STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

**State of West Virginia,**
**Plaintiff Below, Respondent**

**vs) No. 11-0342** (Wyoming County 06-F-74)

**Gerald Wayne Little,**
**Defendant Below, Petitioner**

**FILED**
**February 14, 2012**
**RORY L. PERRY II, CLERK**
**SUPREME COURT OF APPEALS**
**OF WEST VIRGINIA**

## MEMORANDUM DECISION

This appeal arises from the Circuit Court of Wyoming County, wherein the petitioner was sentenced to a determinate term of ten years of incarceration for voluntary manslaughter following a jury trial. The appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State has filed a response brief.

This Court has considered the parties' briefs and the appendix on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the appendix on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the appendix presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

On appeal, petitioner argues that the circuit court improperly instructed the jury during the verbal reading of the jury instructions as to the elements of voluntary and involuntary manslaughter, and that this mistake mislead the jury, caused confusion, and incorrectly stated the law. He further argues that the improper instruction deprived him of his fundamental right to a fair and impartial trial, and now requests that the matter be remanded for a new trial. Per our prior case law on this issue, "[t]he basis of the objection [to a jury instruction] determines the appropriate standard of review." *State v. Guthrie*, 194 W.Va. 657, 671, 461 S.E.2d 163, 177 (1995). "In this light, if an objection to a jury instruction is a challenge to a trial court's statement of the legal standard, this Court will exercise *de novo* review." *Id*.

To begin, it is important to note that at no point in his brief does petitioner cite the specific language that he argues was erroneous, and likewise does not explain how the same misled the jury to the extent that he was deprived of his right to a fair and impartial trial. Petitioner simply asserts that an error occurred and argues that this entitles him to a new trial. This Court has held that "[a]ssignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived." Syl. Pt. 6, *Addair v. Bryant*, 168 W.Va. 306,

284 S.E.2d 374 (1981). Although petitioner's insufficient argument has likely waived his claim, it is apparent from the record that petitioner also would not be entitled to relief based on the merits of his allegations as contained in the petition.

A review of the record, along with the respondent's brief, illustrates that the only possible error of which petitioner could complain was committed when the circuit court, after providing the jury with instructions on involuntary manslaughter, incorrectly stated that the jury could only convict petitioner if they were "convinced beyond a reasonable doubt of the truth of the charges as to each of these elements of voluntary manslaughter." The record shows that the circuit court had made clear that it was addressing the legal standard for involuntary manslaughter at the outset by instructing the jury that, in order to convict petitioner of involuntary manslaughter, they must find the he "did unintentionally, but with reckless disregard for human life and the safety of others, cause the death of [the victim]." The jury had just been instructed on the standards for first degree murder, second degree murder, and voluntary manslaughter. Simply put, the circuit court made a mistake and incorrectly used the word "voluntary" when speaking as to the standard for involuntary manslaughter. It is important to note, however, that the jury was later provided with a written copy of the jury instructions that were free of this transposition.

Of further importance is the fact that the record is devoid of any objection to the jury instructions at the time they were given, and petitioner did not raise the issue in his post-trial motions shortly following his conviction. In ruling upon petitioner's most recent motion for a new trial, the circuit court noted this concern by stating that "[n]ot only was the objection not timely voiced during trial, but the [petitioner's] December 2, 2008 motion [for new trial] did not raise faulty instructions as a ground for new trial and the objection was not brought to this court's attention until well into 2010 - almost two years after the trial." Respondent argues that petitioner has waived his objection to the jury instructions and that the Court should be precluded from hearing this appeal on these grounds alone. "As a general rule, no party may assign as error the giving of an instruction unless he objects thereto before the arguments to the jury are begun, stating distinctly as to the instruction the matter to which he objects and the grounds of his objection; and ordinarily only grounds thus assigned in the trial court will be considered on appeal of the case to this Court." *Tracy v. Cottrell*, 206 W.Va. 363, 376, 524 S.E.2d 879, 892 (1999) (citing Syl. Pt. 6, *State v. Davis*, 153 W.Va. 742, 172 S.E.2d 569 (1970)).

However, there is an exception to this rule known as the plain error doctrine, and "[i]t enables this Court to take notice of error, including instructional error occurring during the proceedings, even though such error was not brought to the attention of the trial court." Syl. Pt. 4, in part, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988). The Court has cautioned, though, that "the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired,

or a miscarriage of justice would otherwise result." *Id*. We do not find that the alleged error below constitutes plain error, and refuse to apply the plain error doctrine in this case. However, even if petitioner's objection had been preserved below, it is clear that his assignment of error is without merit.

As noted above, the lone mistake that petitioner likely relies upon is a simple transposition of the words "voluntary and involuntary" following the circuit court's verbal instructions to the jury on the crime of involuntary manslaughter. A review of the record shows that, aside from this simple misstatement, the circuit court's instructions were correct as a matter of law. The jury heard instructions regarding involuntary and voluntary manslaughter, and was no doubt aware that petitioner could be convicted of either. Further, the record shows that the jury was provided with a copy of the written jury instructions to use in deliberations, which copy did not contain the mistake referenced above and again correctly stated the law as it relates to both voluntary and involuntary manslaughter. This Court has held that "[t]he giving of confusing or incomplete instructions does not constitute reversible error where a reading and consideration of the instructions as a whole cure defects in the complained of instructions." *State v. Pannell*, 175 W.Va. 35, 37, 330 S.E.2d 844, 847 (1985) (quoting Syl. Pt. 4, *State v. Stone*, 165 W.Va. 266, 268 S.E.2d 50 (1980), *overruled on other grounds by State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991)). Further, "[i]n a situation such as this, the appropriate inquiry is whether an instructional error or apparent instructional error was remedied by other instructions given in the case." *State v. Richards*, 195 W.Va. 544, 548, 466 S.E.2d 395, 399 (1995). Based upon our review of the record, and our reading and consideration of the instructions as a whole, any alleged defect of which petitioner claims was clearly cured by the written instructions provided to the jury. As such, the circuit court was correct that this alleged error does not warrant a new trial.

For the foregoing reasons, we find no error in the decision of the circuit court and the order denying petitioner's motion for a new trial is hereby affirmed.

Affirmed.

**ISSUED**: February 14, 2012

**CONCURRED IN BY**:
Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh