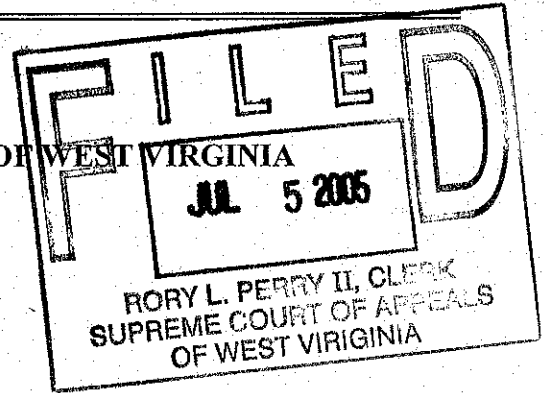


NO. 32500

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

RONNIE LYNN LEGG,

Appellant.

**BRIEF OF APPELLEE
STATE OF WEST VIRGINIA**

**DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL**

**DAWN E. WARFIELD
DEPUTY ATTORNEY GENERAL
STATE BAR ID NO. 3927
STATE CAPITOL, ROOM 26E
CHARLESTON, WEST VIRGINIA 25305
(304) 558-2021**

Counsel for Appellee

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NO. 32500

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**BRIEF OF APPELLEE
STATE OF WEST VIRGINIA**

I.

**KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW**

Ronnie Lynn Legg, defendant below (hereinafter "Appellant") was convicted of violating West Virginia Code § 61-3-52, which provides that any person who willfully and maliciously removes or destroys timber valued at more than one thousand dollars on the lands of another shall be guilty of a felony. The conviction followed a two-day jury trial in the Circuit Court of Greenbrier County, West Virginia, the Honorable James J. Rowe presiding.

By order of December 2, 2003, Appellant was sentenced to 1-2 years in the penitentiary, which sentence was suspended and he was placed on home confinement in lieu of incarceration. It is from this judgment that Appellant now appeals.

This appeal is predicated upon the trial court's denial of Appellant's motion for new trial, which raised the issue of the trial court's use of a jury instruction outlining the elements of "aiding and abetting" after Appellant was indicted as a principal in the first degree.

II.

STATEMENT OF FACTS

Appellant was indicted by the June 2003 Term of the Grand Jury of Greenbrier County, West Virginia for the felony offense of "Wrongful Removal of Timber - More Than \$1,000.00" (Record ["R."] 1.) The indictment alleges that Appellant entered upon land owned by Josh Bruner and cut down two red oak trees valued in excess of \$1,000.00, in violation of West Virginia Code § 61-3-52.

At trial, the evidence was that in August of 2002 Conservation Officer C.R. Johnson received a telephone call from Harmon Boggs. Mr. Boggs served as a caretaker for some property located in western Greenbrier County owned by Josh Bruner, who lived in upstate New York. Mr. Boggs had discovered that two large red oak trees had been cut on the Bruner property (9/16/03 Tr. at 95-97)¹, and had reported this to Officer Johnson.

Officer Johnson checked with various lumber yards in the area, and found that two large red oak logs had been sold to Jayfor Lumber located at Charmco in Greenbrier County. (R. 132, Johnson Testimony at 16-18.) As a result of his investigation, Officer Johnson learned that Appellant and an individual named Bucky Holland had taken two large red oak logs to Jayfor

¹Only selected excerpts of the trial proceedings were transcribed when Appellant filed his petition for appeal, and are contained in the reproduced Record. Subsequent to this Court granting the appeal, Appellant had the remaining trial proceedings transcribed. The transcript of the remainder of Appellant's trial on September 16-17, 2003, is contained in a separate volume from those excerpts.

Lumber, for which Appellant was paid the sum of \$1,624.50. (9/16/03 Tr. at 163, 168-69, 171-72.)

As a result of information obtained at Jayfor, Officer Johnson felt that Appellant and Clinton “Bucky” Holland were suspects. (R. 132, Johnson Testimony at 17.)

Officer Johnson eventually interviewed Holland, and armed with information obtained from Holland, presented the case to the June 2003 Grand Jury, which returned an indictment against Appellant, charging him with cutting down two red oak trees on the property of Josh Bruner.

