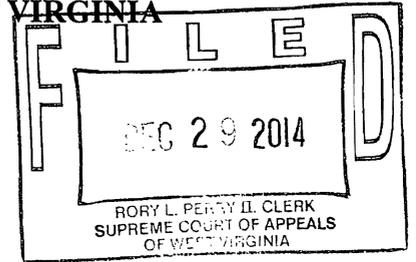


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 14-0818



STATE OF WEST VIRGINIA,

Respondent,

v.

BRASHAN BEVERLY,

Petitioner.

RESPONDENT'S BRIEF

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INTRODUCTION

This case concerns whether a trial court must instruct a jury orally on the elements of the charged crimes. In *State v. Miller*, 184 W. Va. 367, 400 S.E.2d 611 (1990), this Court held 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.” This Court did not specify whether such instruction must be given orally, nor did its reasoning suggest that oral instructions are in any way superior to written instructions. The State acknowledges that the record in this case does not reflect that the trial court orally instruct the jury on all the elements of the charged crimes, but it does appear that written instructions were conveyed to the jury. Whether that is sufficient is the question in this case and, the State respectfully submits, a question not yet squarely addressed by this Court.

STATEMENT OF THE CASE

On May 18, 2006, an indictment was returned in the Circuit Court of Kanawha County, West Virginia, charging Brashan Beverly (“Petitioner”) with two counts of attempted first degree murder and two counts of malicious wounding. (App. at 1, 4-5.) The charges allege that in January 2006, Petitioner attempted to murder Robert J. Thompson and James R. Hensley with a handgun, ultimately wounding both in the attempt. (*Id.* at 4-5.) Petitioner’s jury trial began on June 4, 2007, and concluded on June 6, 2007, with the jury finding Petitioner guilty of the attempted first degree murder of Robert Thompson, the attempted second degree murder of James Hensley, the malicious wounding of Robert Thompson, and the malicious wounding of James Hensley. (*Id.* at 6, 449-74.)

The State's first witness, Robert Thompson, testified that on the evening of January 26, 2006, James Hensley drove him to the residence of Timothy Thompson located near Amandaville, West Virginia. (*Id.* at 100-02.) Robert testified that Timothy had asked him to come over approximately one hour before he arrived between 8:45 and 9:00 p.m. (*Id.* at 102, 105-06.) It was dark outside, but Robert testified that a huge streetlight overlooked the area. (*Id.* at 102.) Once parked, Robert testified that Timothy came outside and spoke with him through the passenger's side window of the full-size pickup truck James was driving. (*Id.* at 103-05; 112; 138.) Robert recalled Timothy saying something about a good deal, which Robert understood to mean that Timothy was selling drugs pretty cheap. (*Id.* at 105.)

Robert testified that while Timothy was speaking with them, he saw Petitioner quickly walking toward the truck. (*Id.* at 107-08.) Robert had no trouble identifying Petitioner, testifying that he knew Petitioner for approximately three or four years as Petitioner had lived close to him in Dunbar. (*Id.* at 106-07.) Robert further testified that prior to the shooting he had conversed with Petitioner over the phone in regard to a missing truck of Robert's. (*Id.* at 109.) Petitioner told Robert that he could have the truck back when he received one thousand six hundred dollars (\$1600.00). (*Id.*) Robert testified that his ex-wife owed Petitioner the money for a previous drug debt and that approximately one and one-half weeks prior to the shooting, Petitioner said to Robert, "[I]f you don't have my money the next time I see you, I am going to kill you[.]" (*Id.* at 110-12.)

Robert testified that Petitioner approached the passenger side window near where Timothy was standing, pulled out a little black gun, and began shooting. (*Id.* at 109, 112-13.) Robert believed Timothy had his hand on the door trying to pull it open while Petitioner was shooting. (*Id.* at 113, 141.) Several shots were fired with Robert being hit twice in the shoulder,

once in the neck, and once in the thumb. (*Id.* at 114.) Robert testified that as the shots were fired, he moved James off of the steering wheel and clutch in order to get the truck started and in gear from the passenger side. (*Id.* at 113, 115-16.) Robert drove to a nearby Go Mart where 911 was dialed. (*Id.* at 116-17.)

