IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,
Respondent,

v.

Appeal No. **18-0207**

HAYDEN DAMIAN DRAKES,
Petitioner.

BRIEF OF RESPONDENT,
STATE OF WEST VIRGINIA

Appeal from February 12, 2018 Sentencing Order
Circuit Court of Cabell County, West Virginia
Criminal Action No. 16-F-344

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I. ASSIGNMENTS OF ERROR

Hayden Drakes, ("Petitioner"), by counsel, advances two assignment of error in this appeal. Pursuant to Rule 10(d) of the West Virginia Revised Rules of Appellate Procedure, the assignments of error are not restated here but will be addressed below.

II. STATEMENT OF THE CASE

As Petitioner notes in his brief, the facts are not significantly in dispute. Late in the evening of March 30, 2016, Petitioner Hayden Drakes ("Petitioner") and a group of friends went to a bar known as Club Deception in Huntington, West Virginia. (App. at 472, 502.) The group was celebrating both Petitioner's birthday — March 31st — and the anniversary of two members of the group, Joshua and Danielle Spurlock. (App. at 472-73.) The group arrived at the bar at around 11:30 pm, and went out to the outdoor patio area. (App. at 474-75.) While they were outside, Brett Powell ("the Victim") approached their group and introduced himself as "Tim." (App. at 475.) Petitioner's group was unacquainted with the Victim at that point. (App. at 475.)

The Victim addressed Petitioner's entire group, inquiring if any of them were interested in purchasing illegal drugs. (App. at 476.) The members of the group informed the Victim that they were not interested in drugs, and asked him to leave, which he did. (App. at 476.) However, the Victim returned after a few minutes, and this time asked Ms. Spurlock specifically if she wanted any drugs. (App. at 477.) When Mr. Spurlock realized this, he went to the Victim, informed him that Ms. Spurlock was his wife and that she was pregnant, and asked him to go away. (App. at 477.)

A few minutes later when Mr. Spurlock was inside, one of his friends found him and told him that the Victim had approached Ms. Spurlock again. (App. at 478.) Mr. Spurlock returned to his group of friends outside and began expressing his frustrations with the situation. (App. at 479.) The Victim came up to Ms. Spurlock again, this time pushing a cup towards her mouth, which Mr.

Spurlock slapped away. (App. at 479.) At that point Petitioner indicated that he wished to try to deescalate the situation, and told Mr. Spurlock he would go to talk to the Victim. (App. at 510-11.)

Petitioner went to the area of the patio where the Victim was standing and talked to him briefly. (App. at 512.) The Victim put his arm around Petitioner, but Petitioner shrugged it off. (App. at 513.) A few seconds later, Petitioner punched the Victim in the face. (App. at 823.) Petitioner punched the Victim repeatedly until the Victim fell to the ground. (App. at 823.) Petitioner and his group then left the bar. (App. at 515-16.)

Danielle Hayes, a patron of the bar who was trained in CPR and first aid, came out to the patio area in the aftermath of the incident. (App at 333-36.) Ms. Hayes noticed that the Victim appeared to be having a seizure, so she turned him on his side. (App. at 334.) When the Victim appeared to stop breathing, she performed CPR. (App. at 334.) Ms. Hayes remained with the Victim until emergency personnel arrived. (App. at 335.)

Fire department personnel arrived at the bar first, and used a mask to assist the Victim's breathing. (App. at 348.) When paramedics arrived, they loaded the Victim in an ambulance. (App. at 348-49.) While in the ambulance, the Victim stopped breathing and his heart stopped beating. (App. at 349.) Though the Victim was clinically dead at this point, the paramedics took him to Saint Mary's Hospital. (App. at 349.) Petitioner suffered severe hemorrhaging in the blood vessels surrounding his brain, which eventually led to a cessation in brain function. (App. at 450-52.) The medical examiner who performed an autopsy on the Victim determined that the cause of death was blunt injuries to the head. (App. at 453.)

A Huntington Police officer, who had received an alert to look for a vehicle associated with the incident at Club Deception, pulled that vehicle over near a Huntington bar known as the

Stonewall at around 1 a.m. on March 31, 2016. (App. at 352-54.) Mr. Spurlock was in the driver's seat, and was arrested for DUI, and Petitioner, who was the passenger, was arrested in connection with his assault of the Victim. (App. at 354.)

On August 17, 2016, a Cabell County grand jury indicted Petitioner on a single count of second degree murder. (App. at 773.) Petitioner's trial began on December 19, 2017. (App. at 140.) At trial, the State introduced testimony from several witnesses who had been at Club Deception and had seen Petitioner striking the Victim. (App. at 285-98, 306-13.) During the testimony of one of these witnesses, the State introduced two videos from Club Deception's patio cameras, both showing the altercation between Petitioner and the Victim. (App. at 292-98, 823.) In addition to several other witnesses, including some emergency personnel and police officers involved in the case, the State called Dr. Can Metin Savasman, the medical examiner who performed the autopsy on the Victim. (App. at 424-25.) Dr. Savasman was qualified as an expert witness without objection, and testified that the cause of the Victim's death was blunt injuries to the head. (App. at 432, 450-53.)

Petitioner introduced the testimony of Mr. Spurlock, who recalled the events largely as detailed above. (App. at 472-84.) Petitioner also testified on his own behalf. (App. at 501.) Petitioner testified to hitting the Victim, but claimed that he "didn't intend to hurt him." (App. at 515.)

After the close of evidence, Petitioner, counsel for both sides, and the Court retired to the Court's chambers for a conference on the jury instructions. (App. at 548-51.) Petitioner raised several objections, including to the State's proposed instruction on the criminal intent required for second degree murder, as discussed in detail below. (App. 588-616.) Chief among Petitioner's counsel's concerns was that the State's proffered instruction stated that "[i]n regard to second

degree murder, the requisite intent would be the intent to do great bodily harm, or a criminal intent aimed at life, or the intent to commit an act involving all the wickedness of a felony." (App. at 605-06.) Petitioner's counsel argued that second degree murder required intent to kill. (App. at 605-13.)

Although the State agreed to remove the "or the intent to commit an act involving all the wickedness of a felony" language, the Circuit Court ultimately overruled Petitioner's objection, (App. at 611-12), and in its instructions to the jury stated "[i]n regard to second degree murder, the requisite intent would be the intent to do great bodily harm, or a criminal intent aimed at life." (App. at 629-30.) The Circuit Court instructed the jury on second degree murder, voluntary manslaughter, and involuntary manslaughter. (App. at 628.)

After deliberation, the jury returned a verdict of guilty of second degree murder. (App. at 680-81.) On January 3, 2018, Petitioner filed a Motion to Set Aside the Verdict, seeking either acquittal or a new trial. Among other claims, Petitioner again challenged the Circuit Court's instruction on the mental state required for a second degree murder conviction. (App. at 812-17.) The Circuit Court denied this Motion in its February 12, 2018, Sentencing Order. (App. at 819-20.) It is from this order that Petitioner now appeals.

III. SUMMARY OF ARGUMENT

Petitioner's first assignment of error challenges the Circuit Court's instructions on the requisite intent for second degree murder. West Virginia's murder statute relies on the common law to define the elements of murder. Under the common law, "intent to do great bodily harm" is a sufficient level of intent to satisfy the malice requirement. This Court recognized this principle for many years. While one recent case states that "intent to kill" is required for second degree murder, this determination was dicta, and was also based on an erroneous reading of prior case

law. The precedent which this Court relied on to come to that determination did not in fact hold that "intent to kill" is required for second degree murder. Accordingly, the elements of second degree murder continue to be defined by the common law, and "intent to do great bodily harm" is sufficient to satisfy the element of malice. Additionally, due to the common law and statutory recognition that voluntary manslaughter is a lesser-included offense of second degree murder, this Court need not redefine the elements of second degree murder in order to comport with its general rules of statutory construction for lesser-included offenses. Therefore, the Circuit Court's second degree murder instructions in this case correctly stated the law.

