information concerning her previous convictions and, thus, was insufficient. The prosecutor can seek another indictment. The indictment would include sufficient information on the defendant's prior DUI convictions to insure that she is clearly and plainly advised of the offense charged and so that her plea and defense are not hampered."

6. State v. Wilkinson, 181 W.Va. 126, 381 S.E.2d 241 (1989) - The defendant contends the trial court erred in permitting the prosecutor to introduce evidence of his earlier conviction for DUI. The defendant was charged with second offense driving under the influence. It was necessary for the State to prove that he was convicted a first time in order to prove the second offense. As indicated in State v. Cozart, 177 W.Va. 400, 352 S.E.2d 152 (1986), evidence of the first offense was clearly admissible under the circumstances.

See State v. Cozart.

7. See W.Va.Code, 17C-5-11 (1983).

8. State v. Barker, 179 W.Va. 194, 366 S.E.2d 642 (1988) - Appellant was convicted of third offense driving under the influence. He contends the trial court erred in admitting evidence of his prior convictions for driving under the influence of alcohol. Appellant pleaded guilty to DUI on August 6, 1982 and was fined and sentenced to a twenty-four hour jail term. On August 22, 1983, he again pleaded guilty to first offense DUI as the result of a plea bargain reducing the offense charged from the second offense DUI to first offense DUI.

Appellant contends his pleas to the two prior offenses were not made voluntarily and intelligently because it was not made clear to him in 1983 that as a consequence of his plea to first offense DUI, his next DUI offense would constitute third offense DUI. He argues he cannot be convicted of third offense DUI because he has not been convicted of second offense DUI.

The Supreme Court found a conviction for third offense DUI requires only two prior DUI convictions and that a prior conviction of second offense DUI is not a prerequisite for conviction of third offense DUI.

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9. See W.Va.Code, 17C-5-2-(j) (1986) for the types of convictions which shall be regarded as convictions for purposes of W.Va.Code, 17C-5-2-(h) (1986) and W.Va.Code, 17C-5-2(i) (1986).

See, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

10. The fact any person charged with a violation of subsection (a), (b), (c), (d), or (e) of this section, or any person permitted to drive as described under subsection (f) or (g) of this section, is or has been legally entitled to use alcohol, a controlled substance or a drug shall not constitute a defense against any charge of violating subsection (a), (b), (c), (d), (e) (f) or (g) of this section. W.Va.Code, 17C-5-2(k) (1986).

11. For purposes of this section, the term "controlled substance" shall have the meaning ascribed to it in chapter sixty-a (60A-1-101 et seq.) of this code. W.Va.Code, 17C-5-2(1) (1986).

12. The reenactment of this section in the regular session of the Legislature during the year one thousand nine hundred eighty-three, shall not in any way add to or subtract from the elements of the offenses set forth herein and earlier defined in the prior enactment of this section. W.Va.Code, 17C-5-2(n).

13. To constitute driving of an automobile, within the meaning of section 2 of Article 5, Chapter 129 of the 1951 Acts of the Legislature, as amended, there must be an intentional movement of the automobile by the defendant. Syl. pt. 1, State v. Taft, 143 W.Va. 365, 102 S.E.2d 152 (1958), affirmed 110 S.E.2d 727 (1959).

14. Proof that a defendant has been convicted of the offense of driving under the influence of alcohol in another state is similar to proof of any other material fact in a criminal prosecution; once the State has introduced sufficient evidence to lead impartial minds to conclude that the defendant had once before been convicted of driving under the influence of alcohol, the State has made a prima facie case. Syl. pt. 1, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

A person convicted of driving under the influence of alcohol under an Ohio statute that makes it an offense to operate a motor vehicle with a "a concentration of ten hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath" has committed an offense with "the same elements" as the offense set forth in W.Va.Code 17C-5-2(d)(1)(E) of operating a motor vehicle with "an alcohol concentration in his blood of ten hundredths of one percent or more, by weight." Syl. pt. 2, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

KNOWINGLY PERMITS VEHICLE TO BE DRIVEN BY ONE UNDER THE INFLUENCE

Any person who knowing permits his vehicle to be driven in this state by any other person who is under the influence of alcohol, or under the influence of any controlled substance or under the influence of any other drug, or under the combined influence of alcohol and any controlled substance or any other drug, or has an alcohol concentration in his blood of ten hundredths of one percent or more, by weight is guilty of a criminal offense.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. knowingly permitted his vehicle
3. to be driven
4. in this state [2]
5. by _____,
6. while _____,
   a. was under the influence of alcohol
   b. was under the influence of any controlled substance (specify)
   c. was under the influence of any other drug (specify)
   d. was under the combined influence of alcohol and any controlled substance or any other drug (specify)
   e. had an alcohol concentration in his blood of ten hundredths of one percent or more, by weight

FOOTNOTES

[1] W.Va.Code, 17C-5-2(f) (1986).

[2] For purposes of this article and five-A [§ 17C-5A-1 et seq.] of this chapter, the phrase "in this State" shall mean anywhere within the physical boundaries of this State, including, but not limited to, publicly maintained streets and highways, and subdivision streets or other areas not publicly maintained but nonetheless open to the use of the public for purposes of vehicular travel. W.Va.Code, 17C-5-2a(a) (1983).

COMMENTS

1. Offer instruction on following "presumption" if applicable.

Upon trial for the offense of driving a motor vehicle in this State while under the influence of alcohol, controlled substances or drugs, or upon the trial of any civil or criminal action arising out of acts alleged to have been committed by any

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person driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, evidence of the amount of alcohol in the person's blood at the time of the arrest or of the acts alleged, as shown by chemical analysis of his blood, breath or urine, is admissible, if the sample or specimen was taken within two hours from and after the time of arrest or of the acts alleged, and shall give rise to the following presumptions or have the following effect:

(a) Evidence that there was, at that time, five hundredths of one percent or less, by weight, of alcohol in his blood, shall be prima facie evidence that the person was not under the influence of alcohol;

(b) Evidence that there was, at that time, more than five hundredths of one percent and less than ten hundredths of one percent, by weight, of alcohol in the person's blood shall be relevant evidence, but it is not to be given prima facie effect in indicating whether the person was under the influence of alcohol;

(c) Evidence that there was, at that time, ten hundredths of one percent or more, by weight, of alcohol in his blood, shall be admitted as prima facie evidence that the person was under the influence of alcohol.

Percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per one hundred cubic centimeters of blood.

A chemical analysis of a person's blood, breath or urine, in order to give rise to the presumptions or to have the effect provided for in subdivisions (a), (b) and (c) of this section, must be performed in accordance with methods and standards approved by the state department of health. A chemical analysis of blood or urine to determine the alcoholic content of blood shall be conducted by a qualified laboratory or by the state police scientific laboratory of the criminal identification bureau of the department of public safety.

The provisions of this article shall not limit the introduction in any administrative or judicial proceeding of any other competent evidence bearing on the question of whether the person was under the influence of alcohol, controlled substances or drugs.

W.Va.Code, 17C-5-8 (1983).

See State v. Hood, 155 W.Va. 337, 184 S.E.2d 334 (1971); State v. Byers, 159 W.Va. 596, 224 S.E.2d 726 (1976); State v. Dyer, 160 W.Va. 166, 233 S.E.2d 309 (1977); State ex rel. Betts v. Scott, 165 W.Va. 73, 267 S.E.2d 173 (1980); State v. Ball, 164 W.Va. 588, 264 S.E.2d 844 (1980); State v. Keeton, 166 W.Va. 77, 272 S.E.2d 817 (1980); Albrecht v. State, 173 W.Va. 268, 314 S.E.2d 859 (1984); State v. Franklin, 174 W.Va. 469, 327 S.E.2d 449 (1985); Cunningham v. Bechtold, 186 W.Va. 474, 413 S.E.2d 129 (1991); W.Va.Code, 17C-5-4; W.Va.Code, 17C-5-5; W.Va.Code, 17C-5-6; W.Va.Code, 17C-5-9; State v. York, 175 W.Va. 740, 338 S.E.2d 219 (1985); Moczek v. Bechtold, 178 W.Va. 553, 363 S.E.2d 238 (1987); State v. Conrad, 187 W.Va. 658, 421 S.E.2d 41 (1992). Mitchell v. Cline, 412 S.E.2d 733 (W.Va. 1991); Chapman v. W.Va. Department of Motor Vehicles, 423 S.E.2d 619 (W.Va. 1992).

2. In certain circumstances, evidence of a defendant's refusal to take a breathalyzer test will be admissible in a criminal trial for driving under the influence of alcohol as evidence of the defendant's guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge upon request by either the State or the defendant, should hold an in camera hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect. Syl. pt. 3, State v. Cozart, 177 W.Va. 400, 352 S.E.2d 152 (1986).

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A cautionary instruction is warranted where evidence of the refusal of the defendant to take a breathalyzer test has been admitted. The instruction should explain that this refusal evidence has only a slight tendency to prove guilt because such refusal does not have a direct bearing on the issue of guilt. Syl. pt. 4, State v. Cozart, 177 W.Va. 400, 253 S.E.2d 152 (1986).

Footnote 7, State v. Cozart, 177 W.Va. 400, 253 S.E.2d 152, 158 (1986): We propose the following cautionary instruction where refusal evidence is admitted:

> "The Court instructs the jury that evidence of the refusal of the defendant to take a breathalyzer test is competent evidence along with other facts and circumstances on the defendant's guilt. However, the jury should consider any evidence of the refusal to take a breathalyzer with caution since such evidence has only a slight tendency to prove guilt because the refusal may be attributed to a number of reasons other than the defendant's consciousness of guilt."

3. State v. Dyer, 177 W.Va. 567, 355 S.E.2d 356 (1987) - The appellant was found guilty of causing a death while driving under the influence of alcohol under W.Va.Code, 17C-5-2(a). At pretrial proceedings, the appellant moved to suppress evidence of the results of the blood-alcohol tests on the ground that the blood sample was not drawn within two hours of his arrest or of the alleged offense. The trial court found the specimen had not been taken within the two-hour period, but concluded the results were admissible as long as they were not used a prima facie evidence of intoxication.

The Supreme Court found the admission of the blood test results did not amount to reversible error. The test results were not used at trial in conjunction with the statutory presumptions regarding intoxication or as direct evidence that the appellant was under the influence of alcohol at the time of the alleged offense. The State's expert witness was not questioned nor did he offer an opinion as to the appellant's probable blood alcohol level at the time of the alleged offense or whether he was, in fact, intoxicated at the time. The evidence was relied on to show appellant had consumed alcoholic beverages in substantial amounts on the day in question and was, therefore, relevant evidence of a probative fact. The Court found in view of the peculiar circumstances of this case, there was no error in the admission of the results of the blood test which would warrant reversal of the conviction. See case for additional facts.

4. A person violating any provision of subsection (b), (c), (d), (e), (f) or (g) of this section shall, for the second offense under this section, be guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the county jail for a period of not less than six months nor more than one year, and the court may, in its discretion, impose a fine of not less than one thousand dollars nor more than three thousand dollars. W.Va.Code, 17C-5-2(h) (1986).

See, State v. Conrad, 187 W.Va. 658, 421 S.E.2d 41 (1992).

A person violating any provisions of subsection (b), (c), (d), (e), (f) or (g) of this section shall, for the third or any subsequent offense under this section, be guilty of a felony, and upon conviction thereof, shall be imprisoned in the penitentiary for not less than one nor more than three years, and the court may, in its discretion, impose a fine of not less than three thousand dollars nor more than five thousand dollars. W.Va.Code, 17C-5-2(i) (1986).

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See, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

5. State v. Satterfield, 182 W.Va. 365, 387 S.E.2d 832 (1989) - The defendant contends the circuit court's dismissal of a felony indictment for third offense DUI was justified because the indictment was defective on its face in failing to state the dates and counts of defendant's previous DUI convictions.

"In Syllabus Point 3, State v. Loy, 146 W.Va. 308, 119 S.E.2d 826 (1961), we required that an indictment alleging a prior DUI conviction aver 'the former conviction with such particularity as to reasonably indicate the nature and character of the former offense, the court wherein the conviction was had and identif(y) the person so convicted as the person subsequently indicted.' Loy's requirement of particularity in a DUI indictment reflects a need to provide the defendant with specific information in the indictment to advise him or her of the nature of the charge and to allow adequate plea and defense preparation."

"Although we have upheld indictments that lacked some information, indictments to be sufficient must plainly advise the defendant of the nature of the charge. In State v. Masters, 179 W.Va. 752, 373 S.E.2d 173, 177 (1988) (a recidivist proceeding based on an indictment containing an incorrect criminal docket number for the prior felony conviction), we refused to find the indictment facially inadequate because the 'defendant was clearly and plainly advised of the offense charged' and he was not hampered in preparing his defense. In State v. Boggess, 163 W.Va. 320, 256 S.E.2d 325 (1979), we refused to quash an indictment for a felony DUI because the indictment alleged the dates of prior convictions rather than the dates of the offenses were committed. In Boggess, id., at 322, 256 S.E.2d at 326, we noted that the statute did not require the dates of prior offenses be specified. See State v. Nester, 175 W.Va. 539, 336 S.E.2d 187 (1985)."

"Here the indictment failed to provide the defendant with any information concerning her previous convictions and, thus, was insufficient. The prosecutor can seek another indictment. The indictment would include sufficient information on the defendant's prior DUI convictions to insure that she is clearly and plainly advised of the offense charged and so that her plea and defense are not hampered."

