

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

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

vs) No. 11-0633 (Ohio County 09-F-111)

**David L. Hunter,
Defendant Below, Petitioner**

FILED
February 13, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner David L. Hunter appeals the circuit court's order sentencing him to serve three to fifteen years, following his conviction by jury of child neglect resulting in death. This appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State has filed its response. Petitioner has filed a reply.

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.

This case arises from the death of a child in a mobile home fire. In March 2009, petitioner and his three children were living in a friend's mobile home, after the electricity had been shut off in petitioner's home. On the night before the fire, the two older children spent the night at another location. That night, petitioner had been drinking heavily. He awoke around 10:00 a.m. to see his youngest child, age three, playing with an item that may have been a lighter, and realized that a fire was burning. He attempted to put out the flames after removing his son from the room. As he was throwing smoldering items out the back door of the mobile home, the three-year-old re-entered the room and petitioner claims the fire he thought was out suddenly started again, and he could not remove the child before becoming overwhelmed with the smoke from the fire. Trial testimony differed as to the effort put forth by petitioner to get the child out of the home. Unfortunately, the three-year-old perished in the fire. Petitioner was treated for burns and smoke inhalation, and at

approximately 11:15 a.m. had a blood alcohol content of .08. At 11:40 a.m., his blood alcohol content was .05.

Prior to the fire, petitioner and his children were the subject of investigations by Child Protective Services (“CPS”), due in part to reports that the three-year-old had been burned with a lighter. CPS workers had cautioned the family just a month prior to this incident that they should use only child-proof lighters and keep them out of reach of the child. Petitioner was indicted on a charge of child neglect resulting in death, and was found guilty at trial. He was then sentenced to three to fifteen years.

On appeal, petitioner argues that the lower court failed to properly and fully instruct the jury pertaining to “neglect” and “cause” under the facts of the present case, and committed error in refusing petitioner’s two proffered jury instructions. Petitioner proffered the following two instructions:

Proposed Instruction No. 1:

Criminal negligence is a substantially higher standard than ordinary negligence that permits recovery of money in a civil suit. The carelessness required to establish criminal negligence is appreciably more serious than that for ordinary civil negligence.

Proposed Instruction No. 2:

In order for criminal liability to be found, the harm must not only be the direct result of the act, but also not so remote as to fail to constitute the natural and probable consequences of defendant’s act.

The circuit court refused both instructions because they were not supported by West Virginia law, and did not come from West Virginia Supreme Court of Appeals decisions. Petitioner argues that he was entitled to an instruction defining “cause” due to the lack of any definition of this term, the necessity to avoid confusion with the title of the offense, and because the State was arguing various acts of neglect on behalf of petitioner caused the child’s death.

The State responds, arguing that the circuit court properly instructed the jury by following the language of West Virginia Code § 61-8D-4a and by reading the statutory definition of neglect, which is all that is required. Further, the State argues that petitioner’s first requested instruction was based in Virginia law, and that petitioner attempts to interchange negligence and neglect, which are not interchangeable terms pursuant to *State v. DeBerry*, 185 W.Va. 512, 515, 408 S.E.2d 91, 94 (1991). Likewise, the State argues that the second proffered instruction was fundamentally flawed as it is based in California and

New Jersey law, not West Virginia law. Additionally, the State notes that West Virginia law does not require the “direct” causation of the child’s death to be the neglect of the petitioner in order to convict him of child neglect causing death.

This Court has stated that:

“The formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court’s giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.” Syllabus point 6, *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995).

Syl. Pt. 1, *Gillingham v. Stephenson*, 209 W.Va. 741, 551 S.E.2d 663 (2001). In the present case, the applicable statute petitioner was charged under reads, in pertinent part, as follows:

(a) If any parent, guardian or custodian shall neglect a child under his or her care, custody or control and by such neglect cause the death of said child, then such parent, guardian or custodian shall be guilty of a felony and, upon conviction thereof, shall be fined not less than one thousand dollars nor more than five thousand dollars or committed to the custody of the Division of Corrections for not less than three nor more than fifteen years, or both such fine and imprisonment.

W. Va. Code, § 61-8D-4a. The relevant statutes do not define “cause” but do define “neglect” as “the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child’s physical safety or health.” W.Va. Code § 61-8D-1(6). The jury instructions used by the circuit court included both the relevant statute and the definition of neglect. Further, the circuit court issued the following instruction:

To prove the commission of “Child Neglect Resulting in Death,” the State must prove each of the following elements beyond a reasonable doubt:

1. That on or about March 18, 2009, in Ohio County, West Virginia,
2. The Defendant, David L. Hunter,
3. Did neglect a child under his care [,] custody or control,

4. In that he neglected [the deceased child], a child under his care, custody and control,
5. And said neglect
6. Caused the death of [the deceased child].

This Court finds that neither instruction suggested by the petitioner is based in West Virginia law. As to the definition of “neglect,” this term is properly defined in the relevant statute, and the statutory definition was included as a proper jury instruction. As to “cause,” petitioner argues for an instruction that is not formulated or reflective of the law in West Virginia. This Court finds no error in the circuit court’s refusal to give petitioner’s proffered instructions.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: February 13, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum