No. 31585 State of West Virginia v. Jason H.

FILED
June 30, 2004
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., dissenting:

In this case, the majority affirms Jason H. (hereinafter "Jason") juvenile delinquency because it found him guilty of malicious assault. The majority affirms because Jason did not cite to the circuit court the controlling authority from this Court concerning the right to self-defense in one's home. The majority thus avoids reviewing the sufficiency of the evidence to support Jason's conviction. Because I believe that Jason properly presented his self-defense claim below, I think the majority should have reached the question of whether the State proved its case beyond a reasonable doubt. If it had reached the issue, it would have had to find that Jason's conviction should be reversed.

A. Waiver of the correct legal standard and insufficiency review

The majority opinion observes that our self-defense cases distinguish between self-defense in general and self-defense in one's dwelling. The majority correctly cites Syllabus point 1 of *State v. Baker*, 177 W. Va. 769, 356 S.E.2d 862 (1987) that, "[t]he amount of force that can be used in self-defense is that normally one can return deadly force only if he reasonably believes that the assailant is about to inflict death or serious bodily harm; otherwise, where he is threatened only with non-deadly force, he may use only non-deadly force in return." However, we have a broader rule for self-defense in a dwelling:

> The occupant of a dwelling is not limited in using deadly force against an unlawful intruder to the situation where the occupant is threatened with serious bodily injury or death, but he may use deadly force if the unlawful intruder threatens imminent physical violence or the commission of a felony and the occupant reasonably believes deadly force is necessary.

Syl. pt. 2, *State v. W.J.B.*, 166 W. Va. 602, 276 S.E.2d 550 (1981).

We further explained the justification for this special rule:

> "'[T]here are strong reasons for recognizing the dwelling as a place of refuge in which the dweller may expect to be free from personal attack even of a nondangerous character, and the trend has been in the direction of holding that an unlawful entry of the dwelling for the purpose of an assault upon some person therein may be resisted by deadly force if this reasonably seems necessary for the purpose "although the circumstances may not be such as to justify a belief that there was actual peril of life or great bodily harm.'" R. Perkins, *Criminal Law* 1024 (1969)."

Id. at 609 n.6, 276 S.E.2d at 554 n.6. We also observed the "sound policy reasons" justifying this special rule. *Id*. at 611, 276 S.E.2d at 556. We first recognized the continuing "validity to the ancient English rule that a man's home is his castle, and he has the right to expect some privacy and security within its confines." *Id*. at 612, 276 S.E.2d at 556.[1] We further noted that this rule was premised on the protection that the home offers to "the basic unit of

[1]The rule continues to retain its validity in England. *See Queen ex rel. Bempoa v. London Borough*, [2002] E.W.H.C 153 ¶ 11 (Q.B. Div'l Ct.).("That an Englishman's home is his castle was an aphorism of our law as long ago as the reign of the first Elizabeth: see *Sendil's case* (1585) 7 Co Rep 6a. It is now almost four hundred years since the principle received its classic formulation in *Semayne's case* (1604) 5 Co Rep 91a at 91b: 'The house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose.'"). An even earlier view is found in Exodus 22:2 (New Amer. Bible), "[i]f a thief is caught in the act of housebreaking and beaten to death, there is no bloodguilt involved. But if after sunrise he is thus beaten, there is bloodguilt."

society–the family." *Id.*, 276 S.E.2d at 556.[2] We also observed that the rule was grounded in common sense:

> from the standpoint of the intruder the violent and unlawful entry into a dwelling with intent to injure the occupants or commit a felony carries a common sense conclusion that he may be met with deadly force, and that his culpability matches the risk of danger. We also recognize that there is often a certain vulnerability to the occupant of a dwelling who is forced to confront the unlawful intruder in the privacy of his home, without any expectation of a public response or help.

Id., 276 S.E.2d at 556.