6. State v. Wilkinson, 181 W.Va. 126, 381 S.E.2d 241 (1989) - The defendant contends the trial court erred in permitting the prosecutor to introduce evidence of his earlier conviction for DUI. The defendant was charged with second offense driving under the influence. It was necessary for the State to prove that he was convicted a first time in order to prove the second offense. As indicated in State v. Cozart, 177 W.Va. 400, 352 S.E.2d 152 (1986), evidence of the first offense was clearly admissible under the circumstances.

See State v. Cozart.

7. See W.Va.Code, 17C-5-11 (1983).

8. State v. Barker, 179 W.Va. 194, 366 S.E.2d 642 (1988) - Appellant was convicted of third offense driving under the influence. He contends the trial court erred in admitting evidence of his prior convictions for driving under the influence of alcohol. Appellant pleaded guilty to DUI on August 6, 1982 and was

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fined and sentenced to a twenty-four hour jail term. On August 22, 1983, he again pleaded guilty to first offense DUI as the result of a plea bargain reducing the offense charged from the second offense DUI to first offense DUI.

Appellant contends his pleas to the two prior offenses were not made voluntarily and intelligently because it was not made clear to him in 1983 that as a consequence of his plea to first offense DUI, his next DUI offense would constitute third offense DUI. He argues he cannot be convicted of third offense DUI because he has not been convicted of second offense DUI.

The Supreme Court found a conviction for third offense DUI requires only two prior DUI convictions and that a prior conviction of second offense DUI is not a prerequisite for conviction of third offense DUI.

9. See W.Va.Code, 17C-5-2-(j) (1986) for the types of convictions which shall be regarded as convictions for purposes of W.Va.Code, 17C-5-2-(h) (1986) and W.Va.Code, 17C-5-2(i) (1986).

See, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

10. The fact any person charged with a violation of subsection (a), (b), (c), (d), or (e) of this section, or any person permitted to drive as described under subsection (f) or (g) of this section, is or has been legally entitled to use alcohol, a controlled substance or a drug shall not constitute a defense against any charge of violating subsection (a), (b), (c), (d), (e) (f) or (g) of this section. W.Va.Code, 17C-5-2(k) (1986).

11. For purposes of this section, the term "controlled substance" shall have the meaning ascribed to it in chapter sixty-a (60A-1-101 et seq.) of this code. W.Va.Code, 17C-5-2(1) (1986).

12. The reenactment of this section in the regular session of the Legislature during the year one thousand nine hundred eighty-three, shall not in any way add to or subtract from the elements of the offenses set forth herein and earlier defined in the prior enactment of this section. W.Va.Code, 17C-5-2(n) (1986).

13. To constitute driving of an automobile, within the meaning of section 2 of Article 5, Chapter 129 of the 1951 Acts of the Legislature, as amended, there must be an intentional movement of the automobile by the defendant. Syl. pt. 1, State v. Taft, 143 W.Va. 365, 102 S.E.2d 152 (1958), affirmed 110 S.E.2d 727 (1959).

14. Proof that a defendant has been convicted of the offense of driving under the influence of alcohol in another state is similar to proof of any other material fact in a criminal prosecution; once the State has introduced sufficient evidence to lead impartial minds to conclude that the defendant had once before been convicted of driving under the influence of alcohol, the State has made a prima facie case. Syl. pt. 1, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

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A person convicted of driving under the influence of alcohol under an Ohio statute that makes it an offense to operate a motor vehicle with a "a concentration of ten hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath" has committed an offense with "the same elements" as the offense set forth in W.Va.Code 17C-5-2(d)(1)(E) of operating a motor vehicle with "an alcohol concentration in his blood of ten hundredths of one percent or more, by weight." Syl. pt. 2, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

KNOWINGLY PERMITS VEHICLE TO BE DRIVEN BY ONE WHO IS AN HABITUAL USER

Any person who knowingly permits his vehicle to be driven in this state by any other person who is an habitual user of narcotic drugs or amphetamine or any derivative thereof is guilty of a criminal offense.[1]

To prove the commission of this offense, the State must prove each of the following elements beyond a reasonable doubt:

1. the defendant, _____,
2. knowingly
3. permitted his vehicle
4. to be driven in this state [2]
5. by _____,
6. and that _____,
7. was an habitual user of narcotic drugs or amphetamines or any derivative thereof.

FOOTNOTES

[1] W.Va.Code, 17C-5-2(g) (1986).

[2] For purposes of this article and five-A [§ 17C-5A-1 et seq.] of this chapter, the phrase "in this State" shall mean anywhere within the physical boundaries of this State, including, but not limited to, publicly maintained streets and highways, and subdivision streets or other areas not publicly maintained but nonetheless open to the use of the public for purposes of vehicular travel. W.Va.Code, 17C-5-2a(a) (1983).

COMMENTS

1. Offer instruction on following "presumption" if applicable.

Upon trial for the offense of driving a motor vehicle in this State while under the influence of alcohol, controlled substances or drugs, or upon the trial of any civil or criminal action arising out of acts alleged to have been committed by any person driving a motor vehicle while under the influence of alcohol, controlled substances or drugs, evidence of the amount of alcohol in the person's blood at the time of the arrest or of the acts alleged, as shown by chemical analysis of his blood, breath or urine, is admissible, if the sample or specimen was taken within two hours from and after the time of arrest or of the acts alleged, and shall give rise to the following presumptions or have the following effect:

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(a) Evidence that there was, at that time, five hundredths of one percent or less, by weight, of alcohol in his blood, shall be prima facie evidence that the person was not under the influence of alcohol;

(b) Evidence that there was, at that time, more than five hundredths of one percent and less than ten hundredths of one percent, by weight, of alcohol in the person's blood shall be relevant evidence, but it is not to be given prima facie effect in indicating whether the person was under the influence of alcohol;

(c) Evidence that there was, at that time, ten hundredths of one percent or more, by weight, of alcohol in his blood, shall be admitted as prima facie evidence that the person was under the influence of alcohol.

Percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per one hundred cubic centimeters of blood.

A chemical analysis of a person's blood, breath or urine, in order to give rise to the presumptions or to have the effect provided for in subdivisions (a), (b) and (c) of this section, must be performed in accordance with methods and standards approved by the state department of health. A chemical analysis of blood or urine to determine the alcoholic content of blood shall be conducted by a qualified laboratory or by the state police scientific laboratory of the criminal identification bureau of the department of public safety.

The provisions of this article shall not limit the introduction in any administrative or judicial proceeding of any other competent evidence bearing on the question of whether the person was under the influence of alcohol, controlled substances or drugs.

W.Va.Code, 17C-5-8 (1983).

See State v. Hood, 155 W.Va. 337, 184 S.E.2d 334 (1971); State v. Byers, 159 W.Va. 596, 224 S.E.2d 726 (1976); State v. Dyer, 160 W.Va. 166, 233 S.E.2d 309 (1977); State ex rel. Betts v. Scott, 165 W.Va. 73, 267 S.E.2d 173 (1980); State v. Ball, 164 W.Va. 588, 264 S.E.2d 844 (1980); State v. Keeton, 166 W.Va. 77, 272 S.E.2d 817 (1980); Albrecht v. State, 173 W.Va. 268, 314 S.E.2d 859 (1984); State v. Franklin, 174 W.Va. 469, 327 S.E.2d 449 (1985); Cunningham v. Bechtold, 186 W.Va. 474, 413 S.E.2d 129 (1991); W.Va.Code, 17C-5-4; W.Va.Code, 17C-5-5; W.Va.Code, 17C-5-6; W.Va.Code, 17C-5-9; State v. York, 175 W.Va. 740, 338 S.E.2d 219 (1985); Moczek v. Bechtold, 178 W.Va. 553, 363 S.E.2d 238 (1987); State v. Conrad, 187 W.Va. 658, 421 S.E.2d 41 (1992). Mitchell v. Cline, 412 S.E.2d 733 (W.Va. 1991); Chapman v. W.Va. Department of Motor Vehicles, 423 S.E.2d 619 (W.Va. 1992).

2. In certain circumstances, evidence of a defendant's refusal to take a breathalyzer test will be admissible in a criminal trial for driving under the influence of alcohol as evidence of the defendant's guilty conscience or knowledge. Prior to admitting such evidence, however, the trial judge upon request by either the State or the defendant, should hold an in camera hearing to determine whether the probative value of such evidence outweighs its possible prejudicial effect. Syl. pt. 3, State v. Cozart, 177 W.Va. 400, 352 S.E.2d 152 (1986).

A cautionary instruction is warranted where evidence of the refusal of the defendant to take a breathalyzer test has been admitted. The instruction should explain that this refusal evidence has only a slight tendency to prove guilt because such refusal does not have a direct bearing on the issue of guilt. Syl. pt. 4, State v. Cozart, 177 W.Va. 400, 253 S.E.2d 152 (1986).

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Footnote 7, State v. Cozart, 177 W.Va. 400, 253 S.E.2d 152, 158 (1986): We propose the following cautionary instruction where refusal evidence is admitted:

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3. State v. Dyer, 177 W.Va. 567, 355 S.E.2d 356 (1987) - The appellant was found guilty of causing a death while driving under the influence of alcohol under W.Va.Code, 17C-5-2(a). At pretrial proceedings, the appellant moved to suppress evidence of the results of the blood-alcohol tests on the ground that the blood sample was not drawn within two hours of his arrest or of the alleged offense. The trial court found the specimen had not been taken within the two-hour period, but concluded the results were admissible as long as they were not used a prima facie evidence of intoxication.

The Supreme Court found the admission of the blood test results did not amount to reversible error. The test results were not used at trial in conjunction with the statutory presumptions regarding intoxication or as direct evidence that the appellant was under the influence of alcohol at the time of the alleged offense. The State's expert witness was not questioned nor did he offer an opinion as to the appellant's probable blood alcohol level at the time of the alleged offense or whether he was, in fact, intoxicated at the time. The evidence was relied on to show appellant had consumed alcoholic beverages in substantial amounts on the day in question and was, therefore, relevant evidence of a probative fact. The Court found in view of the peculiar circumstances of this case, there was no error in the admission of the results of the blood test which would warrant reversal of the conviction. See case for additional facts.

4. A person violating any provision of subsection (b), (c), (d), (e), (f) or (g) of this section shall, for the second offense under this section, be guilty of a misdemeanor, and, upon conviction thereof, shall be imprisoned in the county jail for a period of not less than six months nor more than one year, and the court may, in its discretion, impose a fine of not less than one thousand dollars nor more than three thousand dollars. W.Va.Code, 17C-5-2(h) (1986).

See, State v. Conrad, 187 W.Va. 658, 421 S.E.2d 41 (1992).

A person violating any provisions of subsection (b), (c), (d), (e), (f) or (g) of this section shall, for the third or any subsequent offense under this section, be guilty of a felony, and upon conviction thereof, shall be imprisoned in the penitentiary for not less than one nor more than three years, and the court may, in its discretion, impose a fine of not less than three thousand dollars nor more than five thousand dollars. W.Va.Code, 17C-5-2(i) (1986).

See, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

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5. State v. Satterfield, 182 W.Va. 365, 387 S.E.2d 832 (1989) - The defendant contends the circuit court's dismissal of a felony indictment for third offense DUI was justified because the indictment was defective on its face in failing to state the dates and counts of defendant's previous DUI convictions.

"In Syllabus Point 3, State v. Loy, 146 W.Va. 308, 119 S.E.2d 826 (1961), we required that an indictment alleging a prior DUI conviction aver 'the former conviction with such particularity as to reasonably indicate the nature and

character of the former offense, the court wherein the conviction was had and identif(y) the person so convicted as the person subsequently indicted.' Loy's requirement of particularity in a DUI indictment reflects a need to provide the defendant with specific information in the indictment to advise him or her of the nature of the charge and to allow adequate plea and defense preparation."

"Although we have upheld indictments that lacked some information, indictments to be sufficient must plainly advise the defendant of the nature of the charge. In State v. Masters, 179 W.Va. 752, 373 S.E.2d 173, 177 (1988) (a recidivist proceeding based on an indictment containing an incorrect criminal docket number for the prior felony conviction), we refused to find the indictment facially inadequate because the 'defendant was clearly and plainly advised of the offense charged' and he was not hampered in preparing his defense. In State v. Boggess, 163 W.Va. 320, 256 S.E.2d 325 (1979), we refused to quash an indictment for a felony DUI because the indictment alleged the dates of prior convictions rather than the dates of the offenses were committed. In Boggess, id., at 322, 256 S.E.2d at 326, we noted that the statute did not require the dates of prior offenses be specified. See State v. Nester, 175 W.Va. 539, 336 S.E.2d 187 (1985)."

"Here the indictment failed to provide the defendant with any information concerning her previous convictions and, thus, was insufficient. The prosecutor can seek another indictment. The indictment would include sufficient information on the defendant's prior DUI convictions to insure that she is clearly and plainly advised of the offense charged and so that her plea and defense are not hampered."

6. State v. Wilkinson, 181 W.Va. 126, 381 S.E.2d 241 (1989) - The defendant contends the trial court erred in permitting the prosecutor to introduce evidence of his earlier conviction for DUI. The defendant was charged with second offense driving under the influence. It was necessary for the State to prove that he was convicted a first time in order to prove the second offense. As indicated in State v. Cozart, 177 W.Va. 400, 352 S.E.2d 152 (1986), evidence of the first offense was clearly admissible under the circumstances.

