
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0394

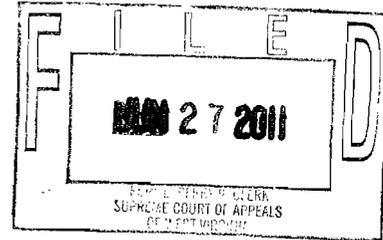
STATE OF WEST VIRGINIA,

*Plaintiff Below,
Respondent,*

v.

TYRONE R. CROUCH, JR.

*Defendant Below,
Petitioner.*



BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

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TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	1
II. SUMMARY OF ARGUMENT	2
III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	3
IV. STATEMENT OF FACTS	3
V. ARGUMENT	22
A. THE PETITIONER’S CLAIM WAS WAIVED BELOW AND IS NOT SUBJECT TO PLAIN ERROR REVIEW BY THIS COURT	22
1. The Standard of Review	22
2. By Failing to Object Below the Petitioner Has Waived this Assignment of Error	23
3. The Petitioner Has Not Proven That the Trial Court’s Instructions Affected His Substantial Rights.	28
VI. CONCLUSION	31

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Keeble v. United States</i> , 412 U.S. 205 (1973)	3
<i>Kirk v. Commonwealth</i> , 44 S.E.2d 409 (Va. 1947)	27
<i>Miranda, Miranda v. Arizona</i> , 384 U.S. 436 (1966)	6
<i>Neder v. United States</i> , 527 U.S. 1 (1999)	28
<i>Noakes v. Commonwealth</i> , 699 S.E.2d 284 (Va. 2010)	27
<i>State v. Bell</i> , 211 W. Va. 308, 565 S.E.2d 430 (2002)	3
<i>State v. Cabrera-Pena</i> , 605 S.E.2d 522 (S.C. 2004)	27
<i>State v. Crabtree</i> , 198 W. Va. 620, 482 S.E.2d 605 (1996)	25
<i>State v. Day</i> , 225 W. Va. 794, 696 S.E.2d 310 (2010)	23
<i>State v. England</i> , 180 W. Va. 342, 376 S.E.2d 548 (1988)	25
<i>State v. Green</i> , 220 W. Va. 300, 647 S.E.2d 736 (2007)	2, 24, 26, 27
<i>State v. Guthrie</i> , 194 W. Va. 657, 461 S.E.2d 163 (1995)	22
<i>State v. Hinkle</i> , 200 W. Va. 280, 489 S.E.2d 257 (1996)	22, 25
<i>State v. LaRock</i> , 196 W. Va. 294, 470 S.E.2d 613 (1996)	23
<i>State v. Lough</i> , 143 W. Va. 838, 105 S.E.2d 538 (1958)	2
<i>State v. Miller</i> , 194 W. Va. 3, 459 S.E.2d 114 (1995)	23
<i>State v. Neider</i> , 170 W. Va. 662, 295 S.E.2d 902 (1982)	22-23
<i>State v. Neuman</i> , 179 W. Va. 580, 371 S.E.2d 77 (1988)	12
<i>State v. Thomas</i> , 157 W. Va. 640, 203 S.E.2d 445 (1974)	24-25
<i>State v. Thompson</i> , 220 W. Va. 246, 647 S.E.2d 526 (2007) (<i>per curiam</i>)	25, 26

<i>State v. Vollmer</i> , 163 W. Va. 711, 259 S.E.2d 837 (1979)	27
<i>Stuckey v. Trent</i> , 202 W. Va. 498, 505 S.E.2d 417 (1998)	26
<i>United States v. Carter</i> , 540 F.2d 753 (4th Cir. 1976)	3
<i>United States v. Colon-Munoz</i> , 192 F.3d 210 (1st Cir. 1999)	28
<i>United States v. Mojica-Baez</i> , 229 F.3d 292 (1st Cir. 2000)	28
<i>United States v. Olano</i> , 507 U.S. 725 (1993)	28
<i>Vujosevic v. Rafferty</i> , 844 F.2d 1023 (3d Cir. 1988)	3
STATUTES:	
Cal. Penal Code § 192(b)	27
W. Va. Code § 17C-5-1(a)	24, 26
W. Va. Code § 61-2-1	1, 26
W. Va. Code § 61-2-4	1, 24, 26
W. Va. Code § 61-2-5	26
W. Va. Code § 62-9-3	1
OTHER:	
W. Va. R. Crim. P. 30	25
W. Va. R. Crim. P. 52(b)	25
W. Va. R. Evid. 103(a)(1)	23

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BRIEF OF RESPONDENT STATE OF WEST VIRGINIA

I.

STATEMENT OF THE CASE

On September 9, 2009, a Fayette County Grand Jury indicted Tyrone “Tike” Crouch, Jr. (hereinafter “the Petitioner” or “Petitioner”), for one count of murder. (App. vol. I, 11.) *See* W. Va. Code §§ 61-2-1, 62-9-3. On November 18, 2009, a Fayette County Petit Jury convicted the Petitioner of the lesser-included offense of voluntary manslaughter pursuant to West Virginia Code § 61-2-4. The Petitioner’s sentencing hearing occurred on December 29, 2009. (App. vol. I, 7.) The trial court denied Petitioner’s motion for probation and sentenced him to a determinate sentence of ten years.¹ (*Id.* at 9.) Petitioner’s appeal is predicated upon this order.

¹The trial court re-sentenced the Petitioner on January 10, 2011, for purposes of appeal. (App. vol. I, 6.)

II.

SUMMARY OF ARGUMENT

The Petitioner claims a single assignment of error:

The Trial Court Erred in Improperly Instructing the Jury As To The Elements Of A Lesser Included Offense By Instructing The Jury That For An Act To Be Involuntary Manslaughter That Act Must Have Been Lawful.

The Petitioner's appeal is based upon an incorrect premise. The trial court did, in fact, instruct the jury that they could convict the Petitioner of involuntary manslaughter if he committed an *unlawful* act unintentionally and with a reckless disregard for the safety of others. (App. vol. III, 127.) Syl. pt. 3, *State v. Lough*, 143 W. Va. 838, 105 S.E.2d 538 (1958); *State v. Green*, 220 W. Va. 300, 306, 647 S.E.2d 736, 742 (2007). The Petitioner's brief does not mention this instruction.

During deliberations the jury asked to be reinstructed on the elements of all the potential verdicts, especially second degree murder and voluntary manslaughter. (App. vol III, 162.) The trial court's re-instruction read "the [Petitioner] . . . while engaged in a *lawful* act, unintentionally and with a reckless disregard for the safety of others, caused the death of [the victim]." (App. vol. III, 171.)

Counsel for the Petitioner's proposed instruction read:

"[O]n or about the 17th day of April did unintentionally cause the death of Lloyd England, which death was the proximate result of the negligence of the [Petitioner], so gross, wanton, and culpable as to show a reckless disregard for human life."

(App. vol. III, 101.)

The argument he is now pressing on appeal was never raised at trial. The Petitioner never asked the trial court for an instruction on "unlawful act" involuntary manslaughter. (App. vol. III,

93.) His objection at trial was confined to the appropriate *mens rea*, not whether the act was legal or illegal. (App. vol. III, 101.)

