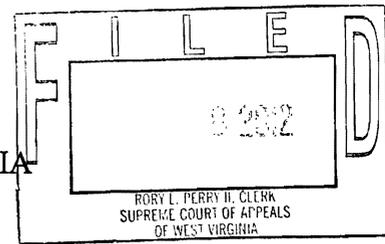


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-1121



STATE OF WEST VIRGINIA,
Plaintiff Below,
Respondent

v.

ETHAN CHIC-COLBERT,
Defendant Below,
Petitioner.

BRIEF ON BEHALF OF THE PETITIONER

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 12-1121

STATE OF WEST VIRGINIA,
Plaintiff Below,
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v.

ETHAN CHIC-COLBERT,
Defendant Below,
Petitioner.

BRIEF ON BEHALF OF THE PETITIONER

Comes now the petitioner, Ethan Chic-Colbert, by counsel, Woody Hill and Kelli Hill, and files the within brief on behalf of the petitioner appealing the final judgement order entered August 16, 2012, by the Circuit Court of Kanawha County, West Virginia, wherein the Circuit Court sentenced the petitioner to consecutive sentences of incarceration upon his conviction by jury of Counts Two, Four, Five, Six and Seven of the indictment returned against him by the Grand Jury in this case. App. vol. I at 189 - 92.

I.

ASSIGNMENTS OF ERROR

- I. The Circuit Court erred in imposing an illegal sentence upon the petitioner based upon his conviction by the jury of Count Four of the Indictment in that the sentence imposed by the Court does not conform to the statutory provision set forth in said Count Four, Chapter 61, Article 8D, Section 4(a), West Virginia Code 1931, as amended.
- II. The Circuit Court erred in denying the petitioner's Motion for Judgment of Acquittal as to Counts Five and Six alleging violation of Chapter 61, Article 8D, Section 4(e), West Virginia Code 1931, in that the evidence in this case was insufficient to sustain the petitioner's convictions as to such counts.

II.

STATEMENT OF THE CASE

The petitioner was initially charged in a seven count Indictment duly returned by the Grand Jury of the Circuit Court of Kanawha County alleging an array of crimes all of which emanated from a spontaneous and violent domestic argument resulting in a physical altercation shortly after midnight on March 4, 2012. App. vol. I at 4 - 6 . The altercation took place in and around a vehicle occupied by the petitioner and a female (Lynitrah Woodson) with whom the petitioner at one time lived and fathered a child. App. vol. II at 406. However, at the time of the altercation on March 4, 2012, the petitioner and Ms. Woodson were not “in any sort of relationship” [her words] and he was only with Ms. Woodson that day to be with his son. App. vol. II at 448. In addition to the petitioner and Ms. Woodson, there were four (4) children in the vehicle ranging in age from not quite two years (the petitioner and Ms. Woodson’s son) to eleven years old. The older three boys were ten or eleven, one being Ms. Woodson’s eleven year old son (Jahlil) and his two friends (Andrew and Tyrel). App. vol. II at 203, 331, 412, 421.

Although the altercation was sudden and brief in duration¹, the consequences were tragic due to the fact that although the argument/altercation between the petitioner and Ms. Woodson began in Ms. Woodson’s vehicle, it was a moving car traveling on an interstate highway and the ensuing fight ended outside the car on the roadway. App. vol. II at 426 - 30. Ms. Woodson’s older son, Jahlil, at some point exited the vehicle in an apparent effort to gain help for his mother

¹At the close of the State’s case, the Court heard argument offered by the defense and prosecution relating to the viability of the kidnapping and murder charges, noting the brevity of the episode of purported “confinement” to be “a matter of seconds” [characterization by the Court] or “a minute or two” [by the prosecutor]. App. vol. II at 485.

and was tragically struck and killed by a passing motorist. App. vol. II at 212 - 14.

The tragedy of a young child dying while attempting to gain help for his mother during a domestic altercation on an interstate drew instant attention from the media: newspapers, radio, television and 24/7 social media.²

²Although the Court ordered the prosecutors at the July 3, 2012, pretrial motion hearing to instruct their witnesses to refrain from testifying as to “opinions” or “speculation” that Jahlil’s actions in exiting the vehicle and moving across three lanes of the interstate was motivated by an attempt “get help for his mother” (App. vol. I at 212 - 13), during the two day trial July 9 - 10, 2012, witnesses called by the State nevertheless testified in response to the prosecutors’ questions in contravention of the Judge’s order:

State’s witness Andrew Proctor: “And that’s when Jahlil ran out around the car ... trying to get help.” App. vol. II at 212.

State’s witness Andrew Proctor: “That’s when Jahlil ran around and tried to flag somebody down and get help. App. vol. II at 213.

In response to the Prosecutor’s question to Tyrel Coffman “And when you saw Jahlil before he got hit, what was he doing?” Answer: “Waiving for help.” App. vol. II at 346.

Such is relevant to this appeal for two reasons: 1) a young boy dying as a result of his attempt to help his mother attracted intense media coverage which was the subject of the petitioner’s failed attempt to gain a change of venue for the trial (App. vol. I 12 - 90); and 2) such underscores the inherent danger in this case that jurors’ emotional reaction to such evidence would be the driving force in their decision making rather than adherence to the Court’s instruction. See, for example, statements of prospective jurors called for this case:

COURT: Where might you have heard something about this matter?

