

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 18-0969

STATE OF WEST VIRGINIA,
Plaintiff-Respondent,

v.

Appeal From a Final Order
Of the Circuit Court of Morgan County
(Case No. 17-F-18)

ERICK D. SHUTE,
Defendant-Petitioner.

PETITIONER'S REPLY BRIEF

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ARGUMENT IN REPLY

1. **IT WAS PLAIN AND PREJUDICIAL ERROR FOR THE COURT TO FAIL TO DIRECT A VERDICT IN FAVOR OF THE PETITIONER AT THE CLOSE OF THE STATE’S CASE-IN-CHIEF AND AT THE CLOSE OF ALL OF THE EVIDENCE, OR IN THE ALTERNATIVE, THE JURY’S VERDICT WAS CONTRARY TO THE EVIDENCE PRESENTED.**

The Respondent principally relies upon the testimony of State witness Terry Marks in its Response Brief to rebut the Petitioner’s claim that the evidence was insufficient to sustain his conviction.

First, the Respondent points out that the Petitioner was witnessed by Marks the day before hiding in the woods with a rifle in his hand when Marks and others were riding around the subject property. This event is irrelevant as the shootings occurred the next day. The Petitioner had a legal right to be where he was observed the day before, he was not trespassing on other property nor was he breaking any law by carrying a firearm in the woods. In fact this was not uncommon for persons living on the mountain to carry firearms for protection from wild animals.

The Respondent then notes that Marks testified that he heard the Petitioner threaten Jack Douglas by stating “you don’t want to call the police.” The Petitioner took the stand in his own defense and denied any such threat. In fact, the Petitioner testified that he knew all three men to usually be armed (which fact was unrebutted by the State); that he asked them if they had permission to be on the property and they ignored him; that when he asked them to leave they became hostile, insulting and threatened him; and that he then saw both Willie and Travis Bartley reaching into their truck to grab something, presumably a gun and that they ignored his commands to stop. The Petitioner told the jury he then feared for his own safety after Willie Bartley said “fuck you, I’m not afraid of you or your fucking gun.” Lastly, he heard Jack Douglas tell Travis Bartley to “get him.”

(A.R. 779-81).

The Petitioner also avers that the testimony of Terry Marks was fraught with falsehoods and misstatements. The Petitioner believes it was apparent that Marks lied about several substantial events. First, he testified that after Jack Douglas was shot, he fell into his arms, however, Marks was not observed with any blood on his person, which surely would have been the case if he had actually caught Jack Douglas.

The Petitioner also avers that the bodies of the three men must have been moved or tampered with as the photographs of the crime scene depict that the bodies were not where they originally fell according to Marks' testimony. Marks said that when he and Jack Douglas returned to the scene and parked the truck he saw the Petitioner and Willie Bartley were still over the by fence talking/arguing. (A.R. 726). Marks said he was standing at the back of the truck and Jack Davis was standing at the driver's door when he said he was going to call the police and Travis Bartley was at the front of the truck. (A.R. 726 & 728). Marks then says that Willie Bartley came over beside him at the rear of the truck. (A.R. 726). Next, Marks says he hears shots (he thought they were warning shots) and Jack Douglas then comes around the truck and falls down on his knees. (A.R. 726-27). Jack Douglas' body isn't found face down (the position a body would end up after first falling on one's knees) but face up. (A.R. 999 photograph of three bodies around the pick-up truck). Marks then testified that Travis came around the truck (from in front of the truck after having been shot) and he also falls on his knees, again ending up, somehow, on his back (see photograph) and his father, Willy Bartley, goes over to pick him (Travis) up and he is shot too. No blood from Travis (DNA) was found on Willy to confirm this accusation. The photograph (A.R. 999), however, shows Willy Bartley's body not near the body of his son Travis, but on the other end and side of the truck beside

the passenger side front tire. (A.R. 727 & 999). Marks then said he ran around the trailer “with the truck in between me and the trailer and him (Petitioner).” (A.R. 727). Marks then said he ran around the trailer and through the woods and came out on the road, all the while being shot at by the Petitioner. (Id.). Marks testified that Travis was shot first, then Jack then Willy. (A.R. 729). Marks later testified that he and Willy were on the backside of the truck when Travis and Jack were shot “up front.” (A.R. 729). Marks then said once Jack had been shot he fell into his arms and that Travis was shot at the front of the truck, but Marks also said Travis was shot first, which makes Marks’ statement about Douglas impossible. (A.R. 729). Again, if Jack Douglas fell into Marks’ arms, Marks would have had Jack’s blood on him, but didn’t. Also, Travis’ body was found not in the front of the truck, where Marks said he was shot first, but in the back of the truck on the driver’s side, so he would have had to follow Jack Douglas, after both he and Jack were shot, from the front of the truck to the back. Additionally, Marks testified that the front drivers door was open when Jack Douglas was shot and the photos of that door show it still open. So after Travis was shot he would have also had to walk around the opened driver’s side door. (A.R. 1004 picture of opened driver’s side door). Totally illogical if not absurd.

Marks then testified that a short while later after he returned to his own home, he saw the Petitioner drive past him in his pick-up truck, leaving the scene and that the Petitioner smiled at him. (A.R. 731). The police did not arrive on scene for some time, enabling Marks to return to the scene and collect any firearms the victims might have had as he knew the Petitioner had left the mountain. Most probably the victim’s bodies had to be moved for Marks to retrieve their weapons.

