IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

Supreme Court No.: 21-0943
Case No. 21-F-130, 21-F-156 & 20-B-244
Circuit Court of Fayette County

TIMOTHY MAICHLE,

Defendant Below, Petitioner.

PETITIONER'S REPLY BRIEF

GARY A. COLLIAS
West Virginia State Bar #784
Appellate Counsel
Appellate Advocacy Division
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
(304)558-3905
gary.a.collias@wv.gov

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITITES

Cases

Statutes

Other Authorities

Constitutional Provisions

REPLY ARGUMENT

The response brief of the State is a masterpiece of sophistry. Petitioner will address the State's frivolous arguments one at a time below.

1. THE STATE ASSERTS THE COURT PROPERLY DENIED PETITIONER'S MOTION TO DISMISS INDICTMENT

The State maintains in Section B. of its response that Count Two of the indictment in this case was sufficient and that the circuit court correctly denied the motion to dismiss that count even though it did not allege that the Petitioner acted with "intent to maim, disfigure, disable or kill." Resp. Br. 9. The Petitioner cited five decisions of this Court that were directly on point in support of his argument that Count Two of the indictment was insufficient because it did not allege the essential element of "intent to maim, disfigure, disable or kill." *State v. Combs*, 166 W.Va. 149, 151, 280 S.E.2d 809, 810 (1980); *State v. Stalnaker*, Syl. Pt. 3, 138 W.Va. 30, 41, 76 S.E.2d 906, 912 (1953); *McComas v. Warth,* 113 W.Va. 163, __, 167 S.E. 96, 96-97 (1932, rehearing denied 1933); *State v. Taylor,* Syl. Pt. 3, 105 W.Va. 298, __, 142 S.E. 254, 256 (1928) and *State v. Meadows*, 18 W.Va. 658, 668-69 (1881). The State did not cite, address, or otherwise discuss any of these controlling cases in its response.

In its response the State cites numerous other cases, all of which actually support the Petitioner's position. The State starts with *State v. Miller,* Syl. Pt. 2, 197 W.Va. 588, 476 S.E.2d 535 (1996); *State v. Wallace*, Syl. Pt. 3, 205 W.Va. 155, 517 S.E.2d 20 (1999) and *State v. Johnson,* Syl. Pt. 4, 219 W.Va. 697, 639 S.E.2d 789 (2006). Resp. Br. 9-10. The State correctly cites these cases from the proposition that all indictments must state the elements of the offense charged and it is sufficient if this is done by substantially following the language of the statute. Resp. Br 10. Count Two of the indictment in this case did not state the element of "intent to maim, disfigure, disable or kill," *or* track the statute (W.Va. Code § 61-2-9(a)) which contains

this intent element. These cases support the argument of the Petitioner. When the State asserts that the "indictment substantially follows the statutory language" it is only referring the that first part of the statute that does not contain the essential element of "intent to maim, disfigure, disable of kill." Resp. Br. 11.

Next the State cites *State v. Grimes*, Syl. Pt. 3, 226 W.Va. 411, 701 S.E.2d 449 (2009) and *Barker v. Fox*, 169 W.Va. 749, 238 S.E.2d 235 (1977) for the proposition that since there is no allegation of willful, intentional fraud Count Two of the indictment is sufficient. Resp. Br. 11. These cases however deal with intentional and willful fraud during the *grand jury testimony and proceeding itself*, not alleged deficiencies in the wording of the indictment. They have no application to the issue in this appeal.

In its continuing attempt to avoid dealing with the on point authorities decided by this Court and relied upon by the Petitioner the State argues that the so-called statute of "jeofails" controls in this case. Resp. Br. 11. A "jeofail" is defined as a "pleading error or oversight...." Black's Law Dictionary (9th ed. 2009). This statute reads as follows:

> Judgment in any criminal case, after a verdict, shall not be arrested or reversed upon any exception to the indictment or other accusation, if the offense be charged therein with sufficient certainty for judgment to be given thereon, according to the very right of the case.