Petitioner's second assignment of error argues that the Circuit Court's voluntary manslaughter instructions improperly shifted the burden of disproving malice to Petitioner. However, Petitioner waived his right to raise an assignment of error related to these instructions, because his trial counsel agreed to the Circuit Court's determination that it would give a combined version of Petitioner's and the State's proposed instructions, which included the language Petitioner now takes issue with. Additionally, even if this Court considers this assignment of error, the Circuit Court's instructions were not incorrect when read as a whole, because they correctly informed the jury that the State bore the burden of proving malice beyond a reasonable doubt for the purposes of a second degree murder conviction.

IV. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to West Virginia Revised Rule of Appellate Procedure 19(a)(4), oral argument is appropriate in this case, because it presents a significant dispute on a narrow issue of law. Due to the necessity for clarification in this area of the law, this case is appropriate for resolution by a signed opinion.

V. ARGUMENT

Petitioner raises two assignments of error in this appeal, challenging the jury instructions on second degree murder and voluntary manslaughter. For the following reasons, both challenges are meritless.

A. Standard of Review.

Petitioner's first assignment of error raises a legal challenge to jury instructions, subject to *de novo* review. *See State v. Guthrie*, 194 W. Va. 657, 671, 461 S.E.2d 163, 177 (1995) ("[I]f 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.") His second assignment of error is waived and thus not properly before this Court, Syl. Pt. 3, *State v. Gangwer*, 169 W. Va. 177, 177, 286 S.E.2d 389, 391 (1982), but to the extent this Court considers it, it is also a legal challenge subject to *de novo* review.

B. The Circuit Court's Instruction on the Intent Requirement of Second Degree Murder Was a Proper Statement of West Virginia Law.

Petitioner's first assignment of error reasserts the objection he raised during the jury instruction conference and in his post-trial motion: that second degree murder in West Virginia requires intent to kill, and that the instruction explaining "[i]n regard to second degree murder, the requisite intent would be the intent to do great bodily harm, or a criminal intent aimed at life" was therefore erroneous. (Pet'r's Br. at 11-13.) The State agrees with Petitioner that this is a challenge to the Circuit Court's statement of the legal standard for second degree murder, making it a legal challenge subject to *de novo* review. *See State v. Guthrie*, 194 W. Va. 657, 671, 461 S.E.2d 163, 177 (1995). This Court has held that "[j]ury 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 misled by the law." Syl. Pt. 15, *State v. Bradshaw*, 193 W. Va. 519, 457 S.E.2d 456, 461 (1995).

West Virginia's murder statute does not define the elements of second degree murder:

> Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit, arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance as defined in article four, chapter sixty-a of this code, is murder of the first degree. All other murder is murder of the second degree.

W. Va. Code § 61-2-1 (1991). This Court has recognized that "our murder statute is not designed to cover all the essential elements of murder, particularly second degree murder." *State v. Starkey*, 161 W. Va. 517, 523, 244 S.E.2d 219, 223 (1978), *overruled on other grounds by Guthrie*, 194 W. Va. 657, 461 S.E.2d 163. Petitioner contends that intent to kill is a required element of second degree murder. However, under the common law definition of murder and a century of West Virginia jurisprudence, "intent to do great bodily harm" was sufficient to support a second degree murder conviction; to the extent recent cases suggest otherwise, they are aberrations which misconstrue the common law.

Due to the nature of this issue, which focuses on the intent requirement of second degree murder, the State finds it necessary to clarify the issue of malice from the outset, particularly as Petitioner asserts that the State equates malice with the intent to kill. (Pet'r's Br. at 15-16.) During discussions in murder cases, this Court has described malice as "essentially a form of criminal intent." *Starkey*, 161 W. Va. at 523, 244 S.E.2d at 223; *see also State v. Davis*, 220 W. Va. 590, 594, 648 S.E.2d 354, 358 (2007) (per curiam) ("[O]ur case law has indicated that the terms malice and intent may be used interchangeably."). However, the State recognizes that while malice incorporates criminal intent — whether that be intent to kill, intent to do great bodily harm, or some other level of intent — it is not intent alone. *See State v. Burgess*, 205 W. Va. 87, 89, 516

S.E.2d 491, 493 (1999) (quoting Black's Law Dictionary 956 (6th ed.1990)) (noting malice has been described as"'[t]he intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent. . . . A condition of the mind showing a heart regardless of social duty and fatally bent on mischief'").

That malice is more than pure intent is evident from the fact that voluntary manslaughter requires intent, but not malice. *See State v. McGuire*, 200 W. Va. 823, 835, 490 S.E.2d 912, 924 (1997) ("It is intent without malice . . . which is the distinguishing feature of voluntary manslaughter."); *State v. Kirtley*, 162 W. Va. 249, 254, 252 S.E.2d 374, 376-77 (1978) ("It is the element of malice which forms the critical distinction between murder and voluntary manslaughter.") For the purposes of murder, malice can be summarized as the requisite intent in the absence of legal excuse, justification, provocation, or mitigation. *See* Syl. Pts. 5-6, *State v. Jenkins*, 191 W. Va. 87, 443 S.E.2d 244, 246 (1994) (recognizing that a legal excuse, justification, or provocation can negate malice in an intentional act); *see also United States v. Serawop*, 410 F.3d 656, 664 (10th Cir. 2005) ("Thus, when we say that a murder must be committed 'with malice,' we mean not just that it requires a particular murderous intent but, more to the point, that it must also be 'without legal justification, excuse, or mitigation.'").

Therefore, with the explicit caveat that the State recognizes that malice includes more than the requisite criminal intent, because the relevant inquiry in this case is the level of intent required in the malice element of second degree murder, the State will use the terms "malice" and "intent" interchangeably throughout the following discussion.

1. It Has Long Been Established That Intent to Do Great Bodily Harm Is a Sufficient Level of Criminal Intent for a Second Degree Murder Conviction.

At common law, intent to do great bodily harm was one of several mental states which could satisfy the element of malice. This Court recognized this principle in *State v. Davis*, when

presented with the question of the requisite mental state to satisfy the malice requirement for murder by poison. *State v. Davis*, 205 W. Va. 569, 583, 519 S.E.2d 852, 866 (1999). The Court observed that, while West Virginia Code § 61-2-1 prescribes that murder accomplished by poison is first degree murder, the act must actually be murder under the common law definition. *Id.* Relying on an oft-cited treatise, this Court recognized that at common law, malice could be shown by "'intent to kill or do serious bodily injury, . . . conduct evinc[ing] a depraved heart,'" or that the act of poisoning occurred while in the commission of a felony. *Davis*, 205 W. Va. at 583-84, 519 S.E.2d at 866-67 (quoting R. LaFave and Austin W. Scott, Jr., *Handbook On Criminal Law* § 73, p. 567 (1972)).[1] Relying on the common law, the Court held:

> in order to sustain a conviction for first degree murder by poison pursuant to W. Va. Code § 61-2-1, the State must prove that the accused committed the act of administration of poison unlawfully, willfully and intentionally for the purpose of or with the intent to kill, *do serious bodily harm* or that the accused's conduct evinced a depraved heart.