See State v. Cozart, supra.

7. See W.Va.Code, 17C-5-11 (1983).

8. State v. Barker, 179 W.Va. 194, 366 S.E.2d 642 (1988) - Appellant was convicted of third offense driving under the influence. He contends the trial court erred in admitting evidence of his prior convictions for driving under the influence of alcohol. Appellant pleaded guilty to DUI on August 6, 1982 and was fined and sentenced to a twenty-four hour jail term. On August 22, 1983, he again pleaded guilty to first offense DUI as the result of a plea bargain reducing the offense charged from the second offense DUI to first offense DUI.

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Appellant contends his pleas to the two prior offenses were not made voluntarily and intelligently because it was not made clear to him in 1983 that as a consequence of his plea to first offense DUI, his next DUI offense would constitute third offense DUI. He argues he cannot be convicted of third offense DUI because he has not been convicted of second offense DUI.

The Supreme Court found a conviction for third offense DUI requires only two prior DUI convictions and that a prior conviction of second offense DUI is not a prerequisite for conviction of third offense DUI.

9. See W.Va.Code, 17C-5-2-(j) (1986) for the types of convictions which shall be regarded as convictions for purposes of W.Va.Code, 17C-5-2(h) (1986) and W.Va.Code, 17C-5-2(i) (1986).

See, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

10. The fact any person charged with a violation of subsection (a), (b), (c), (d), or (e) of this section, or any person permitted to drive as described under subsection (f) or (g) of this section, is or has been legally entitled to use alcohol, a controlled substance or a drug shall not constitute a defense against any charge of violating subsection (a), (b), (c), (d), (e) (f) or (g) of this section. W.Va.Code, 17C-5-2(k) (1986).

11. For purposes of this section, the term "controlled substance" shall have the meaning ascribed to it in chapter sixty-a (60A-1-101 et seq.) of this code. W.Va.Code, 17C-5-2(l) (1986).

12. The reenactment of this section in the regular session of the Legislature during the year one thousand nine hundred eighty-three, shall not in anyway add to or subtract from the elements of the offenses set forth herein and earlier defined in the prior enactment of this section. W.Va.Code, 17C-5-2(n) (1986).

13. To constitute driving of an automobile, within the meaning of section 2 of Article 5, Chapter 129 of the 1951 Acts of the Legislature, as amended, there must be an intentional movement of the automobile by the defendant. Syl. pt. 1, State v. Taft, 143 W.Va. 365, 102 S.E.2d 152 (1958), affirmed 110 S.E.2d 727 (1959).

14. Proof that a defendant has been convicted of the offense of driving under the influence of alcohol in another state is similar to proof of any other material fact in a criminal prosecution; once the State has introduced sufficient evidence to lead impartial minds to conclude that the defendant had once before been convicted of driving under the influence of alcohol, the State has made a prima facie case. Syl. pt. 1, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

A person convicted of driving under the influence of alcohol under an Ohio statute that makes it an offense to operate a motor vehicle with a "a concentration of ten hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath" has committed an offense with "the same elements" as the offense set forth in W.Va.Code 17C-5-2(d)(1)(E) of operating a motor vehicle with "an alcohol concentration in his blood of ten hundredths of one percent or more, by weight." Syl. pt. 2, State ex rel. Kutsch v. Wilson, 427 S.E.2d 481 (W.Va. 1993).

DEFENSES
ACCIDENTAL DEATH

Accidental killing may provide a legal excuse for the crime charged in the indictment. Where a defendant relies upon a claim of accidental killing as his defense to murder, you may only consider that claim of accidental killing in your deliberations if you are convinced that the defendant has presented evidence demonstrating such defense to an appreciable degree.[1]

If the evidence in this case raises a reasonable doubt in your minds as to whether the killing was accidental or intentional, it is your duty to find the defendant not guilty.[2]

FOOTNOTES

[1] State v. Daniel, 182 W.Va. 643, 391 S.E.2d 90 (1990); State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990).

A defendant is required to present evidence on the affirmative defenses asserted as long as the State does not shift to the defendant the burden of disproving any element of the State's case. Syl. pt. 5, State v. Daniel, 182 W.Va. 643, 391 S.E.2d 90 (1990); State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990).

"...Accidental killing is not such matter of defense as throws on the accused the burden of proving it by a preponderance of evidence. It is the duty of the state to allege and prove that the killing, though done with a deadly weapon, was intentional or willful...(W)hen the evidence, taken as a whole, raises a reasonable doubt in the minds of the jury as to whether the killing was accidental or intentional, they must acquit the accused, for the reason that the state has failed to sustain its case. In other words, 'if, on the whole evidence, the jury are left in reasonable doubt as to the intent of the defendant, they can not convict of the crime.' Whart.Cr.Ev. § 764, and note 1... (T)he claim that the killing was accidental goes to the very gist of the charge, and denies all criminal intent, and throws on the prosecution the burden of proving such intent beyond a reasonable doubt." State v. Cross, 42 W.Va. 253, at 258, 24 S.E. 996 (1896).

"Where accidental killing is relied upon as a defense, the accused is not required to prove such defense by a preponderance of the evidence, because there is a denial of intentional killing, and the burden is upon the state to show that it was intentional, and if, from a consideration of all the evidence, both that for the state and the prisoner, there is a reasonable doubt as to whether or not the killing was accidental or intentional, the jury should acquit... (W)here accidental killing is relied upon, the prisoner admits the killing, but denies that it was intentional. Therefore, the state must show that it was intentional, and it is clearly error to instruct the jury that the defendant must show that it was an accident by a preponderance of the testimony,..." State v. Legg, 59 W.Va. 315, 53 S.E. 545, at 550 (1906).

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[2] "Where one, upon an indictment for murder, relies upon accidental killing as a defense, and there is evidence tending in an appreciable degree, to establish such defense, it is error to refuse to instruct the jury that if they believe from the evidence that the killing was the result of an accident, they should find the defendant not guilty. Syl. pt. 10, State v. Legg, 59 W.Va. 315, 53 S.E. 545 (1906)." Syl. pt. 4, State v. Evans, 172 W.Va. 810, 310 S.E.2d 877 (1983).

COMMENTS

Accidental death / felony-murder

"The crime of felony-murder in this State does not require proof of the elements of malice, premeditation or specific intent to kill. It is deemed sufficient if the homicide occurs accidentally during the commission of, or the attempt to commit, one of the enumerated felonies." Syl. pt. 7, State v. Sims, 162 W.Va. 212, 248 S.E.2d 834 (1978).

Accidental death / involuntary manslaughter

"An instruction on accidental killing does not preclude a verdict of guilty of involuntary manslaughter since involuntary manslaughter requires an act, or the performance of an act, that is 'unlawful and culpable and something more than the simple negligence, so common in everyday life, in which there is no claim that anyone has been guilty of wrong-doing.' State v. Lawson, 128 W.Va. 136, at 148, 36 S.E.2d 26 at 32 (1945)." State v. Evans, 172 W.Va. 810, 310 S.E.2d 877, at 881 (1983).

Accidental death / self-defense

See, State v. Cobb, 166 W.Va. 65, 272 S.E.2d 467 (1980); State v. Green, 157 W.Va. 1031, 206 S.E.2d 923 (1974).

In general

"'Where, upon a trial for murder, the killing is shown to have been done with a deadly weapon, and the defendant relies upon accidental killing as an excuse, it is a question for the determination of the jury as to whether the killing was intentional, or the result of an accident. And when the evidence tends, in an appreciable degree, to establish both theories, it is the duty of the court to instruct the jury presenting both, if asked to do so.' State v. Legg, 59 W.Va. 315, 53 S.E. 545, 3 L.R.A.N.S., 1152." State v. Shaffer, 138 W.Va. 197, 75 S.E.2d 217 (1953).

See, State v. White, 171 W.Va. 658, 301 S.E.2d 615 (1983).

DEFENSES
BONA FIDE CLAIM OF RIGHT
ROBBERY/LARCENY

A defendant may assert as a defense to a robbery or larceny charge, that he had a bona fide claim of ownership to the specific property stolen and therefore, that he had no intent to steal. However, this defense is not available where the defendant took money or other property, to which he did not have a specific ownership claim, in satisfaction of a debt.[1]

If you have a reasonable doubt whether or not the defendant had a bona fide claim of ownership to the specific property stolen and therefore, had no intent to steal, you must find the defendant not guilty.

FOOTNOTES

[1] Syllabus point 2, State v. Winston, 170 W.Va. 555, 295 S.E.2d 46 (1982).

In Winston, the Court notes the defense of "bona fide claim of right" used in State v. Bailey, 63 W.Va. 668, 60 S.E. 785 (1908) and State v. Flanagan, 48 W.Va. 115, 35 S.E. 862 (1900) involved the recovery of specific property to which the owner claimed title. A taking in satisfaction of a debt, as in Winston, is not a claim of ownership to any specific property and therefore does not defeat a robbery conviction.

COMMENT

1. One who takes property in good faith under fair color or claim of title, honestly believing he is the owner and has a right to take it, is not guilty of larceny, even though he is mistaken in such belief, since in such case the felonious intent is lacking. State v. Kelly, 175 W.Va. 804, 338 S.E.2d 405 (1985).

2. Under the circumstances of this case, if the defendant in good faith believed that the goods with the larceny of which he is charged were the property of the ___, did not enter the milk house with the intent to steal the goods, and therefore could not be convicted of the charge. State v. Flanagan, 48 W.Va. 115, 35 S.E. 862 (1900).

3. "A number of jurisdictions have adopted such a rule (that a 'bona fide claim of right' to property can defeat a charge of robbery) on the theory that the animus furandi or intent to steal does not exist when a person takes property under the belief that he has a bona fide claim to it. This is upon the theory that the intent to steal is an essential element of the crime of robbery." State v. Winston, 170 W.Va. 555, 295 S.E.2d 46, 49 (1982).

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4. "If a person takes property of another under an honest belief of right in himself to do so, he is not guilty of larceny thereof, even though he took it with knowledge of the adverse claim of such other person, and his own claim ultimately prove to be untenable." Syllabus Point 2, State v. Bailey, 63 W.Va. 668, 60 S.E. 785 (1908). Syl. pt. 1, State v. Kelly, 175 W.Va. 804, 338 S.E.2d 405 (1985).

5. Facts and circumstances indicating lack of confidence in the claim of right under which property has been taken and carried away, and determination to defeat the adverse claim by putting the property beyond the reach of legal process, such as concealment, disposition or destruction thereof, tend to prove lack of good faith on the part of the taker. Syllabus point 4, State v. Bailey, 63 W.Va. 668, 60 S.E. 785 (1908).

6. "Whether a claim of right under which property has been so taken was bona fide or only pretended is generally a question of fact for the jury." Syl. pt. 3, State v. Bailey, 63 W.Va. 668, 60 S.E. 785 (1908).

DEFENSES
DURESS OR COERCION

In general, an act that would otherwise be a crime may be excused if it was done under compulsion or duress, because there is then no criminal intent. The compulsion or coercion that will excuse an otherwise criminal act must be present, imminent, and impending, and such as would induce a well-grounded apprehension of death or serious bodily harm if the criminal act is not done; it must be continuous; and there must be no reasonable opportunity to escape the compulsion without committing the crime. A threat of future injury is not enough.[1]

If the evidence in the case leaves you with a reasonable doubt that the defendant acted willfully and voluntarily, and not as a result of coercion, compulsion or duress as just explained, then it is your duty to find the defendant not guilty.[2]

FOOTNOTES

[1] Syl. pt. 1, State v. Tanner, 171 W.Va. 529, 301 S.E.2d 160 (1982); State v. Lambert, 173 W.Va. 60, 312 S.E.2d 31 (1984).

[2] State v. Tanner, supra.

COMMENTS

1. "At common law, duress was generally recognized as a defense, except against charges involving taking the life of an innocent person. This is, of course, consistent with a fundamental premise of our criminal law that a person cannot be criminally punished for acts not done voluntarily...

"...If the evidence raised a reasonable doubt about his criminal intent to commit the offense charged, it would be a valid legal defense." State v. Tanner, supra, at 163.

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

DEFENSES
INTOXICATION / DRUG USE [1]

Voluntary intoxication is generally never an excuse for a crime. However, where a certain state of mind or intent is an essential element of the crime, an accused is not guilty if, at the time of the commission of the alleged criminal act, he was so intoxicated that he was unable to form the essential intent or have the essential mental state.

In this case, the defendant is charged with _____. One of the essential elements of _____ is _____ (e.g. specific intent to kill, acting with malice, premeditation, or deliberation). The defendant contends at the time of the alleged offense, he was unable to _____, because he was intoxicated.

If you find the defendant was incapable of _____ because he was intoxicated, then you must find the defendant not guilty of _____.

If you have any reasonable doubt as to whether or not the defendant was so intoxicated that he was unable to _____, you must find the defendant not guilty of _____.

FOOTNOTES

[1] In State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990), the following instructions on intoxication were given:

Footnote 7 - State's instruction number 7 states the intoxication defense as set out in State v. Brant, 162 W.Va. 762, 766-67, 252 S.E.2d 901, 903-04 (1979): "The Court instructs the jury that it is no defense to a criminal act that the defendant's intoxication or use of drugs reduced his or her inhibitions, making the commission of a criminal act more likely. Further, a defendant's claim of intoxication or drug use can never be used as a defense when the defendant claims that his or her capacity to control his or her actions were diminished, but can only be used when there is demonstrated a total lack of capacity so that the defendant's bodily machine completely failed. Furthermore, for intoxication to be used as a defense where a weapon is used, it must affirmatively appear that the defendant had no predisposition to commit the crime or to engage in aggressive anti-social conduct which the intoxication merely brought to the forefront. (emphasis in original).

