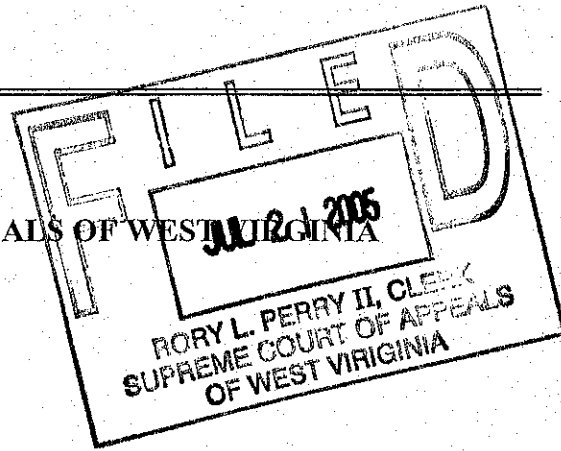


NO. 32610

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

DAVID REED,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I.

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

A jury convicted David Reed, defendant below (hereinafter "Appellant"), of violating West Virginia Code § 61-2-28(d) (Third Offense Domestic Battery), which provides that any person who unlawfully and intentionally makes physical contact of an insulting or provoking nature with a family member, and has twice been convicted of the same offense, shall be guilty of a felony. After his conviction the State filed an information under West Virginia Code § 61-11-19, alleging that the Appellant had been convicted of a prior felony, and upon this conviction was a recidivist under West Virginia Code § 61-11-18(a).

By order dated May 4, 2004, Appellant was sentenced to 2-5 years in the penitentiary. (R. at 189-190.) It is from this judgment that Appellant appeals.

This Appeal is predicated on the trial court's ruling denying bifurcation of the guilt and penalty phases of the Appellant's trial. The Appellant solely relies upon this Court's ruling in Syl. Pt. 11, *State v. McCraine*, 214 W. Va. 188, 588 S.E.2d 177 (2003).

II.

STATEMENT OF FACTS

The January 2002 Term of the Cabell County Grand Jury indicted the Appellant on three counts of third offense domestic battery, and three counts of second offense violation of a protective order. (R. at 71-73.) The indictment alleges that on March 24, 2002, the Appellant choked his son David Reed (Count 1), shoved his daughter Tysheena Reed over a toilet (Count II), and violated a DVP order by being present in his wife's house (Count V). The indictment also alleges that on May 1, 2002, the Appellant assaulted his wife, Patricia Reed, (Count III), and violated the same DVP order (Count VI), and that on March 17, 2002, the Appellant violated the DVP order by being present in his wife's house (Count IV).

At trial, the State proved that the Appellant, Patricia Reed and her four children resided at 2116 Twelfth Avenue in Huntington, Cabell County, West Virginia. Ms. Reed had lived with the Appellant for 14 years. They were married for three or four years, and divorced in the summer of 2002. (Crim. Tr. at 137.) In the late evening hours of April 30/ May 1, 2002, while Ms. Reed was asleep on her couch, the Appellant returned home drunk. (Crim. Tr. at 139.) Ms. Reed arose went into the bedroom took off her clothes and put her robe on. After briefly speaking to the Appellant, she left the walked her dog for about twenty to thirty minutes. On cross-examination, she testified that she left the house in order to get away from the Appellant. (Crim. Tr. at 159.) When she came

home, the Appellant chastised her for leaving the house dressed only in a robe and pair of pants. (Crim. Tr. at 142.)

At approximately 1:30 the Appellant and Ms. Reed began to argue again. The Appellant told Ms. Reed that she was “[r]eally making me mad,” grabbed her by the throat and squeezed, scratching her with his nail. (Crim. Tr. at 147-148.) The State introduced pictures showing Ms. Reed’s neck and jaw, taken at the time of the incident. The jury was able to use its own judgment as to the extent and nature of Ms. Reed’s injury.

The Appellant took his hands off of Ms. Reed’s neck after she fell over her 13-year-old daughter Tysheena. (Crim. Tr. at 149, 172, 184.) After Ms. Reed fell, her daughter Davina tried to call for help, but the Appellant snatched the phone away from her. (Crim. Tr. at 150.)