Davis, 205 W. Va. at Syl. Pt. 8, 519 S.E.2d at 856 (emphasis added). This demonstrates that, at least in the context of murder by poison, intent to do great bodily injury is sufficient to support the malice requirement under § 61-2-1.

Given that intent to do great bodily harm was sufficient to support the element of malice for a murder conviction at common law, and this Court has approved that definition in a different application of § 61-2-1, the next issue is to determine whether the legislature intended to incorporate this aspect of the common law in its statement that "all other murder is murder of the second degree." Though the current version of § 61-2-1 took effect in 1991, the statute has undergone little change since West Virginia's secession from Virginia, particularly in its provision

[1] Other jurisdictions have recognized this or a materially similar definition of the element of malice at common law. *See, e.g., United States v. Pearson*, 159 F.3d 480, 486 (10th Cir. 1998); *People v. Dykhouse*, 345 N.W.2d 150, 158 (Mich. 1984).

of several categories of first degree murder and the pronouncement that "all other murder is murder of the second degree." *See, e.g.*, *State v. Abbott*, 8 W. Va. 741, 747 (1875) (quoting the 1868 version of West Virginia's murder statute); *State v. Schnelle*, 24 W. Va. 767, 769 (1884) (quoting the 1882 version of West Virginia's murder statute). Indeed, the 1860 version of Virginia's murder statute — in effect at the time of West Virginia's secession — is materially similar to the current version of § 61-2-1. *See* Va. Code § 54-191-1 (1860).

A review this Court's early case law demonstrates that it considered intent to do great bodily harm to be a sufficient level of intent to satisfy the malice requirement of second degree murder under § 61-2-1 and its predecessors. In the 1886 case *State v. Douglass*, this Court discussed the malice requirement for murder and recognized "intent to kill or do some great bodily harm" in the absence of adequate provocation, as well as conduct demonstrating a "depraved heart," as examples of malice. *See State v. Douglass*, 28 W. Va. 297, 299-300 (1886) (citations omitted). This Court's cases through the early twentieth century continued to consider intent to commit great bodily harm as sufficient to demonstrate malice. *See, e.g.*, *State v. Weisengoff*, 85 W. Va. 271, 101 S.E. 450, 457 (1919) (recognizing that an intentional act "apt to produce death or great bodily harm" would be sufficient to demonstrate malice); *State v. Taylor*, 57 W. Va. 228, 50 S.E. 247, 252 (1905) ("If there was a fixed purpose to do bodily harm, without killing, and death resulted, it was murder of the second degree."); Syl. Pt. 2, *State v. Morrison*, 49 W. Va. 210, 38 S.E. 481 (1901) ("The intent to do enormous or severe bodily harm with a deadly weapon, followed by homicide as the result of the execution of such intent, constitutes murder in the second degree, unless the act be done under such circumstances as render the killing excusable, or justifiable, or voluntary manslaughter."). In other instances from the same period, the Court made clear that specific intent to kill was not required for second degree murder. *See State v. Dodds*, 54 W. Va.

289, 46 S.E. 228, 232 (1903) ("Wherever, then, in cases of deliberate homicide, there is a specific intention to take life, the offense, if consummated, is murder in the first degree; if there is not a specific intention to take life, it is murder in the second degree.");[2] Syl. Pt. 6, *State v. Beatty*, 51 W. Va. 232, 41 S.E. 434 (1902) ("In all cases of killing under circumstances which render the slayer guilty of murder, and the act which produced death was not accompanied by such specific intent [to kill], the grade of the crime is murder of the second degree."), *overruled in part by State v. Chaney*, 117 W. Va. 605, 186 S.E. 607 (1936); *Morrison*, 49 W. Va. at Syl. Pt. 3, 38 S.E. at 481 ("A specific intention to kill is not essential to murder in the second degree, but it is essential to murder in the first degree.").

This Court continued to recognize these principles throughout most of the twentieth century. *See, e.g.*, *State v. Roush*, 95 W. Va. 132, 120 S.E. 304, 309 (1923) (reversing second degree murder conviction due to instructions which improperly allowed the jury to presume the requisite "malicious intent to kill or inflict great bodily harm"); *State v. Burdette*, 135 W. Va. 312, 333, 63 S.E.2d 69, 82 (1950) (quoting *McWhirt v. Com.*, 44 Va. 594, 610 (Va. Gen. Ct. 1846)) (characterizing as "very appropriate" language from a Virginia case that "'[m]alice aforethought may consist in the intention to do great bodily harm, as well as to kill'"); *State v. Bias*, 156 W. Va. 569, 576, 195 S.E.2d 626, 630 (1973) (affirming second degree murder conviction where the evidence was sufficient to show "that the defendant severely beat the deceased with the intention of killing her or of doing great bodily harm and, that as a result of this beating, the deceased died"); *Starkey*, 161 W. Va. at 525, 244 S.E.2d at 224 (characterizing the requisite level of malice for attempted second degree murder as intent to do "serious bodily harm or death"). In *State v.*

[2] Curiously, despite this language, Petitioner characterizes *Dodds* as requiring intent to kill for second degree murder. (Pet'r's Br. at 13.)

Haddox, this Court restated these principles, noting "the intent to do great bodily harm can be an element of murder in the second degree." *State v. Haddox*, 166 W. Va. 630, 632, 276 S.E.2d 788, 790 (1981) (per curiam). Petitioner emphasizes that *Haddox* is only a *per curiam* decision. (Pet'r's Br. at 14.) However, the State does not assert that *Haddox* itself established that intent to do great bodily harm is a sufficient mental state to sustain a conviction for second degree murder. Rather, *Haddox* merely restated the common law roots for second degree murder.

Accordingly, that "intent to do great bodily harm" satisfies the malice requirement of second degree murder in West Virginia is a long-standing principle stemming from the legislature's adoption of the common law definition of murder.

2. The Cases Petitioner Relies On Do Not Alter the Long-Standing Definition of Malice.

Petitioner has identified a series of cases that he argues overrule this understanding and establish that intent to kill is necessary to satisfy the malice requirement of second degree murder. Petitioner primarily relies on *Gerlach v. Ballard*, 233 W. Va. 141, 756 S.E.2d 195 (2013) and the case it cites heavily, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), for this proposition, but also contends that *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (1982) supports the same conclusion. For the following reasons, none of these three cases overrules the common law understanding of malice.

a. *Gerlach v. Ballard* is Not Controlling Because its Relevant Language is Dicta and Only Purports to Restate Law Established in *State v. Guthrie*.

From the outset, the State acknowledges that *Gerlach v. Ballard* is apparently on point, as it determined that "intent to kill is an element of second degree murder." *Gerlach v. Ballard*, 233 W. Va. 141, 149, 756 S.E.2d 195, 203 (2013). However, *Gerlach* is not dispositive of this matter for several reasons.

As an initial matter, while *Gerlach* dealt with the mental state required for a second degree murder conviction, the question at issue was not identical to this case. In that case, the petitioner had been convicted of one count of second degree murder and one count of death of a child by a parent, guardian or custodian in violation of W. Va. Code § 61-8D-2a (1994) based on the same conduct, and had raised a double jeopardy claim in habeas corpus. *Gerlach*, 233 W. Va. at 143, 756 S.E.2d at 197. The respondent argued that there was no double jeopardy issue for two reasons: (1) it was clear that the legislature intended that a person could be convicted of both offenses, and (2) under the United States Supreme Court's criteria set out in *Blockburger v. United States*, 284 U.S. 299 (1932), each offense required proof of a fact the other did not, with second degree murder's unique fact being intent to kill. *Id.* at 145, 756 S.E.2d at 199.