The majority finds that this law is inapplicable because

> [Jason] never raised the self-defense standard concerning the occupant of a home or dwelling during any of the proceedings below. There is no reference in the record to the *W.J.B.* case. Moreover, there was no objection to the Circuit Court's reliance on *State v. Baker*. The appellant raises this issue for the first time upon appeal to this Court.

The majority then concludes, "[c]onsequently, inasmuch as the issue now asserted by [Jason] concerning self-defense was not raised below or made part of the record before the Circuit Court, it is not properly before this Court and is, accordingly, without merit." It therefore does not address whether there was sufficient evidence to convict Jason. I disagree and would find that we should address the question of evidentiary sufficiency.

We I agree that "[t]o preserve an issue for appellate review, a party must

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[2]*See also Queen ex rel. Bempoa,* [2002] E.W.H.C. 153 ¶ 10 ("The integrity of the home is one of the core values of any civilised society. Rightly both the civil law and the criminal law take an exceedingly serious view of any unlawful violation of the home.").

articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect." Syl. pt. 2, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 470 S.E.2d 162 (1996). However,

> "the 'raise or waive' rule, though important, is a matter of discretion. Thus, like most rules, this rule admits of an occasional exception. Exceptions must be few and far between and, therefore, an appellate court's discretion should not be affirmatively exercised unless the equities heavily preponderate in favor of such a step."

State v. Salmons, 203 W. Va. 561, 571, 509 S.E.2d 842, 852 (1998) (quoting *State v. Miller*, 197 W. Va. 588, 598, 476 S.E.2d 535, 545 (1996)). The importance the law attaches to self-defense in one's home and the facts here heavily preponderate in favor of such a step.

Moreover, since Jason argued self-defense below, I am not convinced that he waived his right to sufficiency review by this Court under the correct legal standard. While he might not have cited *W.J.B.* below, it is undisputed that he raised the *issue* of self-defense below and our law (like that of other jurisdictions) supports the recognition that citing authority in support of a legal argument is not necessarily the same thing as raising legal arguments in the first instance, *see Tracy v. Cottrell*, 206 W. Va. 363, 371 n.4, 524 S.E.2d 879, 887 n.4 (1999) ("[T]his Court has never held that failing to produce legal authority for an objection at trial, in and of itself, constitutes waiver of the issue for appeal purposes."), especially where the opposing party is on notice of the issue. *See also Interactive Gift Exp., Inc. v. Compuserve, Inc.*, 256 F.3d 1323, 1347 (Fed. Cir. 2001) (party may advance additional or new supporting arguments based on the evidence of record to support its claim).

A case explaining this doctrine is *United States v. Rapone*, 131 F.3d 188 (D.C. Cir. 1997). In *Rapone*, a defendant was convicted of contempt of court in a bench trial. While not constitutionally entitled to a jury, he was statutorily entitled to one. However, his numerous requests to the trial court for a jury did not cite the statute. Both the trial court and the government understood the defendant was seeking a jury trial–albeit on constitutional grounds. On appeal the defendant cited the statute, but the government argued that failure to cite it below waived the issue. *Id*. at 196. The appellate court reversed finding:

> The issue, then, is whether [defendant] surrendered his statutory right to a jury trial because he did not bring the statute to the district court's attention during his repeated requests for a jury trial. We hold that he did not. This case is distinguishable from cases in which a litigant attempts to raise an entirely new claim or new issue on appeal. In such cases, "issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal." *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C.Cir.1984). We have made exceptions to this rule only in "exceptional circumstances." *Id.* at 1085. In the present case, [defendant] is not attempting to raise the issue of a jury trial for the first time on appeal. Rather, he simply offers new legal authority for the position that he repeatedly advanced before the district court–that he was entitled to have his case tried before a jury.