The State's last witness, James Hensley, testified that Robert had contacted him on January 26, 2006, in order for James to look at a car Robert had for sale; James bought and resold automobiles from time to time. (*Id.* at 335.) James testified that Robert asked him for a ride that evening and that the two eventually stopped by Timothy Thompson's residence because Timothy might have been interested in buying the car. (*Id.* at 339-40.) James testified that Timothy approached the passenger window and that while Robert and Timothy were talking about the car, Petitioner walked up to his side of the truck. (*Id.* at 342.) James testified that he knew of Petitioner, seeing Petitioner several times over a number of weeks preceding the night of the shooting. (*Id.* at 353.) When Petitioner was unable to open his door, James testified that Petitioner went to the other side of the truck. (*Id.* at 344.) James testified that Robert and Timothy both had a hold of a check Robert wanted Timothy to cash when Petitioner began firing gunshots from the passenger side. (*Id.* at 345.) James testified that when the shots were fired his legs were paralyzed immediately, and he also could not raise his arm. (*Id.* at 346-47.) One of the shots went through his right arm and another had hit his spine before lodging in his lung. (*Id.*) James testified that Robert started the truck, and they subsequently drove to Go Mart. (*Id.* at 347-48.) As a result of the shooting, James testified that he received surgery to put his arm back together, but has completely lost any feeling in his legs. (*Id.* at 350.)

After the State had rested its case, Petitioner neither testified nor presented any further witnesses. (*Id.* at 388-89.) At the close of evidence, arguments were made in regard to the jury

instructions. Defense counsel argued that counts three and four regarding malicious wounding should be considered lesser included offenses of counts one and two regarding attempted first degree murder. (*Id.* at 389-96.) The circuit court rejected defense counsel's argument, though it did state that defense counsel's argument "wasn't for not" and further stated, "I want to put these instructions in as proffered instructions and your vehement objection [S]o you preserve that." (*Id.* at 396.) After arguments regarding the jury instructions were concluded, the jury was brought back into the courtroom, and the court subsequently read its general charge to the jury. (*Id.* at 402-20.) The record does not reflect that the trial court read to the jury the elements of the crimes for which the defendant was charged. After closing arguments, the jury left the courtroom and began their deliberations at 4:44 p.m. (*Id.* at 447.) By the end of the day, the jury had not yet reached a verdict. (*Id.* at 447-49.)

The following day and out of the presence of the jury, the circuit court revealed that there was a note from the jury foreman stating that the jury wanted the instructions reread. (*Id.* at 449.) Defense counsel proposed that the court give the instructions to the jury in writing instead. (*Id.* at 450.) After the court expressed its concern that the instructions were too marked up to send back to the jury, defense counsel suggested giving the jury only the written instructions that contain the substantive elements pointing out that the elements instructions were not too marked up. (*Id.*) The State agreed that the written elements instructions could be sent back with the jury. (*Id.* at 450-52.) The jury was then brought into the courtroom, and the court reread its general charge to the jury and sent back with the jury the remaining written substantive instructions that pertained to the elements of the crimes. (*Id.* at 451-69.) The record, however, does not include a copy of those instructions. The jury subsequently returned a verdict finding

Petitioner guilty of one count of attempted first degree murder, one count of second degree murder, and two counts of malicious wounding. (*Id.* at 470-74.)

Petitioner subsequently filed a Notice of Appeal on October 23, 2007, however, no brief was filed on Petitioner's behalf. (*Id.* at 528-31.) On January 8, 2014, this Court entered an order for the Circuit Court of Kanawha County to resentence and appoint counsel for Petitioner for the purposes of appeal. (*Id.* at 532.) The circuit court thereafter entered a series of orders resentencing Petitioner, the latest order being entered on June 30, 2014. (*Id.* at 533-40.) The instant appeal follows.