For this Court to rule for the Petitioner it must find that the trial court had an obligation, *sua sponte*, to instruct the jury on both lawful and unlawful act involuntary manslaughter.² Otherwise, it must rule that the Petitioner has waived this assignment of error.

The Petitioner's assignment of error also asks this Court to re-weigh the evidence, a duty reserved for the jury, to determine the Petitioner's intent. The record demonstrates that the jury found sufficient evidence of the Petitioner's intent to kill. This is a question of fact. Such questions are not for appellate courts.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case presents no issues of first impression. Nor does it require a complex analysis of already existing case law. Counsel for the Respondent states that oral argument is not necessary. *See* Rule 18(a)(1) of the Revised Rules of Appellate Procedure.

IV.

STATEMENT OF FACTS

A reasonable juror could have found that on April 16, 2009, the Petitioner struck the victim with a crowbar near the front door of his home. (App. vol. II, 150.) Jan Care employee Tim

²The Petitioner claims *State v. Bell*, 211 W. Va. 308, 310, 565 S.E.2d 430, 432 (2002), is dispositive to the case at bar. It is not. In *Bell*, defense counsel requested a jury instruction on the lesser-included offense. The same may be said for *Keeble v. United States*, 412 U.S. 205, 206 (1973); *United States v. Carter*, 540 F.2d 753, 754 (4th Cir. 1976); and *Vujosevic v. Rafferty*, 844 F.2d 1023, 1026 (3d Cir. 1988). These cases, cited by the Petitioner, do not address a trial court's duty to instruct the jury on the elements of a lesser-included offense when it has not been asked for.

Robinson testified that he was dispatched to the Petitioner's home in Oak Hill, Fayette County, at approximately 11:00 p.m. (App. vol. II, 149.) He found the victim lying on his back in the entrance to the home,³ with a substantial amount of blood puddled on the floor underneath his head. (App. vol. II, 151, 156.) The victim was not breathing, had a swollen and lacerated right eye, and blood coming from his nose. (App. vol. II, 151, 161.) After clearing his airway of blood, Mr. Robinson and the investigating officer placed the victim's hands on his chest and rolled him onto his left side, placed a board underneath him, and rolled him back onto the board while Mr. Robinson's partner held the victim's head. (App. vol. II, 154, 161.) Because of the method used by the EMTs they were afforded a full view of the area underneath and surrounding the victim. (App. vol. II, 202-03.) Neither Mr. Robinson, his partner nor the investigating officer noticed a knife anywhere near the victim's body. (App. vol. II, 155, 163, 203.) The investigating officers located a crowbar in the Petitioner's back bedroom. (App. vol. II, 100, 205.) The crowbar was tested for fingerprints and DNA. Both tests came up negative. (App. vol. II, 192-93.)

Corporal Chris Young, the lead investigating officer, was dispatched to the Petitioner's home by 911 call of a fight in progress. The 911 operator did not mention the presence of any weapons. (App. vol. II, 195.) He found the victim lying on his back, with his head rested near the front door. (App. vol. II, 196.) His feet were pointed to the rear of the Petitioner's home, and his hands were lying by his side, with his palms facing up. (App. vol. II, 198.) The Petitioner's ex-wife Laura Rubin was sitting on a couch, and the Petitioner was standing next to the victim, holding a wet cloth to his face. (App. vol. II, 196.) He repeatedly told Officer Young that he ordered the victim to

³According to his partner, the victim's head was lying in the front doorway. (App. vol. II, 160.)

leave his home, but that the victim refused. He also stated that he feared Mr. England because he knew he had murdered someone several years before.⁴ (App. vol. II, 201, 208.) The Petitioner's house had two front doors: a storm door, and a front door. The front door swung towards the inside of the house, but could not be opened all the way because of a bookshelf. (App. vol. II, 197-98.) The officer described the area near the front door as a "tight space."⁵ (App. vol. II, 201.) The victim had blood running from his eye and nose, and was making gurgling sounds as if he was choking on his own blood. (App. vol. II, 199, 202.) As the officer assisted the EMT, he noticed a bandana near the victim's head, but did not notice a knife anywhere near it. (App. vol. II, 200.) After he and the EMT took the victim outside, he walked back into the Petitioner's home to find the Petitioner standing in the front doorway, and a knife lying open on the ground. (App. vol. II, 204, 208.) The Petitioner pointed to the knife and said, "He was gonna cut me with it." The Petitioner had not mentioned this the first time he spoke to Officer Young. (App. vol. II, 204.) The officer also opined, based upon his experience, that the Petitioner was intoxicated. He did not want to take a statement from the Petitioner while he was in this condition. (App. vol. II, 205.)

Detective Perdue, the State's first witness, testified that he found blood on the front and the base of the inside of the front door. (App. vol. II, 123.) Some of the victim's blood splashed onto the top of the door and dripped downwards. Some of the blood splashed onto the bottom of the door.

⁴The Petitioner did not tell the investigating officer that the victim had lived with him for six months *after* this alleged murder. (App. vol. III, 77.)

⁵This restricted space made it more difficult to roll the victim onto the board. It also restricted the ground covered by the victim. Despite the victim's presence in this tight space, the officer did not see a knife. (App. vol. II, 203.)

(App. vol. II, 96, 102, 105.) There was no blood towards the back of the living room or in the home's kitchen. (*Id.*)

The following day Detective Perdue spoke to the Petitioner at the Oak Hill Police Department. (App. vol. II, 107.) Before speaking to the detective, the Petitioner reviewed and executed a *Miranda*⁶ waiver form. The detective recorded the statement. (App. vol. II, 110.) After the first statement,⁷ Detective Perdue told the Petitioner that he did not believe he was being honest with him. (App. vol. II, 115.) A few minutes later, the Petitioner volunteered to give a second statement.

Prior to taking this statement, Detective Perdue had him execute a second *Miranda* waiver form. (App. vol. II, 115.) The second statement began shortly after 10:00 p.m. and was also recorded. (App. vol. II, 117.)

Both statements were played for the jury. (App. vol. II, 134.) According to the first statement the victim was holding a knife in his right hand. (App. vol. II, 135, 138.) Detective Perdue demonstrated to the jury how the Petitioner claimed the victim was holding the knife. (App. vol. II, 136.) Over defense counsel's objection, the detective also pointed out several inconsistencies between the two statements.

Detective Perdue also took a statement from witness Ms. Rubin who was present when the incident occurred. (App. vol. II, 142, 174.) The detective also recorded this statement. (App. vol.

⁶*Miranda v. Arizona*, 384 U.S. 436 (1966).

⁷According to the detective, the first statement began at about 9:30 p.m. and lasted 40 minutes. (App. vol. II, 110, 113.)

II, 143.) According to the statement, the Petitioner and the victim were arguing over beer. (App. vol. II, 177.)

After the State's first witness, the trial court delivered a copy of the proposed charge to counsel and accepted proposed jury instructions from both sides. (App. vol. II, 125.)

At trial, Ms. Rubin⁸ testified that the victim came to the Petitioner's home while the Petitioner was grilling. When the victim came over, he was drinking. (App. vol. II, 180.) A half-hour later, the Petitioner and Ms. Rubin walked to the store to buy some butter, cigarettes, and beer. (App. vol. II, 180-81.) Before they left, the victim gave Ms. Rubin all of his change. (App. vol. II, 180.) When they came back, the victim and the Petitioner began to argue over the beer. (App. vol. II, 181.) Ms. Rubin testified that the argument went "up and down" for the rest of the day, but did not get physical until later that evening. (*Id.*) She claimed that, at some point, the victim had the Petitioner up against the wall.⁹ (App. vol. II, 176.) Although she was at the home the entire evening, she never saw a knife in the victim's hand. (App. vol. II, 178.) After the victim was taken from the home, Ms. Rubin claimed she saw a knife on the floor near a bandana under the victim. (App. vol. II, 178-79.)

The State called Dr. Michael Hall, a board-certified trauma surgeon working at CAMC, the evening of the incident. (App. vol. II, 166.) Both sides stipulated to his expertise in the area of trauma surgery. (*Id.* at 165.) Because of the seriousness of his injuries, the victim was transferred to the CAMC trauma unit from Plateau Medical Center in Oak Hill. (*Id.* at 166.) After stabilizing

⁸The trial court described Ms. Rubin as a witness with "some limitations." Direct examination soon degenerated into Ms. Rubin answering the questions she wanted to answer, not the ones asked.

⁹The Petitioner never mentioned this in his statement to the police. (App. vol. III, 77.)

the patient, Dr. Hall ordered CAT scans of the patient's head, neck, chest, and abdomen. According to the hospital's neurosurgeon the patient had a "huge hemorrhage" in the frontal portion of his brain, that involved the mid-portion of his brain and portions of his brainstem. After viewing the patient's CAT scan, the surgeon opined that it was not likely that he would survive. (App. vol. II, 167, 170.) The patient had also suffered numerous acute fractures to the bones on both sides of his face. (*Id.* at 168-69.)

After his initial exam and diagnosis, the patient was moved to the ICU, where the neurosurgeon once again consulted. (App. vol. II, 170.) After waiting a sufficient period of time--several hours--to ensure that the patient's lack of responsiveness was not due to recently ingested medication, the neurosurgeon tested the patient's reflexes. They were "rudimentary." (*Id.* at 171.) The patient was declared brain dead on April 18, 2009. (*Id.* at 172.) A team harvested his organs, and then he was transported to the medical examiner's office. (*Id.*)

The State's Medical Examiner, Dr. Hamada Mahmoud, performed an autopsy on the victim on April 20, 2009. (App. vol. II, 211.) The victim had suffered several blunt force injuries to his face which had been stitched up prior to his death. The injuries were consistent with a backhanded strike to the face with a crowbar. (*Id.* at 212.) The doctor characterized the manner of death as a homicide. (*Id.* at 214.) There were two causes of death. The Petitioner died from a severe interbrain hemorrhage brought on by high blood pressure caused by ingestion of cocaine and the injuries suffered when the Petitioner hit him in the face with the crowbar. The victim tested positive for alcohol, cocaine, and Valium. (*Id.* at 214, 217.)

The State rested after Dr. Mahmoud's testimony. (App. vol. II, 218.) Counsel for the Petitioner made a motion for a judgment of acquittal, limited to the first and second degree murder

charges. (*Id.* at 222.) The trial court described the State's evidence of premeditation and deliberation as "weak," but ruled that degree is a question of fact for the jury. (App. vol. II, 224-26.) He denied defense counsel's motion.

The second day of trial opened with the presentation of the defense's case-in-chief. The defense's first witness was Dr. Adin Timbayan. (App. vol. III, 4.) Dr. Timbayan specializes in emergency medicine and is board certified in abdominal surgery. (*Id.*) The trial court certified the doctor as an expert in emergency medicine and abdominal surgery. (*Id.*) The doctor worked at Plateau Medical Center and had treated the victim for broken facial bones on February 1, 2009. (App. vol. III, 5.) He then treated the victim on the evening of the incident for similar injuries. (*Id.*) The doctor performed CT scans on the victim in February and April 2009. The April 2009 CT scan revealed several facial fractures and intracerebral bleeding; the February scan revealed similar fractures but no bleeding. The doctor also had a toxicology screen conducted on the victim in April which revealed the presence of cocaine, Valium, and alcohol. (App. vol. III, 7-8.) The trial court admitted the victim's medical records into evidence pursuant to a stipulation. (App. vol. III, 17.)

On cross-examination the doctor testified that the presence of broken bones on both sides of the victim's face was consistent with multiple strikes by a blunt object. (App. vol. III, 11.)

The defense next called William Collins. By the time of his testimony, Mr. Collins had known the Petitioner for 30 years. (App. vol. III, 18.) Mr. Collins had visited the Petitioner at his home the day before the incident, and claimed to have noticed a crowbar, a hammer and a ginseng hoe lying near a chair on the living room floor. (*Id.*) By the time of his testimony, the witness had known the victim for 25 years, and testified he was a friend. (*Id.*) A month before the incident the

victim showed the witness a knife which looked just like the knife recovered from the Petitioner's home. (App. vol. III, 19.)

On cross-examination the witness conceded that he had spoken with the Petitioner several times before trial. He also conceded that when he spoke to the police a few days before trial, he did not mention seeing the crowbar, although he knew the Petitioner had killed the victim with a crowbar. (App. vol. III, 20.) Although he claimed to have seen the crowbar in the living room the day before the incident, he had no idea where it was the day of the incident. (App. vol. III, 21-22.)

The defense next called Patricia Miller, the victim's aunt. (*Id.* at 23.) Ms. Miller testified that the victim stopped off at her house before going to the Petitioner's house. She opined that he was intoxicated. (*Id.* at 24.) She also knew the Petitioner, who phoned her the evening of the incident and complained that the victim was intoxicated and would not leave. In response to a ridiculously leading question from defense counsel, Ms. Miller testified that the phone went dead during this conversation.¹⁰ (App. vol. III, 27.)

Ms. Miller could not recall when the phone went dead. She also conceded that she had a daughter that rented space in the Petitioner's home, that she had spoken to the Petitioner prior to trial. (App. vol. III, 29-30.) After the phone allegedly went dead, Ms. Miller called the Petitioner back. Although he did not answer, his phone was not disconnected. Although she claimed she was concerned she did not go to the Petitioner's house or call the police. (App. vol. III, 30.)

On redirect, she recalled that the victim carried a knife that looked just like the one introduced at trial. (App. vol. III, 31-32.)

¹⁰She could only recall this unusual event after defense counsel put the words in her mouth. (App. vol. III, 27.)

The defense then re-called Laura Rubin. (App. vol. III, 32.) She testified that, upon returning from the store, she sat down in the living room while the Petitioner continued cooking in the kitchen. The victim went from the living room to the kitchen. (App. vol. III, 33-34.) She described the argument between the victim and the Petitioner as a “drunk altercation between two people.” (App. vol. III, 34.) She repeatedly said, “You all don’t fight.” (App. vol. III, 36-37.) It was two men--“face to face, body to body.” At one point the victim had the Petitioner pinned up against the wall.

After the Petitioner struck the victim with the crowbar, Ms. Rubin ran into the kitchen to retrieve a towel which the Petitioner held to the victim’s face. The Petitioner then called 911. While they were taking the victim to the ambulance, the Petitioner and Ms. Rubin were sitting on the couch. Ms. Rubin noticed the knife, and showed it to the Petitioner. (App. vol. III, 40.) On cross-examination, Ms. Rubin testified, “When [the investigating officers] were asking me about the knife, do I think Tike could have planted that knife under Lloyd. I myself wondered that, and so I didn’t know.” (App. vol. III, 43.)

One of the officers asked the Petitioner how many times he hit the victim. The Petitioner responded once. The officer then asked him what he hit him with. The Petitioner lied, and stated that he hit him with his fist. (App. vol. III, 40-41.) That is when the officer noticed the crowbar in the bedroom and asked the Petitioner if he had hit him with the crowbar. On cross-examination, Ms. Rubin testified that she told the police that the Petitioner might have gone into the bedroom just before striking the victim with the crowbar. (App. vol. III, 45.) Counsel for the State produced one of Ms. Rubin’s statements in which she had told the police that she had seen the Petitioner go into the bedroom before striking the victim. (App. vol. III, 46-48.)

The Petitioner testified on his own behalf after receiving his *Neuman*¹¹ rights from the trial court. (App. vol. III, 54-56.) The Petitioner had known the victim for 30 years or more. The day of the incident the Petitioner was grilling some meat for a ramp festival he was attending the next day. The victim arrived at his home at approximately 8:00 p.m. There was no indication of friction between the Petitioner and the victim, until the Petitioner returned from the store later that evening.¹² Both the Petitioner and the victim had been drinking.¹³ The Petitioner claimed that the victim was intoxicated. (App. vol. III, 60.) Upon his return from the store, the Petitioner went into the kitchen. Ms. Rubin stayed in the living room, watching television. The victim went in and out of the kitchen. (*Id.* at 61.) When the Petitioner refused to buy the victim any more beer, the victim became verbally abusive. According to the Petitioner, the victim continued to behave this way, off and on, for about 40 minutes. The Petitioner remained in the kitchen.

It would appear that the straw that broke the camel's back occurred when the victim asked the Petitioner if he could borrow some money. The Petitioner told him he didn't have any to loan, and asked the victim to leave. (*Id.* at 62.) The victim turned to leave, but stopped between the kitchen and the living room, grabbed the Petitioner and pushed him up against the wall. He continued to be verbally abusive. This is when Ms. Rubin came in and told both men not to fight.

At that point the victim walked towards the front door. Although the victim was leaving his house, the Petitioner testified that he called Patricia Miller to "calm him down." (App. vol. III, 64.)

¹¹Syl. pt. 7, *State v. Neuman*, 179 W. Va. 580, 581, 371 S.E.2d 77, 78 (1988).

¹²Initially, the Petitioner stated that he went to the store once that evening. On cross-examination he stated, for the first time, that he went twice. (App. vol. III, 73.)

¹³The Petitioner did not mention that he had consumed two forty-ounce beers that evening until trial. (App. vol. III, 75-76.)

While the victim was leaving, the Petitioner allegedly told the victim's aunt that the victim refused to leave. Although he later claimed that he was in fear for his life, the Petitioner did not call 911 until after he struck the victim with the crowbar, which he retrieved from his bedroom. (App. vol. III, 64-65, 78-79.) According to the Petitioner, the victim turned around--suggesting he was originally facing the front door--and walked towards the Petitioner with a knife in his hand. The Petitioner was leaning against a chair in the living room approximately six or seven feet from the front door. (*Id.* at 65.) As the victim was walking towards him the Petitioner threw the phone, picked up a crowbar, and backhanded the victim with it. (App. vol. III, 66.) The victim staggered two steps backwards, fell and hit his head on the front door jamb. (*Id.*)

After the victim fell, the Petitioner called 911 and attempted to stop the victim's head from bleeding with a wet cloth. After the victim's body was moved out of the Petitioner's house, he pointed out the knife to the investigating officer. (App. vol. III, 69.)

The Petitioner gave two statements to the investigating officer and Detective Perdue the next evening. He did not mention the crowbar in his first statement. (App. vol. III, 70.) At the close of this statement, Detective Perdue told the Petitioner that he did not believe the statement was truthful. The detective waited ten minutes and took another one. (*Id.*) The Petitioner stated that he hit the victim once, and that he acted in self-defense. (App. vol. III, 70-71.)

On cross-examination the Petitioner admitted that his first statement to the police was untruthful. He told the officers that he had punched and kicked the victim, not hit him with a crowbar. (App. vol. III, 72, 75.) The Petitioner then changed his story again, stating that he went to the store twice that evening. Mr. England was not present when he went the first time. (*Id.* at 75.) In his statement, the Petitioner claimed that he had nothing to drink; during his testimony, he

conceded that he drank two 40-ounce bottles of beer. (*Id.* at 76.) The Petitioner did not tell the police that the victim had lived with him for six months approximately two years earlier. (*Id.* at 77.) Nor did the Petitioner claim, in either of his statements, that the victim pushed him up against the wall. (*Id.*) Nor did he mention that the victim had pulled a knife on him during the 911 call he made after striking the victim, or to the officers before they removed the victim's from the Petitioner's home.¹⁴ (App. vol. III, 79-80.) On cross, the Petitioner claimed that he mentioned the knife to the officer. This was the first time he made this claim. He did not make it in either statement or during direct examination. (*Id.* at 80.)

On re-direct the Petitioner testified that he did not call 911 because it was not his habit to call the police on friends and family. (*Id.* at 81.) On re-cross, the victim conceded that he had called 911 on previous occasions to have different people removed from his house. (App. vol. III, 84.)

After the Petitioner's testimony the defense rested. (*Id.* at 85.) The defense made a motion for a judgment of acquittal, claiming there was no evidence of premeditation, and that the State had failed to produce sufficient evidence to rebut the Petitioner's self-defense claim beyond a reasonable doubt. (*Id.* at 87-88.) The State responded that there was evidence that the Petitioner went into the bedroom to retrieve the crowbar before he struck the Petitioner. (*Id.* at 88.) The trial court denied the defense's motion, finding sufficient evidence of premeditation and that the presence or absence of the victim's knife was a jury question. (*Id.* at 89-90.) The court then took up jury instructions.

¹⁴According to Officer Young the Petitioner repeatedly told him that he had ordered the victim to leave his home, but that the victim refused. (App. vol. II, 201, 208.) The Petitioner did not mention a knife when the officer initially entered his home and discovered the victim lying on the floor.

(*Id.* at 90.) Neither the defense nor the State had any objections to the trial court's jury charge. (*Id.*

91.) During argument on the State's instructions the following exchange took place:

MR. ADKINS [DEFENSE

COUNSEL]: The -- other than that, the only issue I have with it, there's one more lesser included offense, which is an involuntary manslaughter, which I believe should be included.

