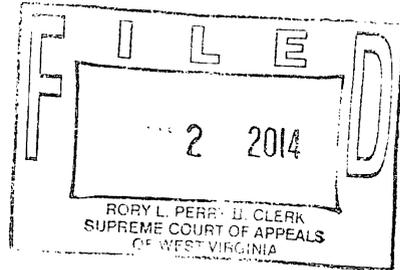

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 13-0910

ROBERT JUNIOR THOMAS,
Plaintiff below,
Respondent,

v.

DAVID BALLARD, Warden,
Mount Olive Correctional Complex,
Defendant below,
Petitioner.



REPLY BRIEF

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TABLE OF CONTENTS

ARGUMENT..... 1

I. The Habeas Court Committed Clear Error When It Found that the Jury Was Not Instructed on All Essential Elements. 1

II. Thomas Cannot Prove that His Trial Counsel Was Constitutionally Ineffective. 3

A. Thomas Has Failed to Prove How Trial Counsel’s Decision Not to Seek to Define Certain Terms Was Objectively Deficient...... 4

B. The Overwhelming Evidence against Thomas Belies Any Claim of Prejudice from His Lawyer’s Performance...... 4

CONCLUSION..... 6

J.

TABLE OF AUTHORITIES

Cases

Harrington v. Richter, 131 S. Ct. 770 (2011)..... 4
State v. Bartlett, 177 W. Va. 663, 355 S.E.2d 913 (1987)..... 2
State v. Davis, 220 W. Va. 590, 648 S.E.2d 354 (2007)..... 2
State v. Longerbeam, 226 W. Va. 535, 703 S.E.2d 307 (2007) (Benjamin, J., dissent)..... 4
State v. Miller, 194 W. Va. 3, 459 S.E.2d 114 (1995)..... 4
State v. Slie, 158 W. Va. 672, 213 S.E.2d 109 (1975)..... 2

Statutes

West Virginia Code § 61-8D-5(a)..... 3

ARGUMENT

Thomas's Response Brief fundamentally misconstrues the habeas court's order. The court granted habeas relief because it found that the jury instructions lacked a temporal element: according to the court, there was no instruction requiring the jury to find that Thomas was both in a position of trust in relation to L.M. and that she was in his care, custody or control *at the time* they had sex. The State's opening brief thoroughly identifies why the court erred in finding that no such instruction was given. In his Response Brief, however, Thomas does not dispute that the jury instructions did, in fact, contain this temporal requirement. Instead, Thomas argues that his trial counsel was ineffective because he did not offer jury instructions defining the terms "position of trust" and "care, custody or control." (Resp't's Br. 6-7.) This argument misses the point and is without merit.

I. The Habeas Court Committed Clear Error When It Found that the Jury Was Not Instructed on All Essential Elements.

First, Thomas's response dodges the issues raised by the habeas court's order and raises something new entirely. The habeas court's order focused on the purported lack of instruction regarding the scope of the relationship that must have existed between that Thomas and L.M. at the time they had sex. The court explained that a jury could determine that their school-bus-driver/student relationship had ended when they had sex, or a jury could decide that Thomas was still exercising control over L.M. at the time of the offense. (App. 694-95.) The court noted that determination was a question of fact for the jury, (App. 693), and that Thomas's "trial counsel did not offer an instruction that would guide the jury as to these issues," (App. 695). That was the basis for the court's reliance on *State v. Longerbeam*, 226 W. Va. 535, 703 S.E.2d 307 (2010), which the habeas court determined was controlling on the temporal issue. (App. 694.) But rather than address this issue, Thomas argues that his lawyer was deficient because "the jury

did not receive[] any kind of guidance on what the terms ‘position of trust’ and ‘care, custody or control’ meant[.]” (Resp’t’s Br. 6-7.) In so doing, Thomas completely ignores the temporal issue that was the central and singular focus of the Circuit Court’s habeas order.

Second, even considering Thomas’s argument that his counsel was ineffective for failing to offer definitional instructions, his claim still fails. Simply put, the law does not require the specificity that Thomas demands. Of course, the jury must be instructed on all essential elements of the offense.* But jury instructions need not define every word contained within each essential element charged. *State v. Bartlett*, 177 W. Va. 663, 667, 355 S.E.2d 913, 917 (1987) (“We have never held that every term in a jury instruction must be defined[.]”). All the law requires is that an instruction “adopts and follows the language of the statute, or uses substantially equivalent language and plainly informs the jury of the particular offense for which the defendant is charged.” Syl. pt. 8, *State v. Slie*, 158 W. Va. 672, 213 S.E.2d 109 (1975); (*see also* Pet’r’s Br. 12). Also, common words may be interpreted by the jury according to their common meaning. *See, e.g., State v. Jett*, 220 W. Va. 289, 647 S.E.2d 725 (2007) (“attempt” does not require a separate definition); *Bartlett*, 177 W. Va. at 667, 355 S.E.2d at 917 (“reckless disregard for safety of others” does not require a separate definition). The jury instructions at Thomas’s trial complied with these requirements.

The Circuit Court’s order granting habeas relief was based on an error of fact. Contrary to the court’s finding, the jury here was properly instructed as to the essential elements of the crime.

* Both sections of the Response Brief cite to *State v. Davis*, 220 W. Va. 590, 648 S.E.2d 354 (2007) (*per curiam*), but that decision is inapplicable here. That case concerned the sole issue of whether the trial court, in answering a jury question, correctly distinguished second-degree murder from voluntary manslaughter. *See Davis*, 220 W. Va. at 593, 648 S.E.2d at 357. *Davis* does not, as the Response Brief suggests, stand for the proposition that a circuit court must define terms in a statute that the Legislature has left undefined.

Thomas was charged with violating West Virginia Code § 61-8D-5(a). That statute provides the following:

If any parent, guardian or custodian or other person in a position of trust in relation to a child under his or her care, custody or control, shall engage in or attempt to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with, a child under his or her care, custody or control, notwithstanding the fact that the child may have willingly participated in such conduct, or the fact that the child may have consented to such conduct or the fact that the child may have suffered no apparent physical injury or mental or emotional injury as a result of such conduct, then such parent, guardian, custodian or person in a position of trust shall be guilty of a felony[.]

To find Thomas guilty, it had to find that Thomas was (1) a “parent, guardian or custodian or other person in a position of trust,” (2) “in relation to a child under his care, custody or control,” and (3) that, within that relationship, he engaged in sexual intercourse or contact with the child. (App. 369-73.) The jury instructions contained these essential elements, tracked the statutory language, and plainly informed the jury of the offense for which Thomas was charged. (*See* Pet’r’s Br. 11-12.) Accordingly, the habeas court erred when it found that the instructions were insufficient.

II. Thomas Cannot Prove that His Trial Counsel Was Constitutionally Ineffective.

Thomas has also failed to show that his trial counsel’s performance was both objectively deficient and prejudicial. The State’s Brief identified reasonable, strategic reasons for trial counsel’s decision not to seek instructions on the scope of “position of trust” and “care, custody or control,” and also explained that, given the evidence against Thomas, any deficiency was not prejudicial. Thomas’s Response neither addresses the validity of these strategies, nor explains why the strength of the evidence at trial did not negate any prejudice from the purportedly missing jury instructions.

A. Thomas Has Failed to Prove How Trial Counsel's Decision Not to Seek to Define Certain Terms Was Objectively Deficient.

The order granting Thomas's request for habeas relief is premised on the conclusion that no reasonable attorney would have done what Thomas's lawyer did at trial; that is, decline to request that the trial court explain the scope of the terms "position of trust" and "care, custody or control" in the jury instructions. But as the State explains in its Brief, a reasonable lawyer could have decided not to request such instructions, as the lack of those instructions could have worked to the defense's advantage, particularly in light of the trial court's statements that it would likely consider the scope of those terms broadly. (*See* Pet'r's Br. 13-15); *cf. Harrington v. Richter*, 131 S. Ct. 770, 790 (2011) ("Although courts may not indulge 'post hoc rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions."). The same is true for the alleged lack of definitional instructions that Thomas complains of in his Response Brief. Tellingly, Thomas's Response does not address the validity of the State's offered strategic reasons. Rather, Thomas simply recites the habeas court's order and concludes that trial counsel was deficient. The habeas court's ruling was an improper second-guessing of reasonable trial strategy, and Thomas cannot carry his burden of proving ineffectiveness.

B. The Overwhelming Evidence against Thomas Belies Any Claim of Prejudice from His Lawyer's Performance.

Likewise, Thomas has failed to prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. pt. 5, in part, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). In light of the evidence introduced against Thomas at trial, the habeas court erred in finding Thomas had carried his burden with regard to the prejudice prong. *See State v. Longerbeam*, 226 W. Va. 535, 542, 703 S.E.2d 307, 314 (2007) (Benjamin, J., dissenting) ("[A] review of all of the evidence in the light

most favorable to the prosecution, compels the conclusion that a rational trier of fact could have found the essential elements of the appellant's crime proved beyond a reasonable doubt.”). Notably, Thomas’s Response Brief does not address the strength of the trial evidence against him and how that precludes his claim of prejudice. (Resp’t’s Br. 9-10.) Thomas cannot show that his trial counsel’s performance prejudiced his defense, and the Circuit Court should have denied the habeas petition.

CONCLUSION

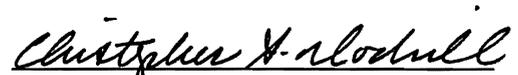
For the reasons stated above and in the Petitioner's Brief, the order of the Circuit Court of Wyoming County, West Virginia, granting habeas corpus relief must be reversed.

Respectfully submitted,

DAVID BALLARD, Warden,
Mount Olive Correctional Complex,
Petitioner,

By counsel,

PATRICK MORRISEY
ATTORNEY GENERAL

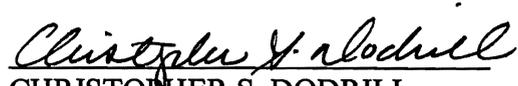


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CERTIFICATE OF SERVICE

I, Christopher S. Dodrill, Assistant Attorney General and counsel for the Petitioner, hereby verify that I have served a true copy of "Reply Brief" upon counsel for the Respondent by depositing said copy in the United States mail, with first-class postage prepaid, on this 27th day of January, 2014, addressed as follows:

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CHRISTOPHER S. DODRILL