SUMMARY OF THE ARGUMENT

Petitioner argues on appeal that the circuit court committed plain error when it only provided a general charge to the jury, failing to instruct the jury on any of the essential elements of the offenses charged. The State acknowledges that the record does not reflect that the circuit court orally instructed the jury on the substantive elements. But the record also reflects that a written set of instructions containing said elements was provided to the jury for their use in deliberations. The State is aware of no rule of law in West Virginia that expressly requires the jury to be instructed orally as opposed to being given a set of written instructions when both parties agree that written instructions may be sent back with the jury. The accused has a fundamental right to have the jury instructed on the essential elements of the offenses charged, and the jury in this case was provided with those instructions in written form. Accordingly, Petitioner cannot demonstrate that the circuit court committed plain error.

Even if this Court were to find that the circuit court did in fact err when it did not orally instruct the jury regarding the elements of the offenses charged, Petitioner cannot demonstrate that such error was prejudicial. To be prejudicial, the error must have affected the outcome of the proceedings in the circuit court. Petitioner has not demonstrated that the jury was misled in any way or that the jury misunderstood the issues and its duty to determine those issues because it was provided with written instructions regarding the substantive elements to the offenses charged. Therefore, Petitioner cannot show that the alleged error affected the outcome of the proceedings, and his claim that the circuit court committed plain error in this regard must be rejected and his conviction affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The sufficiency of conveying written as opposed to oral jury instructions is a question that does not appear to have been previously addressed by this Honorable Court; therefore, this matter is appropriate for oral argument. This matter would appear not to be appropriate for a memorandum decision.

ARGUMENT

I. Standard of Review

“As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, 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, 489 S.E.2d 257 (1996). In reviewing jury instructions *de novo*, this Court “consider[s] all the jury heard and, from the standpoint of the jury, decide[s] not whether the charge was faultless in every particular but whether the jury was misled in any way and whether it had an understanding of the issues and its duty to determine those issues.” *Id.* at 285, 489 S.E.2d at 262. Reversal is required “only if the error was prejudicial in light of the entire record.” *Id.*

When a party fails to preserve an issue for appellate review, this Court may still review the issue where the trial court error is plain. “Under plain error, appellate courts will notice unpreserved errors in the most egregious circumstances. Even then, errors not seasonably brought to the attention of the trial court will justify appellate court intervention only where substantial rights are affected.” *State v. LaRock*, 196 W. Va. 294, 316, 470 S.E.2d 613, 635 (1996). “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, 459 S.E.2d 114 (1995); W. Va. R. Crim. P. 30 (“[A]ny appellate court may, in the interest of justice, notice plain error in the giving or refusal to give an instruction, whether or not it has been made the subject of objection.”)

II. The Circuit Court Did Not Commit Plain Error When It Provided the Jury a Written Set of Jury Instructions Containing the Substantive Elements to the Crimes Charged.

A. The Circuit Court Did Not Commit An Error That Is Plain.

In order to satisfy the plain error standard, Petitioner must first demonstrate that the court committed (1) an error that is (2) plain. Syl. Pt. 7, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. “To be ‘plain,’ the error must be ‘clear’ or ‘obvious.’” Syl. Pt. 8, in part, *Id.*

“Under plain error analysis, an error may be “plain” in two contexts. First, an error may be plain under existing law, which means that the plainness of the error is predicated upon legal principles that the litigants and trial court knew or should have known at the time of the prosecution. Second, an error may be plain because of a new legal principle that did not exist at the time of the prosecution, *i.e.*, the error was unclear at the time of trial; however, it becomes plain on appeal because the applicable law has been clarified.”

Syl. Pt. 6, *State v. Myers*, 204 W. Va. 449, 513 S.E.2d 676 (1998).

In support of his argument that the circuit court committed plain error in this case, Petitioner relies upon this Court’s decision in *State v. Miller*, 184 W. Va. 367, 400 S.E.2d 611 (1990), which found in its lone syllabus point 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.” The jury in *Miller* was not provided with any instructions, written or oral, that informed the jury what crimes the defendant in that case “was actually being tried for and what the elements of those crimes were that the state had to prove.” *State v. Miller*, 184 W. Va. 367, 368, 400 S.E.2d 611, 612 (1990).

Unlike in *Miller*, the jury in this case was provided with written instructions on all the essential elements of the offenses charged, even though it was not instructed orally in that respect. Petitioner is correct insofar as the record reflects that the circuit court did not orally instruct the jury with regard to the essential elements of the crime charged. (App. at 402-20,

451-69.) However, upon agreement by both parties, the jury was provided with a written set of instructions containing the elements of the offenses charged, and for that reason *Miller* is distinguishable from the case at hand.

Respondent is aware of no rule of law in West Virginia that expressly requires the jury to be instructed orally as opposed to being given a set of written instructions when both parties agree that written instructions may be sent back with the jury. Unlike cases from other jurisdictions,¹ the holding espoused in *Miller* does not expressly require the instructions to be given orally, nor does any of its reasoning suggest that oral instructions are superior to written ones. *Miller*, 184 W. Va. at 369, 400 S.E.2d at 613 (“Thus, we conclude that the trial court must instruct the jury on all essential elements of the offenses charged . . .”). In addition, the West Virginia Rules of Criminal Procedure expressly permit “the jury to take the written instructions to the jury room.” W. Va. R. Crim. P. 30. Given the foregoing, Petitioner has not met his burden to show that the Circuit Court committed an error that was plain under existing law. Thus, Petitioner’s plain error claim must be rejected and his conviction affirmed.

The State acknowledges that the record does not appear to contain the actual set of written instructions that went to the jury. Of the two sets of written jury instructions contained within the court file, only one includes the substantive elements of the charged offenses. (*Id.* at 495-510.) But this set of instructions contains a notation at the top reading, “Not given.” (*Id.* at 495.) Furthermore, a close reading of the instructions reveals that they are in all likelihood the

¹ See *United States v. Perry*, 479 F.3d 885, 892 (D.C. Cir. 2007); *People of Territory of Guam v. Marquez*, 963 F.2d 1311, 1315 (9th Cir. 1992); *United States v. Noble*, 155 F.2d 315, 318 (3d Cir. 1946).

proposed jury instructions from defense counsel which were rejected by the circuit court.² Accordingly, this set of written instructions containing the substantive elements was indeed “not given” to the jury, either orally or in writing, because they are the proffered instructions from defense counsel which were rejected by the circuit court.

Nevertheless, “[a]s a general rule, proceedings of trial courts are presumed to be regular, unless the contrary affirmatively appears upon the record, and errors assigned for the first time in an appellate court will not be regarded in any matter of which the trial court had jurisdiction or which might have been remedied in the trial court if objected to there.” Syl. Pt. 17, *State v. Thomas*, 157 W. Va. 640, 203 S.E.2d 445 (1974). Importantly, Petitioner does not argue that the jury was incorrectly instructed, but rather that the jury was not instructed at all regarding the elements. While the underlying record is admittedly unclear as to what specific written instructions were sent back to the jury, all of the parties agreed that a set of written instructions containing the elements of the crimes charged were to be sent back with the jury for their use in deliberations. (*Id.* at 449-52.) Furthermore, the record also reflects that no objection was raised by either party with regard to the contents of these instructions.

B. Providing the Jury with Written Jury Instructions Containing the Elements of the Offenses Charged as Opposed to Orally Instructing the Jury Regarding Said Elements Did Not Affect the Outcome of the Proceedings.