Additionally, the trajectory of the shots fired is inconsistent with where the bodies were found. *See:* (A.R. 1031 the computer animation drawing of the origin of the shots, the shot paths,

the truck and were the bodies were found). Wound tract for Jack Davis was entrance wound in the back, exit wound out the front of the chest just below the sternum, back to front, right to left and downward. (A.R. 749-750). The wound tract for Travis Bartley was entrance wound on the right abdomen, front to back, left to right and downward. (A.R. 751-52 & 1040). Also there was another entrance wound on the right back where the bullet broke into two. (A.R. 752). The wound tract for Willy Bartley was an entrance wound to the left side of the face, exit wound to the other (right) side of the face as the bullet went through the oral cavity. (A.R. 754). From back to front. There was also a gunshot wound to the left neck. (A.R. 756). In closing, the State claimed that the Petitioner climbed over the fence, after the initial shots were fired and went up to Willy and “put one more round into Willy.” (A.R. 870). If that were true, i.e., shooting to make sure the victim was in fact dead, at close range, there would have been gun shot residue on the victim somewhere in the area of the entrance wounds (left cheek or left neck), however, none was found. Possibly Marks himself shot Willy to put him out of his misery, who knows?

The Petitioner states that this was not challenged by his trial counsel but should have been. Petitioner states that he recalls at least one victim to be lying face down on the ground and that his body was obviously moved by someone. The Petitioner believes that Terry Marks returned after he saw the Petitioner leave the mountain and probably retrieved any firearms the victims were in possession of.

Additionally, Marks testified that he heard shots being fired as he was fleeing the scene and that he heard bullets whizzing past him in the woods. The Petitioner testified that he never fired at Marks nor was any evidence presented of any bullets or bullet fragments being recovered from where Marks said he ran.

The Petitioner also avers that the State failed to establish the element of malice for first degree murder. The Petitioner argues that had his actions been malicious, he would have actually ambushed the men, catching them off guard. Instead, the undisputed evidence was that at the time of the Petitioner's initial encounter with the three victims, Willie Bartley approached the Petitioner who was behind his own fence and spoke to him for a significant amount of time. In fact, at this time, Marks testified that he and Jack Douglas actually got into the truck and left Willie Bartley alone with the Petitioner (armed with an M16 assault rifle) to take a look at the property again. (A.R. 725). Therefore, none of the four men present were in fear of their own safety from the Petitioner as his actions did not display any malice or threat toward them.

Accordingly, the Petitioner believes that from all the evidence presented at trial, even taking the evidence in the light most favorable to the State, no reasonable, rational juror would have found him guilty of the crimes of murder in the first degree and attempted murder in the first degree. There was insufficient evidence on the issue of premeditation and deliberation, and malice was inferred by the use of a deadly weapon, but actual malice was lacking. Clearly, the jury was swayed by sympathy over the loss of the lives of three men, ignoring the actual facts of the case.

2. IT WAS PLAIN AND PREJUDICIAL ERROR AND AN ABUSE OF DISCRETION FOR THE COURT TO DENY THE PETITIONER'S REQUESTED JURY INSTRUCTION ON IMPERFECT SELF-DEFENSE WHICH WAS SUPPORTED BY THE EVIDENCE.

The Petitioner refers the Court to his original Petition and the arguments made therein, most notably that no case has yet been presented to this Court wherein the facts would actually support the possibility of an imperfect self-defense instruction being given and that other jurisdictions have recognized the defense.

3. IT WAS PLAIN AND PREJUDICIAL ERROR AND AN ABUSE OF DISCRETION FOR THE COURT TO DENY THE PETITIONER'S OBJECTION TO THE STATE'S JURY INSTRUCTION ON ATTEMPTED MURDER WHICH INCLUDED LYING IN WAIT WHEN THE EVIDENCE DID NOT SUPPORT THAT INSTRUCTION.

Clearly there was no evidence presented by the State of an ambush or surprise attack by the Petitioner which could possibly support the notion of lying in wait. The evidence clearly established that the Petitioner and Willie Bartley spoke to each other at the fence line for a substantial amount of time and that even Terry Marks and Jack Douglas left their immediate location in their truck and returned and the Petitioner was still talking to Willie Bartley. There was no lying in wait and it was clear error to so instruct the jury. Also, as pointed out in the Petitioner's original brief, the error was not harmless as it could have directly influenced the jury into believing that the victims were ambushed or taken by surprise which was not the case and would have negated any possible self-defense or imperfect self-defense theory.

4. IT WAS PLAIN AND PREJUDICIAL ERROR AND AN ABUSE OF DISCRETION FOR THE COURT TO SENTENCE THE PETITIONER TO CONSECUTIVE SENTENCES.

Petitioner incorporates the arguments and law as set forth in his Original Petition for Appeal filed herein.

WHEREFORE, the Petitioner, Erick Shute, prays that the Court overturn his convictions aforesaid and grant him a new trial arguing that: (1) the Circuit Court abused its discretion in not granting him a directed verdict of acquittal or finding that the jury's verdict was contrary to the evidence presented; (2) that the Court erred by refusing the Petitioner's request for an instruction upon the theory of imperfect self-defense; (3) that the Court erred by giving the State's jury instruction regarding murder or attempted murder to include "lying in wait;" and (4) that the Court

abused its sentencing discretion by sentencing the Petitioner to consecutive sentences, and or such other relief as the Court may deem just, necessary and proper.

Respectfully submitted,

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By Counsel

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CERTIFICATE OF SERVICE

I, B. Craig Manford, hereby certify that on this 18th day of December, 2019, a true and accurate copy of the foregoing **Appellant's Reply** was were delivered to the Appellate Division, Office of the Attorney General, 812 Quarrier Street, 6th Floor, Charleston, West Virginia 25301 by United States Mail, postage prepaid and by electronic mail.

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