JUROR: I followed it in the newspaper and on the news on the television; but other than that, I don’t know anything about it.

COURT: All right. Did you reach a conclusion as to the guilt or innocence of the defendant because of the news accounts that you saw?
Be honest with us. It’s okay.

JUROR: Be honest with you?

COURT: Yes, ma’am. It’s okay to have opinions.

JUROR: I thought he needed just a whipping, is what I thought.

COURT: Okay.

JUROR: I thought he needed a whipping. That’s all.

COURT: All right. So you believed he would be guilty?

The petitioner was arrested (turned himself in on the early morning of March 4th). App. vol. II at 379 - 80. He was subsequently indicted on May 18, 2012 (App. vol. I at 1, 4 - 6) and arraigned on May 29, 2012, at which time the trial was scheduled for July 9, 2012 (App. vol. I at 7 - 8, 201). Despite the complexity of the case, the seriousness of the charges and a major

JUROR: Yes, sir. I'm sorry.

COURT: No, no. I would much prefer you have these opinions now –

JUROR: (Interposing) Thank you.

COURT: (Continuing) – than to sit there and think about it and not have told me.

JUROR: Yeah. I wanted to beat the fire out of him.

App. vol. II at 74 - 75.

Other jurors:

“I thought it was the boyfriend’s fault for the kid going and trying to get help” App. vol. II at 72.

“It would be hard not to be prejudiced, you know, just from reading the papers.” App. vol. II at 45.

“I heard news reports about it over – on the television, that the young man was leaving the car to help his mother who was being beaten by her boyfriend.” App. vol. II at 94.

“One thing that I read recently was some discussion about whether there would be evidence that the child was running to get help. I read that.” App. vol. II at 108 - 09.

“What I was told at work was that the defendant was beating a person in the vehicle, and the child left the vehicle to get help for his mother and was struck by the vehicle.” App. vol. II at 135 - 36.

It should be noted that although counsel for the petitioner filed a motion for change of venue prior to trial (App. vol. I at 12 - 90), the motion was heard and denied by the Court on July 3, 2012 at the hearing on pretrial motions. App. vol. I at 130 - 32 , 217 - 19. The petitioner’s trial counsel neither supplemented nor renewed the motion as the trial approached and jury selection commenced on July 9, 2012, nor does the record reflect that trial counsel requested individual *voir dire* despite the intense publicity and evident hostile public sentiment against the petitioner. Although such may constitute ineffective assistance of counsel, any such claim would be appropriately addressed, if at all, in a collateral post-conviction proceeding. Accordingly, the petitioner is not raising an ineffective assistance of counsel claim here and expressly reserves the right to pursue such a claim, if at all, at a later date.

disruption caused by a derecho which unexpectedly struck³, the case proceeded at a fast pace and the two-day trial commenced as scheduled on July 9, 2012.

As noted, the original indictment contained seven counts, including charges of kidnapping (Count One) and felony murder (Count Three) under the prosecution's theory that the petitioner's domestic assault against Ms. Woodson – which began in, but was concluded outside of, the vehicle – constituted such. Although the petitioner's counsel filed motions prior to trial requesting the Court to dismiss the kidnapping/murder charges (App. I vol. 96 - 129) and the Court alerted the prosecution prior to trial that the State's basis for the kidnapping/murder charges "seem weak" (App. vol. I at 231), the defense's pretrial motion to dismiss Counts One and Three were denied (App. vol. II at 20 - 21). The inflammatory charges were accordingly presented to the jury along with the domestic battery and multiple child neglect charges during voir dire, opening statements and the entirety of the State's case. App. vol. II at 40 - 41, 161 - 66, and 194 - 96. However, both were dismissed at the close of the State's case.⁴

The petitioner was ultimately convicted by a jury of the misdemeanor offense of domestic battery in violation of West Virginia Code §61-2-28(a) as contained in Count One; the felony offense of child neglect causing injury in violation of West Virginia Code §61-8D-4(a) as

³The pre-trial motion hearing proceeded as scheduled on July 3, 2012, during the power outage. App. vol. I at 215.

⁴At the close of the State's case the Court granted defense counsel's motion for judgment of acquittal as to Count One (kidnapping) and Count Three (murder) (App. vol. II at 477 - 94), finding under the evidence viewed in the light most favorable to the State that 1) the State had failed to meet its burden of proof as to the essential elements of the kidnapping charge and, in addition, 2) that even if the Court had found "that there was a technical kidnapping, which of course I am not finding, I do find that this is incidental to the domestic battery that was taking place, or alleged to have been taking place." App. vol. II at 493.

contained in Count Four, relating to Jahlil's death; and three charges of the felony offense of gross child neglect in violation of West Virginia Code §61-8D-4(e) as contained in Counts Five, Six and Seven relating to Andrew (Jahlil's friend), Tyrel (Jahlil's friend) and Ethan (the petitioner's two year old son) respectively. App. vol. I at 179 - 80; 181 - 82; App. vol. II at 613 - 14.

At the sentencing hearing held on August 15, 2012, the Court imposed the maximum term of imprisonment as to each count to run consecutively (App. vol. I at 189 - 95; 293 - 94) to be followed by a 25 year period of supervised release (App. vol. I at 186 - 188).

III.

SUMMARY OF ARGUMENT

The petitioner contends in this appeal that the sentence of imprisonment of not less than three nor more than fifteen years imposed by the Circuit Court under Count Four of the Indictment is an illegal sentence in that said sentence does not conform to the statute alleged to have been violated by the petitioner as set forth in Count Four of the Indictment, that is, West Virginia Code, §61-8D-4(a). This Court has "traditionally recognized that the legislature has the primary right to define crimes and their punishments" and therefore "Courts cannot set punishments that are inconsistent with the statutory penalties." *State v. Wilson*, 226 W. Va. 529, 535, 703 S.E. 2d 301, 307 (2010).

The petitioner therefore contends that he should have received a sentence of one to three years as provided under West Virginia Code, §61-8D-4(a) and requests that this Court to remand this case and direct the Circuit Court to re-sentence him accordingly as to Count Four.

The petitioner challenges his convictions as to Counts Five and Six of the Indictment

which allege “gross neglect” relating to the petitioner’s conduct toward alleged child victims Andrew Proctor (Count Five) and Tyrel Coffman (Count Six). “Gross neglect” as alleged in Counts Five and Six – charging petitioner with violations of West Virginia Code §61-8D- 4(e) – is specifically defined under and West Virginia Code §61-8D- 1(6).

Accordingly, turning to the definitions of §61-8D- 1(6), in order to sustain a conviction under West Virginia Code §61-8D- 4(e) the evidence adduced in the case must support a finding by a rational trier of fact that the defendant charged therein was a “person” who “voluntary accepted a supervisory role” concerning the child victim identified in the indictment alleging such violation. Such evidence (that such a “person” who “voluntarily accepted a supervisory role” charged with such offense) is required in order to convict regardless of the nature of the subsequent conduct alleged to have occurred which may have placed the alleged child victim at risk.

The petitioner contends that the record in this case demonstrates that the evidence in this case was insufficient to sustain the petitioner’s conviction as to Count Five (relating to Andrew) and Count Six (relating to Tyrel). The evidence presented in support of the essential element required to be proven *as to whether petitioner could be found by the jury to be a person who “voluntarily accepted a supervisory role” relating to Andrew or Tyrel* – after reviewing the evidence in the light most favorable to the prosecution – fails. No rational trier of fact could have found said essential element to be proven beyond a reasonable doubt as to Counts Five and Six. The petitioner therefore requests this Court to vacate petitioner’s convictions and sentences as to Counts Five and Six and remand this matter to the Circuit Court for entry of judgment of acquittal as to Counts Five and Six.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The petitioner requests the opportunity to present oral argument under Rule 19 of the West Virginia Rules of Appellate Procedure in that this case involves 1) an assignment of error in the application of settled law (petitioner's assertion that the sentence of imprisonment imposed by the Circuit Court as to Count Four of the Indictment is an illegal sentence) and 2) an assignment of error claiming insufficient evidence (to support the jury's verdicts as to Counts Five and Six). Concerning whether this is a case appropriate for Memorandum Decision, the petitioner leaves such to the discretion of this Honorable Court.

V.

ARGUMENT

- A. THE CIRCUIT COURT ERRED IN IMPOSING AN ILLEGAL SENTENCE UPON THE PETITIONER BASED UPON HIS CONVICTION BY THE JURY OF COUNT FOUR OF THE INDICTMENT IN THAT THE SENTENCE IMPOSED BY THE COURT DOES NOT CONFORM TO THE STATUTORY PROVISION ALLEGED IN SAID COUNT FOUR, CHAPTER 61, ARTICLE 8D, SECTION 4(a), WEST VIRGINIA CODE 1931, AS AMENDED AND PETITIONER THEREFORE REQUESTS THIS COURT TO REMAND THIS MATTER TO THE CIRCUIT COURT FOR RE-SENTENCING AND DIRECT THE CIRCUIT COURT TO RE-SENTENCE PETITIONER AS TO COUNT FOUR NOT TO EXCEED THAT WHICH IS AUTHORIZED UNDER WEST VIRGINIA CODE, § 61-8D-4(a) TO A TERM OF IMPRISONMENT OF NOT LESS THAN ONE NOR MORE THAN THREE YEARS.**

1. Standard of Review

The petitioner asserts that the Circuit Court committed error by imposing sentence as to Count Four of the Indictment which does not conform to the statutory provision set forth in

Count Four, §61-8D-4(a).⁵

This Court has held that “[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.” Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va.138, 459 S.E. 2d 415 (1995).

2. Argument

Count Four of the Indictment against the petitioner alleged:

COUNT FOUR: And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that ETHAN SAMUEL CHIC-COLBERT, being the parent, guardian and custodian of Jahlil Clements, a child, on the ___ day of March, 2012, and prior to the date of the finding of this Indictment, in the said County of Kanawha, did unlawfully and feloniously neglect Jahlil Clements, and by such neglect, caused the death of the said Jahlil Clements, in violation of Chapter 61, Article 8D, Section 4(a), West Virginia Code 1931, as amended against the peace and dignity of the State.

The essential elements under the statute alleged in Count Four - West Virginia Code §61-8D-4(a) - include the following: 1) the defendant; 2) in Kanawha County, WV; 3) then being a parent, guardian or custodian of a child; 4) did unlawfully and knowingly neglect the child; and 5) by such neglect cause said child bodily injury. *State v. DeBerry*, 185 W. Va. 512, 408 S.E. 2d 91 (1991).

The record in this case clearly indicates that the State intended to proceed under a different statute, however, than that alleged in Count Four; another statute which - if correctly

⁵The illegal sentence imposed by the Court was a term of imprisonment not less than three nor more than fifteen years, App. vol. I at 189 - 95; 293.

The maximum penalty under West Virginia Code § 61-8D-4(a) is “[a fine of] not less than one hundred nor more than one thousand dollars or [commitment] to the custody of the division of corrections for *not less than one nor more than three years*, or in the discretion of the Court, be confined in the county jail for not more than one year, or both such fine and confinement or imprisonment.”

alleged in the indictment and proven up at trial - could have been utilized.⁶ However, it is equally clear that Count Four of the Indictment presented to, and duly returned by, the Grand Jury, against the petitioner charged a different statute which is also applicable under the facts of this case: West Virginia Code § 61-8D-4(a) entitled “Child neglect resulting in injury; child neglect creating risk of injury; criminal penalties.”

The record also reflects that the prosecutor failed to recognize his/her error concerning the allegations and statute set forth in Count Four of the Indictment until such was brought to the Court’s attention by the petitioner’s counsel just prior to the jury’s commencement of deliberations. App. vol. II at 601-610. In bringing this issue to the attention of the Court, trial

⁶Upon review of the record it appears that the State intended to proceed against the petitioner under another statute which may have been applicable under the facts alleged in this case, that is: West Virginia Code § 61-8D-4a, “Child neglect resulting in death; criminal penalties.” This conclusion is based upon the following:

Count Four contains surplus language “caused the death” whereas “bodily injury” is the injury required under the statute set forth in Count Four, § 61-8D-4(a).

The jury instructions provided by the State for inclusion in the Court’s charge include the caption “Child neglect resulting in death” from §61-8D-4a rather than the caption “Child neglect resulting in injury” of the statute set forth in Count Four, § 61-8D-4(a). App. vol. II at 565 - 66.

The jury instructions given concerning Count Four include an essential element required under §61-8D-4a but not required under § 61-8D-4(a) (that the subject child be under the defendant’s care, custody and control) – which essential element was *not* included in Count Four of the indictment drafted by the State and presented to the Grand Jury for its consideration. App. vol. II at 567 - 68; App. vol. I at 4 - 6.

Following conviction, the officer who prepared the Presentence Investigation Report correctly included the possible penalty upon conviction of the statute set forth in Count Four of the Indictment [§ 61-8D-4(a)], a term of imprisonment of not less than one nor more than three years. App. vol. I at 289 - 90. However, the prosecutor incorrectly advised the Court that such was an “error” and that “the Code section that the defendant was convicted under, the possible penalty is actually 3 to 15, an indeterminate term of not less than 3 nor more than 15” (*Id.*) which is the possible penalty under §61-8D-4a.

counsel for the petitioner stated:

And so I think that the charge in the indictment should be the charge that the jury determines. And if we need to actually amend the jury instructions to comply with the statute, I think that it – I think that could be done at this point. They can still decide on the evidence presented at trial. App. vol. II at 608.

Although the Court declined to take any action in response to counsel's request to "amend the jury instructions," no corrective action as to the jury instructions were needed.

Although the jury instructions incorrectly characterized the offense charged in Count Four as "child neglect by a parent, guardian, custodian resulting in a death of a child" rather than the correct title of the offense actually charged [§ 61-8D-4(a)] "Child neglect resulting in injury...", the essential elements set forth in the Court's instructions regarding Count Four upon which the Jury returned its verdict support conviction upon the offense charged in Count Four [§ 61-8D-4(a)].

At the conclusion of the trial, under the evidence adduced and instructions of the Court, the Jury convicted the petitioner of Count Four of the Indictment. App. vol. I at 179 - 80; 181 - 82; App. vol. II at 613.

Under the West Virginia Code, the penalty for violation of § 61-8D-4(a) is "[a fine of] not less than one hundred nor more than one thousand dollars or [commitment] to the custody of the division of corrections for *not less than one nor more than three years*, or in the discretion of the Court, be confined in the county jail for not more than one year, or both such fine and confinement or imprisonment." (Emphasis added) At the sentencing hearing subsequently held on August 15, 2012, however, the trial Court, illegally sentenced the petitioner to a greater sentence than allowed by the statute upon which he was convicted: not less than three nor more than fifteen years, the statutory maximum under West Virginia Code § 61-8D-4a(a). App. vol. I

at 189 - 95; 293.