Additionally, the *Gerlach* Court did not even need to reach the question of the mental state requirement for second degree murder, as it determined that "the legislative intent in this instance is clear and that no double jeopardy violation has occurred." *Gerlach*, 233 W. Va. at 147, 756 S.E.2d at 201. This Court has held that in adjudicating double jeopardy challenges, courts should first consider whether the legislature intended to allow "aggregate sentences for related crimes" and that it is only necessary to apply the *Blockburger* test to the extent "no such clear legislative intent can be discerned." Syl. Pt. 8, *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253, 255 (1992). Accordingly, once the *Gerlach* Court made the determination that, based on the legislative intent, there was no double jeopardy violation, it was unnecessary to decide whether each crime required proof of a different fact.

Though unnecessary, the Court went on to apply the *Blockburger* test and examine whether the elements of the two crimes required proof of different facts. *Gerlach*, 233 W. Va. at 147, 756 S.E.2d at 201. The petitioner argued that the elements of second degree murder were a subset of

the elements of death of a child by a parent, guardian or custodian, because both crimes only required that the defendant had the intent to harm the victim, while the respondent maintained that intent to kill was an element of second degree murder.[3] *Id.* The Court acknowledged that several of its older decisions had held that specific intent to kill was not an element of second degree murder. *Id.* at 148, 756 S.E.2d at 202. However, the Court found that its decision in *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995) had addressed and clarified this issue; the *Gerlach* Court read *Guthrie* to have held that intent to kill was an element of both first and second degree murder, and that the difference was that first degree carried the additional elements of premeditation and deliberation. *Id.* It then determined that "pursuant to *Guthrie*, intent to kill is an element of second degree murder." *Id.* at 149, 756 S.E.2d at 203. The *Gerlach* Court did not put this conclusion in a syllabus point. *See* Syl. Pt. 1, *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303, 306 (2014) ("[T]he Court uses original syllabus points to announce new points of law.").

This decision is not controlling for several reasons. Notably, the Court's consideration of the mental state requirement for second degree murder was dicta, as it was unnecessary to the disposition of the claim, which had already been resolved based on legislative intent. *See In re Kanawha Val. Bank*, 144 W. Va. 346, 382–83, 109 S.E.2d 649, 669 (1959) ("Obiter dicta or strong expressions in an opinion, where such language was not necessary to a decision of the case, will not establish a precedent."). Secondly, even on its own terms, *Gerlach* did not purport to resolve contradicting precedent and create a new point of law; rather, it determined that the issue had already been resolved in *State v. Guthrie*, and merely restated what it had purportedly held in that

[3] There was no dispute between the parties that death of a child by a parent, guardian or custodian included an element that the defendant be a parent, guardian, or custodian, a fact not required by second degree murder.

case. Accordingly, even to the extent *Gerlach*'s statement that intent to kill is an element of second degree murder is legally correct, *Guthrie* is the controlling precedent.

b. The *Gerlach* Court Overstated *Guthrie*, Which Did Not Hold that Intent to Kill Is Required for Second Degree Murder.

As discussed, the Court in *Gerlach* determined that *Guthrie* had resolved the question of whether intent to kill is a required element of second degree murder. However, that question was not asked in *Guthrie*; the relevant issue in that case was whether the trial court's jury instructions had properly defined first degree murder. *See Guthrie*, 194 W. Va. at 672, 461 S.E.2d at 178. The *Guthrie* Court focused primarily on the elements of premeditation and deliberation, noting that prior decisions had improperly conflated them with the intent to kill itself. *Id.* at 673-75, 461 S.E.2d at 179-81. The Court rejected prior caselaw that suggested premeditation and deliberation could occur instantaneously when the intent to kill arose, finding instead "that there must be some evidence that the defendant considered and weighed his decision to kill in order for the State to establish premeditation and deliberation under our first degree murder statute. This is what is meant by a ruthless, cold-blooded, calculating killing." *Id.* at 675–76, 461 S.E.2d at 181–82. The Court then stated that "[a]ny other intentional killing, by its spontaneous and nonreflective nature, is second degree murder." *Id.* at 676, 461 S.E.2d at 182.

The *Gerlach* Court relied on this statement in its determination that *Guthrie* had decided that intent to kill was an element of second degree murder. *Gerlach*, 233 W. Va. at 148, 756 S.E.2d at 202. However, a plain reading of "any other intentional killing, by its spontaneous and nonreflective nature, is second degree murder," does not suggest that the *Guthrie* Court, in defining conduct insufficient to constitute premeditated and deliberate first degree murder, intended to provide an exhaustive definition of second degree murder. The State does not question that an unlawful killing, committed with the intent to kill, but without premeditation or deliberation, is

second degree murder. However, while *Guthrie*'s language makes clear that *any* such killing is second degree murder, it does not limit second degree murder to *only* those killings.

This Court has recognized that specific intent to kill is a required element of first degree murder under a theory that the killing was deliberate and premeditated. *See State v. Lanham*, 219 W. Va. 710, 715, 639 S.E.2d 802, 807 (2006); *Starkey*, 161 W. Va. at 523, 244 S.E.2d at 223. The State does not challenge this requirement with respect to first degree murder. Thus, in defining premeditation and deliberation while distinguishing first and second degree murder, intent to kill is the only relevant level of intent, because a lesser intent could not support a first degree murder conviction regardless of premeditation and deliberation. Therefore, to the extent intent to do great bodily harm is a sufficient level of intent to support a conviction for second degree murder, it would have been irrelevant to the question raised in *Guthrie*, and the fact that the *Guthrie* Court did not discuss it is unsurprising and should not be read to exclude it from the law.

In summation, the *Gerlach* Court not only read *Guthrie* to answer a question which was not asked, but it reached that conclusion based on an overstatement of *Guthrie*'s relevant language. Accordingly, *Guthrie* did not hold that intent to kill is a required element of second degree murder, and is not controlling law in this case.

c. *State v. Hatfield* Did Not Hold that Intent to Kill Is a Required Element of Second Degree Murder.

While Petitioner relies primarily on *Gerlach* and *Guthrie* for the proposition that intent to kill is a required element of second degree murder, he also points to another decision each of those cases cited, *State v. Hatfield*. (Pet'r's Br. at 13.) According to Petitioner, under *Hatfield* both first and second degree murder require intent to kill. (Pet'r's Br. at 13.) As an initial matter, Petitioner misreads this case, and even to the extent it could be read to support his position, it is inapplicable, as it did not directly address the requisite mental state for second degree murder.

In *Hatfield*, the petitioner was convicted at trial of first degree murder — on the theory of a premeditated and deliberate killing — and appealed, challenging the sufficiency of the evidence. *See Hatfield*, 169 W. Va. at 194-97, 286 S.E.2d at 405-07. The Court discussed the elements of murder as follows:

> It is obvious that the specific intent to kill for first degree murder is related to and is a necessary constituent of the elements of premeditation and deliberation such that proof of the latter will also aid in proving the former. *State v. Jones*, 279 S.E.2d 835, 838–39 (N.C. 1981). We discussed at some length in *State v. Starkey*, *supra*, the term "malice" and concluded it is essentially "a form of criminal intent." 244 S.E.2d at 223. Thus, in regard to first degree murder, the term "malice" is often used as a substitute for "specific intent to kill" or "an intentional killing." *E.g.*, *State v. Ferguson*, 165 W. Va. 529, 270 S.E.2d 166, 170 (1980); *State ex rel. Combs v. Boles*, 151 W. Va. 194, 198, 151 S.E.2d 115, 118 (1966). It is clear, however, that the intent to kill or malice is a required element of both first and second degree murder but the distinguishing feature for first degree murder is the existence of premeditation and deliberation.