Footnote 8 - The defendant's instruction number 11 given to the jury concerning the intoxication defense stated the law according to State v. Keeton, 166 W.Va. 77, 272 S.E.2d 817 (1980) and was as follows: "The Court

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instructs the jury that if you believe from the evidence that Johnny Miller killed Lorelei Reed as charged in the indictment, and at the time of such killing Johnny Miller was under the influence of alcohol voluntarily taken by him, then such intoxication is in law no excuse for the act done by Johnny Miller unless you believe from the evidence that such intoxication was such as did, in fact, deprive him at the time of the killing of the element of premeditation, in which event you can find Johnny Miller guilty of no greater offense than murder in the second degree."

The Court found both instructions were correct statements of law, but cautioned that the law set forth in Brant was limited to the facts of that case which revealed a total absence of malice on the part of the defendant and demonstrated appellant's total lack of capacity due to intoxication. Although the Court found no error in giving the Brant instruction, they found courts should normally give this type of instruction only when faced with facts similar to the facts in that case. The preferable instruction was found in defendant's instruction 11 based on syl. pt. 2 of Keeton. See COMMENTS, number 1, below.

COMMENTS

1. "'Voluntary drunkenness is generally never an excuse for a crime, but where a defendant is charged with murder, and it appears that the defendant was too drunk to be capable of deliberating and premeditating, in that instance intoxication may reduce murder in the first degree to murder in the second degree, as long as the specific intent did not antedate the intoxication.' Syllabus Point 2, State v. Keeton, 166 W.Va. 77, 272 S.E.2d 817 (1980)." Syl. pt. 8, State v. Hickman, 175 W.Va. 709, 338 S.E.2d 188 (1985). State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990). Syl. pt. 2, State v. Bush, (No. 21899) (3/25/94).

"'Intoxication to reduce an unlawful homicide from murder in the first degree, must be such as to render the accused incapable of forming an intent to kill, or of acting with malice, premeditation or deliberation.' Syl. pt. 4, State v. Burdette, 135 W.Va. 312, 63 S.E.2d 69 (1950)." Syl. pt. 3, State v. Keeton, 166 W.Va. 77, 272 S.E.2d 817 (1980).

"Where there is evidence in a murder case to support the defendant's theory that his intoxication at the time of the crime was such that he was unable to formulate the requisite intent to kill, it is error for the trial court to refuse to give a proper instruction presenting such a theory when requested to do so." Syl. pt. 4, State v. Keeton, 166 W.Va. 77, 272 S.E.2d 817 (1980).

The Court found the instruction offered by the defendant on intoxication was incorrect, but the court's failure to give some instruction on intoxication when it was the defendant's primary defense was plain error.

"While it is true that voluntary drunkenness does not ordinarily excuse a crime, State v. Robinson, 20 W.Va. 713 (1882), it may reduce the degree of the crime or negate a specific intent. Wheatley v. U.S., 159 F.2d 599 (4th Cir. 1946). The trial court's denial of the requested instruction regarding the defendant's ability to form the proper intent for first degree murder erased the

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possibility of a charge of second degree murder. Our Court has stated that, 'if a sane man, not having voluntarily made himself drunk for the purpose of committing crime, does, while in a state of such gross intoxication as to render him incapable of deliberation, commit a homicide, he is guilty of no higher offense than murder in the second degree.' State v. Kidwell, 62 W.Va. 466, 471, 59 S.E. 494, 496 (1907).

"...As a general rule we have held that the level of intoxication must be 'such as to render the accused incapable of forming an intent to kill, or of acting with malice, premeditation or deliberation,' syl. pt. 1, State v. Davis, 52 W.Va. 224, 43 S.E. 99 (1903); however, where the weapon was non-deadly, namely, an automobile rather than a knife or a gun the conclusion that homicide was intended is not as readily reached. State v. Keeton, at 820, 821.

2. "...In effect, on the record before us, we must conclude that the human machine broke down so completely that no malice could be inferred notwithstanding the use of a deadly weapon."

"We do not in any way imply by the holding of this case that we are departing from our traditional rule which denies the legitimacy of intoxication as a defense or mitigating circumstance in a criminal case. That rule is founded on the wise recognition that in most cases voluntary intoxication reduces the individual's inhibitions to anti-social activity making the commission of a criminal act more likely. A rule which permits a defendant to plead that because of his intoxication his capacity to control himself or to form a specific intent was diminished would provide every would-be malefactor with a convenient excuse which would appear sufficiently reasonable to confuse any jury. Heretofore, however, we have permitted intoxication to be considered by the jury to reduce first degree murder to second degree murder because it can negate the element of premeditation and deliberation required for a conviction of first degree murder, State v. Robinson, 20 W.Va. 713 (1882), and that rule will continue to apply. Furthermore, it has generally been held that intoxication will serve as a defense to a specific intent crime such as burglary, when it appears that the defendant was so incapacitated that he could not formulate the intent to commit a felony after breaking and entering. State v. Phillips, 80 W.Va. 748, 93 S.E. 828 (1917). Total incapacitation is what confronts us in this case... State v. Brant, 162 W.Va. 762, 252 S.E.2d 901, at 903 (1979).

"...What makes the case before us different from almost every other case in which intoxication is raised is that in the case before us there was no evidence of malice apart from the use of a deadly weapon and there was affirmative evidence of absence of malice presented by the State's own witnesses; therefore, the intoxication did not have the effect of reducing the appellant's inhibitions so that preexisting malice or disposition to anti-social conduct could rise to the surface and be acted upon, as is the usual case with intoxication..."

"...intoxication can never be used as a defense where it is alleged that there was diminished capacity except where previous exceptions apply, but can only be used when there is demonstrated a total lack of capacity such that the bodily machine completely fails. Furthermore, where a weapon is involved it must affirmatively appear that the defendant had no predisposition to commit the crime or to engage in aggressive anti-social conduct which the voluntary intoxication brought to the forefront." State v. Brant, supra, at 904.

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3. "...The law seems clearly to be that only where the defendant is intoxicated to such a degree as to be thereby rendered incapable of forming an intent to kill, or willful premeditation and deliberation, will the degree of homicide be reduced from murder in the first degree, because of such intoxication..." State v. Burdette, 135 W.Va. 312, 63 S.E.2d 69 (1950).

The Court instructs the jury that, if you believe from the evidence in this case, beyond a reasonable doubt, Harry Atlee Burdette and Fred Painter, acting together, or the defendant Harry Atlee Burdette by himself, willfully, maliciously, deliberately and premeditatedly killed the deceased, Edward O'Brien, you should find the defendant, Harry Atlee Burdette, guilty of murder in the first degree, although he may have been drinking intoxicating liquors before and at the time of the killing, unless you further believe from the evidence that at the time of the killing he was so grossly intoxicated that he did not know he was doing wrong nor did not know what the consequence of his act might be. State v. Burdette, supra. State v. Corey, 114 W.Va. 118, 125, 171 S.E. 114 (1933).

4. In the trial for robbery, defendant's instruction number 16 was given. Although intoxication or drunkenness will never provide a legal excuse for the commission of a crime, the fact that a person may have been intoxicated at the time of the commission of a crime may negate the finding of specific intent. So evidence that a defendant acted while in a state of intoxication is to be considered in determining whether or not the defendant acted with specific intent as charged. If the evidence in the case leaves the jury with a reasonable doubt whether, because of the degree of intoxication, or the use of medication or a combination of both, the mind of the accused was capable of forming, or did form, specific intent to commit the crime charged, the jury should acquit the accused. See footnote 6, State v. Vance, 168 W.Va. 666, 285 S.E.2d 437 (1981).

5. Intoxication/self-defense - The court instructs the jury that if you believe from the evidence, that John M. Greer, the brother of the prisoner, provoked the deceased to make an assault upon him, the said John M. Greer, then said John M. Greer was bound to retreat, as far as possible, consistent with his own safety at the time, before the prisoner, James A. Greer, was justifiable in killing the deceased to save the life of said John M. Greer, or to protect him, said John M. Greer, from great bodily harm,...unless the jury believe from the evidence, that the said John M. Greer was so drunk as to be mentally incapable of knowing that it was his duty to retreat, or physically unable to retreat. State v. Greer, 22 W.Va. 800, 818 (1883).

6. "In a case in which specific intent to do a forbidden act is essential to the commission of the offense, intoxication to the extent of deprivation of reason and will power constitutes a defense, if the act forbidden has not been completely performed so as legally to warrant an inference of such intent from the actual perpetration thereof." Syl. pt. 1, State v. Phillips, 80 W.Va. 748, 93 S.E. 828 (1917).

"Such intoxication, if established by proof, precludes a finding of guilt of the breaking and entering of a building with intent to steal, when the proof shows only a breaking and entering, but not an actual taking nor any attempt to take." Syl. pt. 2, State v. Phillips, 80 W.Va. 748, 93 S.E. 828 (1917).

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"If, in such case, the proof of temporary dementia occasioned by intoxication is so full, clear, and decisive as to leave no room for a reasonable opinion to the guilty, contrary, the trial court should direct the jury to find the defendant not if requested to do so, and, if it has failed in that respect, it should sustain a motion, made in due time, to set aside the verdict and grant a new trial." Syl. pt. 3, State v. Phillips, 80 W.Va. 748, 93 S.E. 828 (1917).

Offenses in which specific intent to do the forbidden act is not an essential element were never excused, at common law, by mere drunkenness of the perpetrator of the act, even though it was so extreme as to wholly deprive him of his reason. (cites omitted) State v. Phillips, 80 W.Va. 748, 93 S.E. 828, 829 (1917).

7. " A person, who is intoxicated, may yet be capable of deliberation and premeditation; and if the jury believe from all the evidence in the case, that the prisoner willfully maliciously, deliberately and premeditatedly killed the deceased, they should find him guilty of murder in the first degree, although he was intoxicated at the time of the killing." Syl. pt. 3, State v. Robinson, 20 W.Va. 713 (1882).

"A person who has formed a willful, deliberate and premeditated design to kill another, and in pursuance of such design voluntarily makes himself drunk for the purpose of nerving his animal courage for the accomplishment of design, and then meets the subject of his malice, when he is so drunk as not then to be able to deliberate on and premeditate the murder, and kills the person, it is murder in the first degree." Syl. pt. 4, State v. Robinson, 20 W.Va. 713 (1882).

"A person, whether he be an habitual drinker or not, cannot voluntarily make himself so drunk as to become on that account irresponsible for his conduct during such drunkenness. He may be perfectly unconscious of what he does; and yet he is responsible. He may be incapable of express malice; but the law implies malice in such a case from the nature of the instrument used, the absence of provocation and other circumstances, under which the act is done." Syl. pt. 5, State v. Robinson, 20 W.Va. 713 (1882).

"If a person kills another without provocation and through reckless wickedness of heart, but at the time of so doing his condition from intoxication is such as to render him incapable of doing a willful, deliberate and premeditated act, he is guilty of murder in the second degree." Syl. pt. 6, State v. Robinson, 20 W.Va. 713 (1882).

"Where a statute establishes degrees of the crime of murder, and provides, that 'all willful, deliberate and premeditated, killing shall be murder in the first degree,' evidence, that the accused was intoxicated at the time of the killing, is competent for the consideration of the jury upon the question, whether the accused was in such a condition of mind as to be capable of deliberation and premeditation." Syl. pt. 7, State v. Robinson, 20 W.Va. 713 (1882).

"As between the two offenses of murder in the second degree and manslaughter the drunkenness of the offender can form no legitimate matter of enquiry; the killing being voluntary, the offense is necessarily murder in the second degree, unless the provocation was of such a character, as would at common law reduce the crime to manslaughter; for which latter offense a drunken man is equally responsible as a sober one." Syl. pt. 8, State v. Robinson, 20 W.Va. 713 (1882).

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"An act done in accordance with a purpose previously formed is not necessarily an act done in pursuance of such previously formed purpose." Syl. pt. 9, State v. Robinson, 20 W.Va. 713 (1882).

"If a man is temporarily insane from the effect of intoxication, then existing, of course it is impossible for him while in such a mental condition to deliberate and premeditate; and being in such a condition of mind, not having formed a previous purpose to kill his victim and in pursuance of such purpose, made himself voluntarily drunk to accomplish his design, he could not be convicted of murder in the first degree." Syl. pt. 10, State v. Robinson, 20 W.Va. 713 (1882).

"...We think we are fully authorized under the authorities to say, that drunkenness is no excuse for crime; at common law the implied malice from his act would doom him to the scaffold, although he was too drunk, when he committed the deed, to harbor express malice. Now the only change made in the stringent rule of the common law is, that where under a statute, in order to constitute murder in the first degree, deliberation and premeditation are required upon the question of whether there was on the part of the prisoner deliberation and premeditation, the jury may consider the fact, that he was intoxicated at the time of the killing. The change goes no further. Upon the question of whether the prisoner is guilty of murder in the second degree or manslaughter, the jury are not permitted to consider the drunkenness of the prisoner at all." State v. Robinson, 20 W.Va. 713, 740 (1882).

"The third instruction is: 'If the jury believe from the evidence beyond a reasonable doubt, that the prisoner, though intoxicated at the time of firing the shot, which caused the death of the deceased, was capable of knowing the nature and consequences of his act, and if he did know, then that he knew he was doing wrong, and that so knowing he fired the shot at the deceased with the willful, deliberate and premeditated purpose of killing him, they will find the prisoner guilty of murder in the first degree.' This instruction is correct as we have already seen..."

8. "... one who has voluntarily become intoxicated and then, while in his drunken state, committed a crime, may not ordinarily raise his voluntary intoxication as a defense to criminal liability. State v. Bailey, 159 W.Va. 167, 220 S.E.2d 432 (1975)." In Re Matherly, 177 W.Va. 507, 354 S.E.2d 603, at 605 (1987).

9. Syl. pt. 5 - Chronic alcoholism is a defense to a charge of public intoxication. Upon a showing that an accused is a chronic alcoholic he is to be accorded all of the procedural safeguards that surround those with mental disabilities who are accused of crime. (addendum on Rehearing). State ex rel. Harper v. Zegeer, 170 W.Va. 743, 296 S.E.2d 873 (1982).

10. State v. Boyd, 167 W.Va. 385, 280 S.E.2d 669 (1981) - Footnote 11, "On appeal the state contends that the insanity defense offered by the appellant is without merit and should be stricken under the proposition that voluntary drug intoxication is no defense to a criminal act. Although we agree that voluntary drug intoxication is no defense to a criminal act, see Annot. 73 A.L.R.3d 98 (1976), we fail to see how that rule applies to the facts of this case.

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There is a distinction to be made between the criminal responsibility of an individual who is intoxicated at the time of the offense, as a result of the voluntary use of drugs, and an individual who is suffering from a mental disease at the time of the offense caused by the long-term voluntary use of intoxicating drugs. The law in this State is that a defendant will not be deemed criminally responsible if, at the time of the offense, he is suffering from a mental disease or defect to such an extent that he cannot appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. State v. Grimm, 156 W.Va. 615, 195 S.E.2d 637 (1973). The origin of the disease or defect is irrelevant for purposes of this rule."

11. "It was clearly not error for the trial court to refuse the defendant's instruction number five which instructs the jury that to find the defendant guilty, the State must prove that the defendant must not have been so drunk, or otherwise incapacitated, as to have been incapable of formulating an intent to steal. Voluntary drunkenness will not ordinarily excuse a crime. Syllabus Point 8, State v. Bailey, 159 W.Va. 167, 220 S.E.2d 432 (1975)." State v. Vance, 168 W.Va. 666, 285 S.E.2d 437, 444 (1981).

12. State v. Rowe, 168 W.Va. 678, 285 S.E.2d 445, 447 (1981) - "... In this State voluntary intoxication has never been allowed as a defense of diminished capacity: it will only reduce first-degree murder to second-degree murder."

13. See State v. Simmons, 172 W.Va. 590, 309 S.E.2d 89, 97 (1983) for discussion of diminished capacity defense.

14. State v. Less, 170 W.Va. 259, 294 S.E.2d 62, 69 (1981) - "The appellant also assigns as error the giving of the following instruction: 'The Court instructs the jury that a person cannot voluntarily make himself drunk, intending to commit a crime, then claim immunity from punishment because of his condition when he committed the crime, the law not permitting a man to avail himself of the excuse of his own vice as a shelter from the legal consequences of such crime.'

It was not error for the trial judge in this case to give an instruction that correctly incorporates the law that a person ... cannot voluntarily make himself so drunk as to become on that account irresponsible for his conduct during such drunkenness: Syl. pt. 5, State v. Robinson, 20 W.Va. 713 (1882). See also State v. Brant, 162 W.Va. 762, 252 S.E.2d 901 (1979); State v. Bailey, 159 W.Va. 167, 220 S.E.2d 432 (1975) overruled on other grounds, State ex rel. D.D.H. v. Dostert, 165 W.Va. 448, 269 S.E.2d 401 (1980)."

15. See, State v. McCarty, 184 W.Va. 524, 401 S.E.2d 457 (1990).

DEFENSES
ENTRAPMENT [1]

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers or their agents to commit a crime, he is a victim of entrapment, and the law as a matter of policy forbids his conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provided what appears to be a favorable opportunity is not entrapment...[2] If, then you should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit crimes such as are charged in the indictment, whenever opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then you should find that the defendant is not a victim of entrapment.

On the other-hand, if the evidence in the case should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit an offense of the character charged, apart from the inducement or persuasion of some officer or agent of the government, then it is your duty to find him not guilty.

FOOTNOTES

[1] Footnote, State v. Taylor, 175 W.Va. 685, 337 S.E.2d 923, at 925 (1985). The Court notes, this instruction given by the State, appears to be widely accepted as a correct and complete statement of the law - See 1 F. Cleckley, Handbook on West Virginia Criminal Procedure I-409 (1985).

See Jacobson v. U.S., 112 S.Ct. 1535 (1992).

[2] "...For example, when the government suspects that a person is engaged in illicit sale of narcotics, it is not entrapment for a government agent to pretend to be someone else and to offer, either directly or through an informer or other deocy (sic), to purchase narcotics from the suspected person..." Footnote, State v. Taylor, 175 W.Va. 685, 337 S.E.2d 923 (1985).

COMMENTS

Generally

This Court, beginning with State v. Piscoineri, 68 W.Va. 76, 69 S.E. 375 (1910), has long recognized the defense of entrapment.

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Definition

See Jacobson v. U.S., 112 S.Ct. 1535 (1992).

Entrapment, as a defense to criminal prosecution, occurs where the design or inspiration for the offense originates with law enforcement officers who procure its commission by an accused who would not have otherwise perpetrated it except for the instigation or inducement by the law enforcement officers. Syl. pt. 3, State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976); Syl. pt. 1, State v. Maynard, 170 W.Va. 40, 289 S.E.2d 714 (1982); Syl. pt. 1, State v. Taylor, 175 W.Va. 685, 337 S.E.2d 923 (1985); Syl. pt. 3, State v. Harshbarger, 170 W.Va. 401, 294 S.E. 2d 254 (1982); Syl. pt. 1, State v. Knight, 159 W.Va. 924, 230 S.E.2d 732 (1976); Syl. pt. 1, State v. Ashworth, 170 W.Va. 205, 292 S.E.2d 615 (1982).

By traditional definition, entrapment occurs when police officers induce a person to commit a crime not contemplated by such person, for the mere purpose of prosecuting him. The defense may be asserted where the criminal design originates in the mind of the police rather than in that of the accused. State v. Basham, 159 W.Va. 404, 223 S.E.2d 53, at 58 (1976).

Entrapment may be defined as the inducement of one to commit a crime not contemplated by him, for the mere purpose of instituting criminal prosecution against him. In order for a defendant to successfully invoke this doctrine, it must appear that the criminal intent - 'the genesis of the idea' - was conceived by the entrapping person, and that the accused, without prior intention to commit the crime, was inveigled into its commission by the entrapper. State v. Jarvis, 105 W.Va. 499, 143 S.E. 235 (1928); quoted in State v. Basham, supra, at 58.

It is perfectly proper for police officers to afford opportunities for the commission of crime without thereby prejudicing the subsequent prosecution of the person who commits the offense. "Artifice and stratagem may be employed to catch those engaged in criminal enterprises." But when the limits of proper crime detection are exceeded and the inspiration for an unlawful scheme originates with police officers themselves who then persuade an otherwise innocent person to commit crime or to participate in its commission, the State is estopped by public policy from pursuing a prosecution for the conduct so induced by its own agents. Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed 413 (1932). Quoted in State v. Basham, 159 W.Va. 404, 223 S.E.2d 53, at 58 (1976); See, State v. Nelson, 434 S.E.2d 697 (W.Va. 1993).

In State v. Nelson, 434 S.E.2d 697 (W.Va. 1993), the jury was instructed as follows:

> The Court instructs the jury that there is nothing improper in the use, by the Sheriff's Department, of decoys, undercover agents and informants to invite the exposure of willing criminals and to present an opportunity to one willing to commit a crime. If you believe the Sheriff's Department did nothing more than afford an opportunity for the commission of the crime charged against (the defendant) entrapment has not occurred.

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The Court found this instruction was consistent with the teaching of State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976) and with general principles of the law on entrapment. In addition, the Court found the court also gave instructions to the jury which set forth the defense of entrapment and the burden of proof for entrapment. The Court found no error.

Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of law-enforcement officials. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958). Quoted in State v. Basham, 159 W.Va. 404, 223 S.E.2d 53, at 58 (1976).

In State v. Nelson, 434 S.E.2d 697 (W.Va. 1993), the defense proposed the following instruction:

> The Court instructs the jury that a law enforcement agent or informant's appeal to sympathy may constitute entrapment where it generates a motive for committing the offense other than ordinary intent. Therefore, if you should find that (the defendant's) motive for committing the offense alleged was generated by a law enforcement agent or informant's appeal to her sympathy, then it is your duty to find her not guilty.

The trial court amended the instruction by deleting the second sentence and giving only the first portion. The Court found no error in such modification.

Inconsistent defenses

"In a criminal case, even though the defendant denies the commission of the offense, he is still entitled to rely on the defense of entrapment if the State injects evidence of entrapment into the case." Syl. pt. 2, State v. Knight, 159 W.Va. 924, 230 S.E.2d 732 (1976).

The general rule is that entrapment is not available as a defense when the accused denies the essential elements of the offense. The Court limited the above exception to cases in which the State's case in chief injects evidence of entrapment into the case.

"Under his pleas of not guilty, a defendant in a criminal case is entitled to have the jury consider, under proper instructions, every theory of defense to which the evidence or the reasonable inferences to be drawn therefrom may entitle him. There is no need to treat the defense of entrapment as an exception requiring the application of a different rule." Syl. pt. 1, State v. Adkins, 167 W.Va. 626, 280 S.E.2d 293 (1981).

See Mathews v. U.S., 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988).

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Subjective / Objective test

"Traditionally, the critical factor in determining whether an accused had been entrapped was whether the unlawful scheme originated with the law enforcement officer or with the accused, a subjective determination which required submission of the issue of entrapment to the jury. State v. Knight, 159 W.Va. 924, 230 S.E.2d 732 (1976); State v. Basham, 159 W.Va. 404, 223 S.E.2d 53 (1976).

"...(W)e have also recognized that the conduct of a law enforcement officer may be so reprehensible as to warrant the trial court in finding entrapment as a matter of law...Syllabus Point 4 of State v. Knight, supra..."

When the defense of entrapment is asserted, the trial court is required to submit that issue to the jury if the evidence gives rise to questions regarding the readiness of the accused to commit the offense or the extent to which a government agent or informer either induced the accused to commit or afforded him opportunity to commit the crime. Syl. pt. 3, State v. Knight, 159 W.Va. 924, 230 S.E.2d 732 (1976). Syl. pt. 2, State v. Ashworth, 170 W.Va. 205, 292 S.E.2d 615 (1982).

A trial court may find, as a matter of law, that a defendant was entrapped, if the evidence establishes, to such an extent that the minds of reasonable men could not differ, that the officer or agent conceived the plan and procured or directed its execution in such an unconscionable way that he could only be said to have created a crime for the purpose of making an arrest and obtaining a conviction. Syl. pt. 4, State v. Knight, 159 W.Va. 924, 230 S.E.2d 732 (1976); State v. Taylor, 175 W.Va. 685, 337 S.E.2d 923 (1985); State v. Hinkle, 169 W.Va. 271, 286 S.E.2d 699 (1982); State ex rel. Paxton v. Johnson, 161 W.Va. 763, 245 S.E.2d 843 (1978); Syl. pt. 4, State v. Nelson, 434 S.E.2d 697 (W.Va. 1993).

The evidence of entrapment was so overwhelming as to show unconscionable government conduct both by the informer and the police undercover trooper, who together initiated the sale and participated actively in consummating it. The circuit court was correct in finding that entrapment was proved as a matter of law. Further, the government evidence of defendant's predisposition to commit the crime was insufficient to submit the issue to the trial jury. State ex rel. Paxton v. Johnson, 161 W.Va. 763, 245 S.E.2d 843 (1978).

Sufficiency of evidence

When a defendant presents evidence of police conduct amounting to entrapment, and the State fails to rebut that evidence or prove defendant's predisposition to commit the crime charged, a trial judge should direct a verdict for defendant as a matter of law. Syl., State v. Hinkle, 169 W.Va. 271, 286 S.E.2d 699 (1982).

Here, the State's failure to call the informer, or explain her absence, supports an inference that her testimony would not have rebutted defendant's.

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Syl. pt. 5, State v. Nelson, 434 S.E.2d 697 (W.Va. 1993) applies Syl., Hinkle, supra. The Court found the evidence in this case does not meet the criteria set forth in State v. Knight, 159 W.Va. 924, 230 S.E.2d 732 (1976) for finding entrapment as a matter of law. The Court found even if the appellant presented some evidence of entrapment, the evidence reveals the State rebutted the evidence by proving the appellant's predisposition to commit the crime charged.

Burden of Proof

When a defendant presents evidence of police conduct amounting to entrapment, and the State fails to rebut that evidence or prove defendant's predisposition to commit the crime charged, a trial judge should direct a verdict for the defendant as a matter of law. Syl., State v. Hinkle, 169 W.Va. 271, 286 S.E.2d 699 (1982).

"The crux of Hinkle's argument is that we should hold that entrapment is a burden-shifting defense like insanity and self-defense. We decline his invitation to adopt that rule." Hinkle, supra, at 700.