At trial, Bucky Holland invoked the Fifth Amendment during most of his testimony, but did affirm giving a truthful statement to Officer Johnson in which he implicated Appellant. (R. 130, Holland Testimony at 17, 25.) Holland’s statement was later read into evidence by Officer Johnson. (R. 133, Johnson Recalled Testimony at 9-13.) According to the statement, Appellant cut the trees on the Bruner property, and Holland skidded them over onto his father’s property. (*Id.*) Appellant testified that although he cut down the trees, he did so as a favor to Holland. (9/17/03 Tr. at 14-16.)

Over Appellant’s objection, the State offered an instruction, which was given, providing the jury with the elements of aiding and abetting. (*See* R. 134, Aiding and Abetting Colloquy; R.136, Jury Instruction Excerpt at 12-17.) This instruction forms much of the basis for Appellant’s assignments of error.

III.

ASSIGNMENTS OF ERROR

Appellant assigns the following errors on appeal:

1. The Trial Court erred in ruling that the indictment of the Appellant was valid after the State changed its mind concerning its theory of the case.

2. The Trial Court erred by not making the State elect between its two theories of the case, and instead instructing the jury upon both theories of the case put forth by the State.
3. The Trial Court erred in using a verdict form which makes it impossible to tell which of the two separate felony offenses that the jury was instructed concerning that they found the Appellant guilty.
4. That the evidence was insufficient to establish the location of the boundary line between the Holland property and the Bruner property.
5. The Trial Court erred in denying the Appellant's Motion for a New Trial.

IV.

ARGUMENT

A. **THE INDICTMENT WAS PROPER IN ALL RESPECTS, AND WAS NOT AFFECTED BY THE JURY INSTRUCTIONS.**

1. **The Standard of Review.**

"Generally, the sufficiency of an indictment is reviewed *de novo*. An indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by practical rather than technical considerations." Syl. Pt. 2, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996).

"[A] general indictment as a principal in the first degree shall be sufficient to sustain a conviction as an aider and abettor or as an accessory before the fact." Syl. Pt. 1, in part, *State v. Petry*, 166 W. Va. 153, 273 S.E.2d 346 (1980).

2. **Discussion.**

Appellant was indicted for the felony offense of "Wrongful removal of Timber - More Than \$1000.00," in violation of West Virginia Code § 61-3-52. The statute also provides a lesser-included

misdemeanor offense for the wrongful removal of timber valued at less than \$1,000.00.² At the conclusion of the evidence, the State requested and obtained an instruction on aiding and abetting the wrongful removal of timber. Appellant argues that this is a separate and distinct offense, with differing elements of proof, which rendered the indictment invalid.

The indictment alleges that on or about July 20, 2002, in Greenbrier County, Appellant “willfully, maliciously and feloniously entered upon the lands of another, cut down, injured, removed or destroyed any timber, of the value of more than \$1,000.00, without the permission of the owner or his or her representative.” Specifically, that Appellant cut down two red oak trees located on the property of Josh Bruner in western Greenbrier County. (R. 1.) The evidence at trial was that Appellant cut down the trees, and that the trees were located on the Bruner property. (9/16/03 Tr. at 95-97.) The State offered an instruction that defined “aiding and abetting,” which the court gave to the jury at the appropriate time. (See R. 136, Jury Instruction Excerpt at 12-13.)

Appellant argues that this Court’s ruling in *State v. Wallace*, 205 W. Va. 155, 517 S.E.2d 20 (1999), rendered the indictment herein invalid. He maintains that by offering an instruction regarding aiding and abetting the State changed the elements of the offense, as proscribed by

²West Virginia Code § 61-3-52 provides, in relevant part:

(a) Any person who willfully and maliciously and with intent to do harm unlawfully enters upon the lands of another, cuts down, injures, removes or destroys any timber, without the permission of the owner or his or her representative is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than three times the value of timber injured, removed or destroyed, or confined in the county or regional jail for thirty days, or both: . . . Provided, however, That a person convicted of a first offense violation of the provisions of this section in which the timber is valued at more than one thousand dollars is guilty of a felony and, upon conviction thereof, shall be confined in a correctional facility for not less than one nor more than two years, or fined not more than three times the value of the timber injured, removed or destroyed, or both fined and confined[.] . . .

Wallace. However, the instruction given to the jury changed nothing. As held by this Court in *State v. Johnson*, 179 W. Va. 619, 371 S.E.2d 340 (1988):

In *State v. Petry*, 166 W.Va. 153, 273 S.E.2d 346 (1980), this Court abolished, at the indictment stage, the common law distinctions among principals in the first and second degree and accessories before the fact and held in Syllabus Point 1, in part: “[A] general indictment as a principal in the first degree shall be sufficient to sustain a conviction as an aider and abettor or as an accessory before the fact.” We recently explained that *Petry* also had an impact on the instructional phase of a criminal case in *State v. Reedy*, 177 W.Va. 406, 415, 352 S.E.2d 158, 167 (1986):

“Our holding in *Petry* explicitly abolished the distinctions between principals in the first degree and aiders and abettors at the indictment stage. Therefore, the prohibition against aiding and abetting instructions in instances where the indictment only charges the defendant as a principal in the first degree has also been abolished.”

Johnson, 179 W. Va. at 628, 371 S.E.2d at 349.

In his brief, Appellant cites *Wallace* for the proposition that an indictment must fully and plainly inform a defendant of the charges against him. (Appellant’s Brief at 8.) Appellee concurs. However, this is not what the instant case is about. In *Wallace* the word “burglariously” was omitted from a burglary indictment, and this Court ruled that such an omission was not a fatal defect in the indictment. In the instant case, the indictment charged Appellant as a principal in the first degree, while the proof indicated that he may have been a principal in the second degree – legally a difference without a distinction. See *State v. Johnson, supra*. It is clear from this Court’s ruling in *Johnson* that an aiding and abetting instruction in a case where the defendant has been indicted as a principal in the first degree is perfectly appropriate and is not error. Appellant’s bare assertion that somehow the ruling of *Petry* has “certainly been modified” by *Wallace* is inapt. (See Appellant’s Brief at 8.) It is perhaps noteworthy that Appellant fails to mention this Court’s decision in *Johnson*.

For the reasons set forth herein, Appellant's argument with respect to his first assignment of error is without merit. The decision of the circuit court in this regard should be affirmed.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY INSTRUCTING THE JURY REGARDING AIDING AND ABETTING.

1. The Standard of Review.

A trial court has broad discretion in formulating its charge to the jury, and this Court reviews a challenge to the giving of a specific instruction under an abuse of discretion standard. *State v. Bell*, 211 W. Va. 308, 310, 565 S.E.2d 430, 432 (2002); *State v. Lease*, 196 W. Va. 318, 322, 472 S.E.2d 59, 63 (1996). "As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is de novo." Syl. Pt. 1, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996).

2. Discussion.

Appellant asserts that the trial court erred by not making the State elect between its two theories of the case, and instead instructing the jury upon both aiding and abetting and principal in the first degree. This claim is basically a reworking of his first assignment of error, and is likewise without merit. This Court rejected the same argument in *State v. Duncan*, 179 W. Va. 391, 369 S.E.2d 464 (1988):

We also reject the related argument that the State was required to elect between prosecuting the appellant as a principal in the first degree or as a principal in the second degree. *Cf. State v. Ashcraft*, 172 W. Va. 640, 309 S.E.2d 600 (1983). In *Ashcraft*, the trial court denied a portion of a defendant's bill of particulars which would have required the State to specify whether it would prosecute a defendant charged with first-degree murder as a principal in the first degree or a principal in the second degree. *Id.* 309 S.E.2d at 606. On appeal, it appeared to the Court that "the appellant, through the discovery process, attempted to force the prosecution to elect

one of two possible factual theories surrounding the degree of involvement of the appellant in [the victim's] death." *Id.* 309 S.E.2d at 606-07. Reasoning that "the resolution of factual disputes in a criminal trial is a function of the jury, not of the prosecutor," this Court held that the trial court did not abuse its discretion in denying that portion of the appellant's motion for a bill of particulars. *Id.* 309 S.E.2d at 607.

Although in the present case we do not address the issue of election in the context of the discovery process, we find the reasoning of the *Ashcraft* Court applicable to the facts before us. Forcing the State to elect between possible factual theories surrounding the appellant's degree of involvement in the [offense] . . . would have invaded the fact finding function of the jury. We, therefore, find no error in the State's failure to elect between prosecuting the appellant as a principal in the first degree and a principal in the second degree.

