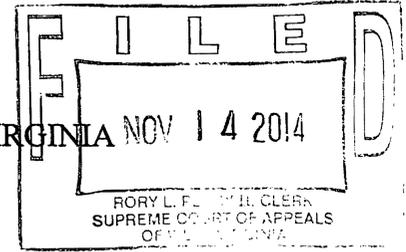


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Respondent,

v.

Supreme Court No. 14-0818

Circuit Court No. 06-F-169
(Kanawha)

BRASHAN BEVERLY,

Petitioner.

PETITIONER'S BRIEF

John A. Carr (WVSB #10461)
John A. Carr, Atty at Law, PLLC
179 Summers Street, Suite 209
Charleston, WV 25301
(304) 344-4822
Email: jcarr@jcarrlaw.com

Counsel for Petitioner

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ASSIGNMENT OF ERROR

The Trial Court Erred When It Failed To Instruct The Jury On The Elements Of The Four Offenses Charged In The Indictment, And Failed To Instruct The Jury On The Elements Of The Lesser Included Offenses Included On The Jury Verdict Form.

STATEMENT OF THE CASE

On May 18, 2006, a grand jury in Kanawha County, West Virginia, returned a four-count indictment against Brashan Beverly (“Beverly”). (A.R. 0004-0005).¹ Beverly was indicted in Count One with the Attempted First Degree Murder of Robert J. Thompson; Count Two with the Attempted First Degree Murder of James R. Hensley, Count Three with the Malicious Wounding of Robert J. Thompson; and Count Four with the Malicious Wounding of James R. Hensley.

Beverly was convicted following a jury trial that took place from June 4 - 6, 2007. (A.R. 0006-0475). The verdict form in this case allowed the jury to find Beverly guilty as charged, to find him guilty of the lesser included offenses of attempted second degree murder; or unlawful wounding or battery. (A.R. 0511-0518). The trial court did not instruct the jury on the essential elements of the offenses, instead providing only a general charge. (A.R. 0402-0420). The jury returned asking for the instructions to be read again, and the trial court repeated the same general charge – again without the essential elements of the offenses. (A.R. 0449-0469). Trial defense counsel did not object.

The jury ultimately returned a verdict of guilty to the Attempted First Degree Murder of Robert J. Thompson; the Attempted Second Degree Murder of James R. Hensley, the Malicious Wounding of Robert J. Thompson; and the Malicious Wounding of James R. Hensley. (A.R. 0511-0518). Following a sentencing hearing on July 23, 2007, Beverly was sentenced by Order

¹ References to the Appendix Record, which was agreed to by the parties, are set forth as “A.R. ____.”

entered September 14, 2007 as follows: Count One (not less than 3 no more than 15 years); Count Two (not less than 1 no more than 3 years); Count Three (not less than 2 no more than 10 years); Count Four (not less than 2 no more than 10 years). All sentences were ordered to run consecutively. (A.R. 0525-0527).

Then-Counsel for the Beverly filed a Notice of Appeal on October 23, 2007, and a request for appellate transcripts. (A.R. 0528-0530). However, a brief on behalf of the Beverly was never filed.

By Order dated January 8, 2014, this Court directed that Beverly be resentenced and appointed counsel for the purposes of pursuing his appeal. (A.R. 0532). Counsel for the Beverly was appointed on January 15, 2014. (A.R. 0533). Beverly was re-sentenced on March 10, 2014; April 8, 2014; May 8, 2014, and most recently on June 30, 2014. (A.R. 0534-0540).

SUMMARY OF ARGUMENT

The trial court failed to instruct the jury on the substantive elements of the charged offenses, or on the lesser included offense listed on the verdict form. Instead, it appears the trial court read the jury two different versions of the general charge. The court file for the trial contains two sets of instructions: (1) a general charge, which has handwritten on it by the trial court, "These were given"; (A.R. 0476-0494) and (2) the substantive elements of the charged offenses, which has written on it by the trial court, "Not Given." (A.R. 0495-0510). The failure to instruct the jury on the essential elements of the offenses deprived Beverly of his fundamental right to a fair trial, and constitutes reversible error.

Therefore, Beverly's conviction and sentence should be vacated, and this matter remanded to the Circuit Court for a new trial.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

A Rule 20 oral argument is necessary in this case because it presents an important constitutional issue regarding the validity of a court ruling and the decisional process would be significantly aided by oral argument.

