
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1121

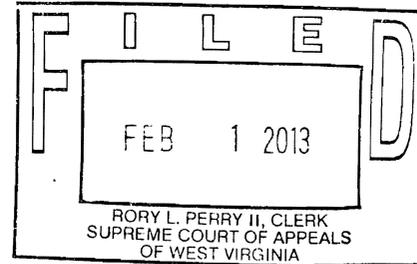
STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

ETHAN CHIC-COLBERT,

Defendant Below, Petitioner.



RESPONDENT'S BRIEF

PATRICK MORRISEY
ATTORNEY GENERAL

SCOTT E. JOHNSON
SENIOR ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, West Virginia 25301
Telephone: (304) 558-5830
State Bar No. 6335
E-mail: sej@wvago.gov

Counsel for Respondent

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STATE OF WEST VIRGINIA'S BRIEF

I.

ASSIGNMENTS OF ERROR

- 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.

- 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

II.

STATEMENT OF THE CASE

“Viewing the evidence in the light most favorable to the Government, *see Glasser v. United States*, 315 U.S. 60, 80 [] (1942), the facts can be summarized as follows[.]” *United States v. Levy*, 335 Fed. Appx. 324, 325 (4th Cir. 2009).

Lynitrah Woodson had two children, Jahlil Clements and Ethan Chic-Colbert II. App. vol. II at 405. The Petitioner was Ethan's biological father, but not Jahlil's. *Id.* at 406-07. However, while Ms. Woodson was pregnant with Ethan, the Petitioner lived with Woodson and took Jahlil to places and watched him when Ms. Woodson went to work in the summer. *Id.* at 408. After Ethan was born, the Petitioner continued living with Ms. Woodson for a short time, during which the Petitioner continued to help Woodson with Jahlil's care. *Id.* Ms. Woodson testified that she allowed the Petitioner to have contact with Jahlil when the Petitioner was visiting Ethan. *Id.* at 409. The Petitioner and Ms. Woodson occasionally attempted to reconcile and reunite. *Id.* The Petitioner also would stay at Ms. Woodson's residence from time to time. *Id.* at 410. During those times, he would continue to help with supervising both Jahlil and Ethan. *Id.*

¹The Petitioner is not raising a claim of ineffective assistance of counsel in his direct appeal, but has reserved the right to file a collateral post-conviction proceeding raising ineffective assistance. Pet'r's Br at 4 n.2. Without offering any views on the merits of any such claim, the State agrees with Petitioner's counsel's sage recognition that any ineffective assistance of counsel claim should properly be filed in a collateral proceeding and recognizes that the Petitioner has the right to file such a post-conviction proceeding.

On March 3, 2012, the Petitioner had been staying at Ms. Woodson's house for two or three days. *Id.* And, indeed, when asked by the police to list his telephone number, the Petitioner gave them Ms. Woodson's telephone number. *Id.* at 529. On that day, Ms. Woodson decided to take 11 year old Jahlil, *id.* at 413, two year old Ethan, *id.* at 410, as well as 11 year old year old Andrew Proctor, *id.* at 203, and 12 year old Tyrel Coffman to the Grand Prix amusement center. *Id.* at 412. Andrew had been at the Woodson residence since between 11:00 a.m. to 1:00 p.m. that day. *Id.* at 215. Tyrel had stayed over at the Woodson residence the night previously. *Id.* at 216, 336. Between 7:00 p.m., *id.* at 415, and around 8:30 p.m., *id.* at 337, Ms. Woodson (in her mother's car, *id.* at 415) drove to the Grand Prix with the Petitioner and the children. *Id.* at 337-38.

While at the skating rink at Grand Prix, the Petitioner would help keep an eye on the children from time to time. *Id.* at 417. The Petitioner became upset because Ms. Woodson had a conversation with another couple. *Id.* at 420. The Petitioner, Ms. Woodson, and the children left the Grand Prix, with Ms. Woodson driving, the Petitioner in the passenger seat, and the children in the back seat. *Id.* at 209-10, 421.

Ms. Woodson then drove though a McDonald's restaurant drive through window. *Id.* at 421. Ms. Woodson asked the Petitioner twice where he was going, to which the Petitioner replied after the second inquiry, "going home with [you]." *Id.* at 424. Ms. Woodson then replied, "No, you're not." *Id.* at 424. The Petitioner was shaking at least one of his legs quickly up and down." *Id.* Ms. Woodson testified that it was obvious that the Petitioner was still upset. *Id.* at 425.

