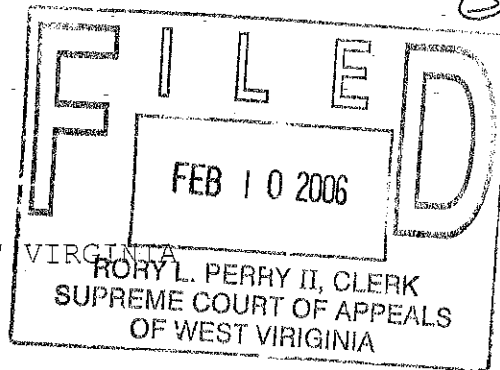


No. 32896



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Appellee

v.

DAMIEN RICKETTS,
Appellant

APPEAL NO. 32896

FROM THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA
CASE NO. 05-F-38

BRIEF ON BEHALF OF THE
APPELLANT, DAMIEN RICKETTS

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SUPREME COURT NO. 32896
CRIMINAL ACTION NO. 05-F-38

BRIEF FOR APPELLANT

Appellant, Damien Ricketts, hereby appeals to this Court from an Order Sentencing Appellant entered on July 15, 2005, by the Honorable Russell M. Clawges, Jr., Judge of the Circuit Court of Monongalia County, that adjudged Damien Ricketts, guilty upon a jury verdict of misdemeanor battery.

STATEMENT OF THE CASE

On January 7, 2005, a one-count indictment was brought against Damien Ricketts as follows:

COUNT ONE: The Grand Jurors of the State of West Virginia, in and for the citizens of Monongalia County, upon their oaths, charge that DAMIEN LAMONT RICKETTS, on or about December 10, 2004, in Monongalia County, West Virginia, committed the offense of "**Malicious Assault**", by intentionally, unlawfully, feloniously and maliciously wounding Amanda Sondag, causing bodily injury to Amanda Sondag, with the intent to maim, disfigure, disable or

kill her, in violation of W.Va. Code §61-2-9(a), as amended, against the peace and dignity of the State.

The case was tried before a jury from April 26, 2005 through April 27, 2005. At the close of the Appellee's case-in-chief, Appellant moved for a judgment of acquittal. His motion was denied. At the close of the Appellant's case-in-chief, the jury deliberated for less than an hour and then found the Appellant guilty of misdemeanor battery, a lesser included offense of the count contained in the indictment.

By "Verdict Order" entered May 3, 2005, the Circuit Court found that the jury found Appellant guilty of Battery. By "Sentencing Order" entered July 15, 2005, the Circuit Court sentenced Appellant to twelve months in the North Central Regional Jail. The Appellant filed a "Notice of Intent to Appeal" on July 20, 2005.

STATEMENT OF THE FACTS

This case involves an altercation that began in the early morning hours of December 10, 2004, at an apartment located on University Avenue in Morgantown, West Virginia. The apartment was inhabited by three individuals: 1) Damien Ricketts, the Appellant, a black male; 2) Natosha Hawkins, the Appellant's girlfriend; and 3) Amanda Sondag, a white female, the alleged victim. The evidence presented indicated that around 11:00 p.m. on the evening of December 9, 2004, Ms. Hawkins and Ms. Sondag were dropped off at a

Morgantown nightclub by the Appellant, who then went to a classmate's home to prepare for a project he had in a Spanish class the next day. (*Trial Transcript pages 74-75*). The evidence further showed that the Appellant studied with his classmate until 3:00 a.m. and then he went to the club to pick up Ms. Hawkins and Ms. Sunday. Ms. Hawkins and Ms. Sunday both testified that they were intoxicated when the Appellant picked them up, but that everyone was getting along and there was no ill will between any of them. When the Appellant, Ms. Hawkins, and Ms. Sunday returned to their apartment, the Appellant had to return to his classmate's home to drop off some paperwork that he had prepared that evening. Ms. Hawkins became upset that the Appellant was leaving. (*Trial Transcript pages 76, 191, & 228*).