Duncan, 169 W. Va. at 395-96, 369 S.E.2d at 468-69.

Interestingly, Appellant relies on felony-murder proceedings for his argument that the State must elect between its two theories of the case before presenting it to the jury. However, in *Stuckey v. Trent*, 202 W. Va. 498, 505 S.E.2d 417 (1998), this Court held that the State was *not* required to elect between premeditated killing and felony murder, but could instruct the jury on both theories, where the State was not seeking a conviction for the underlying felony. The Court reasoned that either theory was a means of proving the same offense – first degree murder. *Id.* at 505, 505 S.E.2d at 424.

In the present case, Appellant admitted cutting down the trees, and only his degree of involvement was at issue. There is no separate statutory definition for "aiding and abetting the malicious removal of timber" in violation of West Virginia Code § 61-3-52. *See* W. Va. Code § 61-11-6 (providing that a principal in the second degree "shall be punishable as if he were the principal in the first degree"). Because the basic elements of the offense and its punishment were the same under either theory, the State was not required to elect between them.

For the foregoing reasons, the circuit court's ruling on this issue should be affirmed.

C. THE VERDICT FORM USED BY THE COURT WAS PROPER, AND ANY CLAIM OF ERROR WAS WAIVED BY THE APPELLANT.

1. The Standard of Review.

To trigger application of the “plain error” doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

Under the “plain error” doctrine, “waiver” of error must be distinguished from “forfeiture” of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right -- the failure to make timely assertion of the right -- does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is “plain.” To be “plain,” the error must be “clear” or “obvious.”

Assuming that an error is “plain,” the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.

Syl. Pts. 7, 8, and 9, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

Syl. Pt. 7, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

2. Discussion.

The Appellant asserts that the trial court erred in instructing the jury as to two potential felony offenses, but having the verdict form reflect only the options of “guilty of a felony”, “guilty of a misdemeanor” or “not guilty.” (See Petition for Appeal at 2, Appellant’s Brief at 3.) However,

Appellant's characterization of the verdict form is misleading. The verdict form presented to the jury actually read as follows:

VERDICT FORM

We, the jury, find the defendant RONNIE LYNN LEGG,

- _____ 1. Guilty of Wrongful Removal of Timber - More Than
\$1,000.00
- _____ 2. Guilty of Wrongful Removal of Timber - Less Than
\$1,000.00
- _____ 3. Not Guilty

(R. 69.)

The Appellant argues that the trial court erred in "using a verdict form which makes it impossible to tell which of the two separate felony offenses that the jury was instructed concerning that they found the Appellant guilty." (Appellant's Brief at 9.) However, this Court need not even address this issue, because Appellant waived any objection to the verdict form at trial.

After the trial court instructed the jury, a bench conference was held during which counsel and the court discussed whether the verdict form should be changed to include a finding on aiding and abetting. Although some of the discussion on this issue was inaudible and thus escaped transcription, the import of this final exchange is clear:

MR. ARBUCKLE: I guess I'm (inaudible) with the verdict form the way it is.

MR. DOLLY: I am too.

THE COURT: I'll leave it as it is.

(See R. 136, Jury Instruction Excerpt at 21.)

From the context, it is apparent that defense counsel advised the trial court that he was *satisfied* with the verdict form as written. Consequently, this issue has been waived by Appellant.

As this Court held in *State v. Miller, supra*, such a waiver forecloses plain error review: “When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined.” Syl. Pt. 8, in part, *Miller*. When Appellant’s defense counsel declined the trial court’s invitation to amend the verdict form to include a finding as to aiding and abetting, he “intentionally relinquished” his right to such an amendment, and therefore waived any objection to the verdict form. *See State v. Knuckles*, 196 W. Va. 416, 421, 473 S.E.2d 131, 136 (1996) (per curiam) (holding that such a waiver “necessarily precludes salvage by plain error review.”). Accordingly, the Court should decline to address this issue.