Ms. Woodson began to drive home on the Interstate, at which time she again asked the Petitioner where he was going—which elicited the same response from him, that he was going with her, to which she replied, "No, you're not." *Id.* at 426. The Petitioner responded, "Yes, I am."

Id. Ms. Woodson then attempted to telephone her mother by cellphone to advise her that the Petitioner was “acting silly again.” *Id.* The Petitioner then hit Ms. Woodson on the side of the jaw or face. *Id.* at 211, 427. The Petitioner continued to hit Ms. Woodson, *id.* at 212, causing her to temporarily blackout. *Id.* at 427. Ms. Woodson’s car hit something and came to rest sideways. *Id.* When Ms. Woodson awoke, the Petitioner was still fighting her. *Id.*

The Petitioner drug Ms. Woodson out of the car by her hair and arm, over the driver’s seat and across the passenger seat, and into the traffic lane, *id.* at 429-30, *see also id.* at 220, where he continued to hit and beat her, *id.* at 230, 289, 433, while yelling and screaming, “I’m going to kill you, B[itch,]” *id.* at 433-34, with Ms. Woodson pleading “Stop. Please stop.” *Id.* at 231.

Ms. Woodson ultimately managed to get up and start pursuing the Petitioner who had started to run away. *Id.* at 436. Ms. Woodson then realized that Jahlil had been struck by a car. *Id.* at 437. Andrew Proctor testified that once the car stopped and the Petitioner drug Ms. Woodson out of the car, Jahlil ran out of the car and attempted to flag down a car. *Id.* at 213. While Jahlil was walking across the Interstate waiving his arms, *id.* at 269, for help, *id.* at 346, he was hit by a car. *Id.* at 232, 262-63. Mary Crist, who witnessed Jahlil being struck, *id.* at 232, was looking right at the Petitioner when she screamed, “The kid got hit.” *Id.* at 233. The Petitioner looked toward Jahlil before Jahlil got hit, *id.* at 233, 294, as a result of the driver being unable to avoid hitting him. *Id.* at 281.² The Petitioner then fled, *id.* at 234, 265, jumping the guardrail, running down the hill, and jumping a fence. *Id.* at 269.

The Petitioner was indicted in a seven count indictment, Count I was a charge that the Petitioner kidnaped Ms. Woodson, Count II was a charge that the Petitioner had committed domestic

²The driver that hit Jahlil gave his contact information to the police and spoke with them at the police station; the driver was not cited for the accident. *Id.* at 286.

battery on Ms. Woodson, Count III was a charge of felony-murder in that Jahlil died in the course of the kidnaping; Count V was a charge of child neglect creating a risk of injury to Andrew Proctor, Count VI was charge of child neglect creating a risk of injury Tyrel Coffman; and Count VII was a charge of child neglect creating a risk of injury Ethan Chic-Colbert II. App. vol. I at 4-6. Count IV of the indictment read, in pertinent part:

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 in 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.

Id. at 5.

At the close of the State's case-in-chief, the Petitioner moved for a judgment of acquittal on all counts. App. vol. II at 477. The circuit court granted the motion as to Count I, kidnaping, and Count II, felony murder (death occurring during the kidnaping). *Id.* at 493-94.

Before instructing the jury, the circuit court gave both the State and defense counsel the opportunity to review the instructions, and when asked by the circuit court "Are the State and the defense satisfied with the instructions and the jury verdict form?" defense counsel stated³, "Yes, your Honor." *Id.* at 551. After defense counsel agreed to the instructions, and after the circuit court read the instructions to the jury, and after closing arguments, the Petitioner's trial counsel raised—for the first time—a claim that Count IV of the indictment (1) did not contain the language of West Virginia Code 61-8D-4a(a), to wit, "care, custody or control[.]" even though the instruction as to Count IV

³It should be noted here that the Petitioner's appellate counsel was not trial counsel.

did contain such language,⁴ and (2) that Count IV of the indictment did not cite to West Virginia Code § 61-8D-4a(a), but to West Virginia Code § 61-8D-4(a). App. vol. II at 605-06. The Petitioner stated to the circuit court that he believed that the proper course of action was to instruct the jury as to West Virginia Code §61-8D-4(a). *Id.* at 608.⁵ The circuit court specifically reserved ruling on the issue as the issue could not be cured at the time since the jury had already been instructed. *Id.* at 610.

The jury returned a verdict convicting the Petitioner on all Counts of the indictment. App. Vol. I at 179-80. The Petitioner was sentenced to 3 to 15 years on Count IV. *Id.* at 190.