DEFENSES
INSANITY
BURDEN OF PROOF

There exists in the trial of an accused a presumption of sanity. However, should the accused offer evidence that he was insane, the presumption of sanity disappears and the burden is on the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time of the offense.[1]

FOOTNOTES

[1] Syl. pt. 2, State v. Milam, 163 W.Va. 752, 260 S.E.2d 295 (1979); Syl. pt. 2, State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981); State v. Massey, 178 W.Va. 427, 359 S.E.2d 865, 872 (1987); Syl. pt. 4, State v. Parsons, 181 W.Va. 131, 381 S.E.2d 246 (1989); Syl. pt. 6, State v. McWilliams, 177 W.Va. 369, 352 S.E.2d 120 (1986); Syl. pt. 1, State v. Rowe, 168 W.Va. 678, 285 S.E.2d 445 (1981); Syl. pt. 6, State v. Adkins, 170 W.Va. 46, 289 S.E.2d 720 (1982); Syl. pt. 3, State v. Bias, 171 W.Va. 687, 301 S.E.2d 776 (1983); Syl., State v. Kinney, 169 W.Va. 217, 286 S.E.2d 398 (1982); State v. Boyd, 167 W.Va. 385, 280 S.E.2d 669 (1981); Syl. pt. 3, State v. Wimer, 168 W.Va. 417, 284 S.E.2d 890 (1981); Edwards v. Leverette, 163 W.Va. 571, 258 S.E.2d 436 (1979); State v. Koon, 440 S.E.2d 442 (W.Va. 1993).

Syl. pt. 3, State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981) - When an accused is relying upon the defense of insanity at the time of the crime charged, the jury should be instructed (1) that there is a presumption the accused was sane at that time; (2) that the burden is upon him to show that he was then insane; (3) that if any evidence introduced by him or by the State fairly raises doubt upon the issue of his sanity at that time, the presumption of sanity ceases to exist; (4) that the State then has the burden to establish the sanity of the accused beyond a reasonable doubt, and, (5) that if the whole proof upon that issue leaves the jury with a reasonable doubt as to the defendant's sanity at that time the jury must accord him the benefit of the doubt and acquit him.

See also, Edwards v. Leverette, 163 W.Va. 571, 258 S.E.2d 436 (1979); State v. Wimer, 168 W.Va. 417, 284 S.E. 890, 895 (1981); State v. Grimm, 165 W.Va. 547, 270 S.E.2d 173 (1980).

COMMENTS

In General

Before an insanity instruction can be given in a criminal case the defendant must present some competent evidence on the subject; the defendant cannot ask the jury simply to consider, as an alternative to guilt or innocence, that

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the defendant could have been insane at the time of the alleged crime. Syl. pt. 4, State v. Schofield, 175 W.Va. 99, 331 S.E.2d 829 (1985).

Sufficiency of State's evidence

See, State v. Parsons, 181 W.Va. 131, 381 S.E.2d 246 (1989); State v. McWilliams, 177 W.Va. 369, 352 S.E.2d 120 (1986); State v. Kinney, 169 W.Va. 217, 286 S.E.2d 398 (1982); State v. Boyd, 167 W.Va. 385, 280 S.E.2d 669 (1981); State v. Wimer, 168 W.Va. 417, 284 S.E.2d 890 (1981); State v. Rowe, 168 W.Va. 678, 285 S.E.2d 445 (1981); State v. Milam, 163 W.Va. 752, 260 S.E.2d 295 (1979); State v. Guthrie, 173 W.Va. 290, 315 S.E.2d 397 (1984); Billotti v. Dodrill, 183 W.Va. 48, 394 S.E.2d 32 (1990); State v. Koon, 440 S.E.2d 442 (W.Va. 1993).

DEFENSES
INSANITY
TEST OF RESPONSIBILITY FOR ACT

One of the issues to be determined by you in this case is whether or not the defendant was sane or insane at the time the alleged offense was committed. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.[1]

If you believe from the evidence beyond a reasonable doubt that the defendant committed all of the elements of the alleged offense, but have a reasonable doubt as to whether or not the defendant, at the time of the commission of the act, was suffering from a mental disease or defect causing him to lack the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law, you should find the defendant not guilty by reason of insanity.

FOOTNOTES

[1] Syl. pt. 2, in part, State v. Myers, 159 W.Va. 353, 222 S.E.2d 300 (1976); Syl. pt. 5, State v. Massey, 178 W.Va. 427, 359 S.E.2d 865 (1987); Syl. pt. 3, State v. Parsons, 181 W.Va. 131, 381 S.E.2d 246 (1989); Syl. pt. 4, State v. Bragg, 160 W.Va. 455, 235 S.E.2d 466 (1977); footnote 4, State v. Samples, 174 W.Va. 584, 328 S.E.2d 191 (1985); State v. Orth, 178 W.Va. 303, 359 S.E.2d 136 (1987).

When a defendant in a criminal case raises the issue of insanity, the test of his responsibility for his act is whether, at the time of the commission of the act, it was the result of a mental disease or defect causing the accused to lack the capacity either to appreciate the wrongfulness of his act or to conform his act to the requirements of the law, and it is error for the trial court to give an instruction on the issue of insanity which imposes a different test or which is not governed by the evidence presented in the case. Syl. pt. 2, State v. Myers, 159 W.Va. 353, 222 S.E.2d 300 (1976).

COMMENTS

TEST TO BE APPLIED - BASED ON MODEL PENAL CODE

"It is appropriate to state here for the guidance of trial courts in this state that the M'Naghten Rule has been justifiably criticized by many courts, as has the Durham Rule and the "irresistible impulse" test. We, therefore, suggest a rule or test to be used in this state in future criminal trials involving a plea

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of insanity which would allow an appropriate balance between cognition and volition to guide the trial courts in their instructions to the jury. We do not adopt any rigid language for the trial courts to use in instructing or charging the jury in such cases, but simply recommend that they adopt an approach based on the Model Penal Code referred to herein and dispense with the more limited test of right and wrong followed in the M'Naghten Rule. We would approve of an instruction to the effect that an accused is not responsible for his act if, at the time of the commission of the act, it was the result of a mental disease or defect causing the accused to lack the capacity either to appreciate the wrongfulness of his act, or to conform his act to the requirements of the law. The scope and extent of the instruction in a case will be governed by the evidence in the case. This, we believe, would be in keeping with the modern thinking of both the medical and legal professions with regard to the problem in cases involving the question of the insanity of the accused." State v. Grimm, 156 W.Va. 615, 195 S.E.2d 637, 647 (1973), overruled on other grounds, State v. Nuckolls, 166 W.Va. 259, 273 S.E.2d 87 (1980). State v. Myers, 159 W.Va. 353, 222 S.E.2d 300 (1976).

"SUBSTANTIAL CAPACITY"

(NOTE: Grimm test - defendant lacks "capacity"; MPC test - defendant lacks "substantial capacity".)

In State v. Duell, 175 W.Va. 233, 332 S.E.2d 246 (1985) an instruction was given in the language of paragraph one of the MPC instruction. The appellant challenged the use of "substantial" capacity as lessening the prosecution's burden of proof. The Supreme Court found that although the insanity instruction incorrectly stated the law under Grimm, it effectively greatened, and not lessened, the burden of the prosecution to prove the appellant sane at the time of the offense. The instruction was incorrect, but favored the appellant. The Court found no error on this issue.

See State v. Koon, 440 S.E.2d 442 (W.Va. 1993). In Koon, a per curiam opinion, the Court seems to apply the "substantial capacity" test although the citations for this standard are an incorrect citation to State v. Myers, and a citation to State v. Parsons. Both Myers and Parsons apply the Grimm defendant lacked "capacity" test.

SCOPE AND EXTENT OF INSTRUCTION GOVERNED BY THE EVIDENCE

In State v. Bragg, 160 W.Va. 455, 235 S.E.2d 466 (1977), instructions containing the language in Grimm were given. The defendant argued there was no issue concerning his appreciation of the wrongfulness of his act and that the instructions should not have included that language. The Court found the instruction approved in State v. Myers, 159 W.Va. 353, 222 S.E.2d 300 (1976) and tacitly approved in State v. Pendry, 159 W.Va. 738, 227 S.E.2d 210 (1976), (overruled in part by Jones v. Warden, 161 W.Va. 168, 241 S.E.2d 914 (1978)); and that there was evidence presented by the State concerning the defendant's appreciation of the wrongfulness of his act. The Court found no error on this issue.

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MENTAL DISEASE OR DEFECT

(NOTE: Paragraph 2 of the MPC which is cited in Grimm, at 645 ("(2) As used in this Article, the terms 'mental disease or defect' do not include any abnormality manifested only by repeated criminal or otherwise antisocial conduct.") is not carried forward in subsequent W.Va. cases).

State v. Milam, 159 W.Va. 691, 226 S.E.2d 433, 440 (1976) - "State's instruction no. 7 contained language which advised the jury that a mental disease or defect must amount to more than a delusion in order to constitute the basis of a finding of not guilty by reason of insanity. The appellant argues that the reference to "delusion" is both confusing and constitutes an improper statement of the law governing the insanity defense. It may well be that this reference to a symptom of severe mental disease is confusing and is not within the scope of the definition of mental disease which we approved in State v. Grimm, 156 W.Va. 615, 195 S.E.2d 637 (1973). However, there was no objection by the defendant to this language at the time of trial and we will not consider an objection to instructions in the first instance before this Court. (cites omitted)."

State v. Massey, 178 W.Va. 427, 359 S.E.2d 865 (1987) - The defendant offered an instruction which would have defined a mental disease or defect as "any abnormal condition of the mind, regardless of its medical label, which... substantially impairs behavior controls." This instruction, which also misapplied the burden of proof on the issue of insanity, was refused. The Court found the instruction was properly refused since it misapplied the burden of proof and since our cases have never accepted a definition of mental disease or defect which is tied to an impairment of "behavior controls". Instead, the Court applied the test used in syl. pt. 2, State v. Myers, 159 W.Va. 353, 222 S.E.2d 300 (1976) to determine a criminal defendant's responsibility for his act.

State v. Boyd, 167 W.Va. 385, 280 S.E.2d 669 (1981) - Footnote 11 - "On appeal the state contends that the insanity defense offered by the appellant is without merit and should be stricken under the proposition that voluntary drug intoxication is no defense to a criminal act. Although we agree that voluntary drug intoxication is no defense to a criminal act, see, Annot., 73 A.L.R.3d 98 (1976), we fail to see how that rule applies to the facts of this case.

"There is a distinction to be made between the criminal responsibility of an individual who is intoxicated at the time of the offense, as a result of the voluntary use of drugs, and an individual who is suffering from a mental disease at the time of the offense caused by the long-term voluntary use of intoxicating drugs. The law in this State is that a defendant will not be deemed criminally responsible if, at the time of the offense, he is suffering from a mental disease or defect to such an extent that he cannot appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. State v. Grimm, 156 W.Va. 615, 195 S.E.2d 637 (1973). The origin of the disease or defect is irrelevant for purposes of this rule."

PUBLIC DEFENDER SERVICES
CRIMINAL JURY INSTRUCTIONS

DEFENSES
INSANITY
(Not guilty by reason of insanity)[1]

NOTE: To be given at request of the defendant [2] or in response to questions by jurors.[3]

If you return a verdict of "not guilty by reason of insanity", the law provides that the court may order this defendant be hospitalized in a mental health facility for a period not to exceed forty days for observation and examination. During the observation period procedures for civil commitment may be initiated before the court having jurisdiction over the individual. The prosecuting attorney of the county within which the crime occurred must be notified of any hearing, conducted within five years of the alleged crime, relating to commitment of the individual, and shall have a right to be heard at any such hearing.[4]

In order for the individual to be committed, the court must make a finding that the individual is mentally ill, retarded or addicted and as a result is likely to cause serious harm to himself or to herself or to others if allowed to remain at liberty. The court must also find that there are no less restrictive alternatives than commitment appropriate for the individual.[5] Once these findings have been made, the court may order the individual to a mental health facility for an indeterminate period, or for a temporary observatory period not exceeding six months.[6]

If the order is for a temporary observation period the court, at any time prior to the expiration of the period, may hold another hearing on the basis of a report by the chief medical officer of the mental health facility where the patient is confined, to determine whether the original order should be modified or changed to an order of indeterminate hospitalization or dismissal of the proceedings.[7]

An order for an indeterminate period expires of its own terms at the expiration of two years, unless prior to the expiration, the Department of Health, upon findings based on an examination of the patient by a physician or a psychologist, extends the order for indeterminate hospitalization.[8]

An involuntarily committed patient cannot be discharged unless the chief medical officer of the mental hospital facility where the patient is confined makes a determination that the conditions justifying involuntary hospitalization no longer exist, or that the individual can no longer benefit from hospitalization.[9] Therefore, in order for the individual to be released, either at the expiration of the temporary observatory period, or at the expiration of the indeterminate period, there must be a showing, based on the sworn testimony of the examining physician or the chief medical officer of the mental health facility, that any likelihood of the defendant causing serious harm to himself or to others if allowed to remain at liberty no longer exists.

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Furthermore, no person committed to a mental health facility subsequent to a verdict of not guilty by reason of insanity, shall be discharged unless the physician in charge gives notice to the committing court and to the prosecuting attorney of the county where the crime occurred. If the court objects to the discharge of the individual, a hearing shall be held at which it must be shown that the individual is not likely to cause serious harm to himself or to others if allowed to remain at liberty, in order for the individual to be discharged. W.Va.Code, 27-6A-4 (1980 Replacement Vol.).

