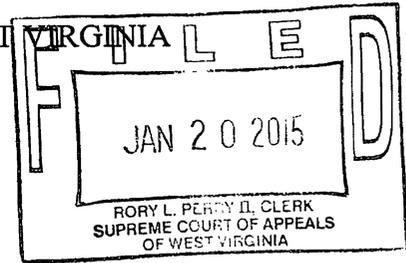


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Respondent,

Supreme Court No. 14-0818

v.

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

BRASHAN BEVERLY,

Petitioner.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ASSIGNMENT OF ERROR1

SUMMARY OF ARGUMENT1

ARGUMENT

 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.....2

 The State Concedes The Jury Was Not Instructed On The Essential
 Elements Of The Offenses On The Record And In Open Court2

 The State Incorrectly States The Jury Was Provided With A Written Copy
 Of The Instructions Containing The Elements Of The Offense2

 Merely Providing A Written Copy Of The Instructions For Jury
 Deliberations, Instead Of Orally Instructing Each Juror On The Record In
 Open Court, Is Insufficient3

 A Circuit Court’s Failure To Instruct Every Juror On Any Of The
 Essential Elements Of The Relevant Offenses Constitutes Per Se Prejudice
 And Reversible Error5

CONCLUSION.....6

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<u>Guam v. Marquez</u> , 963 F.2d 1311, 1314-15 (9th Cir. 1992)	3
<u>State v. Davis</u> , 220 W.Va. 590, 648 S.E.2d 354 (2007)	5, 6
<u>State v. Harshbarger</u> , 170 W.Va. 401, 294 S.E.2d 254 (1982)	4
<u>State v. Miller</u> , 184 W.Va. 367, 400 S.E.2d 611 (1990)	5, 6
<u>State v. Miller</u> , 194 W.Va. 3, 459 S.E.2d 114 (1995)	6
<u>Wiseman v. Ryan</u> , 116 W.Va. 525, 182 S.E.670 (1935)	5
<u>United States v. Noble</u> , 155 F.2d 315, 318 (3rd Cir. 1946)	3
<u>United States v. Perry</u> , 479 F.3d 885, 892 (D.C. Cir. 2007)	3
<u>RULES</u>	
W.Va. R. Crim. P. 30	4, 5

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

SUMMARY OF ARGUMENT

The State now concedes that the Circuit Court failed to orally instruct the jury in open court and on the record of the substantive elements of the charged offenses, or of the lesser included offenses listed on the verdict form. The State instead argues that the Circuit Court provided a written copy of the essential elements of the charged offenses, and that these instructions were legally correct. This argument is unsupported by the record, which only reflects that after the jury returned from the jury room and asked the Circuit Court to re-read the instructions, the Circuit Court indicated its intention to provide a written copy to the jury – not that a written copy was ever **actually** provided. Nor are the contents of the instructions reflected in the record. Even under the unsupported assumption that a copy was actually provided – and that they were legally correct – there is no evidence to support the conclusion that a single juror, let alone every juror, read the instructions. There can be no doubt that the failure of the Circuit Court to instruct the jury on **any** essential element of the charged offenses, or the lesser included offenses, deprived Petitioner 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.

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. The State Concedes The Jury Was Not Instructed On The Essential Elements Of The Offenses On The Record And In Open Court

The State concedes in its Response Brief that the Circuit Court did not orally instruct the jury on the record and in open court with regard to the essential elements of the crimes charged. Response Brief, p. 9.

B. The State Incorrectly States The Jury Was Provided With A Written Copy Of The Instructions Containing The Elements Of The Offense

The State incorrectly states that the jury was provided with “written instructions on all the essential elements of the offenses charged...” Response Brief, p. 9. The record simply does not support this strained conclusion.

First, the record reflects only that the trial court stated that it was going to give the jury a copy of certain unknown written instructions – not that it ever actually did. (A.R. 0468).

Second, the record does not reflect the contents of these instructions, or the unsupported conclusion that they contained all of the essential elements of the offenses charged (or the essential elements of the lesser included offenses that were available to the jury and listed on the verdict form). The State not only jumps to this unsupported conclusion, but then curiously turns this deficiency back on Beverly by arguing the Petitioner has failed to argue that the jury was incorrectly instructed. Response Brief, p. 11. It is simply impossible for Beverly to argue that the instructions were incorrect – because the record fails to support the conclusion that any instructions on the essential elements were ever provided to the jury, let alone what the content of those instructions might have been. One is left to wonder how Beverly can argue, for

example, that the instruction on attempted first degree murder was incorrect when there simply was no instruction given.

C. Merely Providing A Written Copy Of The Instructions For Jury Deliberations, Instead Of Orally Instructing Each Juror On The Record In Open Court, Is Insufficient

The State argues that it is sufficient for the trial court to provide a written copy of the instructions to the jury, instead of orally instructing each juror on the record in open court. This argument – which is premised on the unsupported assumption that the jurors were actually provided with a written copy of instructions that correctly stated the essential elements of the charged and lesser included offenses – is fatally flawed.