Even if this Court were to find that the circuit court did in fact err when it did not orally instruct the jury regarding the elements of the offenses charged, Petitioner has not established

² The description of malicious wounding in regard to both counts three and four within this set of instructions explain that malicious wounding is a lesser included offense of attempted murder, an argument made by defense counsel and ultimately rejected by the circuit court. (*Id.* at 389-96, 497-98, 506-07.) Additionally, these instructions do not contain an instruction regarding attempted second degree murder, which the jury ultimately found Petitioner guilty. (*Id.* at 470.) Finally, the circuit court stated on the record that it was going to make sure to place Petitioner’s proffered instructions in the record so that he may preserve that issue. (*Id.* at 396.)

that the error was prejudicial. While *Miller* establishes that the accused has a fundamental right to have the jury instructed on the essential elements of the offense charged and that the failure to instruct the jury regarding those elements constitutes reversible error, Petitioner's reliance on *Miller* does not complete the analysis of whether plain error occurred. *Miller*, 184 W. Va. at 369, 400 S.E.2d at 613. More recent cases from this Court establish that the analysis must go further and analyze whether such error was prejudicial.

“Assuming that an error is ‘plain,’ the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant.” Syl. Pt. 9, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. “To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.” *Id. see also State v. Davis*, 220 W. Va. 590, 597, 648 S.E.2d 354, 361 (2007).

Petitioner fails to meet his burden to show that providing the jury with written jury instructions containing the elements of the offenses charged as opposed to giving oral instructions regarding the same affected the outcome of the lower proceedings. Petitioner offers two arguments refuting the adequacy of the written jury instructions. Neither is sufficient.

Petitioner first argues that “there is no indication in the record that the instructions actually were provided.” (Pet'r's Br. at 4.) But a fair reading of the record establishes that the written instructions were indeed sent back with the jury. Before the jury was brought into the courtroom on the third day of trial, it was agreed by both parties that the circuit court could reread its general charge to the jury and subsequently give the jury the written instructions containing the essential elements of the offenses charged. (App. at 449-52.) Before rereading the general charge to the jury, the circuit court stated on the record before the jury that it would

be sending the written elements back with the jury. (*Id.* at 452.) At the conclusion of reading its general charge, the circuit court stated, “That’s it on the instruction, I’m going to give you . . . the rest of them to take. I’ll send them right in and you can have them.” *Id.* at 468.

Petitioner also alleges that even assuming that the written instructions were provided, there is no evidence that each juror actually read the written instructions. (Pet’r’s Br. at 4.) Such argument is inapposite, however, as there would equally be no evidence that each juror actually listened to the instructions had they been given orally. Jurors are required to be provided jury instructions on the essential elements of the offenses charged and such was done in this case. Furthermore, Petitioner has not demonstrated that the jury was misled in any way or that the jury misunderstood the issues and its duty to determine those issues because it was provided with written instructions.

Given the foregoing, Petitioner cannot meet his burden to show that providing the jury with written jury instructions containing the elements of the offenses charged as opposed to giving oral instructions regarding the same affected the outcome of the lower proceedings. Accordingly, Petitioner cannot demonstrate that he was prejudiced by the jury being provided with written jury instructions, and his claim that the trial court committed plain error in this regard must be rejected.

CONCLUSION

For the reasons stated above, the judgment of the Circuit Court of Kanawha County must be affirmed. In the alternative, a remand for an evidentiary hearing before a different judge would be appropriate to settle the record on the issue of what instructions were given to the jury.

Respectfully submitted,

STATE OF WEST VIRGINIA
Respondent,

By counsel,

PATRICK MORRISEY
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A handwritten signature in black ink, appearing to read 'D. A. Knopp', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Derek A. Knopp, Assistant Attorney General and counsel for the State of West Virginia, hereby verify that I have served a true copy of "Respondent's Brief" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 29th day of December, 2014, addressed as follows:

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