MR. CROUCH [COUNSEL

FOR THE STATE]: Your honor, I know the fashion in the Supreme Court right now is to give the defendant whatever lesser includeds they want, so long as the evidence sustains it.

I don't see, from the State's case or from the defense any justifiable facts for an involuntary finding. I don't think its proper, with all due respect.

MR. ADKINS:

The felony charges first degree, second degree, and voluntary manslaughter, all require an intent to kill. Involuntary manslaughter is not the result of an involuntary act, per se. It's a question for the jury whether or not there was an intent to kill. Not whether he acted involuntarily. That's a -- the label "involuntary" is misleading.

The elements of involuntary manslaughter would be the defendant [Petitioner], Tyrone Crouch, in Fayette County, West Virginia, on or about the 17th [16th] day of April, 2009, did unintentionally cause the death of Lloyd England [the victim], which death was the proximate result of the negligence of the defendant so gross, wanton, and culpable to --

THE COURT:

Well, that's the problem I have, is the negligence. Where is the evidence of a negligent act here? It appears the striking of this man in the face was a deliberate act. It's either self-defense or voluntary manslaughter, at the least.

MR. ADKINS:

Well, you can mean to strike someone without meaning to kill them.

THE COURT:

Okay.

MR. ADKINS: So in striking them, if you were -- if you were intentionally striking them, that does not necessarily mean that it was your intent to kill them. The label of "involuntary" is a little bit misleading.

THE COURT: Did he ever testify to that, in striking him, it was his intent just to knock him out, not to kill him or whatever? I don't think there was any testimony that -- well, for instance, I think you might be right if to hit him in the shoulder and just stop him, but it bounced off his should and should and hit him up in the head, and I didn't aim to do that. I just aimed to hit in the shoulder and stop him, but" --

MR. ADKINS: I believe his testimony, paraphrasing here, "I didn't know where I was going to hit him. I might have hit him in the shoulder. I didn't know exactly what was going to happen. He was coming at me."

I believe under those particular circumstances, that involuntary manslaughter does fit.

MR. PARSONS: Your Honor, that's -- then that's what self-defense if for. Then he should be acquitted. He shouldn't be convicted of involuntary.

Let me put the law on the record. State v. Cobb, 166 WV 65. It says, "Involuntary manslaughter happens when perform a lawful act and a death results therefrom that you didn't intend."

He either defended himself and he's not guilty, or he murdered this guy by hitting him in the head. I don't see where there's any negligence or any accident in this case at all, and I think that's the touchstone of involuntary manslaughter.

THE COURT: Mr. Adkins?

MR. ADKINS: Well, if we just go by the elements, the key is what was the intent at the time all this happened. I mean, they all -- the felony cases -- the felony offenses require a specific intent to kill somebody else.

There should be a middle ground in there where, "I didn't intend to kill him. I acted." The jury could see some justification in arming yourself and -- but not a complete and total justification.

If you look at the elements of involuntary manslaughter, its not the result of an involuntary act, but the label is a little misleading.

THE COURT: Well, -- okay.

MR. ADKINS: There was no intent to kill him.

THE COURT: All right. Well, the -- I don't know that it's really appropriate to give the involuntary. When you look at the evidence in this particular situation, the -- but I'm reluctant not to give it and have this matter reversed because it wasn't in there. The way our Supreme Court is going nowadays, I just don't know.

And as I've commented before, the jury is going to have to make some determinations as to what was in this man's mind, and so I believe it ought to be in there. So I will add a fifth instruction to the --.

(App. vol. III, 90-96.)

The trial court incorporated the instruction into the State's first instruction setting forth the elements of murder in the first and second degrees, and voluntary manslaughter. (App. vol. III, 96.)

The defense withdrew an instruction covering the elements of the same crimes. (*Id.* at 98.)

Upon return from recess, the following exchange took place:

THE COURT: All right. All the parties have returned from the break, and I find on the bench State's Instruction No. 1 that has added to it the extra verdict of "involuntary." Have you looked at this instruction Mr. Adkins?

MR. ADKINS: Yes. That's a little different that the elements that I had put in my instruction as to involuntary manslaughter.

THE COURT: How is it different?

MR. ADKINS: The elements I had, “on or about the 17th [16th] day of April did unintentionally cause the death of Lloyd England, which death was the proximate result of the negligence of the defendant, so gross, wanton, and culpable as to show a reckless disregard for human life.

On Page 7 of what the State has done, involuntary manslaughter is a misdemeanor, “when a person engaged in a lawful act unintentionally causes the death of another person or where a person engaged in a lawful act and unlawfully causes the death of another person.”

I took mine, I believe, from out stock, and the State took theirs from their –

MR. PARSONS: I’m reticent to admit I took mine from Judge Hatcher and I compared it to Chapter 17.

THE COURT: Well, what better authority could you have?

MR. PARSONS: I have –

THE COURT: Good Lord.

MR. PARSONS: I can offer no greater authority than that, Judge. But I think we’re sort of looking at the same coin from two different sides maybe. But I reviewed Chapter 17, and I think it’s an accurate statement of the law, but –

THE COURT: All right. I’ll hear what Mr. Adkin’s final decision is. I’m going to mark this State’s Exhibit (sic) No 1A, to differentiate it from No. 1 that I’ve written on. Any objections to State’s Instruction No. 1A? Any objection to Page 7.

MR. ADKINS: Yes, the one with involuntary manslaughter. It’s a whole lot –

THE COURT: All right. The –

MR. ADKINS: It’s a whole lot different than what I submitted.

THE COURT: All right. Well, the Court believes that No. 7’s definition of involuntary manslaughter is a correct statement of the law,

and so the State's Instruction No. 1A will be given, unless there's some other objections to it.

MR. ADKINS: *No.*

(App. vol. III, 100-02; emphasis added.)

The trial court instructed the jury on the elements of first degree premeditated murder. (App. vol. III, 121-22.) It also instructed the jury on the elements of second degree murder (intentional without premeditation), and voluntary manslaughter (intentional killing without malice). (App. vol. III, 121-22, 125-26.) The court's involuntary manslaughter instruction did not include defense counsel's language regarding negligence, but it did include both "lawful" and "unlawful" language:

Involuntary manslaughter, a misdemeanor, is committed when a person, while engaged in a *lawful* act, unintentionally causes the death of another person or where a person engaged in a *lawful* act *unlawfully* causes the death of another person.

To prove the commission of involuntary manslaughter, a misdemeanor, a lesser included offense of the charged in the indictment, the State must prove beyond a reasonable doubt the following:

That the defendant [Petitioner], Tyrone R. Crouch, Jr., in Fayette County, West Virginia, on or about April 17 [16], 2009, while engaged in an *unlawful* act unintentionally and with reckless disregard for the safety of others caused the death of Lloyd England.

(App. vol. III, 126-27; emphasis added.)

As to intent, the trial court instructed the jury that it may only be proven by circumstantial evidence:

One of the elements of the crime charged in the indictment in this case is the element of specific intent. That is to say, before the defendant can be guilty as charged, he must have intended to do that which he is accused of doing.