III.

SUMMARY OF ARGUMENT

The Petitioner raises two arguments: (1) the indictment did not charge him with the crime of which the jury convicted him; and, (2) as to Andrew Proctor and Tyrel Coffman, there was insufficient evidence to show that he voluntarily accepted a supervisory role toward them.

⁴The circuit court instructed the jury as to Count IV:

Before the defendant, Ethan Chic-Colbert, can be convicted of child neglect by a parent, guardian, custodian resulting in death of a child, the State of West Virginia must overcome the presumption that the defendant, Ethan Chic-Colbert, is innocent and prove to the satisfaction of the jury beyond a reasonable doubt, 1) the defendant, Ethan Chic-Colbert 2) in Kanawha County, West Virginia 3) on or about the 4th day of March, 2012 4) then being a parent, guardian or custodian of Jahlil Clements, a child 5) did unlawfully and knowingly neglect Jahlil Clements, a child under his care, custody and control and 6) by such neglect caused the death of said Jahlil Clements.

App. vol. II at 567-68.

⁵The Petitioner recognized that he would benefit from a conviction under West Virginia Code § 61-8D-4(a) rather than 61-8D-4a(a), because the former carries a sentence of 1 to 3 years (or a sentence of 1 year in the court's discretion) of incarceration while the later carries a penalty of 3 to 15 years.

As to the first ground, the Petitioner did not object pretrial to the indictment, nor did he object at all until after the jury had been instructed and, indeed, until after he affirmatively approved the jury instructions that were given. Under West Virginia Rule of Criminal Procedure 12(b)(2)\, grounds relating to the indictment must be raised pretrial *except* when the claim is that the indictment does not show jurisdiction or allege an offense. Here, the Petitioner is not alleging that Count IV of the indictment did not allege an offense, he is alleging that it charged an offense different from the one the jury convicted him of. Because the Petitioner concedes the indictment's Count IV did allege an offense, the Petitioner waived the issue by not raising it pretrial.

Moreover, when an indictment is challenged belatedly, this Court “will construe an indictment in favor of validity Without objection, the indictment should be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense under West Virginia law or for which the defendant was convicted.” Syl. Pt. 1, in part, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996). Here, the Petitioner claims that the indictment did not include the words, care, custody, or control. However, these terms are subsumed within the statutory definition of custodian under West Virginia Code § 61-8D-1(4) and of neglect under West Virginia Code § 61-8D-1(6). At the very least, the plain meaning of the term custodian includes the concepts of care, custody and control. *See United States v. Resendiz-Ponce*, 549 U.S. 102, 107-08 (2007) (use of a word that in “common parlance” would include a necessary element of the crime renders an indictment sufficient even if the element is not explicitly spelled out). The circuit court should be affirmed.

As to the second ground, the Petitioner faces a difficult burden in claiming that there was insufficient evidence. At the very least, there was testimony from Ms. Woodson that the Petitioner

was helping her watch Andrew and Tyrel and the other 2 boys with them at the Grand Prix from time to time. And this evidence (if not sufficient in and of itself) should be read in light of the other evidence that the Petitioner considered and acted as if the Woodson residence was his home and that on the night before the death Tyrel slept over at the house, and that Andrew came over for a large part of the day to play. The circuit court should be affirmed.

IV.

ORAL ARGUMENT

Oral argument is unnecessary in this case.

V.

ARGUMENT

A. The Petitioner failed to object before trial that Count IV of the Indictment was defective so the issue is waived. If the issue is not waived, the failure of the Petitioner to timely object means Count IV should be read liberally and upheld because there is “a reasonable construction” of Count IV that would support it charging a violation of West Virginia Code § 61-8D-4a(a). Finally, because of the overwhelming evidence that the Petitioner had care, custody and control over Jahlil, any error in the indictment is harmless.

1. *Because the Petitioner failed to object before trial that the indictment was defective, the issue is waived.*

The Petitioner’s trial counsel did not raise the claim that Count IV of the indictment was defective before trial, instead, he waited until *after* the jury had been selected (i.e., until *after* jeopardy attached), until *after* the State rested its case, until *after* he rested his case, until *after* he had approved the jury instructions, until *after* the jury was instructed, and until *after* closings were made to the jury. The Petitioner has waived this issue.

West Virginia Rule of Criminal Procedure 12(b)(2), provides that “[d]efenses and objections based on defects in the indictment . . . other than that it fails to show jurisdiction in the court or fails to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings” must be raised prior to trial. Here, the Petitioner is not asserting, nor did he assert below, that Count IV of the indictment did not charge an offense—he instead asserts that the indictment did charge an offense, albeit not the one the jury was instructed on. App. vol. II at 606-07. By its plain terms,⁶ Rule 12(b)(2)’s waiver exception applies only when the indictment fails to allege *any* offense—and the Petitioner has clearly conceded that Count IV did charge an offense, albeit child neglect causing risk rather than child neglect causing death. Pet’r’s Br. at 10. Thus, his failure to raise his objection to the indictment below waives the issue here. *Compare State v. Johnson*, 219 W. Va. 697, 702, 639 S.E.2d 789, 794 (2006) (per curiam) (“the indictment was so defective as not to charge an offense under West Virginia law, and one can raise such a defect at any time.”) *with State v. Sulick*, No. 11-0043, slip op. at 8 n.13 (W. Va. Feb. 23, 2012) (“To the extent that Ms. Sulick’s argument relates to the charges contained within the indictment, we summarily reject the notion that it was unconstitutionally vague. First, we recognize that any objections to the indictment must have been raised prior to trial.”); *United States v. Calabrese*, 825 F.2d 1342, 1346-47 (9th Cir. 1987) (claims that indictment was “unconstitutionally vague, ambiguous, and duplicitous” waived on appeal); *Pandiscio v. State*, 670 A.2d 1340 (Del. 1995) (Table) (Text available at 1995 WL 715627, at *2) (“With respect to his . . . claim, alleging ambiguities in the indictment, Superior

⁶“Court rules are interpreted using the same principles and canons of construction that govern the interpretation of statutes[.]” *Casaccio v. Curtiss*, 228 W. Va. 156, 718 S.E.2d 506 (2011), and “[s]tatutes whose language is plain must be applied as written[.]” *Foster Foundation v. Gainer*, 228 W. Va. 99, 110, 717 S.E.2d 883, 894 (2011).

Court Criminal Rule 12 provides that motions alleging defects in the indictment or information must be raised prior to trial or be deemed waived.”); *Hart v. State*, 761 So.2d 334, 334-35 (Fla. Dist. Ct. App. 1998) (“Appellant asserts that the way the information is worded, it charged him only with harming the officer, rather than threatening harm, notwithstanding the wording in the ‘to wit’ clause. However, Appellant never properly presented this argument to the trial court. . . . Furthermore, Appellant was not prejudiced or embarrassed at trial by any ambiguity, as the record is clear that the case was tried on, and Appellant defended himself against, a charge of threatening harm. . . . We also note that Appellant had no objection to the court’s instruction to the jury that they could find Appellant guilty of corruption by threat if he ‘threatened unlawful harm[]’ charging the jury on finding guilt of corruption by threat by threatening unlawful harm. We, therefore, affirm Appellant’s conviction and sentence.”).

The Circuit Court should be affirmed.

2. *The Petitioner’s failure to timely object means Count IV should be read liberally and upheld because there is “a reasonable construction” of Count IV that would support it charging a violation of West Virginia Code § 61-8D-4a(a).*

Even if the Petitioner did not waive this issue, he still cannot prevail. “The scrutiny given to an indictment depends, in part, on the timing of a defendant’s objection to that indictment.” *United States v. Sabbeth*, 262 F.3d 207, 218 (2d Cir. 2001). Consistent with this rule, this Court has held that while

a challenge to a defective indictment is never waived, this Court literally will construe an indictment in favor of validity where a defendant fails timely to challenge its sufficiency. Without objection, the indictment should be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense under West Virginia law or for which the defendant was convicted.

Syl. Pt. 1, in part, *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996). A timely objection is one “made at the earliest possible moment.” *State v. Palmer*, 210 W. Va. 372, 376-77, 557 S.E.2d 779, 783-84 (2001) (per curiam) (footnote omitted). See also *United States v. Pheaster*, 544 F.2d 353, 361 (9th Cir. 1976) (objection to indictment made only after all the evidence had been presented in a lengthy jury trial—“the very limited resources of our judicial system require that such challenges be made at the earliest possible moment in order to avoid needless waste”).⁷ Court’s applying tests similar to *Miller* have characterized the test as being a “stringent standard[,]” *Pheaster*, 544 F.2d at 361, the stringency of which increases with the delay in making an objection. “[T]he tardier the challenge, the more liberally and aggressively have indictments been construed so as to save them[.]” *United States v. Prince*, 868 F.2d 1379, 1384 (5th Cir. 1989) (quoting *United States v. Richardson*, 687 F.2d 952, 962 (7th Cir.1982)). Such a liberal reading is further justified by the fact that a delay in objecting “tends to negate the possibility of prejudice in the preparation of the defense,’ because one can expect that the challenge would have come earlier were there any real confusion about the elements of the crime charged.” *United States v. Lo*, 231 F.3d 471, 481 (9th Cir. 2000) (citation omitted). Here the Petitioner’s trial counsel did not claim that Count IV was defective before trial; instead, he waited until *after* the jury had been seated, until *after* the State rested its case, until *after* he rested his case, until *after* he had approved the jury instructions, until *after* the jury was instructed, and until *after* closings were made to the jury. The Petitioner faces an uphill struggle.

⁷It has also been noted that “[t]he purpose behind this rule is to prevent a criminal defendant from ‘sandbagging’ or deliberately foregoing raising an objection to an indictment so that the issue may later be used as a means of obtaining a new trial following conviction.” *Palmer*, 210 W. Va. at 376, 557 S.E.2d at 783. Accord *Pheaster*, 544 F.2d at 361 (“Such a long delay in raising the issue suggests a purely tactical motivation of incorporating a convenient ground of appeal in the event the jury verdict went against the defendants.”).

The Petitioner contends that he was charged in the indictment with a violation of West Virginia Code § 61-8D-4(a), but was convicted under West Virginia Code § 61-8D-4a(a) and, as such, he was illegally sentenced. The gravamen of the claim is that Count IV of the indictment did not include the language “under his or her care, custody or control” and, thus, the indictment should be read to reference West Virginia Code § 61-8D-4(a).

Here, Count IV of the indictment read:

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 in 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.

App. vol. I at 5.

First, it is evident that the State intended Count IV to charge a violation of West Virginia Code § 61-8D-4a(a). While the Code citation contained in Count IV of the indictment did read “Chapter 61, Article 8D, Section 4(a)” which is admittedly not the same as West Virginia Code § 61-8D-4a(a), Count IV used the wording “*caused the death*,” which is language contained in West Virginia Code § 61-8D-4a(a); Count IV did not use the language “cause said child *bodily injury*,” which is the language contained in West Virginia Code § 61-8D-4(a). Indeed, Counts V, VI, and VII further substantiate this because those Counts and used the language “created a substantial risk of serious bodily injury and death,” indicating that the “serious bodily injury” is not synonymous with “death.”

Moreover, defense counsel was aware throughout the trial that the State was proceeding under the two different statutes, indeed, at the mid-trial motion for judgment of acquittal defense

counsel referenced the two different statutes the State was proceeding under. App. vol. II at 495. And, more importantly, when the instructions were presented to counsel for his approval—instructions containing the Code § 61-8D-5a(a) language—counsel did not object and affirmatively stated his satisfaction with the instructions. App. vol. II at 551. And when defense counsel finally did bring the issue to the circuit court’s attention, the objection made was not that the Petitioner was prejudiced in making his defense. *Id.* at 605-06. Thus, any error in using the wrong code citation is harmless. *See* W. Va. R. Crim. P. 7(c)(3) (“Error in the citation or its omission shall not be ground for dismissal of the indictment or information or reversal of the conviction if the error or omission did not mislead the defendant to his or her prejudice.”).

Second, as noted above, this Court must give the indictment a liberal construction because of the belated objection. “[I]n appraising a tardily challenged information or indictment, this Court has ‘considerable leeway to imply the necessary allegations’ from the language of the document.” *State v. Halbesleben*, 75 P.3d 219, 222 (Idaho Ct. App. 2003). Thus, this Court should “liberally interpret the allegations of the indictment to determine whether the necessary ‘care or custody’ element can be inferred.” *Id.*

Count IV charged, *inter alia*, that the Petitioner was Jahlil’s “custodian” and that by the Petitioner’s “neglect” of Jahlil, the Petitioner caused Jahlil’s death.

By charging the Petitioner as, *inter alia*, a “custodian” the essential element of “care, custody or control” was met because West Virginia Code § 61-8D-1(4) (emphasis added) defines a custodian as “a person over the age of fourteen years *who has or shares actual physical possession or care and custody of a child on a full-time or temporary basis*, regardless of whether such person has been granted custody of the child by any contract, agreement or legal proceeding.”

