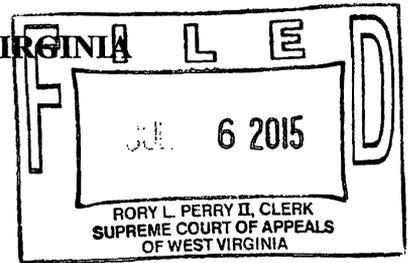


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**



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**CHARLESTON, WEST VIRGINIA**

**NO. 15-0195**

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**STATE OF WEST VIRGINIA**

**Plaintiff/Respondent**

**v.**

Appeal from a final order  
of the Circuit Court of  
Harrison County (14 -M-13-3)

**MATTHEW CALVERT,**

**Defendant/Petitioner**

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**PETITIONER'S SUPPLEMENTAL BRIEF**

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## ASSIGNMENTS OF ERROR

- 1) The trial court below committed reversible error by failing to properly instruct the jury on the essential element of intent of the offense charged.

## STATEMENT OF THE CASE

The Petitioner incorporates by reference the procedural history and relevant facts regarding Petitioner's trial and conviction contained in Petitioner's original Petitioner's Brief.

## ARGUMENT

### *I. Standard of Review*

The refusal to give a requested jury instruction is reviewed on an abuse of discretion standard, while the question of whether a jury was properly instructed is a question of law and is reviewed *de novo*. *State v. Dinger*, 624 S.E.2d 572, 575 (W.Va. 2005).

### *II. The trial court below committed reversible error by failing to properly instruct the jury on the essential element of intent of the offense charged.*

"It is for the court to instruct the jury and when given they are instructions of the court and not the parties who request them." *State v. Riley*, 151 S.E.2d 308, 326 (W.Va. 1966). In a criminal prosecution, it is "mandatory and indispensable" that the instructions set forth the elements of the offense and the mere reading of a statute will not suffice. *United States v. Head*, 641 F.2d 174, 180 (4<sup>th</sup> Cir. 1981). Giving an erroneous instruction raises a presumption of prejudice and warrants a new trial unless it appears that the complaining party was not prejudiced by such an instruction and only if it can be declared beyond a reasonable doubt that the instruction in no way contributed to the conviction or affected the outcome of the trial will prejudice not be found. *State v. Romine*, 272 S.E.2d 680, 682 (W.Va. 1980) (internal citations omitted). "The jury must be clearly and properly advised of the law in order to render a true and lawful verdict." *Id.* "A judge must instruct that the prosecution must prove beyond a reasonable

doubt each element of a crime, specifying the elements.” *State v. Barnett*, 284 S.E.2d 622, 623 (W.Va. 1981) (internal citations omitted). “Intent cannot be presumed when it is an element of the crime charged.” *Id.* (internal citations omitted). “The 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.” *State v. Miller*, 400 S.E.2d 611, 613 (W.Va. 1990).

On June 1, 2015, the United States Supreme Court decided *Elonis v. United States*, No. 13-983 (U.S. Jun. 1, 2015) to resolve a circuit split that had precipitated in the lower circuits since the Court’s decision in *Virginia v. Black*, 538 U.S. 343, 359 (2003). Eleven circuits had entertained a “true threats” analysis under 18 U. S. C. §875(c) which provides in relevant part: “Whoever transmits in interstate or foreign commerce any communication containing . . . any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.” *Id.* All of the circuits required that the communication, applying an objective standard, that a reasonable recipient familiar with the context of the communication, would perceive the communication to be a “true threat.” *Elonis*, No. 13983 at 30 (Thomas, J., dissenting). However, two of the eleven circuits, in addition to the objective test, also required the prosecution prove that the speaker had the specific subjective intent that their communication be intended as a “true threat.” *Id.*

The majority of the *Elonis* Court held, through rules of statutory construction, that “mere omission from a criminal enactment of any mention of criminal intent should not be read as dispensing with it.” *Elonis*, No. 13983 at 12 (internal quotations and citations omitted). The Court concluded that this rule of construction reflects the “basic principle that wrongdoing must be conscious to be criminal.” *Id.* (internal citations omitted). The “central thought” is that a

defendant must be “blameworthy in mind” before he can be found guilty, a concept courts have used historically with terms such as “*mens rea*, scienter, malice aforethought and guilty knowledge.” *Id.* at 13. The Court also stated it would remain true to the familiar maxim of “ignorance of the law is no excuse” only that the defendant must “know the facts that make his conduct fit the definition of the offense.” *Id.* The Court held the *mens rea* must reach such a level as to separate legal innocence from wrongful conduct. *Id.* at 15. The Court also concluded that the “scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.” *Id.* at 16.