After the Appellant fell asleep, Ms. Reed asked her daughter to call 911. 911 operator Melissa Triplett testified that she received a 911 call from Tysheena Reed on May 1, 2002, at 4:34 A.M. (Crim. Tr. at 181.) Tysheena identified the Appellant, stated that he had assaulted her mother, and then whispered that she was afraid. (Crim. Tr. 182.)

Huntington City Police Officer Greg Moore responded to the dispatch. Ms. Reed told him that the Appellant had put his hands on her throat and pushed her down to the floor. (Crim. Tr. at 190.) Officer Moore observed raised, red finger marks around Ms. Reed’s throat. (Crim. Tr. at 191.) Based upon his observations and Ms. Reed’s statements, Officer Moore arrested the Appellant. (Crim. Tr. at 192.)

After Officer Moore’s testimony, the State rested its case. The Appellant made a motion for a judgment of acquittal claiming that the State had failed to prove that he had strangled Ms. Reed. The trial court denied the Appellant’s motion. (Crim. Tr. at 199-200.)

After a *Neuman*¹ colloquy, the Appellant testified on his own behalf. (Crim. Tr. at 197-198, 201.) The Appellant denied returning home drunk. (Crim. Tr. at 206.) He denied ever having put his hands on Ms. Reed's throat, and ever saying that "Oooh, you make me so mad." He denied that Ms. Reed toppled over Tysheena. (Crim. Tr. at 211-212.) He conceded the he and Ms. Reed had some words when he found her outside with the family dog. (Crim. Tr. at 206-207.)

Although the witness' demeanor is difficult to discern from the cold record, the record suggests that the Appellant was defensive on cross-examination. (Crim. Tr. at 216, 219, 221.) On the other hand, Ms. Reed's testimony was emotional. She cried on several occasions. (Crim. Tr. at 145, 154-156.) Her testimony was not vindictive; she did not characterize her husband as a bad man. On numerous occasions she gave him the benefit of the doubt. She speculated that the Appellant grabbed her robe in order to break her fall. (Crim. Tr. 165.) She did not embellish upon the nature of her injuries.

The most important distinction between Ms. Reed's testimony, and the Appellant's testimony was their behavior during cross-examination. The Appellant offered the jury a blanket denial, but there was no evidence explaining Ms. Reed's motive to lie. The record suggests that he became agitated when counsel for the State pushed him. Ms. Reed was not argumentative or defensive during cross-examination. (Crim. Tr. at 165-166.) The record does not suggest that she appeared to be hiding something from the jury.

After deliberating for 57 minutes, the jury found the Appellant guilty. (Crim. Tr. at 263-264.)

¹*State v. Neuman*, 179 W.Va. 580, 584, 371 S.E.2d 77, 81 (1988).

III.

ASSIGNMENTS OF ERROR

Appellant assigns the following errors on appeal:

1. The trial court denied the Appellant his absolute right to bifurcation under *State v. McCraine*, 214 W. Va. 188, 588 S.E.2d 177 (2003.)
2. Since the Appellant's underlying conviction should be reversed, the State's recidivist conviction should also be reversed and his sentence voided.

IV.

STANDARD OF REVIEW

Because this issue is solely a matter of law, this Court reviews the matter *de novo*. *McCraine*, 214 W. Va. at 203, 588 S.E.2d at 192.

V.

ARGUMENT

A. REVERSING THIS CONVICTION WOULD BE A MISCARRIAGE OF JUSTICE.

The Appellant is asking this Court to overturn a jury verdict and remand his case for a new trial because he was not afforded the opportunity for a meaningless hearing. He suffered no prejudice from the trial court's decision. The State never introduced evidence, either as part of a unitary trial or during the guilt phase of his trial mentioning the Appellant's prior convictions. Indeed, the record suggests that the Appellant agreed to stipulate if the State would not try to introduce this evidence under West Virginia Rule of Evidence 404(b).

Having previously benefitted from his stipulation, he now claims that this very same stipulation denied him a fair trial. Although entitled to, the Appellant never sought a bifurcation hearing prior to trial. Syl. Pt. 4, *State v. Nichols*, 208 W. Va. 432, 434, 541 S.E.2d 310, 312 (1999). Nor did he preserved a *Nichols* issue at trial or by post-trial motion. Having no evidence of prejudice, the Appellant argues that violations of *McCraime* are *per se* reversible error. *McCraime* does not support his position; indeed, this Court has never decided a case supporting his position.

The trial court relied upon controlling precedent when it denied the Appellant's motion. *State v. Nichols; McCraime* at 214 W. Va. at 208, 588 S.E.2d at 196 (Davis, J., dissenting) ("As a general rule, the principle of stare decisis *directs* us to adhere. . . to the holdings of our prior cases.") (citation omitted).

Clearly, this Appellant is a danger to the community. At sentencing, the trial court found, without objection, that the Appellant had been arrested 49 times, charged with 51 misdemeanors, and 14 felonies. (Sent. Hr'g at 7.) He was convicted of 22 misdemeanors, and 1 felony. (*Id.*) He had been on probation twice, violating it once (*Id.*) This was his second felony domestic battery arrest. On February 5, 2000, he was indicted on one count of domestic battery third offense, and one count of malicious wounding. (R. at 184.) The indictment alleged that the Appellant strangled Ms. Reed, and punched her in the head. (R. at 184.) The Appellant pled guilty to an attempt to commit a felony. The trial court sentenced him to 1-3 years, to run consecutively with a failure to appear sentence of 1 year. (R. at 183.)

The Appellant's NCIC record includes three prior convictions for DVP violations. (R. at 124-125, 126-127, 128-129.) Apparently the Appellant was sentenced to time served on each offense. (R. at 124-129.) His sentences ranged from 15 to 60 days. On June 7, the Magistrate Court

of Cabell County sentenced him to time served--15 days. (R. at 125.) Two days after the Appellant was released he was again arrested for the same charge. This time he received 60 days. (R. at 129.)

The record also reveals that the Appellant has been convicted of domestic battery twice in approximately 30 days--once on March 17, 1996, and again on April 18, 1996. (R. at 130, 143.) He was convicted of obstructing an officer, and battery, for which he served a year. (R. at 141.) He has been arrested for possession of a dangerous and deadly weapon, second degree sexual assault, intimidating a witness, joyriding, breaking and entering, and burglary. (R. at 128-142.)

He has been arrested in three states: West Virginia, Georgia, and Ohio. (*Id.*) He was arrested in Ohio for falsification of a prescription, and was wanted in Watkinsville, Georgia, on an outstanding warrant for contempt of court. (R. at 133.) The trial court had to issue a *capias* when the Appellant failed to appear for a court date relating to his first felony domestic battery arrest. (R. at 139.) The Appellant also failed to appear for a court date relating to an arrest for second degree sexual assault, and domestic violence. (R. at 139.) These charges were later dismissed.

After the Appellant's March 24, 2002, arrest for two counts of domestic battery, and two counts of violating a DVP, the State agreed to reduce his bond from \$80,000 to \$10,000. The Appellant posted his bond on April 8. (R. 40-41.) Less than a month later he was arrested for another third offense domestic battery. (R. at 43.) Thus, this Court is presented with an Appellant, who, while free on a \$10,000² bond, having two pending felony third offense domestic batteries, two prior domestic battery convictions, and facing a sentence enhancement under the recidivist statute, again chose to abuse a member of his family.

²In exchange for the Appellant's waiver of his preliminary hearing, the State agreed to a bond reduction. (R. at 70.)

The record demonstrates that this Appellant poses a substantial, and unacceptable risk to the citizens of his community. He poses an even greater risk to his former wife and her children. Afforded chance after chance by the courts; indeed, too many chances, to reform, he continues to reoffend. Short term incarceration has failed to prevent this Appellant from reoffending. Indeed, the record demonstrates that the Appellant reoffends shortly after his is released. Appellant's felony conviction did not deter him. Once he was released, he continued to reoffend. The courts and prosecutors of this State have tolerated this violent recidivist for too long. This felony conviction is long overdue.