Further, Count IV of the indictment used the term “neglect,” which West Virginia Code § 61-8D-1(6) defines as “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.” And supervision (i.e., a “supervisory role”), is a synonym for “care, custody or control.” See *State v. Longerbeam*, 226 W. Va. 535, 541, 703 S.E.2d 307, 313 (2010) (per curiam) (“she was not under the supervision, or to be statutorily-specific ‘care, custody or control,’ of Appellant”). Indeed, this Court has observed the overlap between the two phrases. “Pursuant to W. Va. Code, 61-8D-4a(a) (1997), the offense of child neglect resulting in death is to be prosecuted against the child’s ‘parent, guardian or custodian.’ In like fashion, the term ‘neglect’ is defined in W. Va. Code, 61-8D-1(6) (1988), as 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.’” *State v. Thompson*, 220 W. Va. 246, 252, 647 S.E.2d 526, 532 (2007) (per curiam).

Third, “[t]he proper analysis for an indictment is to look at it as a whole. An indictment is ‘not fatal, where from the whole thereof the meaning is made clear to a person of ordinary intelligence.’” *State v. Palmer*, 210 W. Va. 372, 379, 557 S.E.2d 779, 786 (2001) (Davis, J., dissenting) (quoting Syl. Pt. 1, *State v. Ruble*, 119 W. Va. 356, 193 S.E. 567 (1937)). Hence, “words used in the indictment are to be construed according to their usual acceptance in common language Words in the statute defining a public offense need not be strictly pursued in the indictment, but other words, conveying the same meaning, may be used.” *Davis v. People* 151 U.S. 262, 265-66 (1894). Thus, “not explicitly including all the elements of the offense in an indictment is not fatal so long as the absent elements can be deduced from the language that is actually included in the

charging document[,]” *United States Ramsey*, 406 F.3d 426, 430 (7th Cir. 2005), and in making such a determination “[i]t is an elementary rule of criminal pleading that common, ordinary words used in indictments or complaints are to be interpreted in accordance with their ordinary and common meaning.” *State v. Maine State Fair Ass’n*, 96 A.2d 229, 230 (Me.1953). See *United States v. Resendiz-Ponce*, 549 U.S. 102, 107-08 (2007) (use of a word that in “common parlance” would include a necessary element of the crime renders an indictment sufficient even if the element is not explicitly spelled out). The use of the word “custodian” in Count IV (i.e., “ETHAN SAMUEL CHIC-COLBERT, being the parent, guardian and custodian of Jahlil Clements”) sets forth the elements of care, custody or control.

“Custodian” by its common meaning, means “care” and “control,” *State v. Stephens*, 206 W. Va. 420, 422, 525 S.E.2d 301, 303 (1999) (observing “the ordinary dictionary meanings of the words ‘custody’ (immediate charge and control)”), *State v. Collins*, 221 W. Va. 229, 233, 654 S.E.2d 115, 119 (2007) (per curiam) (quoting *Black’s Law Dictionary* 412 (8th ed. 2007)) (“The word ‘custody’ is defined as ‘[t]he care and control of a thing or person for inspection, preservation, or security.’”), accord *People v. Sorrendino*, 37 P.3d 501, 506 (Colo. Ct. App. 2001) (quoting *Leithold v. Plass*, 413 S.W.2d 698, 700 (Tex.1967)) (“‘custody’ includes ‘the elements of immediate and direct care and control of the child, together with provision for its needs’”), and etymologically, of course, includes “custody.” *Pozek v. State*, 803 So.2d 768, 770 (Fla. Dist. Ct. App. 2001) (citations omitted) (“A “custodian” is someone who has custody of another”). Count IV of the indictment easily passes constitutional muster, especially of under the liberality standard.

The circuit court should be affirmed.

B. The State adduced sufficient evidence to prove the Petitioner neglected Andrew Proctor and Tyrel Coffman on the late evening and early morning of March 3/4, 2012.

West Virginia follows the *Jackson v. Virginia*, 443 U.S. 307 (1979) standard in reviewing sufficiency of the evidence claims. *State v. LaRock*, 196 W. Va. 294, 303, 470 S.E.2d 613, 622 (1996) (“In *State v. Guthrie*, 194 W. Va. 657, 667–70, 461 S.E.2d 163, 173–76 (1995), we recently revised our standard of review when a criminal defendant challenges the sufficiency of the evidence in support of a jury verdict. We adopted, both generally and in cases with circumstantial evidence, the standard set forth by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979).”). Under *Jackson*, a court asks, “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” 443 U.S. at 318–19.

A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt.

Syl. Pt. 3, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

Jackson does not simply supplant the jury with the reviewing court. Sufficiency of the evidence review does not give a court the power to usurp or supplant the trial jury and sit as a second jury under the guise of discharging a judicial function. See *State v. Stowers*, 66 S.E. 323, 326 (W. Va. 1909) (“We are not jurors”). “[T]his court ‘cannot make [its] own credibility

determinations but must assume that the jury resolved all contradictions in testimony in favor of the Government.” *United States v. Penniegraft*, 641 F.3d 566, 572 (4th Cir. 2011) (quoting *United States v. United Med. & Surg. Sup. Corp.*, 989 F.2d 1390, 1402 (4th Cir.1993)). Indeed, “[t]he jury is the trier of the facts and in performing that duty it is the sole judge as to the weight of the evidence and the credibility of the witnesses.” Syl. Pt. 2, *State v. Bailey*, 151 W. Va. 796, 155 S.E.2d 850 (1967). “Thus, in considering a constitutional sufficiency challenge, a . . . court disregards (as it must assume the jury did) any evidence that does not support the jury verdict.” *Policano v. Herbert*, 453 F.3d 79, 96 (2d Cir. 2006) (Raggi, dissenting from denial or rehearing en banc). *See also State v. Niederstadt*, 66 S.W.3d 12, 14 (Mo. 2002) (en banc) (“The Court examines the evidence and inferences in the light most favorable to the verdict, ignoring all contrary evidence and inferences.”); *State v. Treadway*, 130 P.3d 746, 748 (N.M. 2006) (“This Court evaluates the sufficiency of the evidence in a criminal case by . . . disregarding all evidence and inferences to the contrary.”); *Ballenger v. State*, 667 So.2d 1242, 1252 (Miss.1995) (“All evidence and inferences derived therefrom, tending to support the verdict, must be accepted as true, while all evidence favoring the defendant must be disregarded”). Indeed, the only time the defendant’s evidence is considered is “in those instances in which it is favorable to the State[.]” *State v. Lyons*, 459 S.E.2d 770, 776 (N.C. 1995). *Jackson* does not ask if the jury made the *right* decision, it only asks if it made a *rational* one. *Herrera v. Collins*, 506 U.S. 390, 402 (1993).

The Petitioner asserts that the State did not prove that the Petitioner neglected Andrew Proctor and Tyrel Coffman, specifically that he did not “voluntarily accept[] a supervisory role” toward Andrew and Tyrel. Pet’r’s Br. at 17. The State, though, did adduce sufficient evidence for the jury to have found this element. *Cf.* Syl. Pt. 1, *State v. Stephens*, 206 W. Va. 420, 525 S.E.2d

301 (1999) (whether a babysitter is a custodian under West Virginia Code § 61–8D–5 is a jury question).

West Virginia Code § 61-8D-(6) defines “neglect” as “the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child” Supervision means care, custody, and control. *See State v. Longerbeam*, 226 W. Va. 535, 541, 703 S.E.2d 307, 313 (2010) (per curiam) (“she was not under the supervision, or to be statutorily-specific ‘care, custody or control,’ of Appellant”). These elements are met here.

West Virginia Code § 61-8D-1(6) requires “voluntarily accepting a supervisory role[.]” As such, there is no need for an “explicit parental delegation of supervisory responsibility[.]” *Snow v. Commonwealth*, 537 S.E.2d 6, 10 (Va. Ct. App. 2000), nor must there be an explicit acceptance of responsibility. Acceptance may be manifested in many ways, including words, acts, or courses of conduct. *See Hawkins v. State*, 910 S.W.2d 176, 179-80 (Tex. App. 1995) (quoting Tex. Penal Code Ann. § 22.04(d)) (“care, custody, or control” is when an actor “has by act, words, or course of conduct acted so as to cause a reasonable person to conclude that he has accepted responsibility”); *Snow v. Commonwealth*, 537 S.E.2d 6, 10 (Va. Ct. App. 2000) (“[O]ne may become a person ‘responsible for the care of a child’ by a voluntary course of conduct and without explicit parental delegation of supervisory responsibility or court order.”). *Cf. Cabot Oil & Gas Corp. v. Daugherty Petroleum, Inc.*, 479 Fed. Appx. 524, 528 (4th Cir. 2012) (per curiam) (quoting *Ways v. Imation Enters. Corp.*, 214 W. Va. 305, 313, 589 S.E.2d 36, 44 (2003) (per curiam) (quoting *Bailey v. Sewell Coal Co.*, 190 W. Va. 138, 437 S.E.2d 448, 450–51 (1993)) (internal quotation marks omitted)) (“Offer and acceptance may be manifested through “word, act[,] or conduct that evince[s] the intention of the parties to contract.””). Further, West Virginia Code § 61-8D-1(6) provides no