The Court concluded that Elonis’s conviction based solely on how a reasonable person understood his posts, reduced his culpability on the “all important element of the crime to negligence,” which the Court has long be reluctant to infer was intended in criminal statutes. *Id.* The Court ultimately concluded that because “criminal liability generally does not turn solely on the results of an act without considering the defendant’s mental state,” Elonis’s conviction was reversed. *Id.* at 19. The Court left open the question of whether recklessness would be sufficient versus specific intent because the issue was not properly briefed or argued before the Court. *Id.*

Justice Thomas’ dissent concluded a general intent and objective reasonable person standard was sufficient, distinguishing the current case from *Black* because *Black* dealt with a statute that expressly required “an intent to intimidate a person or group of persons.” *Elonis*, No. 13983 at 46 (Thomas, J., dissenting). The statute currently before this Court also requires specific intent. West Virginia Code §61-3C-14a, which provides in relevant part: “(a) It is unlawful for any person, with the intent to harass or abuse another person, use a computer to: (3) Threaten to commit a crime against any person or property.” *Id.*

Should this Court not find this particular prong of the statute to be unconstitutionally vague and/or overbroad, a conviction can only stand if the jury finds beyond a reasonable doubt that a speaker have the specific intent to harass or abuse another person and the specific intent that the communication be a threat to commit a crime against any person or property. The Petitioner attempted to instruct the jury on the specific intent related to prong two in his proposed Jury Instruction No. 2. (“A.R.”) at 67. The trial court below refused to give this Jury Instruction No. 2 over Petitioner’s objection. *Id.* at 240. Instead, the trial court instructed the jury by a mere reading of the statute. *Id.* at 240-250. The Petitioner attempted to argue specific intent in closing. *Id.* at 258. But, the jury was further misled and confused when the State argued in closing “it doesn’t say unless the person felt threatened, that’s what he wants you to believe,” but that’s not an excuse. *Id.* at 255. The Petitioner was completely prejudiced when the trial court allowed the State to say in closing “Intent, that’s the word, not the criminal intent, just intent.” *Id.* at 260.

Should this Court not require specific intent necessary to satisfy this prong of the offense charged, *Elonis* mandates that negligence will not suffice, at least a recklessness standard is required and, therefore, what the Petitioner thought was necessary for the jury to consider, and a finding of criminal intent, was required. However, This Court has long held:

The essence and gist of the statutory offence is the intent with which the act may be done. If any of the acts be done, the party may be liable as for a common law offense; but without the intent, as laid down in the statute, there could be no conviction under the statute.

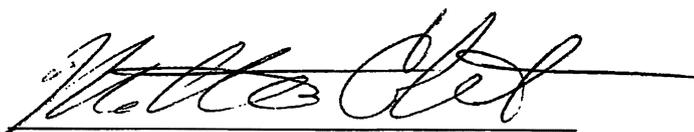
*State v. Meadows*, 18 W.Va. 658, 668 (W.Va. 1881). The trial court below violated the Petitioner’s fundamental right to a fair trial and committed reversible error by not instructing the jury on the essential element of intent needed to be proved beyond a reasonable doubt and allowing the state to argue that no criminal intent was necessary.

## CONCLUSION

Based on the foregoing, in addition to the assignments of error alleged in his Petitioner's Brief, the trial court below deprived the Petitioner of his fundamental right to a fair trial, and constitutes reversible error.

The Petitioner would now like to correct an error in his Petitioner's Brief. The Petitioner alleged that assignment of error number three was raised for the first time in his motion for a new trial. This allegation is error. This issue was first brought to the trial court's attention in the Petitioner's motion for judgement of acquittal after the State's case-in-chief. ("A.R.") at 192. This issue was again raised in the Petitioner's renewed motion for judgement of acquittal after introduction of all the evidence. *Id.* at 237. Because this issue was raised twice for the trial court, assignment of error number three from the Petitioner's Brief should be reviewed *de novo* under *Dinger* rather than a "plain error" standard of review.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, Matthew Calvert, certify that I have caused a true and accurate copy of this "Petitioner's Supplemental Brief" to be served upon the Assistant Attorney General via first class mail, postage prepaid, on July 3, 2015, at 812 Quarrier Street, 6<sup>th</sup> Floor, Charleston, WV 25301.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matthew Calvert", written over a horizontal line.

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