As to the merits of Appellant’s assertions regarding the verdict form, this is again related to the “aiding and abetting” issue already addressed herein. Although somewhat inartfully drawn, Appellant’s argument seems to be that the verdict form should have contained another possible verdict - apparently that of “Guilty of Being an Aider and Abettor” or some variation thereof. The Appellant asserts that since two jury instructions were given, there were two differing sets of elements and that the verdict form was therefore “inadequate.” (Appellant’s Brief at 9-10.) This argument ignores the law in this jurisdiction. *See State v. Petry, supra*. There is no difference between the offenses for a principal in the first degree and a principal in the second degree, and a jury may convict for any crime upon proof that one aided and abetted another in the commission of such crime. *See State v. Johnson*, 179 W. Va. at 628, 371 S.E.2d at 349. *Cf. Stuckey v. Trent*, 202 W. Va. at 505, 505 S.E.2d at 424 (holding that separate verdict forms were not required for

premeditated murder and felony murder, where the State did not proceed against the defendant upon the underlying felony).

There is nothing wrong with this verdict form, which included both the felony charged and the lesser-included misdemeanor offense under the statute, in conformity with the jury instructions. (See R. 136, Jury Instruction Excerpt at 7-9.) The Appellant's argument for an additional option on the verdict form should be rejected by this Court.

D. THE EVIDENCE AT TRIAL REGARDING THE BOUNDARY LINE WAS CLEAR, AND WAS SUFFICIENT TO SUPPORT THE APPELLANT'S CONVICTION BEYOND A REASONABLE DOUBT.

1. The Standard of Review.

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

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

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. . . . Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt[.]

Syl. Pt. 3, in part, *Guthrie*, *supra*.

2. Discussion.

The Appellant asserts that the evidence at trial was insufficient to show the location of the boundary line between the Holland property and the Bruner property. This assignment of error was not raised at the circuit court level or in the petition for appeal. It first appears in the Appellant's appeal brief.

The Appellant asserts that the evidence at trial regarding the boundary was "contradictory, at best." (Appellant's Brief at 11.) On the contrary, State witness Harmon Boggs, the caretaker who discovered the missing trees, testified that he had known the Bruner property for 20 or 30 years, and was familiar with the location of the property lines. (9/16/03 Tr. at 92.) Regarding the trees that were cut, the following exchange took place:

Q. Now, can you say for sure they were on Josh Bruner's property?

A. Yes, they was.

(*Id.* at 95.) Boggs went on to say that the trees were "about 10, 20, 30 feet from the line." (*Id.* at 96.)

Harmon Boggs also described an "old barbed-wire and old rail fence" that marked the property line, and said the trees were well within the Bruner property. (9/16/03 Tr. at 99-100.) Notably, during his testimony Appellant said that after he cut the trees down, "he [Holland] drug them down to his property," apparently referring to the adjoining Holland property. (9/17/03 Tr. at 16-17.) Given the testimony of Harmon Boggs, who testified about his historical knowledge of the property and its boundaries, coupled with the Appellant's testimonial "slip of the tongue," there was no genuine dispute regarding the property boundary. The Appellant knew that the trees were on the Bruner property, and admitted as much by telling the jury that Holland dragged the trees "down to

his property,” clearly suggesting that the logs were on someone else’s property before being dragged by Holland.

During cross-examination, Appellant also testified that after the trees were cut, Holland “skidded them across the fence” (9/17/03 Tr. at 28), further solidifying the State’s case that the trees were on Josh Bruner’s property. It is clear that the fence referred to by Appellant is the same fence described by Harmon Boggs as the boundary line between the properties in the following exchange:

Q. . . . and the line was where the fence was?

A. Yeah.

(9/16/03 Tr. at 95.)

In *State v. Williams*, 209 W.Va. 25, 543 S.E.2d 306 (2000), this Court reversed a conviction under West Virginia Code § 61-3-52, observing that the State had failed to meet its burden of proof regarding the property line over which the defendant logger had strayed. In the opinion, the Court found:

Regarding the precise location of the boundary line and whether the Appellant actually crossed it, the State failed to present a deed depicting the precise boundary line; nor did a surveyor testify to establish the property line. There was no fence along the property line; nor were there any remnants of a fence.

Williams, 209 W. Va. at 31, 543 S.E.2d at 312.

In the instant case, however, there was in fact a fence along the property line, and Harmon Boggs described it for the jury. The boundary line was established by competent proof. Even the Appellant admitted that, after having heard the testimony at trial, he understood that the trees were on Josh Bruner’s property. (9/17/03 Tr. at 23.)