ARGUMENT

I. The Trial Court Erred When It Failed To Instruct The Jury On The Elements Of The Four Offenses Charged In The Indictment, And Failed To Instruct The Jury On The Elements Of The Lesser Included Offenses Included On The Jury Verdict Form.

A. Standard of Review

The question of whether a jury was properly instructed is a question of law, and the review is *de novo*. Syl. pt. 1, State v. Hinkle, 200 W.Va. 280 (1996); Syl. Pt. 1, State v. Shingleton, 222 W.Va. 647 (2008).

This Court may review instructional errors that were not timely objected to under the doctrine of plain error. W.V. Rule of Crim. Proc. 30. To trigger application of the plain error doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. Syl. Pt. 7, State v. Miller, 194 W.Va. 3 (1995).

B. The Trial Court's Failure to Instruct the Jury on the Essential Elements of the Offense Constitutes Reversible Error

The record reflects that the trial court did not instruct the jury on the essential elements of the offenses, instead providing only a general charge. (A.R. 0402-0420). The court file for the trial contains two sets of instructions: (1) a general charge, which has handwritten on it by the trial court, "These were given"; (A.R. 0476-0494) and (2) the substantive elements of the charged offenses, which has written on it by the trial court, "Not Given." (A.R. 0495-0510).

The jury returned asking for the instructions to be read again, and the trial court repeated the same general charge – again without the essential elements of the offenses. (A.R. 0449-0469).

As this Court has held, "[t]he trial court must instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error," Syl., State v. Miller, 184 W.Va. 367 (1990), and furthermore "an incomplete instruction constitutes reversible error where the omission involves an element of the crime." Id., 184 W.Va. at 368 n. 1

This is not a case where a single element of an offense was omitted or incorrectly stated. See, e.g., State v. Davis, 648 S.E.2d 354 (2007) (under the plain error doctrine, trial court committed reversible error by failing to instruct the jury that "intent" is an element of second degree murder).

Instead, the jury was not instructed on any of the elements of the charged offenses or the lesser included offenses contained on the jury verdict form. Although there was some discussion concerning whether a written copy of the instructions would be provided to the jury after the jury asked for the instructions to be re-read, there is no indication in the record that the instructions actually were provided (and, even assuming they were, there is simply no evidence that each juror read the written instructions). In summary, there is no evidence to support the conclusion that any one juror, let alone all of the jurors, were instructed on, or provided, the essential elements of the offenses.

There simply cannot be any serious argument that the failure to instruct the jury on the essential elements of the charged offenses and the lesser included offenses contained on the jury verdict form:

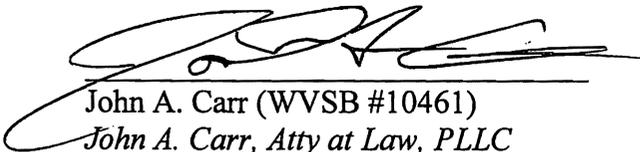
1. Was error;
2. That this error is was plain, or clear and obvious. Syl. Pt. 8, in part, State v. Miller, 194 W.Va. 3 (1995);
3. The error affected substantial rights. See, e.g., State v. Davis, 648 S.E.2d 354, 361 (2007) (“We have made clear that ‘[t]he trial court must instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error.’” (citing Syl., State v. Miller, 184 W.Va. 367 (1990))); and
4. The error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

CONCLUSION

The trial court’s failure to instruct the jury on the essential elements of the offenses deprived Beverly of his fundamental right to a fair trial, and constitutes reversible error. Consequently, Beverly respectfully requests this Court vacate his conviction and sentence, and remand the matter to the Circuit Court for a new trial.

Respectfully submitted,

BRASHAN BEVERLY
By Counsel



John A. Carr (WVSB #10461)
John A. Carr, Atty at Law, PLLC
179 Summers Street, Suite 209
Charleston, WV 25301
(304) 344-4822
Email: jcarr@jcarrlaw.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, John A. Carr, hereby certify that on November 14, 2014, I hand-delivered a copy of the foregoing *Petitioner's Brief* and the *Appendix Record* to Derek Knopp, Assistant Attorney General, State of West Virginia, 812 Quarrier Street, 6th Floor, Charleston WV 25301, (304) 558-5830, counsel for the respondent.


John A. Carr
Counsel for Petitioner