The Appellant returned to the apartment within fifteen minutes of leaving and upon his return, he found Ms. Hawkins, who was crying. She began yelling at the Appellant. The Appellant sat down on the third stair to listen to Ms. Hawkins who was standing at the base of the stairs. After a short period of time, Ms. Sunday also began yelling at the Appellant. The testimony of all three individuals was that the Appellant did not respond either verbally or physically to the yelling of Ms. Hawkins and Ms. Sunday. After a period of time, Ms. Sunday stepped up to the Appellant and shoved his head into the wall. (*Trial Transcript pages 79, 196, & 231*). All three of the individuals testified that the Appellant had taken no actions toward Ms. Sunday, whatsoever,

prior to her shoving his head in the wall. (*Trial Transcript page 79*). After being pushed; the Appellant pushed Ms. Sondag away from him and she stumbled down the two steps to the base of the stairs. The Appellant and Ms. Hawkins testified that Ms. Sondag reached out and grabbed the Appellant, bringing him down the steps with her. Ms. Sondag testified that she may have grabbed the Appellant, she couldn't recall. (*Trial Transcript page 80*). Thereafter, the story of what occurred differs. The Appellant and Ms. Hawkins testified that Ms. Sondag continued to grab and kick at the Appellant and the Appellant struck Ms. Sondag in an effort to get her off of him. (*Trial Transcript pages 196 & 232*). Ms. Sondag testified that the Appellant struck her at least a couple of times while she was laying on the floor. However, during cross examination she testified that she may have struck him at the bottom of the stairs. (*Trial Transcript page 81*).

All of the parties agreed that the incident lasted very briefly and, thereafter, Ms. Sondag went to the bathroom, cleaned up and then left the apartment, without any interference from the Appellant. Ms. Sondag ended up at the apartment of a neighbor, who decided to take her to the hospital for treatment of a cut on her head. The police were called to the hospital and, thereafter, a warrant was issued for the Appellant's arrest.

ASSIGNMENTS OF ERROR

- I. THE CIRCUIT COURT ERRED WHEN IT ALLOWED THE STATE TO QUESTION THE APPELLANT REGARDING HIS PRIOR CRIMINAL HISTORY.

- II. THE STATE FAILED TO SHOW BEYOND A REASONABLE DOUBT THAT THE APPELLANT DID NOT ACT IN SELF DEFENSE AND THUS RESULTED IN THE JURY RETURNING A COMPROMISED VERDICT.

- III. THE CIRCUIT COURT ERRED WHEN IT FAILED TO DISMISS THE INDICTMENT AGAINST THE APPELLANT WHEN IT WAS SHOWN THAT THE OFFICER WHO TESTIFIED BEFORE THE GRAND JURY STATED THAT THE DEFENDANT REFUSED TO PROVIDE A STATEMENT AFTER HIS ARREST.

ARGUMENT

- I. THE CIRCUIT COURT ERRED WHEN IT ALLOWED THE STATE TO QUESTION THE APPELLANT REGARDING HIS PRIOR CRIMINAL HISTORY.

Prior to the beginning of the trial in this matter, the Assistant Prosecuting Attorney filed a *Notice of Intent to Introduce 404(b) Evidence*. Appellant's counsel filed a response to said motion and on the morning of the trial, the Circuit Court denied the State's motion. Paragraph 4 of the State's motion to introduce 404(b) evidence dealt with the Appellant's prior conviction in 2001 for delivery of a controlled substance. The Circuit Court specifically stated that the Appellant's prior conviction for delivery of a controlled substance was not 404(b) evidence and was not to be mentioned at trial. (*See Trial Transcript at pg. 35*).

The Appellant took the stand in his own defense during his case-in-chief. At no time during his direct testimony or his cross-examination did he raise the issue of his character. (*See Trial Transcript pages 222-247*). Nevertheless, the State during cross-examination asked the following:

Q. You've been convicted of a felony offense, haven't you?

Mr. Edwards: Your Honor, I object.

The Court: It's overruled.

A. Yes, ma'am.

Q. You were convicted of trafficking in controlled substances, weren't you?

A. No, ma'am.

Q. Distributing control substances?

A. I don't believe those are the exact words in the statute, but I believe the wording was possession or - it might've been distribution. You might be right, ma'am. You would know better than I would.

Q. Would it help for you to see the document?

A. You would know better than I would, ma'am.

Q. So, you were selling drugs, correct?

A. Not exactly, ma'am. I smoked marijuana.

Q. So, you're saying you weren't convicted of -

A. I didn't say I wasn't convicted, ma'am. What I said was that I wasn't exactly selling drugs, ma'am.

Q. And your conviction was for delivery of a controlled substance?

A. Yes, ma'am.

Q. That wasn't possession of a controlled substance, was it?

A. No, ma'am.

Q. That means you were transmitting it to somebody else?

A. Yes, ma'am.

Ms. Kern: I have no further questions.

(Trial transcript pages 246-247).

This Court, in State v. McGinnis, 193 W.Va. 147, 455 S.E.2d 516 (1994), very clearly held that the improper admission of other crimes evidence requires reversal. The Circuit Court's overruling of Appellant's counsel's objection to the questions of the State was in direct contradiction to its previous ruling denying the State's request to introduce 404(b) evidence. The Circuit Court's attempt at correcting the problem with an instruction at the end of closing arguments only served to again highlight the Appellant's prior conviction:

THE COURT: Ladies and gentlemen of the jury, I'm going to do something a bit unusual at this point in the trial. I am going to instruct you to disregard some of the evidence which you heard during the trial of this case, and I'm going to strike the evidence from the record at this point and tell you not to consider it for any purpose whatsoever in your deliberations in this case, and that is the evidence of Mr. Ricketts' prior conviction.

The Court has reconsidered an earlier ruling. It's not admissible and is not to be considered by you for any purpose whatsoever in your deliberations in this case. You are to decide this case based upon all of the other evidence and all of the other evidence alone.

(Trial Transcript page 321).

The Circuit Court could not un-ring the bell, or as stated in Government of Virgin Islands v. Toto, 529 F.2d 278, 283 (3rd Cir. 1976) "[a] drop of ink cannot be removed from a glass of milk." The Appellant in this case was found guilty of a lesser included misdemeanor offense after less than an hour of deliberations. Clearly, the fact that the jury heard repeatedly that the Appellant had a prior felony conviction influenced the

deliberations. For this reason, the Appellant's conviction should be reversed.

II. THE STATE FAILED TO SHOW BEYOND A REASONABLE DOUBT THAT THE APPELLANT DID NOT ACT IN SELF DEFENSE AND THUS RESULTED IN THE JURY RETURNING A COMPROMISED VERDICT.

The Appellant in this case presented evidence through the cross-examination of the alleged victim, as well as evidence through the testimony of Natosha Hawkins and his own testimony that his actions were in self-defense. The law in West Virginia is very clear that once a defendant produces sufficient evidence of self-defense, the State is required to disprove the defense of self-defense beyond a reasonable doubt. Syl. pt. 1, State v. Bates, 181 W.Va. 36, 380 S.E.2d 203 (1989); Syl. pt. 4, State v. Kirtley, 162 W.Va. 249, 252 S.E.2d 374 (1978); 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 384 S.E.2d 358 (1989); State v. Mullins, 171 W.Va. 542, 301 S.E.2d 173, 176 (1982); State v. Daniel, 182 W.Va. 643, 391 S.E.2d 90 (1990). **Compromised verdict** is defined by *Black's Law Dictionary, Sixth Addition* as "[o]ne which is reached only by the surrender of conscientious convictions on one material issue by some jurors in return for a relinquishment of matters in their like settled opinion on another issue, and the result is one which does not hold the approval of the entire panel."

In the present case, all three individuals who were present at the time of the incident, Damien Ricketts, Natosha Hawkins, and the alleged victim, Amanda Sunday, testified that the Appellant acted in self-defense. (See *Trial Transcript* pages 79, 196 & 231). The only evidence that the State presented to refute the Appellant's claim of self-defense was that of the alleged victim, Amanda Sunday. Ms. Sunday, however, admitted that she was the one who first struck the Appellant. (See *Trial Transcript* pages 79-80). In addition, Ms. Sunday admitted that she was unsure of what other physical actions she directed towards the Appellant after she shoved his head against the wall. (See *Trial Transcript* pages 80-81).

The Appellant and Natosha Hawkins both testified that Amanda Sunday was the first one to strike the Appellant and then continued to strike at the Appellant until he defended himself. (See *Trial Transcript* pages 196 & 232). This Court has held that **reasonable doubt** is one that excludes every reasonable hypothesis except that of guilt. State v. Magdich, 105 W.Va. 585, 143 S.E. 348 (1928). The only evidence that the State presented that the Appellant did not act in self-defense was the testimony of Amanda Sunday, which was compromised, at best, and certainly not beyond a reasonable doubt.

Moreover, had the jury actually believed Ms. Sunday, they would have returned a verdict of guilty of Malicious Assault or Unlawful Assault. The fact that the jury returned a verdict of

misdemeanor battery after less than an hour of deliberations, shows that they did not believe Ms. Sunday's testimony and returned a compromised verdict. The State was allowed to tell the jury that the Appellant, a black male, with a prior felony, struck and hurt a white female. If the jury did not believe that the Appellant had not acted in self-defense, he surely would have been convicted something worse than a battery. For the forgoing reasons, the Appellant's conviction should be reversed.

III. THE CIRCUIT COURT ERRED WHEN IT FAILED TO DISMISS THE INDICTMENT AGAINST THE APPELLANT WHEN IT WAS SHOWN THAT THE OFFICER WHO TESTIFIED BEFORE THE GRAND JURY STATED THAT THE DEFENDANT REFUSED TO PROVIDE A STATEMENT AFTER HIS ARREST.

During the presentation of the indictment of the Appellant, the investigating officer, who was the sole witness presented to the grand jury, commented to the grand jury that the Appellant refused to give a statement after his arrest. (See *Grand Jury Transcript page 6*). Upon receiving a copy of the grand jury transcript, Appellant's counsel moved to have the indictment against the Appellant dismissed. (See *Trial Transcript page 40*). The Circuit Court denied Appellant's motion.

"An appellate court is obligated to see that the guarantee of a fair trial under Section 10 of Article III of the West Virginia Constitution is honored. Thus, only where there is

a high probability that an error of due process proportion did not contribute to the criminal conviction will an appellate court affirm. High probability requires that an appellate court possess a sure conviction that the error did not prejudice the defendant." Syllabus point 3. State v. Barnhart, 211 W.Va. 155, 563 S.E.2d 820 (2002); Syllabus point 11, State v. Guthrie, 194 W.Va. 657, 461 S.E.2d 163 (1995). In Syllabus point 1 of State v. Walker, 207 W.Va. 415, 533 S.E.2d 48, (2000) this Court held "Under the Due Process Clause of the West Virginia Constitution, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or comment on the same to the jury." Syllabus point 1, State v. Boyd, 160 W.Va.234, 233 S.E.2d 710 (1977).

In the present case, the solicitation regarding the Appellant's post-arrest silence came as a result of a question by a member of the Grand Jury. Even though the Prosecuting Attorney did not solicit the remark, it is still problematic given that this was something that was important enough for a member of the Grand Jury to ask on their own.

It is a well settled law that a defendant has the right to remain silent, and that right is not to be used against him at trial. This Court has stated in Syllabus Point 1, State v. Walker, 207 W.Va. 415, 533 S.E.2d 48 (2000)"[u]nder the Due Process Clause

of the West Virginia Constitution, Article III, Section 10, and the presumption of innocence embodied therein, and Article III, Section 5, relating to the right against self-incrimination, it is reversible error for the prosecutor to cross-examine a defendant in regard to his pre-trial silence or to comment on the same to the jury." Syllabus point 1, State v. Boyd, 160 W.Va. 234, 233 S.E.2d 710 (1977).


The Appellant's silence was used against him before the Grand Jury, thereby, denying his right of Due Process under the West Virginia Constitution. For this reason, the Appellant's conviction should be reversed and remanded.

RELIEF REQUESTED

The Appellant's conviction be reversed and a judgement of acquittal entered and/or he be granted a new trial.

RESPECTFULLY SUBMITTED,

Damien Ricketts,
Appellant, By Counsel.



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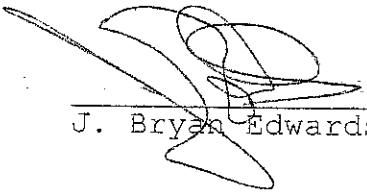
FROM THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA
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BRIEF ON BEHALF OF
THE APPELLANT, DAMIEN RICKETTS

CERTIFICATE OF SERVICE

I, J. Bryan Edwards, hereby certify that I served a copy of the foregoing "Brief on Behalf of the Appellant, Damien Ricketts" by U. S. Mail this 9th day of February, 2006, to the following:

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J. Bryan Edwards