Hatfield, 169 W. Va. at 198, 286 S.E.2d at 407-08.

This language does not state that intent to kill is required for second degree murder. While the *Hatfield* Court stated that "the intent to kill or malice is a required element of both first and second degree murder," this was after observing that, in the context of *first degree murder*, the term "malice" is used interchangeably with "specific intent to kill." *See Hatfield*, 169 W. Va. at 198, 286 S.E.2d at 407. This language does not preclude the principle that another level of criminal intent, such as intent to do great bodily harm, could be sufficient for the malice requirement of *second degree murder*. As discussed above with *Guthrie*, the mere fact that this Court recognized that intent to kill is a *sufficient* mental state to support a conviction for second degree murder does not mean that it is *necessary*.

Additionally, *Hatfield* is not controlling for many of the same reasons *Guthrie* does not control. The *Hatfield* Court did not address competing views of the necessary intent for second degree murder and determine that intent to kill was required. Indeed, like *Guthrie*, *Hatfield*

addressed first degree murder, and only commented collaterally on the requirements for second degree murder. Accordingly, even to the extent the above-quoted language from *Hatfield* suggests that intent to kill is a required element of second degree murder, it is dicta, as it is an opinion on an issue which was not before the Court and was unnecessary to its holding. *See In re Kanawha Val. Bank*, 144 W. Va. at 382-83, 109 S.E.2d at 669; 20 Am. Jur. 2d Courts § 33 (defining dicta as "expressions of opinion which are not necessary to support the decision reached by the court").

Hatfield did not hold that intent to kill is a required element of second degree murder, and to the extent its language can be read to support that conclusion, it is dicta. Accordingly, *Hatfield* did not overrule the common law understanding of malice and does not control in this case.

3. The State Does Not Rely On The Principle that Premeditation and Intent to Kill Are Synonymous.

Petitioner also seeks to characterize the State's position that intent to kill is not a required element of second degree murder as reliant on the notion that premeditation is synonymous with the intent to kill. (Pet'r's Br. at 14.) Though the prior discussion does not suggest such a position, out of caution the State explicitly disavows reliance on this theory.

As discussed above, rather than the level of criminal intent required for second degree murder, *Guthrie* addressed confusion in the law of first degree murder about the distinction between premeditation and deliberation and the intent to kill. *Guthrie*, 194 W. Va. at 672, 461 S.E.2d at 178. In *State v. Schrader*, 172 W. Va. 1, 302 S.E.2d 70 (1982), this Court determined that "what is really meant by the language 'willful, deliberate and premeditated' in W. Va. Code, 61-2-1 [1923] is that the killing be intentional." *State v. Schrader*, 172 W. Va. 1, 6, 302 S.E.2d 70, 75 (1982), *overruled by Guthrie*, 194 W. Va. 657, 461 S.E.2d 163. *Guthrie* determined that this was incorrect, noting that this allowed for a "notion of instantaneous premeditation and momentary deliberation [which] is not satisfactory for proof of first degree murder." *Guthrie*, 194

W. Va. at 675, 461 S.E.2d at 181. The Court overruled *Schrader* and held that "there must be some period between the formation of the intent to kill and the actual killing, which indicates the killing is by prior calculation and design. This means there must be an opportunity for some reflection on the intention to kill after it is formed." *Guthrie*, 194 W. Va. at Syl. Pts. 5-6, 461 S.E.2d at 170. The State does not dispute *Guthrie*'s holding, does not rely on *Schrader* as support for any of its arguments, and notes that the issues of premeditation and deliberation are simply not at issue in this case where the State did not pursue a first degree murder charge.

Petitioner also seeks to tie *Starkey* and *Haddox* to *Schrader*, arguing that those cases also equate premeditation with the intent to kill, (Pet'r's Br. at 14), but that too is unavailing. *Starkey* dealt with a challenge to a conviction for attempted second degree murder, rather than first degree murder, so it did not address the issue of premeditation in detail; however, where it was briefly discussed, the *Starkey* Court recognized malice as separate from premeditation and deliberation for the purposes of first degree murder. *See Starkey*, 161 W. Va. at 526, 244 S.E.2d at 224 n.6. *Haddox* does not even mention "premeditation" or "first degree murder." *See Haddox*, 166 W. Va. 630, 276 S.E.2d 788. *Schrader*, the latest of the three cases, does not cite *Starkey* or *Haddox*. *See Schrader*, 172 W. Va. 1, 302 S.E.2d 70. Additionally, though *Guthrie* explicitly overruled an unrelated *Starkey* holding, it did not even mention *Starkey* in its discussion of premeditation, and actually stated that "only *Schrader* deals with the exact issue raised *sub judice*." *Guthrie*, 194 W. Va. at 672-77, 461 S.E.2d at 178-83 n.17. Accordingly, *Starkey* and *Haddox* did not rely on the principle that premeditation and intent to kill are synonymous, and the State advocates no such position in this case.

4. West Virginia's Statutory Lesser-Included Offense Principles Do Not Require the Conclusion that Intent to Kill Is a Required Element of Second Degree Murder.

In addition to his argument that this Court has specifically held that intent to kill is a required element of second degree murder, Petitioner argues that it must be an element because it is an element of voluntary manslaughter, a lesser-included offense of second degree murder. (Pet'r's Br. at 16.) Petitioner points to this Court's test for determining if an offense is a lesser-included offense of another, as set out in *State v. Louk*:

> The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense.

Syl. Pt. 1, *State v. Louk*, 169 W. Va. 24, 285 S.E.2d 432, 433 (1981), *overruled on other grounds by State v. Jenkins*, 191 W. Va. 87, 443 S.E.2d 244 (1994). Petitioner argues *Louk* in an inverted fashion; instead of applying the test to determine whether voluntary manslaughter is a lesser-included offense of second degree murder based on each offense's elements, he argues that because this Court has recognized voluntary manslaughter as a lesser-included offense of second degree murder, second degree murder's elements should be constructed so that the *Louk* test is satisfied. (Pet'r's Br. at 16-17.)

This Court has stated on multiple occasions that voluntary manslaughter is a lesser-included offense of murder. *See State v. McGuire*, 200 W. Va. 823, 834, 490 S.E.2d 912, 923 (1997) ("[T]here can be no doubt that we also have considered voluntary manslaughter as a lesser included offense of murder."); *Guthrie*, 194 W. Va. at 671, 461 S.E.2d at 177 ("The jury was charged in this case on the offenses of first and second degree murder and the lesser-included offenses of voluntary and involuntary manslaughter."). It has also recognized that voluntary manslaughter requires an intent to kill. *See, e.g., State v. Ferguson*, 222 W. Va. 73, 79, 662 S.E.2d

515, 521 n.6 (2008); *State v. Wright*, 162 W. Va. 332, 334, 249 S.E.2d 519, 521 (1978) ("It is fundamental in this jurisdiction that voluntary manslaughter requires a[n] intent to kill."); *State v. Foley*, 131 W. Va. 326, 340, 47 S.E.2d 40, 47 (1948) ("We think it clear that the crime of voluntary manslaughter necessarily involves the element of intent to kill."). Therefore, to the extent that intent to do great bodily harm can satisfy the malice requirement of second degree murder, voluntary manslaughter requires proof of a fact that second degree murder does not always require. On its face, this situation would seem to violate the *Louk* test.