Intent is a state of mind. It is, therefore, not susceptible of proof by tangible or direct evidence but may be proved, if at all, by circumstances, including actions and statements.

In this regard, you are instructed that, in your determination of whether the element of intent has been proven beyond a reasonable doubt, you are to consider all the evidence in this case.

(App. vol. III, 128.)

The trial court's malice instruction read:

Malice is the essential element of the crimes of murder in the first degree and murder in the second degree. To act maliciously is to act with malice. Malice includes not only anger, hatred and revenge, but every unlawful and unjustifiable motive.

It is not confined to ill will toward anyone or more particular persons but is intended to denote an action flowing from a wicked or corrupt motive, done with an evil mind and attended with such circumstances as to carry with them the plain indication of a heart disregarding social duty and deliberately bent on mischief.

(App. vol. III, 122-23.)

During their deliberations the jury requested the trial court re-instruct them on the difference between second degree murder and voluntary manslaughter. The court read this question in open court before responding. (App. vol. III, 162.) After consulting with counsel, and without objection from either side, the trial court re-instructed the jury on the elements of all the charged offenses. (*Id.* at 164.) The court's re-instruction on the elements of involuntary manslaughter read:

Involuntary manslaughter, a misdemeanor, is when a person while engaged in a *lawful* act unintentionally causes the death of another person or where a person engaged in a *lawful* act *unlawfully* causes the death of another person.

To prove the commission of involuntary manslaughter, a misdemeanor, a lesser included offense of that charged in the indictment, the State must prove beyond a reasonable doubt the following: That the defendant [Petitioner], Tyrone R. Crouch, Jr., in Fayette County, West Virginia, on or about April 17, 2009, while engaged in a *lawful* act, unintentionally and with reckless disregard for the safety of others, caused the death of Lloyd England.

(App. vol. III, 170-71; emphasis added.)

The written instruction states:

Involuntary manslaughter, a misdemeanor, is when a person, while engaged in a *lawful* act, unintentionally causes the death of another person, or where a person engaged in a *lawful* act, unlawfully causes the death of another person.

To prove the commission of involuntary manslaughter, a misdemeanor, a lesser included offense of that charged in the Indictment, the State must prove, beyond a reasonable doubt, the following:

That the defendant [Petitioner], Tyrone R. Crouch, Jr., in Fayette County, West Virginia, on or about April 17, 2009, while engaged in an *unlawful* act, unintentionally and with reckless disregard for the safety of others, caused the death of Lloyd L. England.

(Emphasis added.)

Clearly, the instructions are not consistent. Initially, the trial court instructed the jury that they could convict the Petitioner of involuntary manslaughter if they found that the Petitioner committed an *unlawful* act unintentionally and with reckless disregard for the safety of others thus causing Lloyd England's death. The trial court's re-instruction stated that the jury could find the Petitioner guilty if he, while engaged in a *lawful* act, unintentionally and with reckless disregard for the safety of others, caused the death of Lloyd England. Petitioner's appellate counsel only quoted the language of the re-instruction in his brief to this Court. (Petitioner's brief at 7.) Counsel for the Petitioner did not object to the court's initial instructions or to its re-instruction.

Prefacing both instructions, the trial court told the jury:

Involuntary manslaughter, a misdemeanor, is committed when a person, while engaged in a *lawful* act, unintentionally causes the death of another person or where a person engaged in a *lawful* act *unlawfully* causes the death of another person.

After the re-instruction, the jury retired at 2:34 p.m. By 2:46 p.m. they had returned a verdict. (App. vol. III, 172.) The jury found the Petitioner guilty of the lesser-included offense of voluntary manslaughter. (*Id.* at 173, 175.)

The trial court set a sentencing date of December 29, 2009, and revoked the Petitioner's bond. (App. vol. III, 176.)

V.

ARGUMENT

A. THE PETITIONER'S CLAIM WAS WAIVED BELOW AND IS NOT SUBJECT TO PLAIN ERROR REVIEW BY THIS COURT.

1. The Standard of Review.

The Petitioner misstates the standard of review in this matter. The trial court did not improperly instruct the jury on the elements of involuntary manslaughter; it simply refused to instruct the jury on "unlawful act" involuntary manslaughter. Such a decision is subject to an abuse of discretion standard of review.

A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion concerning the specific wording of the instruction, and the precise extent and character of any particular instruction will be reviewed only for abuse of discretion.

Syl. pt. 4, *State v. Guthrie*, 194 W. Va. 657, 663, 461 S.E.2d 163, 169 (1995).

"The basis of the objection determines the appropriate standard of review." *Id.* at 671, 461 S.E.2d at 177. "In general, the refusal to give a requested jury instruction is reviewed for abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*." Syl. pt. 1, *State v. Hinkle*, 200 W. Va. 280, 281, 489 S.E.2d 257, 258 (1996).

The question of whether a defendant is entitled to an instruction on a lesser included offense involves a two-part inquiry. The first inquiry is a legal one having

to do with whether the lesser offense is by virtue of its legal elements or definition included in the greater offense. The second inquiry is a factual one which involves a determination by the trial court of whether there is evidence which would tend to prove such lesser included offense.

State v. Neider, 170 W. Va. 662, 665, 295 S.E.2d 902, 905 (1982).

“To trigger application of the plain error doctrine, there must be an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity or public reputation of judicial proceedings.” Syl. pt. 7, *State v. Miller*, 194 W. Va. 3, 7, 459 S.E.2d 114, 118 (1995).

“Under plain error, appellate courts will notice unpreserved errors in the most egregious circumstances. Even then, errors not seasonably brought to the attention of the trial court will justify appellate intervention only where substantial rights are affected.” *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996). Where, however, “there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation of the rule of law need not be determined.” Syl. pt. 8, in part, *State v. Miller*.

2. **By Failing to Object Below the Petitioner Has Waived this Assignment of Error.**

This Court has repeatedly held that West Virginia Rule of Evidence 103(a)(1) that an objection must be “(1) specific, (2) timely, and (3) of record.” *State v. Day*, 225 W. Va. 794, 800 n.14, 696 S.E.2d 310, 316 n.14 (2010). The Petitioner claims that the trial court failed to properly instruct the jury on all of the elements of involuntary manslaughter. Specifically, he claims that the court failed to include an “illegal act” involuntary manslaughter instruction. This is not true: Although the Petitioner fails to mention it in his brief, the trial court instructed the jury that they could find the Petitioner guilty of involuntary manslaughter if:

“[T]he [Petitioner], Tyrone R. Crouch, Jr., in Fayette County, West Virginia, on or about April 17, 2009, while engaged in an *unlawful* act, unintentionally and with reckless disregard for the safety of others, caused the death of Lloyd L. England.”

The State will concede that the second time the trial court instructed the jury it stated:

[T]he [Petitioner], Tyrone R. Crouch, Jr., in Fayette County, West Virginia, on or about April 17, 2009, while engaged in a *lawful* act, unintentionally and with reckless disregard for the safety of others, caused the death of Lloyd England.

But the Petitioner has not objected to the instructions because of their inconsistency. Indeed, if this Court were to read the Petitioner’s brief, it could assume that the jury was only instructed once. His appeal is based on another premise: That the trial court failed to instruct the jury on the elements of “illegal act” involuntary manslaughter.

Nor did the Petitioner ask for such an instruction at trial. The Petitioner’s proposed instruction read:

“[O]n or about the 17th [16th] day of April [the Petitioner] did unintentionally cause the death of Lloyd England, which death was the proximate result of the negligence of the defendant, so gross, wanton, and culpable as to show a reckless disregard for human life.¹⁵

The Petitioner’s proposed instruction never mentions the lawfulness or unlawfulness of the underlying act. Thus, the Petitioner is faulting the trial court for failing to give an instruction he never asked for. Indeed, had the trial court given his proposed instruction, it would not have resolved the issue he now raises on appeal. Syl. pt. 17, *State v. Thomas*, 157 W. Va. 640, 642, 203

¹⁵This language is taken from this Court’s opinion in *State v. Green*, 220 W. Va. 300, 647 S.E.2d 736 (2007), a case involving the violation of the State’s negligent homicide statute. See W. Va. Code § 17C-5-1(a). Although the *Green* case made it clear that the term “reckless disregard of the safety of others” requires more than ordinary negligence, neither the statute or the case law requires the giving of an instruction requiring the court to distinguish between an unlawful act or a lawful act. It simply compared the *mens rea* required for an involuntary manslaughter conviction with the *mens rea* required under West Virginia Code § 17C-5-1(a).

S.E.2d 445, 449 (1974) (“Errors assigned for the first time on appeal will not be regarded in any matter of which trial court had jurisdiction or which might have been remedied in the trial court had objection been raised there.”); *State v. Thompson*, 220 W. Va. 246, 647 S.E.2d 526 (2007) (*per curiam*) (instruction not asked for which changes theory of defense deemed waived).

Not only did the Petitioner fail to raise this objection below, his counsel affirmatively waived it when he told the trial court that, apart from the language regarding criminal negligence, he had no further objections to the court’s involuntary manslaughter instruction. (App. vol. III, 102.) *See* W. Va. R. Crim. P. 52(b) (“Deviation from a rule is error unless there is a waiver. Waiver is the intentional relinquishment or abandonment of a known right. . . . [W]hen there has been such a knowing waiver, there is no error and the inquiry as to the effect of the deviation from a rule of law need not be determined.¹⁶”) *See also State v. Crabtree*, 198 W. Va. 620, 631, 482 S.E.2d 605, 616 (1996) (“When a right is waived, it is not reviewable even for plain error.”).

Nor did the trial court have an independent obligation to instruct the jury on the elements of both “illegal act” and “legal act done unlawfully” manslaughter. Unless requested, the trial court has no duty to instruct the jury on alternative theories of the same offense. *See State v. Hinkle, supra* (involuntary manslaughter indictment limited to charging defendant with driving a motor vehicle

¹⁶Rule 30 of the West Virginia Rules of Criminal Procedure states, in part, that “[n]o party may assign as error the giving or the refusal to give an instruction or the giving of any portion of the charge unless the party objects thereto before the arguments to the jury are begun.” Counsel for the Respondent concedes that the rule also states, in part, that “the court or any appellate court may, in the interest justice, notice plain error in the giving or refusal to give an instruction, whether or not it has been made the subject of objection.”

But this Court has held that the Plain Error Doctrine contained in Rules 30 and 52(b) of the West Virginia Rules of Criminal Procedure is identical. Syl. pt. 4, *State v. England*, 180 W. Va. 342, 344, 376 S.E.2d 548, 550 (1988). Thus, the rule of waiver applies to Rule 30 in the same fashion it applies to Rule 52(b).

in unlawful manner under West Virginia Code § 61-2-5). *Cf. State v. Thompson*, 220 W. Va. at 252, 647 S.E.2d at 532 (trial court does not have duty to *sua sponte* instruct the jury on an affirmative defense not raised by appellant); Syl. pt. 5, *Stuckey v. Trent*, 202 W. Va. 498, 505 S.E.2d 417 (1998) (murder by any willful, deliberate and premeditated killing, and (2) felony-murder constitute alternative means under West Virginia § 61-2-1; state may rely upon both theories at trial).

In *State v. Green*, 220 W. Va. at 304-05, 647 S.E.2d at 740, the defendant was convicted of two counts of negligent homicide by motor vehicle under West Virginia Code § 17C-5-1(a). The issue before the Court was whether proof of the defendant's violation of the traffic code, an unlawful act, which resulted in a death, was sufficient evidence to support a conviction under West Virginia Code § 17C-5-1(a). Upon a thorough review of the case law in both this and other jurisdictions, this Court found that a mere violation of a traffic control statute resulting in the unintentional death of another is not sufficient proof of negligent homicide by motor vehicle. The unlawful act must be accompanied by conduct which is so gross, wanton, and culpable to demonstrate a reckless disregard for human life. *Green*, 220 W. Va. at 310-11, 647 S.E.2d at 746-47.

It is this Court's implicit holding that "a legal act performed illegally" or an "illegal act" set forth two alternative theories of liability which is most relevant to this case. *Green's* focus on the circumstances giving rise to criminal liability under "illegal act" involuntary manslaughter tacitly recognized that "legal act" involuntary manslaughter and "illegal act" involuntary manslaughter are alternative theories of liability. The Court's concern that violation of a statute which is *malum prohibitum*, without an additional showing of gross negligence, would render the "unlawful act" theory of liability too broad. "It is not the unlawfulness of an act that justifies the conviction. A mere technical violation of a traffic safety statute will not suffice. Rather, solid evidence indicating

gross, wanton, and culpable negligence showing a reckless disregard for human life must be introduced.” *State v. Green, supra* (citing *State v. Vollmer*, 163 W. Va. 711, 259 S.E.2d 837 (1979)).¹⁷

Several other states have recognized these alternative theories of liability either by statute or case law. *See* Cal. Penal Code § 192(b) (involuntary manslaughter requires the commission of an illegal act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.); *Noakes v. Commonwealth*, 699 S.E.2d 284 (Va. 2010) (common law crime of involuntary manslaughter requires proof of the killing of one accidentally, contrary to the intention of the parties, in the prosecution of something unlawful, but not felonious; or in the improper performance of a lawful act.); *Kirk v. Commonwealth*, 44 S.E.2d 409, 413 (Va. 1947) (“To convict a person for involuntary manslaughter *caused by the improper performance of a legal act, . . .*”) (emphasis added); *State v. Cabrera-Pena*, 605 S.E.2d 522, 526 (S.C. 2004) (“Involuntary manslaughter is: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others.”).

In this case, the State requested an instruction setting forth the elements of “legal act done in an illegal manner” involuntary manslaughter. The defense requested an instruction which stated,

¹⁷At one point this Court approvingly quotes from footnote 3 of *State v. Vollmer*, 163 W. Va. 711, 259 S.E.2d 837 (1979), which states, “From a logical standpoint the phrase seems to contain a redundancy, since the performance of a lawful act in an unlawful manner makes the act itself unlawful.” 163 W. Va. at 713 n.3, 259 S.E.2d at 839 n.3.