Id. Jason does not now assert an entirely new legal theory, his legal theory is the same here as below–that he acted in self-defense. *Compare Albrecht v. Committee on Fed. Employ. Benefits*, 357 F.3d 62, 66 (D.C. Cir. 2004) ("By contrast, appellants here present not new legal *authority* for an argument raised in the district court, but rather an entirely new *argument*–that the defendant is not the 'Board of Governors' identified in the complaint. We thus agree with the Board that the argument is waived."). Consequently, when an appellate

court reviews a question of law *de novo*,[3] the court must use its "'"full knowledge of its own . . . precedents."'" *Rapone*, 131 F.3d at 197 (quoting *Elder v. Holloway*, 510 U.S. 510, 516, 114 S. Ct. 1019, 1023, 127 L. Ed.2d 344, 351 (1994)) (quoting *Davis v. Scherer*, 468 U.S. 183, 192 n.9, 104 S. Ct. 3012, 3018 n.9, 82 L. Ed. 2d 139, 48 n.9 (1984)). As we have said:

> "'When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.'"*United States National Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 446, 113 S. Ct. 2173, 2178, 124 L. Ed.2d 402, 412 (1993), *quoting Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99, 111 S. Ct. 1711, 1718, 114 L. Ed.2d 152, 166 (1991).

State v. Blake, 197 W. Va. 700, 706 n.10, 478 S.E.2d 550, 556 n.10 (1996). *Accord Forshey v. Principi*, 284 F.3d 1335, 1356 (Fed. Cir. 2002) ("[A]ppellate courts may apply the correct law even if the parties did not argue it below and the court below did not decide it, but only if an issue is properly before the court."), *overruled on other grounds by Morgan v. Principi*, 327 F.3d 1357 (Fed. Cir. 2003).

Finally, I believe that *Baker*'s refusal to address whether a business owner has a self-defense privilege similar to that of a homeowner is not applicable here. *Baker's* refusal to address this question stemmed from the fact that Baker did not make that argument either below or in this Court. 177 W. Va. at 771 n.2, 356 S.E.2d at 864 n.2 ("The defendant did not

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[3]We, of course, have held that "[t]he determination of whether a circuit court applied the proper legal standard is a question of law we review *de novo*." Syl pt. 1, *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 584 S.E.2d 176 (2003).

urge below nor on appeal that as co-owner of the bar she had a special standing to utilize self-defense similar to the occupant of a home."). Thus, footnote 2 was gratuitous dicta recognizing that there was out of jurisdiction authority that a business owner has no duty to retreat when attacked in the place of business.[4] Here, by contrast, there is mandatory authority about an occupant's self-defense rights; precedent under which Jason squarely falls.

By not addressing the sufficiency issue as Jason did not cite *W.J.B.* below, the majority has "occasion[ed] appellate affirmation of [an] incorrect legal result[][,]" *Elder v. Holloway*, 510 U.S. at 515 n.3, 114 S. Ct. at 1023 n.3, 127 L. Ed. 2d at 350 n.3, as I shall now demonstrate.

B. Application of law to fact

In order to show that there was insufficient evidence to convict Jason, I begin by reciting the pertinent facts. In late 2000, Atwell borrowed $90.00 from Jason.[5] Atwell gave Jason a "Gibson Amp" to hold until the money was repaid. It appears that the money was supposed to be repaid within five days, but Atwell failed to repay the money. Instead, he began harassing Jason to regain the Gibson Amp.[6]

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[4]Indeed, Baker's footnote 2 specifically cited the annotation appearing at 41 A.L.R.3d 584 (1972). The full title of this annotation is *Homicide: Duty to Retreat as a Condition of Self-Defense when One is attacked at his Office, or Place of Business or Employment.*

[5]The record suggests Atwell was around 17 or 18 years of age at that time.

[6]During the trial Atwell denied engaging in the harassing conduct.

During the trial, Jason testified that Atwell drove a car recklessly near Jason's prior home. He described the incident as involving "spinning tires," and that Atwell "about run over one of [the neighbor's] granddaughters."[7] Jason also testified that Atwell left a threatening note at a house in which Jason once lived that Atwell "was wanting his f-ing amp, [and] he'd do what it f-ing took [to obtain it]." Jason also testified that around October 30, 2000 "[s]omebody throwed eggs, beat the windows out, spray painted my house, flipped over the tables, broke off the water faucets and filled up the floor with water and everything."[8] Jason said he reported this, giving Atwell's name as a suspect, but nothing was done.

On the evening of October 31, 2000, Jason was in the kitchen of his home with his girlfriend, Drema M., and her 10-month-old son. He testified that while eating, Atwell broke in.[9] Thereupon a fight ensued and he struck Atwell with a baseball bat.

At the conclusion of the adjudicatory proceeding, the trial court found Jason was justified in hitting Atwell once, but that further strikes were unjustified. Thus, the court found that the State proved beyond a reasonable doubt that Jason used excessive force.

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[7]This incident was reported to the police, but no arrest was made.

[8]It appears that Jason was living in the house alone and independent of his parents.

[9]Atwell gave a different version of what occurred. According to him, he knocked on Jason's door and was invited into the home.

Jason argues that the State failed to prove beyond a reasonable doubt that he did not act in self-defense at all times during the fight with Atwell. Our cases have held that "[o]nce there is sufficient evidence to create a reasonable doubt that [an assault] resulted from the defendant acting in self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense." Syl. pt. 4, *State v. Kirtley*, 162 W. Va. 249, 252 S.E.2d 374 (1978). *See also* Syl. pt. 6, *State v. McKinney*, 178 W. Va. 200, 358 S.E.2d 596 (1987) ("Once the defendant meets his initial burden of producing some evidence of self-defense, the State is required to disprove the defense of self-defense beyond a reasonable doubt."). Further, we have held that "[i]t is peculiarly within the province of the [factfinder] to weigh the evidence upon the question of self-defense, and the verdict of a [factfinder] adverse to that defense will not be set aside unless it is manifestly against the weight of the evidence." Syl. Pt. 5, *State v. McMillion*, 104 W. Va. 1, 138 S.E. 732 (1927). *See* Syl. Pt. 2, *State v. Clark*, 175 W. Va. 58, 331 S.E.2d 496 (1985). This Court has also been careful to note that

> 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 [factfinder] might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the [factfinder] can find guilt beyond a reasonable doubt. Credibility determinations are for a [factfinder] and not an appellate court.

Syl. Pt. 3, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). While this is a demanding standard, it is not insurmountable. *See, e.g.*, *State v. Cook*, 204 W. Va. 591, 515 S.E.2d 127 (1999) (reversing conviction based on insufficiency of the evidence since the State did not carry its burden of showing beyond a reasonable doubt that the defendant did not act in defense of her husband when she shot the husband's attacker).

This Court observed in *W.J.B.*, 166 W. Va. at 608, 276 S.E.2d at 554 (1981), (internal quotations and citations omitted), that "a person has the right to repel force by force in the defense of his person, his family or his habitation, and if in so doing he uses only so much force as the necessity, or apparent necessity, of the case requires, he is not guilty of any offense[.]" "In addressing the standard by which the reasonableness of an individual's beliefs and actions in self-defense must be judged, we have recognized that the reasonableness of such beliefs and actions must be viewed 'in [the] light of the circumstances in which he acted at the time and not measured by subsequently developed facts.'" *State v. Plumley*, 184 W. Va. 536, 540, 401 S.E.2d 469, 473 (1990) (per curiam) (quoting *State v. Reppert*, 132 W. Va. 675, 691, 52 S.E.2d 820, 830 (1949)).

In the instant proceeding, the circuit court found that Jason "may have been justified in striking [Atwell] one time, but he used far more force than was necessary to subdue [Atwell]; he beat him senseless." In other words, the circuit court found that Jason's

first blow was justified as self-defense, but further blows were excessive. *See* Syl. pt. 1, in part, *State v. Miller*, 85 W. Va. 326, 102 S.E. 303 (1919) ("One assaulted by another is not bound to retreat, but if he . . . unnecessarily pursues his assailant after the latter has declined the combat and inflicts upon him bodily injury, he is guilty of assault and battery."); Syl. pt. 8, in part, *Shires v. Boggess*, 72 W. Va. 109, 77 S.E. 542 (1913) ("One in his own house need not stand and take without resisting with force even slight assaults of an intruder or trespasser. . . . But he must not use force disproportioned to that used against him[.]").

In view of the circuit court's finding that self-defense was initially appropriate, I will examine Jason's testimony on how the confrontation began.[10] Jason described what occurred after Atwell broke into the home as follows:

> Q. Did he swing at you?
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> A. He [Atwell] swung at me. He swung like he was going to hit toward me. And when he did, he hit Drema and made her drop [the baby]. And that's when he jumped back up trying to get hold of me. And that's when I hit him, I come up like this right here (indicating). And hit him with a ball bat right here. That's how he got the mark on his jaw right there. That was the first hit that was swung.
> . . .
>
> Q. And what happened then? Did he fall?
>
> A. Yes, sir. He started staggering around his feet, you know what I

[10]Atwell testified that he was invited into the home and that he and Jason had a friendly talk for about 45 minutes. At the end of the conversation, he claimed that while preparing to leave, Jason snuck up behind him and struck him. My review of the trial court's oral findings show it did not give any weight to Atwell's version of how the fight started.

mean, kind of where it knocked him off balance and he kind of reached down in the back of his pants trying to get something. . . .

. . .

Q. So the first lick you swung with the bat, he just staggered backwards?

A. When I hit him, he just kind of like stared at me like I didn't do nothing to him, you know what I mean? Then he started staggering around.

Q. And when he was going down, you hit him, is that what you're saying?

A. Yeah.

Q. And you hit him 8 to 10 times total?

A. Yeah.

Q. Did you do this out of anger?

A. No, out of saving my life. I thought he come in there to kill me. I didn't have nothing against Billy. When he come to pawn the amp, I did it as a favor, and then he got mad. And if I'd known that would be the cause of all of this, I'd just give him the amp back. It ain't worth $90, you know what I mean?

The State contends this case is similar to *State v. Wykle*, 208 W. Va. 369, 540 S.E.2d 586 (2000) (per curiam), and that we should affirm on that authority. I disagree. In *Wykle* the defendant was convicted of unlawful assault. The facts in that case revealed that the victim was the initial aggressor. During an argument with the defendant, the victim slapped the defendant on the head.[11] The defendant retaliated by stabbing the victim nine times. After the jury convicted him, he argued on appeal that the State failed to prove beyond a

[11]This attack occurred in the home of a friend of the defendant.

reasonable doubt that he did not act in self-defense. This Court rejected the argument:

> We believe the use of a deadly weapon under the circumstances to be unjustified. Nothing in the record indicated [the victim] possessed a deadly weapon, or that [the defendant] was in imminent danger of death or great bodily harm. [The victim] confronted [the defendant] with nothing more than his bare hands. Both men were relatively the same size in height and weight. While our cases would support the reasonable use of [the defendant's] bare hands to repel any further attack by [the victim], we believe the jury properly found that the use of a knife to stab [the victim] nine times was excessive in relation to any reasonably perceived danger.

Wykle, 208 W. Va. at 374, 540 S.E.2d at 591.

The decision in *Wykle* is distinguishable from the instant case. In *Wykle*, the victim was invited into the home where the attack occurred. In the instant case, Atwell broke into Jason's home. There was no evidence in *Wykle* that the defendant knew the victim had a reputation for carrying weapons. In the case *sub judice*, Atwell testified that he knew that Atwell had on occasion possessed guns, knives and brass knuckles. In *Wykle*, there was no evidence showing that the victim had previously harassed or threatened the defendant. On the other hand, Jason testified to harassing conduct by Atwell that included a threatening note and vandalism of his home.[12] Finally, in *Wykle* we found it significant that there was no real

[12]See *State v. Richards*, 190 W.Va. 299, 305, 438 S.E.2d 331, 337 (1993) ("[T]he Court has recognized that where a defendant in a malicious wounding or assault case relies on self-defense, he may properly introduce evidence of the violent or turbulent character of the victim and also evidence of prior threats or attacks of the victim against the defendant.").

physical size difference between the victim and the defendant. In this case, however, the record fails to show if a size difference existed between Jason and Atwell.