As an initial matter, regardless of this Court's disposition of Petitioner's *Louk* argument, it should not redefine the elements of second degree murder to correspond with the elements of voluntary manslaughter. In the context of first degree murder, this Court has already recognized that the propriety of lesser included offenses can be dependent on the theory of murder the State relies on. As noted, when the State pursues a first degree murder charge under a theory that the killing was deliberate and premeditated, second degree murder, voluntary manslaughter, and involuntary manslaughter are all recognized as lesser-included offenses. *See McGuire*, 200 W. Va. at 834, 490 S.E.2d at 923; *Guthrie*, 194 W. Va. at 671, 461 S.E.2d at 177. However, when the State seeks a first degree murder conviction under a felony murder theory, none of those crimes are lesser-included offenses. Syl. Pt. 4, *State v. Wade*, 200 W. Va. 637, 490 S.E.2d 724, 727 (1997) ("As a matter of law, second-degree murder, voluntary manslaughter, and involuntary manslaughter are not lesser included offenses of felony-murder.").

To the extent that this Court is unsatisfied with the longstanding common law understanding that voluntary manslaughter is a lesser-included offense of second degree murder, whether voluntary manslaughter is a lesser-included offense could be treated as dependent on the theory the State relies on, as with first degree murder. Where the State argues second degree

murder based on an intent to kill, voluntary manslaughter would be a lesser-included offense. In those scenarios where the State concedes that a defendant had no intent to kill and seeks to demonstrate malice through intent to do great bodily harm, voluntary manslaughter would not be a lesser-included offense. In either case, based on the explicit language of West Virginia Code § 61-2-1, a murder indictment would properly charge both offenses:

> In an indictment for murder and manslaughter, it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in every such indictment to charge that the defendant did feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder the deceased.

W. Va. Code § 61-2-1 (1991). In second degree murder prosecutions, the propriety of a voluntary manslaughter instruction would hinge — as it already does — upon the evidence at trial.

Additionally, this Court has recognized exceptions to the *Louk* test where the legislature has made it clear that an offense is intended to be a lesser included offense of another. In *Henning*, a petitioner who had been indicted on malicious assault challenged his misdemeanor assault conviction, asserting that the latter was not a lesser-included offense of the former. *See State v. Henning*, 238 W. Va. 193, 195, 793 S.E.2d 843, 845 (2016). This Court recognized that assault, at least under one of the two methods of proving the crime, included the element of "placing a person in reasonable apprehension of immediately suffering physical pain or injury," a fact not required to prove malicious assault. *Henning*, 238 W. Va. at 198, 793 S.E.2d 848. The Court observed, however, that this case differed from typical applications of *Louk*'s elements test, in that assault and malicious assault were prohibited under the same statute, West Virginia Code § 61-2-9. *Henning*, 238 W. Va. at 199, 793 S.E.2d 849. The Court noted that, prior to the explicit inclusion of assault and battery in that statute, it had held several times that those charges would be sustained under an indictment for malicious assault. *Henning*, 238 W. Va. at 198-99, 793 S.E.2d

848-49 (citing Syl. Pt. 1, *State v. Craft*, 131 W. Va. 195, 47 S.E.2d 681 (1948) and Syl. Pt. 3, *State v. King*, 140 W. Va. 362, 84 S.E.2d 313 (1954)). The Court determined that "by placing the offenses of assault and battery within the framework of West Virginia Code § 61-2-9, it is clear that the legislature intended to import the common law pertaining to the offenses of assault and battery into the statute." *Henning*, 238 W. Va. at 200, 793 S.E.2d at 850. *Henning* thus held that assault is a lesser-included offense of malicious assault. *Id.*; *see also State v. Bland*, 239 W. Va. 463, 470, 801 S.E.2d 478, 485 (2017) (applying the *Henning* exception to find that domestic assault is a lesser-included offense of domestic battery, despite requirement of an additional element).

This Court should apply the reasoning of *Henning* in this case to determine that voluntary manslaughter is a lesser-included offense of second degree murder, even though the malice requirement of second degree murder can be satisfied by intent to do great bodily harm, while voluntary manslaughter requires intent to kill. As with the assault crimes at issue in *Henning*, there is a deep-rooted common law understanding that voluntary manslaughter is a lesser-included offense of second degree murder. *See, e.g.*, Syl. Pt. 2, *State v. Galford*, 87 W. Va. 358, 105 S.E. 237 (1920) ("Malice, express or implied, is an essential element of murder in the first or second degree, and if it is absent the offense is of no higher grade than voluntary manslaughter."); Syl. Pt. 8, *State v. Robinson*, 20 W. Va. 713 (1882) ("[T]he killing being voluntary, the offense is necessarily murder in the second degree, unless the provocation was of such a character, as would at common law reduce the crime to manslaughter . . . ."); Syl. Pt. 10, *State v. Cain*, 20 W. Va. 679 (1882) (recognizing that the circumstances of a homicide can reduce second degree murder to manslaughter).

Also like the crimes at issue in *Henning*, second degree murder and voluntary manslaughter are prohibited by the same statutory provision, West Virginia Code § 61-2-1. Indeed, as noted above, § 61-2-1 provides that that a murder indictment is sufficient to charge murder and manslaughter. W. Va. Code § 61-2-1 (1991). West Virginia's statutory indictment form for murder also makes clear that a murder indictment which states that the accused "feloniously, wilfully, maliciously, deliberately and unlawfully did slay, kill and murder" the victim shall be sufficient such that "the accused may be convicted of either murder of the first degree, murder of the second degree, voluntary manslaughter, or involuntary manslaughter, as the evidence may warrant." W. Va. Code § 62-9-3 (1882). Given the common law precedent and legislative intent that voluntary manslaughter is a lesser-included offense of second degree murder, this Court should determine that there is no need to alter the malice requirement of second degree murder to require specific intent to kill merely to comport with *Louk*.

* * *

The above discussion demonstrates that, from the State's inception, the legislature has relied on the common law to define the elements of murder, and has characterized second degree murder as all that which is murder at common law but not specifically elevated to first degree murder. It also shows that under the common law, as adopted and applied for over a century, intent to do great bodily harm was sufficient to satisfy the malice requirement of second degree murder. The discussion also demonstrates that each of the cases Petitioner cites — *Gerlach*, *Guthrie*, and *Hatfield* — for the proposition that intent to kill is a required element of second degree murder have not squarely addressed the common law understanding of malice and limited it as Petitioner claims. Finally, it shows that there is no need to curtail the common law definition of malice in order to ensure voluntary manslaughter continues to operate as a lesser-included offense of murder.