FOOTNOTES

[1] State v. Boyd, 167 W.Va. 385, 280 S.E.2d 669, 683-685 (1981).

An instruction which attempts to explain under what circumstances a criminal defendant who has been involuntarily committed to a mental institution subsequent to a verdict of not guilty by reason of insanity may be discharged from the mental institution must include an adequate and accurate explanation of the law relating to commitment and discharge of involuntary patients at state mental institutions. Syl. pt. 6, State v. Boyd, 167 W.Va. 385, 280 S.E.2d 669 (1981).

"...Boyd requires that any instruction on the disposition of a defendant after a verdict of not guilty by reason of insanity include a complete explanation of the procedure for involuntary commitment and discharge as given in the Code." State v. McWilliams, 177 W.Va. 369, 352 S.E.2d 120, at 127 (1986).

[2] In any case where the defendant relies upon the defense of insanity, the defendant is entitled to any instruction which advises the jury about the further disposition of the defendant in the event of a finding of not guilty by reason of insanity which correctly states the law; however, when the court gives an instruction on this subject which correctly states the law and to which the defendant does not object, the defendant may not later assign such instruction as error. Syl. pt. 2, State v. Nuckolls, 166 W.Va. 259, 273 S.E.2d 87 (1980); Syl. pt. 4, State v. Jackson, 171 W.Va. 329, 298 S.E.2d 866 (1982); Syl. pt. 4, State v. Bias, 171 W.Va. 687, 301 S.E.2d 776 (1983); Syl. pt. 1, State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981); Syl. pt. 1, State v. Lutz, 183 W.Va. 234, 395 S.E.2d 478 (1988); State v. McWilliams, 177 W.Va. 369, 352 S.E.2d 120 (1986).

"In order to prevent this problem in the future, we hold that defense counsel is entitled to argue the consequences of finding a defendant not guilty by reason of insanity. In this regard counsel should be granted the same freedom to draw an instruction on insanity dispositions which we have accorded for parole eligibility. Consequently, as we stated in State v. Wayne, 162 W.Va. 41, 245 S.E.2d 838, 843 (1978), 'we hold that any instruction on this issue is very much a question of trial tactics and that the defendant is entitled to any instruction on the subject which correctly states the law and which he deems will present the proposition in its most favorable light.' Once the court has given an instruction on this subject which correctly states the law, the

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defendant is precluded from later assigning such instruction as error unless he objects." Therefore, syllabus point six of State v. Grimm, 156 W.Va. 615, 195 S.E.2d 637 (1973) which says '(a)n instruction telling the jury the procedure to be followed if it returned a verdict of not guilty by reason of insanity is not a proper instruction, because this procedure is a matter for the court and not the jury', is expressly overruled. State v. Nuckolls, 166 W.Va. 259, 273 S.E.2d 87, 90 (1980).

"A party is not entitled to his own instruction when the trial court's instruction accurately and adequately covers the issue and when the party makes no specific objection to the trial court's instruction." Syl. pt. 3, State v. McWilliams, 177 W.Va. 369, 352 S.E.2d 120 (1986).

State v. Lutz, 183 W.Va. 234, 395 S.E.2d 478 (1988) - Syl. pt. 2, "Where it clearly and objectively appears in a criminal case from statements of the jurors that the jury has failed to comprehend an instruction on a critical element of the crime or a constitutionally protected right, the trial court must, on request of defense counsel, reinstruct the jury." Syllabus Point 2, State v. McClure, 163 W.Va. 33, 253 S.E.2d 555 (1979). (In Lutz the Court found that although the question of disposition on a verdict of not guilty by reason of insanity was not technically a "critical element of the crime", resolution of that issue was clearly critical to the jury in reaching its verdict. The Court found it was reversible error for the judge to deny defendant's motion orally to reinstruct the jury in light of the jury's evident confusion over the law.)

State v. Boyd, 167 W.Va. 385, 280 S.E.2d 669 (1981) - at 685 - We recently held that a criminal defendant, as a matter of right, is entitled to an instruction which advises the jury about his further disposition in the event of a finding of not guilty by reason of insanity. State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981); State v. Nuckolls, 166 W.Va. 259, 273 S.E.2d 87 (1980). However, the court below failed to provide defense counsel with an opportunity to offer an instruction of his own in response to the jury's question, or to object to the court's instruction before it was given, a right which we find implicit in the holdings of Daggett and Nuckolls. Therefore, we must agree with the appellant's contention that the giving of this instruction, especially in light of its inaccuracy and prejudicial effect, constituted reversible error."

[3] See, State v. Nuckolls, 166 W.Va. 259, 273 S.E.2d 87 (1980); State v. Daggett, 167 W.Va. 411, 280 S.E.2d 545 (1981).

[4] W.Va.Code, 27-6A-3 (1974).

[5] W.Va.Code, 27-5-4(j) (1992).

[6] W.Va.Code, 27-5-4(k) (1992).

[7] W.Va.Code, 27-5-4(k)(3) (1992).

[8] W.Va.Code, 27-5-4(k)(4) (1992).

[9] W.Va.Code, 27-7-1 (1980).

DEFENSES
SELF-DEFENSE [1]

If the defendant was not the aggressor, and had reasonable grounds to believe and actually did believe that he was in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force against his assailant, he had the right to employ deadly force in order to defend himself. By 'deadly force' is meant force which is likely to cause death or serious bodily harm.

In order for the defendant to have been justified in the use of deadly force in self-defense, he must not have provoked the assault on him or have been the aggressor. Mere words, without more, do not constitute provocation or aggression.[2]

The circumstances under which he acted must have been such as to produce in the mind of a reasonably prudent person, similarly situated, the reasonable belief that the other person was then about to kill him or to do him serious bodily harm.[3] In addition, the defendant must have actually believed that he was in imminent danger of death or serious bodily harm [3] and that deadly force must be used to repel it.[4]

If evidence of self-defense is present, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find that the State has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty.[5] In other words, if you have a reasonable doubt whether or not the defendant acted in self-defense, your verdict must be not guilty.

FOOTNOTES

[1] E. Devitt and C. Blackmar, Federal Jury Practice and Instructions §§ 41.19 (3rd ed. 1977). Set forth in footnote 8, State v. Kirtley, 162 W.Va. 249, 252 S.E.2d 374 (1979). Noted with approval in State v. Duncan, 168 W.Va. 225, 283 S.E.2d 855 (1981). See Syl. pt. 1, State v. Knotts, 421 S.E.2d 917 (W.Va. 1992); State v. Beegle, 425 S.E.2d 823 (W.Va. 1992).

[2] In any case, the necessity relied on to excuse the killing must not have arisen out of the defendant's own misconduct. State v. Ashcraft, 172 W.Va. 640, 309 S.E.2d 600 (1983).

"The general rule is that a person accused of an assault does not lose his right to assert self-defense, unless he said or did something calculated to induce an attack upon himself." Syl. pt., State v. Smith, 170 W.Va. 654, 295 S.E.2d 820 (1982).

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"The general rule is broadly stated in 6A C.J.S. Assault and Battery § 91 (1975):

The provoking act on the part of accused, depriving him of the right of self-defense, need not be such as would give the party attacking him such right; but, before one accused of assault can be deprived of his right of self-defense on the ground of provoking the difficulty, he must have said or done something, for the purpose of inducing an attack upon him, which was calculated to bring about that result. (Footnote references omitted.)

"Our cases recognize the general common law rule that one who is at fault or who is the physical aggressor can not rely on self-defense; but we have not located a discussion about particular language that may result in forfeiture of the right to claim self-defense."

"Courts elsewhere have seldom discussed this point; but the Supreme Court of Iowa, reversing a second-degree murder conviction, stated the rule as follows:

> 'Defamation or opprobrious epithets, not uttered for the purpose of bringing about opportunity to kill or do great bodily harm do not constitute such an act of aggression or provocation as to deprive the defendant of the right to claim self-defense.' State v. Davis, 209 Iowa 524, 528, 228 N.W. 37, 39 (1929)."

State v. Smith, supra, at 821, 822; State v. Asbury, 187 W.Va. 87, 415 S.E.2d 891 (1992); State v. Knotts, 421 S.E.2d 917 (W.Va. 1992).

Instruction which told the jury the defendant could not justify the killing if he had brought on or begun the difficulty, although with no intent to kill or do bodily injury to the deceased, should have been refused. A man does not lose his right of self-defense unless he has done some wrongful act. Mere innocent or accidental cause of difficulty or combat, permitted by this instruction, is not enough. State v. Taylor, 57 W.Va. 228 at 240, 50 S.E. 247 (1905).

[3] "Imminent danger of serious bodily injury or death is a basic requirement of the law of self-defense." We stated in State v. W.J.B., 166 W.Va. 602, 276 S.E.2d 550, 553 (1981), that:

> '(A) defendant who is not the aggressor and has reasonable grounds to believe, and actually does believe, that he is in imminent danger of death or serious bodily harm from which he could save himself only by using deadly force against his assailant has the right to employ deadly force in order to defend himself.' (cites omitted).

State v. Clark, 175 W.Va. 58, 331 S.E.2d 496, 500 (1985).

"Apprehension of danger, to justify a homicide, must not be based alone on surmises, but there must be coupled therewith some aid on the part of the party, from whom danger was apprehended, evidencing an immediate intention to carry into execution his threats or designs, and the jury are to judge of the reasonable grounds for such apprehension on the part of the defendant from all the facts and circumstances, as they existed at the time of the killing." Footnote 10, State v. Ashcraft, 172 W.Va. 640, 309 S.E.2d 600, 612 (1983).

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See, State v. Plumley, 184 W.Va. 536, 401 S.E.2d 469 (1990); State v. Gibson, 186 W.Va. 465, 413 S.E.2d 120 (1991); State v. Asbury, 187 W.Va. 87, 415 S.E.2d 891 (1992).

"Once the danger has passed and the defendant can no longer reasonably believe that he is in danger, the law does not excuse the taking of a human life." State v. Clark, 175 W.Va. 58, 331 S.E.2d 496, 500 (1985).

"No apprehension of danger previously entertained will justify the commission of the homicide; it must be an apprehension existing at the time the defendant fired the fatal shot." Syl. pt. 6, State v. McMillion, 104 W.Va. 1, 138 S.E. 732 (1927). (See also, State v. Collins, 154 W.Va. 771, 781, 180 S.E.2d 54, 61 (1971).

A person is not justified in shooting or employing a deadly weapon after the adversary has been disarmed or disabled. People v. McBride, 130 Ill. App.2d 201, 264 N.E.2d 446 (1970); 40 C.J.S. Homicide § 131(b) (1944); State v. Clark, 175 W.Va. 58, 331 S.E.2d 496 (1985).

"...The question of the sufficiency of an overt act or hostile demonstration to show a design real or apparent to do him great bodily harm, which would warrant the defendant acting in self-defense, was purely a question for the jury. (In determining this the jury were told) it was their duty to view the whole case from the standpoint of the prisoner and that he had the right to act upon appearances, and if those appearances afforded him reasonable grounds to believe that and that he did believe that he was in danger of death or great bodily harm, and that at the time he fired the shot ...he believed such an act necessary to avoid the apparent danger, to acquit him, although it might afterward turn out that the appearances were false, and that there was neither design to do him serious injury or danger that it would be done." State v. McMillion, 104 W.Va. 1, at 10, 138 S.E.2d 732 (1927).

[4] "The amount of force that can be used in self-defense is that normally one can return deadly force only if he reasonably believes that the assailant is about to inflict death or serious bodily harm; otherwise, where he is threatened only with non-deadly force, he may use only non-deadly force in return." Syl. pt. 1, State v. Baker, 177 W.Va. 769, 356 S.E.2d 862 (1987); State v. W.J.B., 166 W.Va. 602, 276 S.E.2d 550, 554 (1981); State v. Bongalis, 180 W.Va. 584, 378 S.E.2d 449 (1989); Syl. pt. 1, State v. Asbury, 187 W.Va. 87, 415 S.E.2d 891 (1992).

A person has a right to repel force by force in the defense of his person, and if in so doing he used only such force as the necessity, or apparent necessity, of the case required, he is not guilty of any offense, though he kills his assailant in so doing. Footnote 10, State v. Ashcraft, 172 W.Va. 640, 309 S.E.2d 600 (1983); State v. W.J.B., 166 W.Va. 602, 276 S.E.2d 550 (1981); State v. Bowman, 155 W.Va. 562, 184 S.E.2d 314 (1971).

"The foregoing rule on the use of force, however, is merely a bland statement of the general rule that 'the amount of force which (a defendant) may justifiably use must be reasonably related to the threatened harm which he seeks to avoid." W. Lafave and Scott, Criminal Law 392 (1972). "The more particular statement as to the amount of force that can be used in self-defense is that normally one can return deadly force only if he reasonably believes that the assailant is about to inflict death or serious bodily harm; otherwise,

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where he is threatened only with non-deadly force, he may use only non-deadly force in return." (cites omitted). State v. W.J.B., 166 W.Va. 602, 276 S.E.2d 550, 554 (1981). (See syl. pt. 2, State W.J.B., supra, for amount of force occupant of a dwelling may use).

See, State v. Gibson, 186 W.Va. 465, 413 S.E.2d 120 (1991); State v. Beegle, 425 S.E.2d 823 (W.Va. 1992).

[5] "Once there is sufficient evidence to create a reasonable doubt that the killing resulted from the defendant acting in self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense." Syl. pt. 4, State v. Kirtley, 162 W.Va. 249, 252 S.E.2d 374 (1979); State v. Stalnaker, 279 S.E.2d 416 (W.Va. 1981); Syl. pt. 1, State v. Matney, 176 W.Va. 667, 346 S.E.2d 818 (1986); State v. Baker, 177 W.Va. 769, 356 S.E.2d 862 (1987); State v. Schaefer, 170 W.Va. 649, 295 S.E.2d 814 (1982); State v. Mullins, 171 W.Va. 542, 301 S.E.2d 173 (1982); State v. Thayer, 172 W.Va. 356, 305 S.E.2d 313 (1983); State v. Bates, 181 W.Va. 36, 380 S.E.2d 203 (1989); see footnote 14, State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990).

In State v. Miller, 184 W.Va. 492, 401 S.E.2d 237 (1990), the appellant contended it was error for the state to offer a self-defense instruction even though self-defense was not asserted by the appellant at trial. He also argued even if the instruction was appropriate, it was erroneous as a matter of law since it required the defense to prove self-defense by "credible evidence", an impermissible burden. In footnote 14, the Court found they did not condone the use of the instruction given without a Kirtley instruction also, but since a Kirtley instruction was not offered by the defendant at trial and no objection was made to the one given, the issue was waived.

"In State v. Kirtley we adopted the majority rule in America that the defendant need not prove self-defense by a preponderance of the evidence in order to place the burden of proof on the prosecution, but merely must produce sufficient evidence to create a reasonable doubt on the issue." State v. Clark, 171 W.Va. 74, 297 S.E.2d 849, 851 (1982).

"Once the defendant meets his initial burden of producing some evidence of self-defense, the State is required to disprove the defense of self-defense beyond a reasonable doubt." Syl. pt. 6, State v. McKinney, 178 W.Va. 200, 358 S.E.2d 596 (1987); Syl. pt. 8, State v. Gibson, 181 W.Va. 747, 384 S.E.2d 358 (1989); See, State v. Mullins, 171 W.Va. 542, 301 S.E.2d 173, 176 (1982); See, State v. Thayer, 172 W.Va. 356, 305 S.E.2d 313, 316 (1983); State v. Daniel, 182 W.Va. 643, 391 S.E.2d 90 (1990).

See, State v. Knotts, 421 S.E.2d 917 (W.Va. 1992).

COMMENTS

Self-defense as a Matter of Law

Ordinarily the use of self-defense is a jury question, nevertheless, if the jury's verdict is manifestly against the weight of the evidence, then it must be set aside. Syl. pt. 5, State v. McMillion, 104 W.Va. 1, 138 S.E. 732 (1927).

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This is particularly true where the State bears the burden of proving the lack of self-defense beyond a reasonable doubt. State v. Baker, 177 W.Va. 769, 356 S.E.2d 862 (1987). See also, State v. Gialdella, 163 W.Va. 60, 254 S.E.2d 685 (1979); State v. W.J.B., 166 W.Va. 602, 276 S.E.2d 550 (1981).

Duty to Retreat

See footnote 2.

"A man may repel force by force, in defense of his person or his property (home), against one who manifestly endeavors by violence or surprise to commit a known felony upon either, and in these cases is not obliged to retreat, but may pursue his adversary until he has freed himself from all danger. Stoneham v. Commonwealth, 86 Va. 523, 10 S.E. 238 (1889)." State v. Phelps, 172 W.Va. 797, 310 S.E.2d 863 (1983).

What one may lawfully do in defense of himself - when threatened with death or great bodily harm, he may do in behalf of a brother; but if the brother was in fault in provoking an assault, that brother must retreat as far as he safely can, before his brother would be justified in taking the life of his assailant in his defense of the brother. But if the brother was so drunk as not to be mentally able to know his duty to retreat, or was physically unable to retreat, a brother is not bound to stand by and see him killed or suffer great bodily harm, because he does not under such circumstances retreat. It is only the faultless, who are exempt from the necessity of retreating while acting in self-defense. Those in fault must retreat, if able to do so, or for other reasons they are unable to retreat, they will be excused by the law for not doing so. State of West Virginia v. Greer, 22 W.Va. 800, at 819 (1883). Quoted in State v. Saunders, 175 W.Va. 16, 330 S.E.2d 674 (1985).

The duty to retreat arises only in the event the defendant was the original aggressor. A person is not required to risk a retreat from an unjustified threatened attack. State v. Cain, 20 W.Va. 679 (1882); Syl., State v. McCallister, 111 W.Va. 440, 162 S.E. 484 (1932); State v. Zannino, 129 W.Va. 775, 41 S.E.2d 641 (1947).

A person in his own home who is subject to an unlawful intrusion and placed in immediate danger of serious bodily harm or death has no duty to retreat but may remain in place and employ deadly force to defend himself. State v. Preece, 116 W.Va. 176, 179 S.E. 524 (1935); State v. Thornhill, 111 W.Va. 258, 161 S.E. 431 (1931); State v. W.J.B., 166 W.Va. 602, 276 S.E.2d 550 (1981); State v. Phelps, 172 W.Va. 797, 310 S.E.2d 863 (1983).

This right of a person to defend himself in his home without retreating exists even if at the time of the attack the defendant is engaged in an illegal business in his home. State v. Bates, 181 W.Va. 36, 380 S.E.2d 203, 206 (1989).

See, State v. Gibson, 186 W.Va. 465, 413 S.E.2d 120 (1991).

"'[W]hen there is a quarrel between two or more persons and both or all are in fault, and a combat as a result of such quarrel takes place and death ensues as a result; in order to reduce the offense to killing in self-defense, two things must appear from the evidence and circumstances in the case: first, that before the mortal shot was fired the person firing the shot declined further combat, and

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retreated as far as he could with safety; second, that he necessarily killed the deceased in order to preserve his own life or to protect himself from great bodily harm....'" Syl. pt. 6, in part, State v. Foley, 131 W.Va. 326, 47 S.E.2d 40 (1948). Syl. pt. 1, State v. Knotts, 421 S.E.2d 917 (W.Va. 1992).

Defense of Another

"The right of self-defense may be exercised in behalf of a brother or a stranger. Syl. pt. 15, State of West Virginia v. Greer, 22 W.Va. 800 (1883)." Syl. pt. 1, State v. Saunders, 175 W.Va. 16, 330 S.E.2d 674 (1985).

"The validity of a claim of defense of another, like the question of self-defense, is properly a matter for the jury's determination." Syl. pt. 3, State v. Saunders, 175 W.Va. 16, 330 S.E.2d 674 (1985).

See also, State v. Schaefer, 170 W.Va. 649, 295 S.E.2d 814 (1982); State v. Wisman, 93 W.Va. 183, 116 S.E. 698 (1923); State v. Collins, 154 W.Va. 771, 180 S.E.2d 54 (1971); State v. Banks, 99 W.Va. 711, 129 S.E. 715 (1925); State v. Whitt, 96 W.Va. 268, 122 S.E. 742 (1924); State v. Waldron, 71 W.Va. 1, 75 S.E. 558 (1912); State v. Wilson, 145 W.Va. 261, 114 S.E.2d 465 (1960); State v. Zannino, 129 W.Va. 775, 41 S.E.2d 641 (1947).

Defense of Habitation

"The occupant of a dwelling is not limited in using deadly force against an unlawful intruder to the situation where the occupant is threatened with serious bodily injury or death, but he may use deadly force if the unlawful intruder threatens imminent physical violence or the commission of a felony and the occupant reasonably believes deadly force is necessary." Syl. pt. 2, State v. W.J.B., 166 W.Va. 602, 276 S.E.2d 550 (1981).

"The reasonableness of the occupant's belief and actions in using deadly force must be judged in the light of the circumstances in which he acted at the time and is not measured by subsequently developed facts." Syl. pt. 3, State v. W.J.B., 166 W.Va. 602, 276 S.E.2d 550 (1981).

See also, State v. Schaefer, 170 W.Va. 649, 295 S.E.2d 814 (1982).

An instruction given by the court was erroneous in that it failed to fully inform the jury on the law with respect to crime prevention in one's home as a justifiable defense to homicide. The Court noted one of the trial court's instructions failed to mention the alternative justification for the use of deadly force, i.e. prevention or termination of a felony in one's home. State v. Phelps, 172 W.Va. 797, 310 S.E.2d 863 (1983).

The defendant did not urge below nor on appeal that as the co-owner of the bar she had a special standing to utilize self-defense similar to the occupant of a home, so the issue was not addressed by the Court. See syllabus point 7, State v. Laura, 93 W.Va. 250, 116 S.E. 251 (1923). See also State v. Sharpe, 18 N.C. App. 136, 196 S.E.2d 371 (1973); Commonwealth v. Johnston, 438 Pa. 485, 263 A.2d 376 (1970); Annot., 41 A.L.R.3d 584 (1972). Footnote 2, State v. Baker, 177 W.Va. 769, 356 S.E.2d 862 (1987).

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Multiple Assailants

"Where, in a trial for murder, there is competent evidence tending to show that the accused believed, and had reasonable grounds to believe, that he was in danger of losing his life or suffering great bodily harm at the hands of several assailants acting together, he may defend against any or all of said assailants, and it is reversible error for the trial court to refuse to instruct the jury to that effect. Syl. pt. 4, State v. Foley, 128 W.Va. 166, 35 S.E.2d 854 (1945)." Syl., State v. Green, 157 W.Va. 1031, 206 S.E.2d 923 (1974).

Unintentional Killing of Third Party

"If the circumstances are such that they would excuse the killing of an assailant in self-defense, the emergency will be held to excuse the person assailed from culpability, if in attempting to defend himself he unintentionally kills or injures a third person." 40 Am.Jur.2d Homicide § 144. State v. Green, 157 W.Va. 1031, 206 S.E.2d 923, 926 (1974).

See, State v. Cobb, 166 W.Va. 65, 272 S.E.2d 467 (1980).

Resisting Arrest

"In making a lawful arrest of a misdemeanant, or in preventing the escape of one under arrest, an officer is justified in taking the life of the misdemeanant, when he is resisted by him in such manner that the officer believes, upon reasonable grounds, that he is in danger of death or great bodily harm." Syl., State v. Murphy, 106 W.Va. 216, 145 S.E. 275 (1928). State v. Reppert, 132 W.Va. 675, 52 S.E.2d 820, 830 (1949).

Voluntary Manslaughter vs. Self-defense

"The relationship between voluntary manslaughter and a claim of self-defense is based on the degree of provocation, as we stated in State v. Starkey, 161 W.Va. 517, 244 S.E.2d 219, 225 n.7 (1978): 'The term 'provocation' as it is used to reduce murder to voluntary manslaughter, consists of certain types of acts committed against the defendant which would cause a reasonable man to kill.... One of the most common types of provocation is an unprovoked assault on the defendant who responds in the heat of passion by killing the assailant. This ordinarily limits the degree of culpability to voluntary manslaughter. State v. Morris, 142 W.Va. 303, 95 S.E.2d 401 (1956). This situation is to be distinguished from the occurrence where the assault is not only unprovoked, but so extreme that the defendant reasonably views that his life will be taken or that great bodily harm will be done him, and he kills the assailant. Here self-defense, if found, will result in his acquittal. State v. Cain, 20 W.Va. 679, 700 (1882); see also State v. Green, 157 W.Va. 1031, 206 S.E.2d 923, 926 (1974).'" Footnote 2, State v. Clayton, 166 W.Va. 782, 277 S.E.2d 619 (1981).

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Self-defense As a Defense to Assault

"The general rule is that a person accused of an assault does not lose his right to assert self-defense, unless he said or did something calculated to induce an attack upon himself." Syl. pt., State v. Smith, 170 W.Va. 654, 295 S.E.2d 820 (1982).

"The general rule is broadly stated in 6A C.J.S. Assault and Battery § 91 (1975)":

> The provoking act on the part of accused, depriving him of the right of self-defense, need not be such as would give the party attacking him such right; but, before one accused of assault can be deprived of his right of self-defense on the ground of provoking the difficulty, he must have said or done something, for the purpose of inducing an attack upon him, which was calculated to bring about that result. (Footnote references omitted.)

"Our cases recognize the general common law rule that one who is at fault or who is the physical aggressor can not rely on self-defense; but we have not located a discussion about particular language that may result in forfeiture of the right to claim self-defense."

"Courts elsewhere have seldom discussed this point; but the Supreme Court of Iowa, reversing a second-degree murder conviction, stated the rule as follows:

> 'Defamation or opprobrious epithets, not uttered for the purpose of bringing about opportunity to kill or do great bodily harm, do not constitute such an act of aggression or provocation as to deprive the defendant of the right to claim self-defense.'" State v. Davis, 209 Iowa 524, 528 N.W. 37, 39 (1929).

State v. Smith, supra, at 821, 822.

The following instruction, given in Bowman v. Leverette, 169 W.Va. 589, 289 S.E.2d 435 (1982) was found not to use or create any presumptions:

"The Court instructs the jury that mere words, however 'insulting or opprobrious' they may be, communicated directly or indirectly to the defendant, will neither justify or (sic) excuse he defendant from the commission of an assault upon a person, and as a matter of law, where the defendant has committed such an assault with a deadly weapon, proof that the victim or his wife uttered such words is not sufficient provocation to justify such an assault."

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