“[the Petitioner] did unintentionally cause the death of Lloyd England, which death was the proximate result of the negligence of the defendant so gross, wanton, and culpable as to show a reckless disregard for human life.” (App. vol. III, 101.) There is nothing in the Petitioner’s instruction mentioning “illegal act” manslaughter. Had the defense wished to pursue an “illegal act” theory of liability it should have requested the appropriate instructions from the trial court: It did not. Counsel for the defense then placed his imprimatur on the instructions. (App. vol. III, 102.) Therefore, this issue was waived below, and is not amenable to a plain error analysis.

3. **The Petitioner Has Not Proven That the Trial Court’s Instructions Affected His Substantial Rights.**

The Petitioner has not proven that the trial court’s failure to instruct the jury on the elements of “illegal act” involuntary manslaughter affected his substantial rights. *See United States v. Olano*, 507 U.S. 725, 734 (1993). “The ‘affecting substantial rights’ prong of the [plain error] test is not satisfied simply by showing an element of an offense was not submitted to the jury.” *United States v. Mojica-Baez*, 229 F.3d 292 (1st Cir. 2000). *See Neder v. United States*, 527 U.S. 1, 9-15 (1999) (an error regarding an erroneous jury instruction that omits an essential element of the offense is subject to harmless error analysis). “To show prejudice the Petitioner must prove that the error ‘affected the outcome of the [circuit court] proceedings.’” *United States v. Colon-Munoz*, 192 F.3d 210 (1st Cir. 1999) (quoting *Olano*, 507 U.S. at 734.)

The Petitioner claims that, had the jury known that an illegal act, such as swinging the crowbar at the victim’s face, committed with gross negligence, but without an intent to kill, constituted involuntary manslaughter, they might have convicted him of “illegal act” involuntary manslaughter.

The Petitioner's contention lacks any evidentiary support. By the phrasing of their question to the court, this Court may reasonably deduce that the jury had already decided that the Petitioner intended to kill the victim. The jury requested re-instruction on all potential verdicts, *especially second degree murder and voluntary manslaughter*. Once the trial court re-instructed them, it took the jury 12 minutes to convict the Petitioner of voluntary manslaughter. (App. vol. III, 172.) The Petitioner assumes that the jury would not have found an intent to kill had the court instructed them on the elements of "illegal act" involuntary manslaughter.¹⁸ The Petitioner's intent is a question of fact reserved for the jury. The Petitioner invites this Court to substitute its factual findings for the jury's. That is not an appellate court's function.

The State introduced substantial evidence that the Petitioner intended to kill the victim when he struck him in the face with the crowbar. The victim was found lying in a puddle of blood next to the Petitioner's front door. Despite finding the victim's body in a confined space neither the police or the EMTs found the alleged knife. Both the Petitioner and the victim had been drinking.¹⁹ According to the Petitioner, the victim was leaving when, for no discernible reason, he turned around and pushed the Petitioner against the wall. (App. vol. III, 62.) The Petitioner did not mention this in either of his two pretrial statements to the investigating officers. The first time the Petitioner mentioned being thrown up against a wall was at trial, after he had heard the State's

¹⁸Petitioner argues that the lack of a viable involuntary manslaughter instruction caused the jury to ratchet up their verdict to voluntary manslaughter. Had the jury believed that the Petitioner did not possess the intent to kill when he swung the crowbar, the logical outcome would have been an acquittal.

¹⁹The only difference being that the victim's blood was screened for alcohol; the Petitioner's was not. At trial the Petitioner admitted, for the first time, to drinking two 40-ounce bottles of beer that evening. (App. vol. III, 60, 75-76.) Officer Young testified that the Petitioner appeared intoxicated when he first spoke to him. (App. vol. II, 205.)

witnesses. (App. vol. III, 77.) When Ms. Rubin allegedly saw this, she did not limit her admonitions to the victim; she said, “Don’t you-all *two* fight.” (App. vol. III, 62; emphasis added.) The victim then turned to leave again. *As he was leaving*, the Petitioner called his aunt, Trish Miller.²⁰ (App. vol. III, 64.) The victim then, allegedly, turned around and brandished a knife.²¹ (App. vol. III, 66.) The Petitioner, who was leaning against a chair six feet from the victim, claimed he grabbed the crowbar, and blindly swung it in the victim’s direction. (*Id.*) It just happened to hit the victim in the face hard enough to break several bones, and contribute to a fatal cerebral hemorrhage.²² When the EMTs arrived, the Petitioner was holding a damp cloth to the right side of the Petitioner’s forehead. (App. vol. III, 67.) Although the Petitioner testified that he only hit the victim once, CAMC Emergency Room Dr. Michael Hall testified that the Petitioner suffered broken bones to both sides of his face. (App. vol. II, 169.)

The Petitioner admitted lying to the police. (App. vol. III, 72.) In his first statement he claimed that he punched and kicked the victim. (*Id.* at 75.) It was only after the detective taking Petitioner’s statement questioned his veracity that the Petitioner admitted hitting the victim with the crowbar. (*Id.* at 70.) The Petitioner did not say that he felt threatened by the victim’s conduct until his statement to the police the following day. (App. vol. III, 79.)

²⁰The Petitioner testified that he was in fear for his life and could not escape. This was after he testified that the victim was leaving his house when he decided to call Ms. Miller.

²¹The Petitioner did not mention this knife when the police and EMT workers initially arrived. Nor did he mention it to the 911 dispatcher. The Petitioner did not mention the knife until the police re-entered his house after transporting the victim’s body to the ambulance. Despite a clear field of vision and their close proximity to the victim, neither the police nor the EMT workers found the knife before taking the victim to the ambulance.

²²The victim’s injuries were so serious that he had to be transferred from Plateau Medical Center to CAMC. (App. vol. II, 166.)

In the end, the jury was required to make a credibility determination. The record of his trial demonstrates that the Petitioner was evasive and dishonest. He made up a story which he hoped he could sell to the jury. This story was successfully exposed by counsel for the State. It is the Petitioner's dishonesty that did him in--not the trial court's jury instructions.

VI.

CONCLUSION

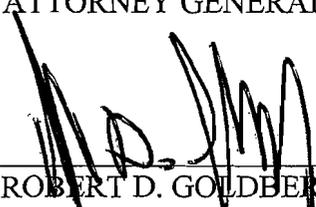
For the foregoing reasons, the judgment of the Circuit Court of Fayette County should be affirmed by this Honorable Court.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



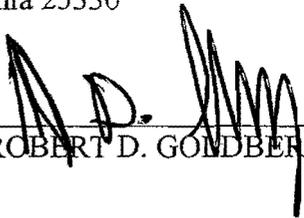
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CERTIFICATE OF SERVICE

I, ROBERT D. GOLDBERG, Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the Brief of Respondent upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 27th day of June, 2011, addressed as follows:

To: Robert C. Catlett
Deputy Public Defender
Kanawha County Public Defender Office
P.O. Box 2827
Charleston, West Virginia 25330



ROBERT D. GOLDBERG