W.Va. Code § 62-2-11. First, the jeofails statute, as a mere statute, cannot answer the question of whether an indictment is sufficient under our State or federal constitutions. Second, by its plain wording this statute only begs the question of whether a particular indictment has "sufficient certainty." That question can only be answered by the constitutional provisions themselves as interpretated by case law. Apparently, the State understanding this, cited these cases in an attempt to support its jeofails argument that somehow Count Two of the indictment in this case was sufficient. The cases are *State v. Chic-Colbert*, 231 W.Va. 749, 760, 749 S.E.2d

642, 653 (2013); *State v. Casdorph,* 159 W.Va. 909, 912, 230 S.E.2d 476, 479 (1976) and *State v. Wallace*, 205 W.Va. at 161, 517 S.E.2d at 26. Resp. Br. 11-12. Ironically, not only do these cases not support the position of the State since they hold that the jeofails statute is intended to apply only to a "technical defect," not the complete lack of an essential element, but all three cases unequivocally hold that all indictments must state the elements of the offense charged *or* substantially follow the language of the statute. *Chic-Colbert,* Syl. Pts. 5 and 7, 231 W.Va. at 760, 749 S.E.2d at 653; *Wallace,* Syl. Pt. 6, 205 W.Va. at 159-60, 517 S.E.2d at 24-25 and *Casdorph*, Syl. Pt. 1, 159 W.Va. at 912, 230 S.E.2d at 479. The indictment below did not state all the elements or track the statute. A.R. 609. Notwithstanding this fact, the response states that the Petitioner's indictment contained "all of the elements the State was charging against him." Resp. Br. 12. If that is true then the Petitioner was not charged with the felony of malicious assault.

Finally, the response of the State claims that the trial "jury in this matter was apprised of all of the elements Petitioner alleges comprise the crime of malicious assault." Resp. Br. 12. Specifically, the State asserts that the circuit court instructed the jury that the "intent to maim, disfigure, disable or kill" was an element of malicious assault, and that thus the trial jury, as well as Petitioner, were sufficiently apprised of the crime of which the Petitioner was accused. Resp. Br. 12. There are two problems with this argument. First it is misleading, deceptive and taken out of context. While the trial court did read the statutory language to the petit jury as quoted in the response, in the very next paragraph the judge stated that in this *particular case*, as the Count Two, the jury did not have to find that the Petitioner had the "intent to maim, disfigure, disable or kill." The instruction was as follows:

> To prove the commission of malicious assault, as charged in Count Two of the indictment, the State must prove beyond a reasonable doubt the following

> elements; that the Defendant, Timothy R. Maichle, in Fayette County, West Virginia, on or about the 9th day of September, 22020, did unlawfully, intentionally, feloniously and maliciously, wound Amanda Maichle, by pushing her from a moving motor vehicle.

A.R. 515. Nowhere to be seen is the" intent to maim, disable. disfigure or kill" in the trial court's actual instruction on Count Two of the indictment. In fact, this instruction, without the element of "intent to maim, disfigure, disable or kill," was given by the judge to the trial jury over the objection of the Petitioner's counsel. A.R. 488-95, 514-16, 643-646. The petit jury was improperly instructed. Second, and more importantly, even if the court below gave the correct instruction, which it did not, it would not cure the *per se* reversible constitutional error. Pet. Br 16-18. *State v. Corra*, Syl. Pt. 7, 223 W.Va. 573, 582-83, 678 S.E.2d 306, 315-16 (2009) and *State v. Miller*, 197 W.Va. 588, 599-600, 476 S.E.2d 535, 546-47 (1996). The Petitioner was convicted in Count Two of a crime for which he was never indicted. Indictments that do not substantially track the statute and do not list essential elements are constitutionally deficient. In the present case the Petitioner gave the circuit court and the prosecutor multiple opportunities to remedy this problem by simply reindicting the Petitioner on Count Two.

2. THE STATE'S DISCUSSION OF *STATE V. JOHNSON*

In Section C. of the State's brief there is a lengthy discussion of *State v. Johnson*, 219 W.Va. 697, 639 S.E.2d 789 (2006). Resp. Br. 12-13. The State addresses an argument that the Petitioner did not make, that is, that a defect in an indictment is jurisdictional. The Petitioner does rely on the *Johnson* case, but only for the standard of review (Pet. Br. 6) and for the proposition that [i]n order to lawfully charge an accused with a particular crime it is imperative that the essential elements of the crime be alleged in the indictment." *Id.* at Syl. Pt. 3. Pet. Br. 16. Numerous other cases are cited by the Petitioner for this rule of law. Pet. Br. 16. Finally, the State argues that Count Two of the indictment is somehow sufficient since it "certainly

charges an offense." Resp. Br. 13. The problem is that it is not the felony offense of which the Petitioner was convicted.