I agree that the circuit court was correct in being concerned about the necessity of Jason striking Atwell more than one time in order to subdue him, as "[o]nce the danger has passed and the defendant can no longer reasonably believe that he is in danger, the law does not excuse [further violence]."*State v. Clark*, 175 W. Va. 58, 62, 331 S.E.2d 496, 500 (1985). However, according to Jason's testimony, repeated blows were necessary because Atwell was not subdued with the first blow and he appeared to be reaching for a weapon. Thus, a critical issue for which the State had the burden, was to show beyond a reasonable doubt that one blow neutralized the threat Atwell posed.

The only evidence the state produced on the issue of the effects of the initial blow to Atwell, was through Atwell. According to him, Jason sneaked up behind him and struck him in the head for no apparent reason. Atwell further testified that the initial blow to the head rendered him defenseless. The circuit court's oral findings show it did not give any weight to Atwell's version of the fight. Consequently, we are left with Jason's testimony that he struck Atwell on the jaw initially, and that this blow did not neutralize Atwell. To rebut Jason's contention that the initial blow did not deter Atwell, the State had to present medical evidence as to what effect the initial blow had on Atwell *See State v. Flippo*, 212 W. Va. 560, 585-586, 575 S.E.2d 170, 195-196 (2002) ("[The defendant] reported that he

was attacked and twice knocked unconscious by the alleged intruder. . . . Dr. Irvin M. Sopher, former chief medical examiner, testified . . . that the bruises to [the defendant's] head were insufficient to render him unconscious."). Absent medical testimony, the state was obligated to call the only other witness to the attack, Drema M., to elicit evidence of the effects of the first blow. *See State v. James*, 211 W. Va. 132, 137, 563 S.E.2d 797, 802 (2002) (per curiam) ("[Defense] counsel retained and exercised full freedom to argue to the [factfinder] the effect of the State having failed to call additional witnesses who might have confirmed or challenged the State's version of the events at issue in the trial."). The State did neither. Consequently, if we put aside Atwell's testimony, we are left to speculate as to what degree of harm the first blow caused and "an appellate court, cannot speculate that, given the evidence at trial, a jury properly charged would have unanimously agreed beyond a reasonable doubt as to the defendant's guilt." *State v. Hinkle*, 200 W. Va. 280, 288 n.28, 489 S.E.2d 257, 265 n.28 (1996). This is, however, exactly what the circuit court did–speculate, and "no person should be condemned as a criminal and punished for a crime when his guilt is shrouded in doubt or uncertainty or rests upon mere speculation or possibility." *State v. Evans*, 136 W. Va. 1, 24-25, 66 S.E.2d 545, 558 (1951) (Haymond, J., dissenting). *See also Phares v. Brooks*, 214 W. Va. 442, 446, 590 S.E.2d 370, 374 (2003) (per curiam) ("We think that a circuit court's order cannot legitimately be based on speculation or divorced from the evidence of record.").

Hence, I "cannot find that the State adduced testimony or other evidence

showing that the defendant acted in any manner other than self-defense[,]" because I do not find the State proved the additional blows were excessive beyond a reasonable doubt. *State v. Bates*, 181 W. Va. 36, 39-40, 380 S.E.2d 203, 206-207 (1989) (per curiam). I would reverse because of evidentiary insufficiency and bar retrial. *State v. Baker*, 177 W. Va. 769, 771, 356 S.E.2d 862, 864 (1987) (""In view of the fact that [Jason] was entitled to a judgment of acquittal, no retrial is permitted and the case is remanded for the entry of such judgment.").

Thus, I respectfully dissent.[13] I am authorized to state that Chief Justice Maynard joins in this dissent.

[13]Because I do not believe that the majority should have reached the issue of the continuance, I express no view on that issue.