As it is now squarely presented with the issue, this Court should maintain the common law understanding of murder, as intended by the legislature, and hold that the jury instructions were proper in this case because intent to do great bodily harm is and should continue to be sufficient to demonstrate the malice requirement for second degree murder. To do otherwise would flout the legislature's intent in relying on the common law definition of murder. Of course, the State recognizes that common law is evolved by courts by definition, and this Court has the power to continue to do so. *See* Syl. Pt. 2, *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 253 S.E.2d 666, 667 (1979) (recognizing this Court's "historic power to alter or amend the common law). However, this Court has recognized that, specifically in the area of criminal law, such evolutions should be of a limited nature. *See State ex rel. Atkinson v. Wilson*, 175 W. Va. 352, 355, 332 S.E.2d 807, 810 (1984) ("Thus, there exists a distinction between a court's power to evolve common law principles in areas in which it has traditionally functioned, i.e., the tort law, and in those areas in which the legislature has primary or plenary power, i.e., the creation and definition of crimes and penalties.") In *Atkinson*, this Court rejected a call to exercise its authority to amend the common law to create a new crime, noting that in the area of criminal law, its power was more appropriately restricted to making procedural alterations. *Id.* at 352, 356, 332 S.E.2d at 811. This Court should exercise the same restraint and refrain from making the substantive alteration of significantly curtailing the common law definition of malice.

The State also notes that Petitioner's view of the law would lead to absurd results. Petitioner suggests that this Court hold that second degree murder requires intent to kill. Were it to do so, traditional first degree murder, second degree murder, and voluntary manslaughter would all require intent to kill. If that were the law, a defendant could commit an intentional violent act against a victim with the intent to do great bodily harm, the victim could die, and the only homicide

charge the defendant could be convicted of would be involuntary manslaughter, a misdemeanor. This would be a ridiculous result the legislature clearly did not intend when it adopted the common law definition of murder.

For the foregoing reasons, this Court should hold that the common law definition of murder continues to control in West Virginia, and that accordingly, intent to do great bodily harm is sufficient to satisfy the malice requirement of second degree murder. Based on these determinations, the Court should conclude that the Circuit Court's instructions on second degree murder were not erroneous and affirm Petitioner's conviction.

C. Petitioner's Claim That the Circuit Court's Voluntary Manslaughter Instruction Was Erroneous Is Meritless.

Petitioner's second assignment of error asserts that the Circuit Court's voluntary manslaughter instructions were erroneous. (Pet'r's Br. at 17.) In explaining that that charge, the Circuit Court instructed the jury:

> Before [Petitioner] can be convicted of Voluntary Manslaughter, the State of West Virginia must overcome the presumption that he is innocent and prove to the satisfaction of the jury beyond a reasonable doubt that: [Petitioner], in Cabell County, West Virginia, on or about the 31st day of March, 2016, did feloniously, unlawfully and intentionally, without premeditation, deliberation or malice, but upon sudden provocation and in the heat of passion kill [the Victim].

(App. at 630.) Specifically, Petitioner asserts that it was error for the Circuit Court to include the "upon sudden provocation and in the heat of passion" language. Petitioner asserts that by adding elements not required by the law, the Court shifted the burden of proving these elements to Petitioner. (Pet'r's Br. at 17-19.)

1. Petitioner Waived this Issue by Accepting the Circuit Court's Plan to Issue a Combined Instruction.

Petitioner claims that the Circuit Court gave this instruction "over objection." (Pet'r's Br. at 6.) This Court has held "[t]he general rule is that a party may not assign as error the giving of

an instruction unless he objects, stating distinctly the matters to which he objects and the grounds of his objection." Syl. Pt. 3, *State v. Gangwer*, 169 W. Va. 177, 286 S.E.2d 389, 391 (1982). Despite Petitioner's claim that he objected, the record shows that not only did Petitioner's counsel not object to this instruction, he agreed to the court's determination to give it. Accordingly, this issue is waived and not subject to appellate review.

The issue of the proper instruction for voluntary manslaughter first arose during the instruction conference when the Circuit Court addressed Petitioner's proposed instruction, which defined the crime as "the unlawful and intentional killing of another without malice." (App. at 565.) When the Court considered this instruction, the following exchange occurred on the record:

> THE COURT: I think [Petitioner's instruction] is okay.
>
> [Prosecution]: Let me say our instruction is better.
>
> [Defense]: The issue of malice is the only difference.
>
> THE COURT: I think so.
>
> [Prosecution]: Yes, but –
>
> [Prosecution]: There has to be provocation.
>
> [Prosecution]: Sudden provocation.
>
> [Defense]: There is another instruction that doesn't have malice for Voluntary Manslaughter.
>
> THE COURT: I agree with that.
>
> [Prosecution]: Of course, it says upon sudden provocation and in the heat of passion. That is appropriate.
>
> [Prosecution]: How does it not get in this instruction? That is an element.
>
> [Defense]: That is straight out of the statute.
>
> THE COURT: I am going to give another instruction on the elements with that.
>
> [Defense]: Okay

(App. at 594-95.) The Court then stated that it would give Petitioner's proposed instruction. (App. at 595.) Although Petitioner points to this as a favorable ruling that the Court did not intend to

include the "upon sudden provocation and in the heat of passion" language in its instructions, this is only partially true. The Court clearly stated that it would give Petitioner's proposed instruction without that language, but also indicated it was going to give another instruction which included that language, to which Petitioner's counsel did not object.

After going through the remainder of Petitioner's proposed instructions, one of the prosecutors asked to revisit the voluntary manslaughter instruction, noting that none of Petitioner's instructions explained sudden provocation and heat of passion. (App. at 596.) The Circuit Court noted that "[t]here is in your-all's instruction" and explained that Petitioner's instruction and the State's instruction "will be read in combination after each other." (App. at 596-97.)

The Circuit Court then started to take up the State's proposed instructions, and suggested it would not give the State's first instruction defining the elements of the crimes, because Petitioner's instructions were sufficient. (App. at 597.) However, the prosecutors quickly pointed out that the "upon sudden provocation and in the heat of passion" language was only in that instruction. (App. at 597-98.) Petitioner's counsel addressed this language, saying "if [the jury doesn't] believe there is malice, they don't believe there is. Clearly that is not an issue. If they find there is no malice, then they may think, well, there is sudden provocation if there is no malice." (App. at 598.) Petitioner's counsel then added "I think it is just pretty clear the jury has to believe there is no malice involved. They don't have to find 'and' –."

The Court then stated that it would combine the State's language with Petitioner's voluntary manslaughter instruction:

> I will take out the rest of that, but I will add that on the Voluntary.
>
> [Defense]: Yes, sir.
>
> THE COURT: I am inserting that No. 5 "without premeditation, deliberation or malice, but upon sudden" -- all the other part of that – "sudden provocation and in the heat of passion."

[Defense]: Yes, sir.

(App. at 598-99.) Undeniably, Petitioner's trial counsel questioned whether it was necessary to give an instruction stating that voluntary manslaughter must be upon sudden provocation and in the heat of passion. However, the record is clear that when the Circuit Court explained its intent to combine the two parties' proposed instructions to include the sudden provocation and heat of passion language, Petitioner's counsel lodged no objection, but rather affirmatively acknowledged the Court's intent.

The Circuit Court returned to the issue of the voluntary manslaughter instructions once more during the conference:

> THE COURT: Defendant's Instruction No. 7 on Voluntary Manslaughter.
>
> [Defense]: Yes, sir.
>
> THE COURT: I am going to refuse that. I am giving – that is covered in State's Instruction No. 1.
>
> [Defense]: What does their instruction say? I don't have that out.
>
> THE COURT: I am using just their definition on Voluntary.
>
> [Defense]: Is that –
>
> THE COURT: The second paragraph.
>
> [Defense]: You are leaving the next paragraph?
>
> THE COURT: Yes.
>
> [Defense]: I don't have that in front of me for some reason.
>
> That's fine.

(App. at 612-13.) Again, where the Circuit Court indicated its intent to offer a voluntary manslaughter instruction including the "upon sudden provocation and in the heat of passion" language the State proposed, Petitioner's counsel not only did not object, but actually affirmatively said "that's fine."

Petitioner cannot now raise the Circuit Court's voluntary manslaughter instruction as an error, because he waived any error when his counsel agreed to the Circuit Court's stated intention to combine Petitioner's proposed instruction with the State's. This Court has explained that "[a] litigant may not silently acquiesce to an alleged error, or actively contribute to such error, and then raise that error as a reason for reversal on appeal." Syl. Pt. 1, *Maples v. W. Virginia Dep't of Commerce, Div. of Parks & Recreation*, 197 W. Va. 318, 475 S.E.2d 410, 411 (1996). In *State v. Miller*, this Court cited favorably to a First Circuit Court of Appeals decision, in which the court determined that an appellant waived an objection to an instruction where his counsel objected, the court offered a new version of the instruction, and his counsel agreed to it. *See State v. Miller*, 194 W. Va. 3, 19, 459 S.E.2d 114, 130 (1995) (citing *United States v. Rojo-Alvarez*, 944 F.2d 959, 971 (1st Cir. 1991)). This case is very similar; though Petitioner's counsel never explicitly objected to the instructions including the "upon sudden provocation and in the heat of passion" language, to the extent he offered any argument against them, he ultimately accepted the Court's determination that the instructions would be combined. Accordingly, Petitioner has waived any error related to the voluntary manslaughter instructions.

Even if this Court does not treat Petitioner's counsel's statements as a waiver, Petitioner has not preserved this issue. Under *Gangwer*, Petitioner cannot assign the voluntary manslaughter instruction as an error on appeal, because he did not object below. Additionally, even if this Court construes his counsel's disagreement with the State's voluntary manslaughter instruction — prior to his agreement to the Circuit Court's plan to combine the instructions — as an objection, it was not sufficiently specific to preserve the issue for appeal. *Gangwer* provides that the grounds for objections must be stated "distinctly" to be preserved. *Gangwer*, 169 W. Va. at Syl. Pt. 3, 286 S.E.2d at 391. To the extent Petitioner's counsel objected to the "sudden provocation and in the

heat of passion" language, it was on the grounds that it was simply unnecessary because the absence of malice is the actual issue separating manslaughter from murder. His counsel did not assert that the State's proposed language would cause any unfair shifting of the burden of proof, the issue Petitioner asserts on appeal.

For the foregoing reasons, either because of Petitioner's affirmative waiver of any objection to the voluntary manslaughter instruction, or because there was no distinct objection on the grounds that the instructions impermissibly shifted the burden of proof of negating malice, Petitioner's second assignment of error is not preserved for appellate review.

2. The Circuit Court's Voluntary Manslaughter Instruction Did Not Shift the Burden on Malice.

Even to the extent this Court considers Petitioner's second assignment of error, it does not constitute reversible error. As discussed above, Petitioner asserts that the Circuit Court's voluntary manslaughter instruction was erroneous because it included that the killing must have occurred "upon sudden provocation and in the heat of passion" as elements the State was required to prove beyond a reasonable doubt. (App. at 630, Pet'r's Br. at 17-19.) As noted, "[j]ury 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 misled by the law." *Bradshaw*, 193 W. Va. at Syl. Pt. 15, 457 S.E.2d at 461.

Petitioner asserts that sudden provocation and heat of passion are not elements of voluntary manslaughter. (Pet'r's Br. at 17.) This is a correct statement of West Virginia law. *McGuire*, 200 W. Va. at Syl. Pt. 3, 490 S.E.2d at 914 ("Gross provocation and heat of passion are not essential elements of voluntary manslaughter, and, therefore, they need not be proven by evidence beyond a reasonable doubt. It is intent without malice, not heat of passion, which is the distinguishing feature of voluntary manslaughter.") Facially, the addition of elements to a crime would seem

harmless to a defendant, as it adds a burden to the State. However, Petitioner argues that in the context of a lesser-included offense, where sudden provocation and heat of passion are in the nature of a defense which negates malice and reduces murder to manslaughter, the State had no interest in proving these elements, and that adding them shifted the burden to him to negate malice. (Pet'r's Br. at 17-19.)

Petitioner invokes the United States Supreme Court's decision in *Mullaney v. Wilbur*, 421 U.S. 684 (1975) as support for his argument that the instruction at issue shifted the burden of proof of negating malice. In *Mullaney*, the Court addressed a due process challenge to Maine's homicide law, which provided that all felonious homicides were punishable as murder, unless a defendant could prove by a preponderance of the evidence that the killing had occurred in the heat of passion on sudden provocation, which would reduce the crime to manslaughter. *Mullaney v. Wilbur*, 421 U.S. 684, 692 (1975). The Court determined that this standard "shifted the burden of proof" and "required [the defendant] to prove the critical fact in dispute." *Mullaney*, 421 U.S. at 701. Accordingly, the Court determined that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Mullaney*, 421 U.S. at 704.

Petitioner acknowledges that, unlike *Mullaney*, the instruction at issue did not explicitly put a burden of proof on him. (Pet'r's Br. at 19.) However, he argues that by including "upon sudden provocation and in the heat of passion" as elements to a lesser-included offense where the State was seeking a conviction on a greater offense, the burden of proving those elements shifted to him. (Pet'r's Br. at 18-19.) Petitioner points out that "[t]he State is trying to prove malice" and thus "has no practical interest in trying to prove provocation or passion," because those elements negate malice. (Pet'r's Br. at 19.)

In interpreting a prior burden-shifting challenge relying on *Mullaney*, this Court held that "[a]n instruction which requires the State to prove beyond a reasonable doubt the existence of malice on the part of the defendant at the time of the homicide, cannot be said to unconstitutionally shift the burden of proof on the issue of provocation to the defendant." *State v. Gangwer*, 169 W. Va. at Syl. Pt. 6, 286 S.E.2d at 391.

The instructions in this case, reviewed as a whole, explained that the State bore the burden of proving malice beyond a reasonable doubt. The Circuit Court instructed the jury that "[i]t is the element of malice which forms the critical distinction between murder and voluntary manslaughter. Malice is not an element of voluntary manslaughter." (App. at 627.) The Circuit Court explained second degree murder as "the unlawful, intentional killing of another person with malice but without deliberation or premeditation." (App. at 628.) The Circuit Court then instructed the jury that "[b]efore [Petitioner] can be convicted of murder in the second degree, the State of West Virginia must . . . prove to the satisfaction of the jury each of the following elements beyond a reasonable doubt: that . . . [Petitioner] unlawfully, intentionally, and maliciously killed [the Victim]." (App. at 629.) It added that "[i]f the jury and each member of the jury has a reasonable doubt of the truth of the charge as to any one or more of these elements of Murder in the Second Degree, you shall find [Petitioner] not guilty of Murder in the Second Degree." (App. at 629.)

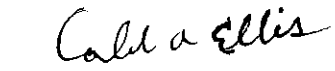
Because the instructions as a whole made clear that the State bore the burden of proof on malice for its second degree murder conviction, under *Gangwer* the inclusion of the "upon sudden provocation and in the heat of passion" language in the voluntary manslaughter instruction did not impermissibly shift the burden of negating malice to Petitioner. Accordingly, Petitioner's second assignment of error is meritless.

VI. CONCLUSION

For the foregoing reasons, this Court should affirm the Circuit Court's February 12, 2018, Sentencing Order.

STATE OF WEST VIRGINIA,
By Counsel.

PATRICK MORRISEY
ATTORNEY GENERAL



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