

**FILED**

**July 25, 2007**

released at 10:00 a.m.

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**Benjamin, Justice, dissenting:**

Yet again, the Majority of this Court has chosen to usurp the discretion bestowed upon a trial court by our prior jurisprudence and to substitute its own judgment to obtain a predetermined result. In so doing, the Majority once more looks to foreign jurisdictions to create the supposed precedential support upon which it now relies. Not only is such foreign law inapplicable to the facts of this case, the Majority's result is plainly contrary to the established law of this State. Being unable to countenance this contrivance in our law, I dissent.

I agree with the dissenting opinion filed herein by Justice Maynard - the plain error doctrine was improperly invoked by the Majority in this matter. Of the West Virginia cases relied upon by the Majority in support of its invocation of the plain error doctrine, only three involved jury instructions and all involved a misstatement of law in the initial instructions. *See State v. Wyatt*, 198 W. Va. 530, 538-9, 482 S.E.2d 147, 155-6 (1996) (finding plain error in initial instruction which misstated the applicable law, including applicable elements of the offense charged, and that error was compounded upon re-reading of a portion of the instructions in response to jury inquiry); *State v. Miller*, 184 W. Va. 367,

400 S.E.2d 611 (1990) (finding failure to instruct jury as to all essential elements of offense charged constitutes reversible error); *State v. Barker*, 176 W. Va. 553, 557-8, 346 S.E.2d 344, 349-50 (1986) (*per curiam*) (finding failure to instruct jury on essential elements of offense constituted plain error). This case does not involve a misstatement of law in the initial instructions provided to the jury. It is undisputed that the initial jury charge was both correct and proper.<sup>1</sup> Rather, the issue herein is a challenge to the trial court's response to a specific jury question, a response which did not constitute a complete recharge of the jury. As recognized in *Davis v. State*, 639 S.E.2d 537, 539 (Ga. Ct. App. 2006), a case relied upon by the Majority herein, "[w]here a jury, which has been fully and properly charged, requests a recharge on a specific question, it is within the discretion of the trial court whether to recharge entirely or to recharge only on the specific question."

The Majority cites to no West Virginia case finding that a trial court abused its discretion in response to a jury question. Instead, the Majority looks to case law from foreign jurisdictions to support its decision in this matter.<sup>2</sup> Careful examination of the cases

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<sup>1</sup>As the trial court's initial charge was both a correct statement of the law and was supported by the evidence, the trial court is afforded broad discretion in its wording and a challenge to the extent and character of a specific instruction is subject to an abuse of discretion standard. See Syl. Pt. 4, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

<sup>2</sup>Another case cited, though apparently not followed, by the Majority, *Smith v. State*, 596 S.E.2d 13, 15 (Ga. Ct. App. 2004), expounds:

As a general rule, the need, breadth, and formation of additional jury instructions are left to the sound discretion of the trial

cited in the Majority opinion, however, fails to reveal the necessary support implied by the Majority for the instant decision. Indeed, several of the cases relied upon by the Majority involved inaccurate or misleading instructions not -- as in the instant matter, the omission of a definition not legally required to be included in the instruction at issue.

The error addressed in *Commonwealth v. Lennon*, 504 N.E.2d 1051 (Mass. 1987), involved a misstatement of law in the initial jury charge, one that omitted premeditation, an essential element of the crime charged, and relieved the Commonwealth of its duty to prove guilt beyond a reasonable doubt. In the instant matter, the initial jury charge was correct and fully advised the jury of the element of the crime and the State's burden of proof. Contrary to the Majority's suggestion, the trial court's response to the jury question did not relieve the State of its burden, requiring reversal as indicated by *Lennon*. Likewise, in *State v. Smith*, 403 S.E.2d 162 (S.C. Ct. App. 1991), the trial court provided an inaccurate legal response to a jury question regarding the provocation legally sufficient to qualify defendant's action as voluntary manslaughter where the defense asserted was

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court. When the jury requests more instructions upon a particular phase of the case, the trial court is under a duty to instruct them in a plain, clear manner so as to enlighten rather than confuse them. The court may respond to a jury's question by repeating charges which are legally sufficient and not misleading. But it is not necessarily error for the court to respond with a direct answer. The critical issue is whether the charge taken as a whole presents the issues in a way not likely to confuse a jury of average intelligence.

defense of another. In responding to the jury question, the trial court reinstructed the jury on voluntary manslaughter with the original instruction and gave two examples of provocation. *Smith*, 403 S.E.2d at 163. However, the examples given involved only assault upon oneself as provocation, not assault upon another, which under the applicable law could qualify as sufficient provocation. *Id.* The appellate court found that the trial court's response did not answer the jury's well-framed, specific question, and further found that the trial court's answer misled the jury as to the law because it "may very well have caused the jury to think that sufficient provocation could only arise out of an assault on the defendant himself." *Id.*