3. THE GRAMMATICAL ARGUMENT OF THE STATE

In Section D. of its response brief the State argues that based on general rules of grammar the offense of malicious assault may be committed in two ways as held by the court below; one that requires the "intent to maim, disfigure, disable or kill," and one that only requires that the victim receive a wound. Resp. Br. 14-15. As a matter of grammar, the State has only established that there may be some ambiguity in the first sentence of the malicious assault statute. In that case the Petitioner still prevails under the rule of lenity that provides that ambiguous penal statutes are to be read in favor of the accused. *State v. Connor,* 244 W.Va. 594, 602, 855 S.E.2d 902, 910 (2021); *State v. A.D.*, Syl. Pt. 4, 242 W.Va. 536, 836 S.E.2d 503 (2019) and *State v, Fuller,* Syl. Pt. 1, 239 W.Va. 203, 800 S.E.2d 241 (2017). This Court however does not need to depend on such a rule of construction to decide this case. The second sentence of W.Va. Code § 61-2-9(a) answers this question by providing the lesser included offense of unlawful assault requires the "intent aforesaid." This is a reference to the "intent to maim, disfigure, disable or kill" contained in the previous sentence, that the State asserts provides that malicious assault can be committed in two ways. The lesser included offense of unlawful assault includes the element of "intent to maim, disfigure, disable or kill." But since it is a lesser included offense, it cannot have any elements that the great offense of malicious assault does not have. Therefore, malicious assault must include the element of "intent to maim, disfigure, disable or kill." This is explained in greater detail in Petitioner's brief at pages 8-9. Finally, the State once again ignores that fact that this Court has decided five cases, spanning from 1881 to 1980, that are directly on point and rule unequivocally that the "intent to maim, disfigure, disable or kill" is an essential element of malicious assault charges. See citations on page 1 of this reply.

4. THE STATE MISINTERPRETS CASES IN ATTEMPT TO SUPPORT ITS ARGUMENT

In Section E. of its response the State relies on the cases of *State v. Daniel*, 144 W.Va. 551, 554, 109 S.E.2d 32, 34 (1959) and *State v. Gibson*, 67 W.Va. 548, 68 S.E. 295, 296 (1910) that have nothing to do with the issue in this case. The *Daniel* and *Gibson* cases stand for the proposition that malicious assault may be committed by inflicting either a "wound" or "bodily injury" on the victim. *Daniel,* 144 W.Va. at 554-55, 109 S.E.2d at 34; *Gibson*, 68 S.E. at 295-96. That is true. But has nothing whatsoever to do with whether malicious assault may be committed without the "intent to maim, disfigure, disable or kill." The *Daniel* case actually supports the Petitioner's position in this appeal. The *Daniel* Court held that the only difference between unlawful assault and malicious assault is unlawful wounding is done without malice. *Daniel,* 144 W.Va. at 554, 109 S.E.2d at 34 That is exactly right. Both require the "intent to maim, disfigure, disable or kill," but only malicious assault requires malice. See Petitioner's brief pages 8-9.

5. THE STATE MISAPPLIES RULES OF CONSTRUCTION

In Section F. of its response the State makes the inane argument that since subsection (b) of W.Va. Code sec 61-2-9 provides that misdemeanor assault may be committed by either an attempt to commit a violent injury *or* by an unlawful act that places another in reason apprehension of immediately receiving a violent injury, that somehow it means that the felony of malicious assault, provided for in the preceding subsection (a), does not require the element of "intent to maim, disfigure, disable or kill." Resp. Br. 16-19. This argument does not merit further response other than to point out that contrary to the State's assertion that the Petitioner's position leads to an absurdity, it is the State's position that is absurd. If the State's view of the elements of malicious assault is a correct statement of the law it would mean the anyone who

maliciously wounds another is guilty of a felony, no matter how slight the wound. That means every time two people get in a fight and someone is cut or otherwise wounded it is a felony. The Legislature clearly intended that it is the "intent to maim, disfigure, disable or kill" that separates the felony from the misdemeanor.

6. THE STATE'S BATTERY ARGUMENT

In Section G. of the State's response, it argues that Count Two of the indictment in this case does not allege all of the exact elements of misdemeanor battery as the State claims the Petitioner asserts. The State misunderstands the Petitioner's argument with regard to battery made at page 17 of Petitioner's brief. The Petitioner's point is that as alleged in Count Two the described conduct could be no *more than battery*. And that is true. To simply maliciously wound a person is no more than battery. But even that is not the real point. The real point is that it is not the felony of malicious assault.