Any assertion by the State that petitioner's conviction under Count Four of the indictment would support an order of imprisonment under the harsher penalty provision of W.Va. Code §61-8D-4a fails on a multitude of grounds:

First, the *sufficiency* of Count Four as is, that is – as drafted by the State, presented to and returned by the Grand Jury, considered by the petit jury and under which the petitioner was duly convicted – is undisputable.

(1) An indictment must contain a statement of essential facts constituting the offense charged; (2) it must contain allegations of *each element of the offense charged, so that the defendant is given fair notice of the charge that he must defend against*; and (3) the allegations must be sufficiently distinctive so that an acquittal or conviction on such charges can be pleaded to bar a second prosecution for the same offense.” *State v. Samuel S.*, 2012 W.Va. Lexis 805. *See W.Va. Crim. Pro. 7(c)(1); Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L.Ed.2d 590 (1974); *State v. Knight*, 168 W.Va. 615, 285 S.E.2d 401 (1981). (Emphasis added)

Moreover, [a]n indictment is sufficient under Article III, section 14 of the West Virginia Constitution and W.Va. R. Crim. P. 7(c)(1) if it (1) *states the elements of the offense charged*; (2) puts a defendant on fair notice of the charge against which he or she must defend; and (3) enables a defendant to assert an acquittal or conviction in order to prevent being placed twice in jeopardy. *State v. Samuel S.*, 2012 W.Va. Lexis 805 (citing Syl. Pt. 6, *State v. Wallace*, 205 W.Va. 155, 517 S.E.2d 20 (1999)). (Emphasis added)

An indictment for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based. *State v. Petrice*, 183 W.Va. 695, 699, 398 S.E.2d 521, 525 (1990) (citing Syl. pt. 3, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983)).

Second, any assertion that Count Four sufficiently sets forth a charge under §61-8D-4a is easily discredited.

An indictment which does not allege every material element of the offense sought to be charged is defective and void... *State v. Johnson*, 219 W.Va. 697, 639 (S.E.2d 789 (2006) (citing Syl pt. 3 *State ex rel Cain v. Skeen*, 137 W.Va. 806, 74 S.E.2d 413 (1953))).

Count Four of the Indictment sufficiently and adequately sets forth the felony offense of “Child neglect resulting in injury” under the statute set forth therein, W.Va. Code § 61-8D-4(a), which states: “If any parent, guardian or custodian shall neglect a child and by such neglect cause said child bodily injury, as such term is defined in § 61-8B-11 then such parent, guardian or custodian shall be guilty of a felony.” As noted by defense counsel prior to commencement of jury deliberation in this case, the tragic death of Jahlil Clements as alleged in Count Four, although surplusage, is clearly sufficient to satisfy the allegation of bodily injury required by West Virginia Code § 61-8D-4(a). App. vol. II at 606.

Conversely, Count Four of the Indictment does *not* sufficiently allege a violation of West Virginia Code § 61-8D-4a in omitted therefrom is *an essential element*. West Virginia Code §61-8D-4a(a) states: “If any parent, guardian or custodian shall neglect a child *under his or her care, custody or control* and by such neglect cause the death of said child, then such parent, guardian or custodian shall be guilty of a felony.”⁷ (Emphasis added)

Any argument that Count Four may be found to sufficiently charge an offense other than the offense specifically alleged therein - §61-8D-4(a) - cannot be sustained.

⁷The essential element “under his or her care custody or control” is required under §§ 61-8D-2, 61-8D-2a, 61-8D-4a, 61-8D-5. These sections deal with the death or sexual abuse of a child. The element is not contained in §§ 61-8D-3, 61-8D-4 which deal with lesser injuries caused by child abuse and neglect.

Accordingly, an element of the offense set forth in West Virginia Code § 61-8D-4a requires the child victim be under the care, custody or control of the accused parent, guardian or custodian. West Virginia Code §61-8D-4(a) -- the section under which the petitioner was indicted and convicted -- contains no such requirement. It is clear that the legislature intended for this specific additional element to apply to the most serious offenses in the child abuse chapter. Therefore, it must be considered an essential element for purposes of determining the adequacy of an indictment.

“In order to lawfully charge an accused with a particular crime it is imperative that the essential elements of that crime be alleged in the indictment.” Syl. Pt.1, *State ex rel. Combs v. Boles*, 151 W.Va. 194, 151 S.E. 2d 115 (1966); Syl. Pt. 4, *State v. Palmer*, 210 W.Va. 372, 557 S.E. 2d 779 (2001). *State v. Johnson*, 219 W. Va. 697, 639 S.E. 2d 789 (2006).

As noted, Rule 7(c)(1)⁸ of the West Virginia Rules of Criminal Procedure requires that an indictment consist of a plain, concise and definite written statement of the essential facts constituting the offense charged and, in addition, “shall state for each count the official or customary citation of the statute, ... which the defendant is alleged therein to have violated.” One purpose of the indictment is to give the defendant notice of the offense against him including notice of the statute alleged to have been violated; another is to allow the court, prosecutor, defense, and the public to know what the grand jury considered in indicting the defendant. *See State ex rel. Marcum v. Farrell*, 140 W. Va. 202, 83 S.E.2d 648 (1954). The defendant must be afforded an opportunity to prepare a defense *based upon the language and the charge – setting forth each essential element of the offense – as set forth in the indictment.*

In the instant case, Count Four of the Indictment does not allege the essential element that the child was “under the care, custody or control” of the petitioner as specifically required under §61-8D-4a. However, Count Four correctly and sufficiently alleges violation of the statute cited therein [§61-8D-4(a)]. As a result of the petitioner’s conviction of Count Four, his punishment is limited to that provided in said statute as charged in Count Four of the Indictment [§61-8D-4(a)].

⁸The inapplicability of Rule 7(c)(3) “harmless error” should be noted. The State’s omission concerning Count Four is *not a mere typographical error*. The State’s failure to allege an *essential element of the offense charged in the indictment* is obviously *outside* the purview of Rule 7(c)(3).

The petitioner therefore requests this Court to enter an order setting aside the illegal sentence of imprisonment of not less than three nor more than fifteen years imposed by the Circuit Court under Count Four of the Indictment, remanding this case to the Circuit Court for re-sentencing and directing the Circuit Court to re-sentence petitioner as to Count Four in accordance with the punishment authorized under West Virginia Code, § 61-8D-4(a), that is not to exceed a term of imprisonment of not less than one nor more than three years.

B. THE CIRCUIT COURT ERRED IN DENYING THE PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNTS FIVE AND SIX ALLEGING VIOLATION OF CHAPTER 61, ARTICLE 8D, SECTION 4(e), WEST VIRGINIA CODE 1931, IN THAT THE EVIDENCE IN THIS CASE WAS INSUFFICIENT TO SUSTAIN PETITIONER'S CONVICTIONS AS TO SUCH COUNTS AND PETITIONER THEREFORE REQUESTS THIS COURT TO VACATE THE PETITIONER'S CONVICTIONS AND SENTENCES AS TO COUNTS FIVE AND SIX AND REMAND THIS MATTER TO THE CIRCUIT COURT FOR ENTRY OF JUDGMENT OF ACQUITTAL AS TO COUNTS FIVE AND SIX.

1. Standard of Review

The petitioner asserts that the Circuit Court committed error by denying the petitioner's motion for judgment of acquittal as to Counts Five and Six of the Indictment in that the evidence was insufficient to sustain the jury's verdicts as to such counts.

When reviewing the sufficiency of the evidence to support a criminal conviction, the standard of review is for the appellate Court "to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus the relevant inquiry is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Syllabus Point 1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E. 2d 163 (1995).” Syl. Pt. 1, *State v. Larock*, 196 W.Va. 294, 470 S.E. 2d 613 (1996).

2. Argument

Counts Five and Six of the Indictment against the petitioner are identical except for child named therein:

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that ETHAN SAMUEL CHIC-COLBERT, on the ___ day of March, 2012, and prior to the date of the finding of this Indictment, in the said County of Kanawha, did unlawfully, feloniously and grossly neglect [Andrew Proctor, Count Five; Tyrel Coffman, Count Six] a child, and by such neglect, created a substantial risk of serious bodily injury and death to the said Andrew Proctor, in violation of Chapter 61, Article 8D, Section 4(e), West Virginia Code 1931, as amended against the peace and dignity of the State.
App. vol. I at 4 - 6

The essential elements which the State was required to prove beyond a reasonable doubt under the statute alleged in Counts Five and Six as set forth in the Court’s jury instructions included the following: 1) the defendant; 2) in Kanawha County, West Virginia; 3) on or about the 4th day of March, 2012;) did grossly neglect [Andrew Proctor/Tyrel Coffman], a child; and 5) by such gross neglect created a substantial risk of serious bodily injury or death of said child.
App. vol. II at 570.

This instruction is based upon the definition of “neglect” specifically set forth in West Virginia Code §61-8D- 1(6) *Definitions*:

“Neglect” means the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child’s physical safety or health.

The petitioner challenges his convictions under West Virginia Code §61-8D- 4(e) as to Counts Five and Six involving Andrew and Tyrel, respectively, and contends that the Circuit Court erred in denying the petitioner's motion for judgment of acquittal at the close of the state’s

case as to Counts Five and Six (App. vol. II at 495 - 96), erred in denying the petitioner's motion for judgement of acquittal at the close of the evidence (App. vol. II at 549 - 50) and erred in denying petitioner's post-trial motion for judgment of acquittal (App. vol. I at 183 - 84, 237 - 41), based upon the ground that the evidence in this case was wholly insufficient to support the verdict of guilty as to those two counts. The petitioner contends that the record in this case is devoid as to any testimony whatever that the petitioner "voluntarily accept[ed] a supervisory role" regarding Andrew (Count Five) or Tyrel (Count Six) which is required to sustain a conviction.

During his opening statement (App. vol. II at 183 - 96) the prosecutor made no representation to the jury as to any anticipated evidence supporting the essential element that the petitioner "voluntarily accepted a supervisory role" over Andrew or Tyrel, in stark contrast to the State's representations of anticipated evidence concerning Jahlil.⁹

The facts are undisputed that the purpose of the petitioner's presence at Ms. Woodson's home on March 4, 2012, was for the petitioner to spend time with his son. App. vol. II at 448. Ms. Woodson's testimony also clearly established that the petitioner had no part in inviting Andrew or Tyrel to her home for the planned "sleepover" [her testimony: "I told him that I was having a sleepover for my son"] nor did he have any part in the planning of the outing to the Grand Prix [her testimony: "I was taking them to the Grand Prix"]. App. vol. II at 448. In

⁹The prosecutor specifically represented that the petitioner "voluntarily accepted supervision" over his Jahlil, but the State made no such assertion as to the anticipated evidence concerning Jahlil's friends Andrew or Tyrel: "When she [Lynitrah] was pregnant with Little Ethan, it's important to also know that the facts will be that the defendant shared a custodial relationship. He voluntarily accepted supervision over Jahlil. That was the history for that period of time. And when he would come back into the house and see Ethan, he would also interact with Jahlil. He voluntarily accepted custody." App. vol. II at 185.

addition, the record is completely devoid of evidence that the petitioner spoke to or had any interaction whatsoever with Andrew's or Tyrel's parents, and is devoid of evidence from which a rational trier of fact could conclude that the petitioner undertook any responsibility ("supervisory role") whatsoever concerning supervision of Andrew or Tyrel.

As to the actual evidence presented by the prosecution at trial, the only witnesses who were called to testify who were in a position to shed light on whether the petitioner "voluntarily accepted a supervisory role" concerning Andrew or Tyrel were Ms. Woodson, Andrew and Tyrel. However, none of these witnesses provided testimony sufficient to support this essential element of Counts Five and Six.

Ms. Woodson provided no testimony that the petitioner voluntarily accepted any "supervisory role" toward Andrew or Tyrel. *See* App. vol. II at 404 - 466. In stark contrast, under specific questioning on the issue from the prosecutor, Ms. Woodson described in detail giving specific examples of instances demonstrating the petitioner's express agreement and acceptance of a supervisory role over Jahlil. App. vol. II at 408, 410, 411 - 12.

Although the State did elicit from Ms. Woodson an affirmative response to the leading question "And the defendant helped to keep an eye on them from time to time [at the Grand Prix]?" (App. vol. II at 417), such falls woefully short of establishing the essential element of accepting a "supervisory" role.

Andrew was called as a witness by the State and was asked no questions whatsoever concerning any "supervisory" role undertaken by the petitioner. *See* App. vol. II at 203 - 23.

Concerning Andrew's time at the Grand Prix, he testified:

Q While you were at the Grand Prix, were you paying any attention to Lynitrah and Ethan or were you just off doing your own thing?

A. Off doing my own thing¹⁰. App. vol. II at 216.

Concerning Tyrel, Tyrel testified that he had spent the night at Jahliil's on other occasions (App. vol. II at 333) but had never met the petitioner before the weekend in question [March 3 - 4, 2012] (App. vol. II at 335). The trip to the Grand Prix was planned by Tyrel, Jahliil and Andrew¹¹ and (question from the prosecutor) "Lynitrah agreed to take all of you out there?" to which Tyrel responded "Yes." App. vol. II at 337. The balance of Tyrel's testimony is silent as to any testimony whatsoever that the petitioner "voluntarily accepted" or engaged in any "supervisory role" of any nature toward Tyrel. See App. vol. II at 331 - 350.

Careful examination of the entire record reveals the failure of the State's case: specific evidence must be presented by the State to meet the essential element of "voluntary acceptance of a supervisory role" concerning Andrew (Count Five) and Tyrel (Count Six) for a conviction under West Virginia Code §61-8D-4(e) to stand.

This Court has previously examined the definition and constitutionality of "neglect" as

¹⁰Andrew's testimony is consistent with that given by the petitioner on this issue. App. vol. II at 502; 530 - 31.

¹¹Such testimony is perfectly consistent with Ms. Woodson's prior sworn testimony, which she acknowledged during cross-examination: "

Q When this incident on March 4th occurred, were you in any sort of relationship with Mr. Colbert at the time?

A No, I was not.

Q And why was he with you that day or night?

A Because he kept calling and wanted to come, and he kept saying *he wanted to see his son*. I told him that ***I was having a sleepover for my son and I was taking them to the Grand Prix***. He asked if he could go, and I said "Yes, you can go." He said *he would be with his son and he wanted to spend time*. I told him he could, and I felt fine with it, with being out in the public opposed to being in my house with him. App. vol. II at 448 (emphasis added).