Similarly, the Majority's reliance upon *Brown v. State*, 610 So.2d 579 (Fla. Dist. Ct. App. 1992), is misplaced because the response to the jury question in *Brown* was not in compliance with Florida law. In *Brown*, the trial court was presented with a jury request for re-instruction on the manslaughter and second-degree murder charges. *Brown*, 610 So.2d at 580. In response, the trial court read the definitions of both offenses, but omitted the definitions of excusable homicide and justifiable homicide from the manslaughter definition. *Id.* at 580-1. The court on appeal found such failure constituted reversible error because a unanimous Florida Supreme Court had previously held both definitions must be included within the definition of manslaughter to provide a complete manslaughter charge. *Id.* at 581.

Arguably similar to the issue presented herein is the case of *People v. Tenner*, 626 N.E.2d 138 (Ill. 1994), which involved a trial court's response to a jury question as to whether intent was necessary to convict the defendant of attempted first degree murder. The trial court's response was to inform the jury that the attempt instruction applies "in conjunction with the other instructions." *Tenner*, 626 N.E.2d at 155. Because the first degree murder instruction previously provided to the jury included felony murder, an offense not requiring intent, the court on appeal found the trial court erred in its response to the jury question by allowing the jury to convict without "necessarily finding" the required element of intent necessary for an attempted first degree murder conviction. *Id.* *Tenner* must therefore be distinguished from this case because the trial court's response below did not provide the potential for conviction based upon an inapplicable legal theory.

Finally, I must take issue with the Majority's reliance upon *Smith v. United States*, 549 A.2d 1119 (D.C. Ct. App. 1988), as such reliance implies we are dealing with a constitutional matter herein. We are not. At issue in *Smith v. United States* was an argument that the trial court's ambiguous response to a jury question regarding whether they may consider certain evidence relative to two "drug possession with intent to distribute" charges violated the defendant's Sixth Amendment right to a unanimous jury where the jury came back "immediately" after receiving the trial court's response. In response to the question as to whether certain evidence could be used to support the "possession" charges,

the trial court stated that the evidence applied to the “distribution” charges and could also apply to the “possession” charges or whatever the jury deemed relevant. *Smith v. United States*, 549 A.2d at 1122. This response, however, was inconsistent with a prior answer to a jury question and with the State’s theory of the case. *Id.* at 1123. In analyzing the issue presented, the court noted

[t]he Sixth Amendment and Super.Ct.Crim.R. 31(a) require jurors to be in substantial agreement as to just what a defendant did as a step preliminary to determining whether that defendant is guilty of the crime charged. Consequently, when one charge encompasses separate incidents, the trial judge must instruct the jury, that if a guilty verdict is returned, the jurors must be unanimous as to which incident or incidents they find the defendant guilty.

*Id.* at 1121 (internal citations and quotations omitted). The court in *Smith* found it clear that the jury was confused as to what evidence could be used to support the possession charges and that the verdict rendered immediately after the incorrect instruction constituted plain error with respect to the constitutional right that the jury be unanimous in determining the charges for which it found the defendant guilty. *Id.* at 1123. *Smith* is inapposite to the case before us because the instant case involves a definitional omission from a supplemental instruction, not an incorrect or misleading instruction regarding what evidence may be considered resulting in a potential Sixth Amendment violation.

In the instant matter, the trial court re-instructed the jury as to the elements of

second degree murder and manslaughter, the offenses at issue in the jury question. The trial court did not omit any element of the offenses charged. Nor did the trial court misstate the law. Instead, the trial court has been faulted by the Appellant and the Majority for exercising its discretion to not further define terms setting forth the elements of the offenses charged, terms which were defined in the original charge.

The Majority recognizes that a challenge to a trial court's response to a jury question is reviewed under an abuse of discretion standard. However, instead of applying this standard, the Majority substitutes its judgment for the sound discretion of the trial court. While I may have preferred that the trial court included the definition of malice when responding to the jury's question regarding intent herein, I will not substitute my judgment for that of the trial court. The trial court exercised its recognized discretion in determining the appropriate response to the jury's question. Absent a response which misstates the law, clearly omits a required element of proof or is simply non-responsive, the trial court is in the best position to determine the appropriate response to a jury question during a trial. That is precisely why the proper standard of review in an appeal such as this is whether the trial court abused its discretion. It did not. Accordingly, because standards of review should never be disregarded because of a whim, caprice or the improper desire of this Court to take on the mantle (and concurrent responsibilities) of that of a trial court, I dissent.