7. THE STOCK JURY INSTRUCTIONS SUPPORT PETITIONER

In Section H. of its response the State attempts to explain to this Court why it should give no consideration to the fact that both the West Virginia Prosecuting Attorneys Institute and West Virginia's Public Defender Services provide in their stock jury instructions that the "intent to maim, disfigure, disable or kill" is an essential element in all malicious assault cases. The Petitioner is aware that this Court is not bound by these instructions. The Petitioner referenced these instructions so the Court would know that attorneys throughout West Virginia, both prosecutors and defense attorneys, understand the "intent to maim, disfigure, disable or kill" to be an essential element of malicious assault. This understanding is reasonable and to be expected since five decisions of this Court hold that it is an essential element. See citations on page one of this reply.

8. THE LAST REFUGE OF THE STATE: HARMLESS ERROR

In Section I. of its response the State retreats to its last resort, arguing harmless error. The State's argument is subtlety deceptive. First, the State seems to argue that under federal law omissions of an essential element in an indictment are subject to a harmless error review. Resp. Br. 20. But the State does not actually say that this is the federal law. And for good reason. First, there is no U.S. Supreme Court case that supports the State's position. Second, most of the cases cited by the State are based solely upon the indictment clause of the 5th Amendment which has not been incorporated against the states and therefore does not apply to state indictments. See for example these cases cited by the State: *U.S. v. Stevenson*, 832 F.3d 412, 427 (3d Cir. 2016); *U.S. v. Allen,* 406 F.3d 940, 945 (8th Cir. 2005); *U.S. v. Robinson*, 367 F.3d 278 (5th Cir. 2004); *U.S. v. Higgs*, 353 F.3d 281, 304 (4th Cir. 2003) and *U.S. v. Prentiss,* 256 F3d 971, 981 (10th Cir. 2001). Third, at least one federal circuit holds that an indictment's failure to recite an essential element is not subject to harmless error analysis. *U.S. v. Omer*, 395 F.3d 1087 (9th Cir. 2004). Finally, there is a U.S. Supreme Court case that holds that an indictment must contain the elements of the offense intended to be charged. *Russell v. U.S.,* 369 U.S. 749, 763-65 (1962). The *Russell* decision is based upon not only the 5th Amendment indictment clause, but also the 5th Amendment due process clause and the 6th Amendment nature and cause of the accusation clause, that have been incorporated against the states through the 14th Amendment. *Russell*, 369 U.S. at 760-61. Therefore, to the extent there is binding U.S. Supreme Court authority on this issue it supports the Petitioner's argument.

Next the State misleadingly cites *State ex rel. Thompson v. Watkins,* 200 W.Va. 214, 218, 488 S.E.2d 894, 898 (1997) in support of the statement that "this Court has applied a harmless error test to indictments with omissions." Resp. Br. 20. This is true. What the State does not say is that in the *Watkins* case the defendant *did not make a timely objection* to the omission and

the omission only involved leaving the word "burglary" out of the indictment and not as in the present case omitting an entire essential element. *Watkins*, Syl. Pt. 3, 200 W.Va. at 218, 488 S.E.2d at 898. In the present case the Petitioner did make a timely motion to dismiss Count Two of the indictment. A.R. 612.

The State further asserts that the operative test is whether the Petitioner was deprived of any constitutional rights or whether he can demonstrate prejudice. Resp. Br. 20-21. The Petitioner can demonstrate both. This Court has held "that a fundamental principle stemming from Section 5 of Article III of the *West Virginia Constitution* is that a criminal defendant only can be convicted of a crime in the indictment." *State v. Miller,* 197 W.Va. 588, 599-600, 476 S.E.2d 535, 546-47 (1996). "When a defendant is charged with a crime in an indictment, but the State convicts the defendant of a charge not included in the indictment, then *per se* error has occurred, and the conviction cannot stand and must be reversed." *State v. Corra*, Syl. Pt. 7, 223 W.Va. 573, 678 S.E.2d 306 (2009). This is also federal law. Stirone v. U.S., 80 U.S. 270, 217 (1960). Count Two of the indictment alleges nothing more than simple battery, since it lacks the intent element that makes it a felony, that is, the "intent to maim, disfigure, disable or kill." A.R. 609. But the Petitioner was convicted of felony malicious assault. This error and omission is of constitutional dimensions, both under the *Miller* and *Corra* West Virginia cases and as a matter of federal constitutional law under *Russell.* In the Petitioner's brief he argues that this case involves *per se* reversable error and relies primarily on the *Corra* case. The State in its response does not even cite or discuss *Corra*. The law is clear however that the deficiency in the indictment in this case is not subject to harmless error analysis but is *per se* reversible error.

Even if the deficiency in the indictment in this case were subject to harmless error analysis, it could hardly be harmless error to indict, try, convict and sentence a defendant for a

felony based on an indictment that alleges at most a misdemeanor. Furthermore, since the trial jury was improperly instructed, over the objection of the Petitioner, that it need not find that the accused possessed the "intent to maim, disfigure, disable or kill," the indictment error contaminated the trial itself and clearly prejudiced the Petitioner. A.R. 488-95, 514-16, 643-46. Not only did the indictment not include this essential element, the trial jury was not told that element even existed as to Court Two. That is prejudice and it is not harmless.

CONCLUSION

This appeal could not be more straight forward. Count Two of the indictment left out the essential element of "intent to maim, disfigure, disable or kill." A hundred years of case law of this Court supports the fact that this is an essential element. The State did not bother to cite or address any of these directly on point cases in its response. The case law is likewise clear that an indictment must contain all of the essential elements of an offense in order to be sufficient. Nothing cited by the State is contrary to this fundamental principle. Petitioner's motion to dismiss Count Two gave the trial court and the prosecution multiple opportunities to correct this deficiency prior to trial.

As a last resort the State argues for harmless error in two short paragraphs at the end of its response. Resp. Br. 20-21. The Petitioner relied on the *State v. Corra* and *State v. Miller, supra*, in his opening brief for the proposition that this was *per se* reversible error. Pet. Br. 17. The State did not even cite or address *Corra* or *Miller* in the harmless error section of its response. Resp. Br. 20-21. Instead, the State only sought to distract this Court from these on point West Virginia cases. Finally, even if harmless error analysis is applied to this case, it was not harmless error to indict, try, convict and sentence the Petitioner for a felony based on an indictment that only alleges a misdemeanor. This is especially true since the trial jury, over the

objection of the Petitioner, was instructed it need not find "intent to maim, disfigure, disable or kill" in order to convict the Petitioner of the Count Two malicious assault charge. A.R. 488-95, 515. The instructions to the jury and the guilty verdict did not "cure" the indictment deficiency. If this Court were to adopt the position of the State as the law of West Virginia it would mean that the indictment would cease to matter at all. If an indictment missing one essential element is sufficient, then an indictment missing two or three elements could also be sufficient. This cannot be right. An indictment has to more than just a piece of paper with the word "Indictment" at the top.

Accordingly, and in light of the fact that the issue on appeal was preserved by timely motion and this case has a *de novo* standard of review, this Court should reverse, set aside and void the Petitioner's indictment and conviction for malicious assault and remand this case to the circuit court for further action consistent with this Court's order. The Petitioner does not seek to have this Court disturb or reverse the Petitioner's convictions and sentences for third offense domestic battery or attempted second degree murder.

Respectfully Submitted,
TIMOTHY R. MAICHLE
By Counsel

GARY A. COLLIAS
West Virginia State Bar #784
Appellate Counsel
Appellate Advocacy Division
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
(304)558-3905
gary.a.collias@wv.gov

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Gary A. Collias, counsel for Petitioner, Timothy Maichle, do hereby certify that I have caused to be served upon counsel of record in this matter a true and correct copy of the accompanying *"Petitioner's Reply Brief"* and to the following:

Andrea Nease-Proper
Assistant Attorney General
Appellate Division
Office of the Attorney General
1900 Kanawha Boulevard East
State Capitol, Building 6, Suite 406
Charleston, WV 25305

Counsel for Respondent

via hand-delivery on the 23rd day of May, 2022.

GARY A. COLLIAS
West Virginia State Bar #784
Appellate Counsel
Appellate Advocacy Division
Public Defender Services
One Players Club Drive, Suite 301
Charleston, WV 25311
(304)558-3905
gary.a.collias@wv.gov

Counsel for Petitioner