33191 – State of West Virginia v. Wade C. Davis

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

Maynard, Justice, dissenting:

I would affirm the judgment of the trial court below because the defendant waived all appealable errors, and the alleged error of which he now complains to this Court simply does not rise to the level of plain error as it has been previously articulated by this Court.

The defendant challenges the jury instructions and supplemental jury instructions given by the trial judge alleging that they were ambiguous and failed to properly state all the elements of the offense of second-degree murder of which the defendant was convicted. The record before us shows that the defendant's trial counsel failed to raise any contemporaneous objections at trial to alleged errors concerning jury instructions and thus waived his client's right to raise these issues on appeal except by way of plain error or ineffective assistance of counsel. As noted by the majority, "in West Virginia criminal cases[,] the sole bases for attacking an unobjected to jury charge are plain error and/or ineffective assistance of counsel." *State v. Miller*, 194 W.Va. 3, 17 n. 23, 459 S.E.2d 114, 128 n. 23 (1995).[1]

[1] Claims of ineffective assistance of counsel are generally not ripe for appellate review on direct appeal. *See State v. Triplett*, 187 W.Va. 760, 771, 421 S.E.2d 511, 522 (1992) ("it

The majority properly finds that the trial court's initial charge to the jury correctly stated the elements of second-degree murder because of the interchangeability of the terms "malice" and "intent" under West Virginia law. *See State v. Hatfield*, 169 W.Va. 191, 198, 286 S.E.2d 402, 407 (1982) (indicating that "in regard to first degree murder, the term 'malice' is often used as a substitute for 'specific intent to kill' or 'an intentional killing.'" (citations omitted)). Also, the majority correctly cites our precedent in *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), as the standard for reviewing jury instructions on appeal. Under the *Guthrie* standard,

> A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not mislead by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

Syllabus Point 4, *Guthrie*, *supra*. Unfortunately, the majority then abandons the *Guthrie* standard in favor of one in which this Court selectively dissects a trial court's jury

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is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal"). "In cases involving ineffective assistance on direct appeals, intelligent review is rendered impossible because the most significant witness, the trial attorney, has not been given the opportunity to explain the motive and reason behind his or her trial behavior." *Miller*, 194 W.Va. at 14-15, 459 S.E.2d at 125-26 (footnote omitted).

instructions, placing special weight on the trial court's last words to the jury. In support of this "last words" standard, the majority resorts to reliance on an obscure New York case, *People v. Simpkins,* 174 A.D.2d 341, 571 N.Y.S.2d 1 (1991), that has been largely ignored by other courts and is completely at odds with *Guthrie.*

According to our well-settled law, "[t]o 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." Syllabus Point 7, *Miller, supra.* Further,

> An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

Syllabus Point 7, *State v. LaRock,* 196 W.Va. 294, 470 S.E.2d 613 (1996). When this law is applied to the instant facts, it is clear that plain error is not present.

Certainly, the trial court could have better responded to the jury's inquiry by more fully addressing intent as an element of second-degree murder. I do not see, however, in light of the fact that the jury had already been properly instructed, how the trial court's

failure to do so seriously affected the fairness, integrity, or public reputation of the judicial proceedings or caused a miscarriage of justice.

Regrettably, the majority's decision will have a greater negative impact than merely reversing the conviction of a defendant whom the jury fairly convicted of second-degree murder. I am convinced that the majority's retreat from our settled law in *Guthrie*, in favor of one in which this Court carefully parses with a fine tooth comb each word of a trial court's jury instruction, will have several negative consequences. First, it will needlessly complicate the task of trial judges as they labor over each individual word in a jury instruction, fearful of this Court's hyper-technical review. Second, it will make trial judges more reluctant to address specific inquiries from juries by restating jury instructions in less than their entirety. Finally, it will result in more unnecessary reversals of valid criminal convictions.

Accordingly, for the reasons stated above, I dissent.