Reviewing the trial testimony, one cannot escape noting that the boundary line was established by every witness who was asked about it. Beginning with Officer Johnson, continuing with Harmon Boggs, then witness Bucky Holland, and finally Appellant himself, all confirmed that the trees were on the Bruner property. To now suggest otherwise flies in the face of reality and trial testimony, which established the location of the boundary line beyond a reasonable doubt.

3. **The Appellant Failed to Preserve this Issue for Appeal.**

The boundary line issue was never raised by Appellant during his trial in the circuit court, or in his motion for a new trial. Consequently, the trial court did not have the opportunity to address this issue. "As a general matter, a defendant may not assign as error, for the first time on direct appeal, an issue that could have been presented initially for review by the trial court on a post-trial motion." Syl. Pt. 2, *State v. Salmons*, 203 W. Va. 561, 509 S.E.2d 842 (1998).

More importantly, the issue was not assigned as error in Appellant's petition for appeal to this Court. This Court has generally declined to address issues raised for the first time in an appellant's brief that were not assigned as error in the petition for appeal. *See, e.g., Dean v. West Virginia Dep't of Motor Vehicles*, 195 W. Va. 70, 73, 464 S.E.2d 589, 592 (1995) (*per curiam*); *State v. Lola Mae C.*, 185 W. Va. 452, 453, 408 S.E.2d 31, 41 n.1 (1991); *Adams v. El-Bash*, 175 W. Va. 781, 783, 338 S.E.2d 381, 388 (1985); *Holmes v. Basham*, 130 W. Va. 743, 754, 45 S.E.2d 252, 258 (1947). Because Appellant raised this issue for the first time in his brief, it should be deemed to be not properly presented for decision on appeal, and should not be considered by this Court.

The State recognizes that this Court may, in the interest of justice, apply the plain error doctrine *sua sponte* to review unpreserved errors when important constitutional rights are at stake.

See, e.g., State v. Salmons, 203 W. Va. at 571 n.13, 509 S.E.2d at 852 n.13 (1998); *State v. Harris*, 189 W. Va. 423, 427 n.1, 432 S.E.2d 93, 98 n.1 (1993). However, “the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result.” Syl. Pt. 4, in part, *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988); *State v. Myers*, 204 W. Va. 449, 456, 513 S.E.2d 676, 683 (1998). None of these factors are present here, and Appellant has failed to present any compelling reasons for this Court to consider this claim. The Appellant’s conviction should therefore be affirmed.

E. THE TRIAL COURT PROPERLY DENIED THE MOTION FOR NEW TRIAL.

1. The Standard of Review.

In reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court’s underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review.

Syl. Pt. 3, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000).

2. Discussion.

Appellant asserts that the trial court erred in denying his motion for new trial. The Appellant’s motion for new trial was argued on the day of sentencing, December 1, 2003. During this hearing, defense counsel argued that the court had erred in giving the State’s instruction regarding aiding and abetting, raising the same objections raised at trial and in the first three grounds of this appeal. (R. 137, Sentencing Hearing at 4-10.) No other grounds were asserted in the motion.

The circuit court denied the motion on the record and by order dated December 1, 2003. (*Id.* at 15-17, R. 117-119.)

Appellant's arguments on this issue were fully addressed by the State's responses to his first three assignments of error, and those arguments need not be repeated here. The circuit court did not abuse its discretion in denying the Appellant's motion for a new trial.

V.

CONCLUSION

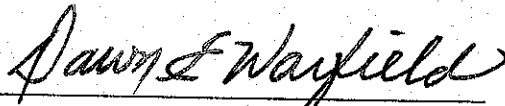
WHEREFORE, for the foregoing reasons, the judgment of the Circuit Court of Greenbrier County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



DAWN E. WARFIELD
DEPUTY ATTORNEY GENERAL
State Bar ID No. 3927
Room 26-E State Capitol
Charleston, WV 25305
(304) 558-2021

CERTIFICATE OF SERVICE

I, DAWN E. WARFIELD, Deputy Attorney General and counsel for the Appellee, do hereby verify that I have served a true copy of the foregoing *Brief of Appellee State of West Virginia*, upon counsel for the Appellant by depositing it in the United States mail, with first-class postage prepaid, on this 5th day of July, 2005, addressed as follows:

Douglas H. Arbuckle, Esquire
205 North Court Street
Lewisburg, West Virginia 24901



DAWN E. WARFIELD