maximum or minimum time limit on the supervisory role. And, under West Virginia Code § 61-8D-1(4), a custodian is one who “shares actual physical possession or care and custody of a child . . . on a temporary basis.” “[T]emporary’ is defined as ‘[l]asting for a time only; existing or continuing for a limited time (usu. short) time; transitory.’” *State v. Collins*, 221 W. Va. 229, 233-34, 654 S.E.2d 115, 119-20 (2007) (per curiam) (quoting *Black’s Law Dictionary* 1504 (8th ed. 2007)). Read in *pari materia*, the supervisory role need only be transitory.

Here, the Petitioner had lived with Ms. Woodson at her house two or three days before Jahlil’s death, App. vol. II at 410, and had apparently been supervising both Jahlil and Ethan. *Id.* While in the car on the night of the accident, he told the Petitioner that he was going home with her. *Id.* at 424. When asked for his telephone number by the police, he gave them the telephone number of the Petitioner’s house. *Id.* On the night before Jahlil’s death, Tyrel had slept over at the Woodson residence, *id.* at 216, 336, and Andrew had been there for approximately seven or eight hours before going to the Grand Pix. *Compare id.* at 215 with *id.* at 337. Further, while at the Grand Prix, the Petitioner “helped [Ms. Woodson] to keep an eye on [Andrew and Tyrel]” from time to time. *Id.* at 417.

A review of “the record as a whole[.]” *Rife v. Blankenship*, 721 F.2d 983, 984 (4th Cir. 1983)—crediting the jury with making all findings of fact and drawing all reasonable inferences therefrom in favor of the State, Syl. Pt. 3, in part, *State v. Guthrie*, 194 W. Va. 657, 663, 461 S.E.2d 163, 169 (1995), and discounting any evidence contradicting the verdict, *Policano v. Herbert*, 453 F.3d 79, 96 (2d Cir. 2006) (Raggi, dissenting from denial or rehearing en banc)⁸—supports the jury’s verdict.

⁸*See generally Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (“Once a defendant has been found guilty of the crime charged, the factfinder’s role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.”).

For the two or three days before the death, the Petitioner not only lived in the Woodson house, he conducted himself as someone with authority in the Woodson house by supervising Ethan and Jahlil. And Tyrel had a sleep over the night before Jahlil's death, and both Tyrel and Andrew played at the Woodson house the day that Jahlil was killed. This, coupled with the fact that the Petitioner helped Ms. Woodson (and there is no doubt that Ms. Woodson was a custodian of Andrew and Tyrel who voluntarily undertook their supervision) at Grand Prix by keeping an eye on Tyrel and Andrew from time to time, was sufficient to establish a voluntary supervisory undertaking by the Petitioner.

VI.

CONCLUSION

For the above reasons, the Circuit Court of Kanawha County should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

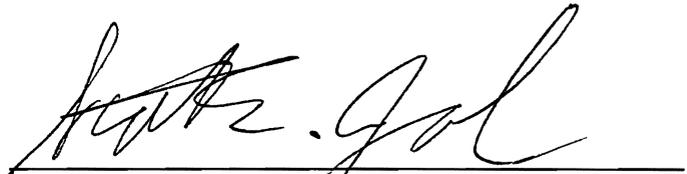


SCOTT E. JOHNSON
SENIOR ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: 304-558-5830
State Bar No. 6335
E-mail: sej@wvago.gov
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Scott E. Johnson, Senior Assistant Attorney General and counsel for the Respondent, do hereby verify that I have served a true copy of the *Respondent's Brief* upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 1st day of February, 2013, addressed as follows:

James Woodrow Hill, Esquire
Hill, Peterson, Carper, Bee & Deitzler, PLLC
500 Tracy Way
Charleston, WV 25311

A handwritten signature in black ink, appearing to read "Scott E. Johnson", written over a horizontal line.

SCOTT E. JOHNSON
SENIOR ASSISTANT ATTORNEY GENERAL
812 Quarrier Street, 6th Floor
Charleston, WV 25301
Telephone: 304-558-5830
State Bar No. 6335
E-mail: sei@wvago.gov
Counsel for Respondent