The State does not dispute that, even if a written copy of the essential elements is provided to the jury, there is absolutely no evidence to support the conclusion that a single member of the jury **actually read** the instructions. It is this fact that constitutes the fundamental error and prejudice in this case. As one federal appellate court has reasoned:

[T]he trial judge would not have fulfilled his duty . . . merely by sending the information out with the jury to read if they chose to do so For not only are counsel and the defendant entitled to hear the instructions in order that they may . . . object to them and secure their prompt correction by the trial judge, but it is equally important to make as certain as may be that each member of the jury has actually received the instructions.

United States v. Noble, 155 F.2d 315, 318 (3rd. Cir. 1946).

As the caselaw cited by the State notes, the lack of specific precedent on the issue of whether the instructions must be read aloud to each juror most likely results from the fact "judges and litigators have always assumed that jury instructions must be oral." United States v. Perry, 479 F.3d 885, 892 (D.C. Cir. 2007) (internal quotation marks omitted) (quoting Guam v. Marquez, 963 F.2d 1311, 1314-15 (9th Cir. 1992); and citing United States v. Noble, 155 F.2d 315, 318 (3rd Cir. 1946)).

Instead of addressing this compelling reasoning, the State counters with the argument that it simply does not matter, because even if the jurors were provided the instructions orally there is “no evidence that each juror actually listened to the instructions...” Response Brief, p. 13. Of course, under the State’s logic, it would make no difference if the entire jury slept through the entire trial – there would be no prejudice because there would be no evidence, that had the jury been awake, any individual juror would have listened. It is only a short extension of the State’s logic to conclude that the presentation of evidence, or the instructions on the law, do not need to occur in open court or on the record – since there is no evidence that each juror would have listened to any of it anyway. Such a conclusion would make a mockery of our criminal justice system, and more importantly for the purposes of this Court’s analysis of the issue in this case, usurp a Defendant’s substantial rights, as well as the fairness, integrity, and public reputation of the judicial proceedings.

The record in this matter is clear – there is no evidence that a single juror, let alone each and every juror, was informed and aware of the essential elements of the charged offenses as well as the lesser included offenses against Beverly.

The State’s reliance on West Virginia Rule of Criminal Procedure 30 is also misplaced. The Rule, as amended in 1995, merely permits a Circuit Court to send the written instructions to the jury room. The Rule does not in any way state or imply that providing the jury a written copy is sufficient or that it is unnecessary to read the instructions in the presence of each juror. This conclusion is unmistakable when one reviews the history of Rule 30. Prior to the implementation of the Rule in 1981, “[i]t [was] in the trial court’s sound discretion whether instructions *which have been read to the jury* may be taken by them to their room when they retire to consider...their verdict.” Syl. Pt. 4, State v. Harshbarger, 170 W.Va. 401, 294 S.E.2d

254 (1982) (citing Syl. Pt. 2, Wiseman v. Ryan, 116 W.Va. 525, 182 S.E.670 (1935) (emphasis added)). After the effective date of the Rule, “[u]nless otherwise ordered by the court with the consent of all parties affected thereby, instructions shall not be shown to the jury or taken to the jury room.” Id. The Rule was later amended, and now simply allows the Circuit Court to permit a copy of the instructions to go back with the jury to the jury room – nothing more and nothing less.

D. A Circuit Court’s Failure To Instruct Every Juror On Any Of The Essential Elements Of The Relevant Offenses Constitutes Per Se Prejudice And Reversible Error

The State summarily argues that Beverly has failed to demonstrate prejudice from the Circuit Court’s failure to provide the jury with any instructions concerning the essential elements of any of the relevant offenses. Actually, one would be hard-pressed to find a more fundamental and prejudicial error anywhere in our jurisprudence. The jury, having not been provided with the elements of the offenses, returned to the courtroom and asked that the instructions be read again. The Circuit Court read the instructions again, and again omitted the elements of the offenses. The jury convicted Beverly on the verdict form of attempted first degree murder, attempted second degree murder, and two counts of malicious wounding – without having ever been instructed as to what legally constituted those offenses. As this Court has previously 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, 400 S.E.2d 611 (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. Again, this is not a case where a single element of an offense was omitted or incorrectly stated. See,

e.g., State v. Davis, 220 W.Va. 590, 648 S.E.2d 354 (2007) (trial court committed plain, reversible error by failing to instruct the jury that "intent" is an element of second degree murder).

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, 459 S.E.2d 114 (1995);
3. The error affected substantial rights. See, e.g., State v. Davis, 220 W.Va. 590, 597, 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.'" (quoting Syl., State v. Miller, 184 W.Va. 367, 400 S.E.2d 611 (1990))); and
4. The error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

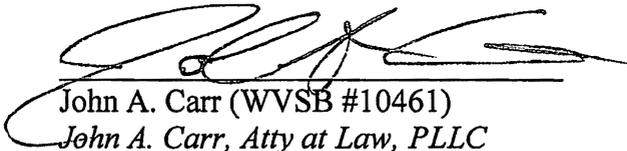
CONCLUSION

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 that 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

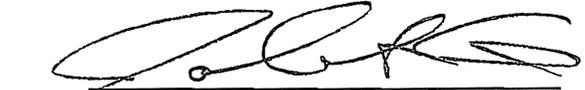


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CERTIFICATE OF SERVICE

I, John A. Carr, hereby certify that on January 20, 2015, I hand-delivered a copy of the foregoing *Petitioner's Reply 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.



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