that term is defined under §61-8D-1(6) in the case of *State v. DeBerry*, 185 W. Va. 512, 408 S.E. 2d 91 (1991). Under the facts of *DeBerry*, the defendant accused of neglect was the child's own mother (who took her twelve year old daughter to a party and encouraged her to drink alcohol and play drinking games, which resulted in her death). The following is a list of cases wherein this Court has granted review and issued an opinion in which the defendant-petitioners were charged under the statutes at issue in this case, West Virginia Code §§ 61- 8D- 4 and 61-8D- 4a. In relationship to the child victims in each of these cases, the defendant-petitioners were parents or residents of the same household as the child victim and each had a supervisory or care-taking relationship with the child: *State v. Deberry*, 185 W. Va. 512, 408 S.E.2d 91 (1991); *State v. Sencindiver*, 2011 W. Va. LEXIS 228; *State v. Reed*, 2011 W. Va. LEXIS 197; *State v. Sanchez*, 2011 W. Va. LEXIS 649; *State v. Boggs*, 2011 W. Va. LEXIS 264; *State v. Thompson*, 220 W. Va. 246, 647 S.E.2d 526 (2007); *State v. Wyatt*, 198 W. Va. 530, 482 S.E.2d 147 (1996); *State ex rel. Diva P. v. Kaufman*, 200 W. Va. 555, 490 S.E.2d 642 (1997); *State v. Hunter*, 2012 W. Va. LEXIS 39; *State v. Thornton*, 228 W. Va. 449, 720 S.E.2d 572 (2011); *State v. Jenkins*, 729 S.E.2d 250, 2012 W. Va. Lexis 315. Each of these cases stands in stark contrast to the case at hand where the petitioner just met the child victims.

Accordingly, in order to meet the standard of proof required under the element that a defendant charged with violating the felony offense of West Virginia Code §61-8D- 4(e), the State must prove that such "person" engaged in conduct - accepting a supervisory role relating to a specific child – which is tantamount to that of a parent, guardian or custodian. As demonstrated in the previous paragraphs, the record in this case is devoid of any such evidence. If any person (adult) who is in the vicinity of a child (for example, visiting someone's home,

attending a party or watching children at a sports event or skating rink) and such a person failed (through action or inaction) to “exercise a minimum degree of care to assure said minor child’s physical safety or health”, then such a person would be subject to prosecution under the State’s theory in this case. Under this interpretation, West Virginia Code §61-8D- 1(6) would impose duties upon *any person* in the presence or vicinity of a child.¹²

A criminal conviction must be based upon *evidence*. Reviewing the evidence in this case as to the element discussed in the preceding paragraphs, in the light most favorable to the State, a *rational trier of fact* could *not* have found the essential elements of the crime proved beyond a reasonable doubt. The petitioner submits that absent the emotionally charged atmosphere created by the sensational media coverage of this case¹³, the jury may have been better able to examine and parse the evidence as instructed by the Court in order to return a rational verdict. In order to sustain a conviction under West Virginia Code §61-8D-4(e) there must be *actual evidence* that the person in question in some way, shape or form “voluntarily accepted a supervisory role” as to that specific child. Such was not adduced in this case. The jury’s verdicts as to Count Five and Count Six of the Indictment must be set aside and judgment of acquittal entered in favor of the petitioner because the evidence presented by the State was insufficient to support the jury’s verdicts. The petitioner therefore requests this Court to vacate petitioner’s convictions and

¹²Under the prosecution’s theory in this case, West Virginia Code §61-8D- 1(6) would have to read as follows:

“Neglect” means the unreasonable failure by a parent, guardian, or any person ~~voluntarily accepting a supervisory role towards~~ IN THE PRESENCE OF a minor child to exercise a minimum degree of care to assure said minor child’s physical safety or health.

¹³The case was so sensational that True TV (previously Court TV) filmed the entire trial. App. vol. II at 5 - 7; 617 - 19.

sentences as to Counts Five and Six and remand the matter to the Circuit Court for entry of judgment of acquittal thereto.

VI.

CONCLUSION

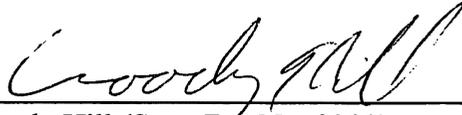
For all the foregoing reasons, the petitioner respectfully requests this Honorable Court to find that the sentence of imprisonment of not less than three nor more than fifteen years imposed by the Circuit Court under Count Four of the Indictment is an illegal sentence greater than allowed by the statute upon which petitioner was convicted, remand this case for re-sentencing and direct the Circuit Court to re-sentence petitioner as to Count Four not to exceed that which is authorized under West Virginia Code, § 61-8D-4(a) to a term of imprisonment of not less than one nor more than three years.

In addition, based upon the foregoing, the petitioner requests this Court to find that the evidence in this case, viewed in the light most favorable to the prosecution, is insufficient to sustain the petitioner's convictions as to Count Five and Count Six, requests this Court to vacate petitioner's convictions and sentences as to Counts Five and Six and remand this matter to the Circuit Court for entry of judgment of acquittal as to Counts Five and Six.

Respectfully submitted,

ETHAN CHIC-COLBERT
Defendant Below, Petitioner

By counsel,

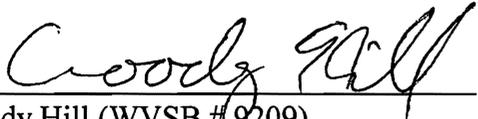

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CERTIFICATE OF SERVICE

I, Woody Hill, counsel for the Petitioner herein, do hereby certify that I have served a true copy of the *Brief on Behalf of the Petitioner* upon counsel for the Respondent by hand delivering said copy on this 18th day of December, 2012, to the following address:

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