B. THE *McCRAINE* VIOLATION WAS HARMLESS ERROR.

The harmless error doctrine is well established in both state and federal law. *See e.g.* W. Va. R. Crim. P. 52(a); W. Va. R. Crim. P. for Mag. Ct. 27(a); W. Va. R. Crim. P. 11(h) (harmless error in procedures for taking guilty pleas); Fed. R. Crim. P. 52(a); 28 U.S.C. § 2111. Although not directly on point, in *State v. Davidson*, 351 N.W.2d 8, 11 (Minn.1984), the Supreme Court of Minnesota ruled that the trial court's failure to accept a defendant's stipulation to a status element of an offense was harmless error. It proceeded to affirm the conviction, describing the trial court's error as harmless, in part, because the defendant's previous conviction had little to do with the case at hand.

In footnote 21 of *McCraine*, this Court characterized the mandatory bifurcation procedure as "a procedural requirement and 'prophylactic standard.'" *McCraine*, 214 W. Va. at 205, 588 S.E.2d at 194. *McCraine* is not one of those fundamental watershed rules of criminal procedure implicit in the concept of ordered liberty. It is a judicially created rule of procedure. *People v. Calderon*, 885 P.2d 83, 91 (Cal. 1994) (Court declined to create a rule of procedure mandating a

bifurcated trial in recidivist proceedings, leaving the decision with the trial court). *See also Spencer v. Texas*, 385 U.S. 554, 567-569 (1967) (Unitary trial does not deprive defendant “the fundamental elements of fairness in a criminal trial.”). Both this Court and the United States Supreme Court have ruled, “Most errors, including constitutional ones are subject to harmless error analysis. *See Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993), simply because it makes no sense to retry a case if the result assuredly will be the same” *State v. Omechinski*, 196 W.Va. 41, 48 n.11, 468 S.E.2d 173, 181 n.11 (1996). *See United States v. Decoster*, 624 F.2d 196, 255 n.86 (C.A.D.C. 1976) and cases cited therein; *United States v. Gaudin*, 515 U.S. 506, 526 (1995).

This Court has found other prophylactic measures amenable to harmless error analysis. *See State v. Blake*, 197 W. Va. 700, 712, 478 S.E.2d 550, 562 (1996) (*Neuman* colloquy similar to prophylactic protections afforded by *Miranda v. Arizona*, 348 U.S. 436 (1966)). In *State v. Salmons*, 203 W. Va. 561, 582, 509 S.E.2d 842, 863 (1998), this Court found a *Neuman* violation harmless. *McCraine's* rationale is similar to *Neuman's*. Both cases establish procedures designed to prevent coercion. The colloquy procedure established in *Neuman* was designed, in part, to protect a criminal defendant's constitutional right to testify, and to ensure that he has not been coerced into giving that right up. (*Id.*) *McCraine's* mandatory bifurcation procedure was designed to prevent coerced stipulations.

In *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), this Court held, “As to error not involving the erroneous admission of evidence, we have held that nonconstitutional error is harmless when it is highly probable the error did not contribute to the judgment.” (citations omitted).

There is no evidence suggesting that the Appellant's stipulation contributed to the judgment. The State did not mention the Appellant's prior convictions to the jury during the guilt phase of his

trial. There is substantial evidence proving the Appellant's prior convictions. There is a certified copy of a criminal complaint and disposition sheet from April 18, 1996, stating that an individual named David Reed, with the same birth-date as the Appellant, pled guilty to domestic battery and served two days.³ (R. at 122, 143-145.) The record also contains an indictment charging David Reed with third offense domestic battery and malicious wounding. (R. at 184.) The Appellant pled guilty to one count of attempt to commit a *felony, a lesser included offense of third offense domestic battery*. (R. at 183.) The court dismissed the malicious wounding charge. The court filed the plea agreement with the Circuit Clerk of Cabell County on September 15, 2000. (R. at 181.) At sentencing in the instant case, the Appellant stipulated that he was the person named in the previous felony indictment. (Sent. Hr'g at 2-4.)

The Appellant now claims that he was coerced into stipulating to these prior offenses because the trial court denied his motion to bifurcate. (Pet. at 2.) If the Appellant felt coerced he did not raise this issue at trial. He did not object to the court's ruling, nor did he raise it in his post-trial motions. This is because he was well aware of his previous record, and the futility of fighting it. Additionally, the Appellant actually benefitted from his stipulation. The State agreed not to introduce 404(b) evidence in return for the Appellant's stipulation. (3/10/03 Hr'g at 12.) After finding that they could not read the stipulation to the jury during the guilt/innocence phase of the trial, the State withdrew its stipulation, and again announced its intent to introduce prior acts of domestic violence during the guilt phase of Appellant's trial. Immediately before trial the State

³The Appellant in this case, David Reed, was born on July 9, 1968. (R. at 122.)

reversed itself again, announcing that it would not introduce 404(b) evidence.⁴ (Crim. Tr. at 5.) After the State announced its intent, the Appellant again agreed to stipulate to the previous offenses. After conducting a colloquy with the Appellant, the trial court accepted his stipulation. (Crim. Tr. at 5-6.)

Before accepting the Appellant's stipulation, the trial court conditionally ruled that it would be amenable to appropriate 404(b) evidence, "And I would be of the opinion if he has committed other acts upon [Ms. Reed] at other times, that could probably be considered as 404(b); but the convictions would not be admissible, only the acts." (3/10/03 Hr'g at 13.) See *Old Chief v. United States*, 519 U.S. 172, 190 (1997) ("[I]ndeed, [if] there were a justification for receiving evidence of the nature of the prior acts, on some issue other than status (*i.e.* to prove 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.' . . . [Fed. R. Evid.] 404(b) guarantees the opportunity to seek its admission.") Syllabus Point 11 of *State v. McCraine*, 214 W. Va. at 193, 588 S.E.2d at 182, addresses the issue of prior convictions, not the admission of prior bad acts. "A trial court must grant bifurcation in all cases . . . in which a defendant seeks to contest the validity of any alleged prior *convictions*." (Emphasis added.) Because prior convictions contain the imprimatur of the State, they are qualitatively different from evidence of prior bad acts. Also, before evidence of a prior bad act may be introduced to the jury, the trial court must conduct a balancing test under *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994). See W. Va. R. Evid. 404(b); W. Va. R. Evid. 609(a). In *State v. Dennis*, 216 W. Va. 331, 607 S.E.2d 437, 458 (2004), this Court ruled that evidence introduced "[T]o demonstrate Appellant's pattern of abusive and

⁴The record suggests that the both the State and the Appellant announced their positions to the court off the record, on the day of trial. (Crim. Tr. at 5.)

controlling behavior as a means of defining the turbulent nature of the relationship.” was *res gestae*, not subject to 404(b) limitations.

The Appellant was tried and convicted of one count of felony domestic battery occurring on May 1, 2002; two months after the Appellant’s arrest for two counts of felony domestic battery and two counts of violating a DVP. Under the doctrine of completeness, this evidence proved an ongoing pattern of domestic abuse over a short period of time. The State had a strong argument for its admissibility. The trial court had already announced that it was amenable to this evidence, and the case law does not prohibit its introduction.

If the trial court did commit a *McCraine* error, it was harmless. The Appellant willingly stipulated to the prior offenses, the record demonstrated that he had two prior convictions for domestic battery, and he benefitted from the stipulation.

C. BY FAILING TO PRESERVE HIS *NICHOLS* OBJECTION AT TRIAL, THE APPELLANT WAIVED HIS ASSIGNMENT OF ERROR.

It is a well-accepted precept of appellate review that this Court will not consider an objection for the first time on appeal. *State v. Miller*, 197 W. Va. 588, 598, 476 S.E.2d 535, 545 (1996). The Appellant has focused his claims upon a case which was not decided by this Court until after his trial.⁵ The Court afford *McCraine* limited retroactive effect applying it to cases in litigation or on appeal during the pendency of the *McCraine* appeal “*in which the issue has been properly preserved.*” *McCraine*, 214 W.Va. at 205 n.21, 588 S.E.2d at 194 n.21 (quoting Syl. Pt. 3, *State v. Gangwer*, 168 W. Va. 190, 283 S.E.2d 839 (1981)).

⁵The court entered its judgment of conviction on March 13, 2003. The court entered Appellant’s sentencing order on April 23, 2003. *McCraine* was submitted to this Court on January 15, 2003, but was not decided until May 16, 2003. The Appellant filed his petition for appeal on September 1, 2004.

The Appellant's appeal was not pending when this Court decided *McCraine*. Indeed, he did not file his appeal for another year. The Appellant is not similarly situated to those whose appeal was pending when the Court decided *McCraine*. Unlike defendants who preserved their bifurcation objections below, the Appellant has raised a bifurcation objection for the first time on appeal. Applying *McCraine* retroactively to this case would undermine the principles of limited retroactivity. Similarly situated defendants should be treated the same. Thus, the defendant in *McCraine* should not be the only person who garners the benefit of the Court's decision. Those whose appeals were pending at the time of the Court's decision, who properly preserved the issue below, should also benefit from *McCraine*. The Appellant is not in that category.

The Appellant never objected to the trial court's decision denying bifurcation under existing law. After the trial court announced its decision, the Appellant, without objection, stipulated. (3/06/03 Hr'g at 11.) At trial, the Appellant was on notice that *Nichols* was the law of the land. Yet he did not request a pre-trial bifurcation hearing. Nor did he request a unitary trial where he could contest his prior convictions and preserve any objections he may have had to this procedure for appeal. (3/06/03 Hr'g at 11.) In fact, before *McCraine* the Appellant had no intention of preserving the bifurcation issue. Nor did he intend to contest the validity of his prior convictions. *See McCraine*, 214 W. Va. at 203, 588 S.E.2d at 192 ("Appellant maintains that the lower court also erred by denying his motion to bifurcate the issues with respect to the third offense DUI charge so that a jury could decide the pending DUI charge without consideration of prior DUI charges which *he intended to challenge.*")⁶ (emphasis added).

⁶After the trial court denied his motion to bifurcate, the Appellant contested his prior convictions in a unitary trial.

Whether the Appellant was required to preserve his objection based upon the law as it existed at trial or whether a defendant is permitted to expand the basis of his objection on appeal are two separate issues. Defense counsel is not required to anticipate changes in the law, but should be expected to argue defenses which are reasonably available at the time of his trial. *United States v. Roberson*, 194 F.3d 408, 414 (3d Cir. 1999) (citations omitted). The law, as it existed at the time of the Appellant's trial, provided a more than sufficient means of preserving an objection to bifurcation. Although it was not mandatory, there was a procedure in place which the trial court was required to follow in order to deny a defendant's motion for bifurcation. The Appellant did not even object to that.

D. THIS COURT'S BIFURCATION HOLDING IN *McCRAINE* SHOULD BE OVERRULED.

In *State v. Guthrie*, 194 W.Va. at 677, 461 S.E.2d at 183, this Court found:

Remaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of stare decisis than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would make the unjustified break from previously established doctrine complete. In such a situation 'special justification' exists to depart from the recently decided case.

(quoting *Adarand Constr., Inc. v. Pena*, 515 U.S. 200, 231 (1995)).

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992), the United States Supreme Court stated, "[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential, pragmatic, considerations designed to test the consistency of overruling a prior position with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."

In *McCraime* this Court disregarded *stare decises*, enacting an broad procedural rule outside the judicial mainstream. *McCraime*, 214 W. Va. at 207-208, 588 S.E.2d at 196-197 (Davis, J., dissenting). See *State v. Brown*, 852 A.2d 260, 263-264 (N.J. 2004) (Trial court is not required to afford defendant a bifurcated trial on felon in possession of a handgun charge.); *State v. Thompson*, 839 A.2d 622, 640 (Ct. 2004) (Rejecting Appellant's argument that *McCraime* suggests a nationwide trend towards mandatory bifurcation.); *Spearmen v. State*, 744 N.E.2d 545, 550 (Ind. Ct. App. 2001) (“[T]he element of the prior felony cannot be bifurcated from the possession element in a [felon in possession] prosecution; *United States v. Mangum*, 100 F.3d 164, 171 (D.C. Cir. 1996) (trial court has discretion to bifurcate trial.); *Carter v. State*, 802 A.2d 460, 480 (Md. App. 2002) (Trial court is not mandated to accept defendant's stipulation to status element of an offense.).

The *McCraime* Court held:

In essence, if a criminal defendant wishes to garner the benefits of bifurcation, he or she shoulder the burden of going forward with evidence in advance of the State presenting its case. Consequently the bifurcation procedure provides the State with the advantage of previewing the criminal defendant's evidence on a material element and denies the defendant a fair trial based on the principles of our criminal justice system.

Id. at 204, 588 S.E.2d at 193.

In response to these concerns, this Court created a new rule of criminal procedure mandating a bifurcated trial upon the defendant's request. There are no exceptions to this rule. Without specifying what fundamental constitutional interest was at stake the Court labeled the rule “prophylactic.” See *McCraime*, 214 W. Va. at 205 n.21, 588 S.E.2d at 194 n.21. Neither federal law, nor the vast majority of the states, require a trial court to bifurcate upon the defendant's request.

Indeed, the only other state court that has considered *McCraine's* approach rejected it. See *Thompson*, 839 A.2d at 640.

The United States Supreme Court has ruled that a state recidivist statute allowing both the underlying offense, and the prior offenses placed on the same indictment, and presented to the same jury in a unitary trial does not violate the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution. *Spencer v. Texas*, 385 U.S. 554, 563-564 (1967). The Court has also held that the states may require a criminal defendant to assume the burden of production on certain issues without violating the defendant's constitutional right to a fair trial. *Medina v. California*, 505 U.S. 437, 442-443(1992) (Presumption of competency, and shift of burden of proof on this issue to a criminal defendant does not violate the Federal Constitution's due process clause); *Patterson v. New York*, 432 U.S. 197, 206 (1977) (Because it is not an element of first degree murder defendant may be required to carry the burden of persuasion on the issue of extreme emotional disturbance.).

Obviously, the Court may not manipulate its procedural rules to shift the State's burden of proof to the defendant. See, e.g., *Harris v. United States*, 536 U.S. 545, 558 (2002) ("Congress may not manipulate the definition of a crime in any way that relieves the government of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt." (citation omitted); cf. *In re Winship*, 397 U.S. 358, 364 (1970) (The due process clause mandates that the state prove every element of an offense beyond a reasonable doubt.); *Sandstrom v. Montana*, 442 U.S. 510, 518 (1979) ("Jury instructions shifting the burden of proof on any element of a crime from the state to the defendant violate the due process clause.").

But the bifurcation procedure announced in *Nichols* did not do this. Although the defendant had the initial burden of production in a motion to bifurcate, the State retained the burden of proving every element of the offense. *Nichols* only addressed the procedure by which a defendant could contest evidence of the crime's status elements. The *Nichols* Court rejected the argument that a status offender's prior convictions were material elements of the offense. *Nichols*, 208 W. Va. at 446, 541 S.E.2d at 324. Since a status element had no connection to the underlying offense, a defendant could prevent the prosecutor from presenting it by stipulating, even if the prosecutor objected.⁷ *Old Chief v. United States*, 519 U.S. 172, 190 (1997); *State v. Nichols*, 208 W. Va. at 443, 541 S.E.2d at 321; *State v. Alexander*, 571 N.W.2d 662, 671 (Wis. 1997) ("Proof of a status element goes to an element entirely outside the gravamen of the offense: operating a motor vehicle with a prohibited alcohol concentration.").

There is no reason why the same distinctions allowing a defendant to stipulate to a status element should not apply to motions to bifurcate. Since the defendant's legal status is "dependent on some judgment rendered wholly independently of the concrete events of later criminal behavior charged against him" the chances of a defendant "previewing [his] evidence" to the State are small. *Old Chief*, 519 U.S. at 190; *McCraime*, 214 W. Va. at 204, 588 S.E.2d at 193. This limited possibility of prejudice does not justify *McCraime*'s broad holding.

Clearly, the opportunity for a bifurcated trial is not a fundamental principle of criminal justice so rooted in our tradition and history that only broad, prophylactic measures are necessary to preserve

⁷This approach has not been adopted in all of the states. See *Carter v. State*, 802 A.2d 460, 480 (Md. App. 2002) (Trial court is not mandated to accept defendant's stipulation to status element of an offense.).

it. *C.f. Miranda v. Arizona*, 384 U.S. 436, 458 (1966) (“Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.”) Nor does it implicate constitutional notions of a fair trial. Indeed, a unitary trial does not implicate federal constitutional interests of due process, or the right to a fair trial. *Spencer*, 385 U.S. at 563.

The Court states that *Nichols* allows the State to preview the defendant’s case before trial. This possibility is inherent, sometimes mandatory, at every criminal trial. Both the State and Defense counsel routinely discuss their trial strategies during plea negotiations. In order to obtain funds to hire an expert, the defendant must tell the court why this expert’s testimony is relevant to his defense. A defendant may give away a snippet of his defense strategy at a 404(b) hearing, or during a motion to suppress. If a defendant objects to the voluntariness of his client’s confession, he must first argue his case to the judge, then to the jury. *Jackson v. Denno*, 378 U.S. 368, 393 (1964.) If the defendant requests discovery, he must reciprocate. If he claims that he was in another part of the State when the previous offenses were committed, he must inform the State of his intent to rely on an alibi defense. *See* W. Va. R. Crim. P. 12.2.

The *McCraine* Court assumes that pre-trial procedures are isolated from the underlying facts of the case. This assumption is not correct. Every time a defense attorney cross-examines a State’s witness before trial, he reveals some part of his defense strategy. He may chose to forego this risk by waiving any objections he may have under the Fourth, Fifth, and Sixth Amendments of the Federal Constitution. Most chose not to.

This Court need look no further then the record in the instant case in order to reject *McCraine’s* assumption. The Appellant filed a motion to sever his domestic battery offenses from

his DVP violations. He also moved to bifurcate his trial. (R. at 89-91, 93.) Both motions involve procedures designed to prevent unfair prejudice. Yet, in the very same opinion, this Court ruled that a motion to sever is committed to the discretion of the trial court, while a motion to bifurcate is not. *McCraime*, 210 W.Va. at 198, 203-204, 588 S.E.2d. at 187, 192-193. There is no reason why this should be so.

Appellant's motion to sever claims that by severing the counts of the indictment, the Appellant preserves his right to testify during the guilt/innocence phase of his domestic battery trial, without implicating himself in his DVP cases. This constitutes pre-trial discussion of the Appellant's trial strategy. He freely discussed evidence regarding the elements of his case, such as his presence in the house when the battery occurred. (2/26/03 Hr'g at 3.) The Court, in its own discretion, granted the Appellant's motion to sever after a pre-trial hearing. There is no reason why Appellant's motion to bifurcate should be handled any differently.

Nichols did not coerce defendants to stipulate to prior convictions. *Nichols* allowed defendants with prior convictions to prevent that evidence from reaching the jury. Given the breadth of litigation on this issue in both state and federal courts it the Appellee suggests that most criminal defendants were not forced into stipulating, they readily accepted an opportunity won after a long and hard fight. The very same defendants who were fighting for the right to stipulate, are now provided the absolute right to bifurcate. Thus, the law of stipulations is obviated.

Although meritorious in its aim, *McCraime* should be overruled.

E. THE APPELLANT'S SECOND ASSIGNMENT OF ERROR HAS NO MERIT.

The Appellant next claims that, because he has not been convicted of a felony, his sentencing enhancement should not apply. Particularly when the Appellant stipulated to the prior offenses at

trial. This might be true if a *McCraine* error required this Court to remand the case for an entirely new trial. Since the Appellant has not addressed this threshold issue in his petition, he has waived it on appeal and rendered this assignment of error meritless. *State v. LaRock*, 196 W.Va. 294, 302, 470 S.E.2d 613, 621 (1996) (Issues not raised in appellate briefs are not considered on appeal.).

VI.

CONCLUSION

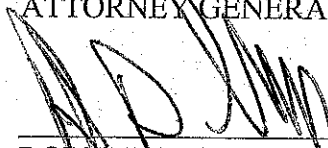
For the foregoing reasons, the judgment of the Circuit Court of Cabell County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

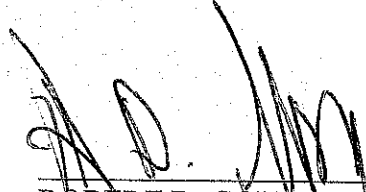


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CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Appellee, do hereby verify that I have served a true copy of the Brief of Appellee State of West Virginia, upon counsel for the Appellant by depositing said copy in the United States mail, with first-class postage prepaid, on this ²⁵~~27~~ day of July, 2005, as follows:

To: R. David Brown, Jr., Esq.
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