FILED
September 16, 2025
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

v.) No. 23-385 (Berkeley County CC-02-2022-F-137)

Harold Rue,
Defendant Below, Petitioner

MEMORANDUM DECISION

Petitioner Harold Rue appeals his trial convictions for first-degree murder and use of a firearm during the commission of a felony and the sentences for those convictions, as set forth in the Circuit Court of Berkeley County's June 13, 2023, sentencing order.[1] On appeal, the petitioner argues that the court committed various errors when instructing the jury. Upon our review, finding no substantial question of law and no prejudicial error, we determine oral argument is unnecessary and that a memorandum decision affirming the petitioner's conviction is appropriate. *See* W. Va. R. App. P. 21(c).

The petitioner was indicted for felony possession of a firearm,[2] use of a firearm during the commission of a felony, and first-degree murder. At trial, the State presented evidence that a resident of a housing development near Interstate 81 in Berkeley County called 9-1-1 to report that she heard "two loud pops coming from the interstate" and observed one man lying on the ground on the side of the road and another man in a black hoodie standing over him. The caller also reported that she saw the man in the black hoodie searching the pockets of the man who was lying on the ground. Other witnesses who called 9-1-1 reported what they believed to be a shooting on the side of the interstate and described a black male who drove away from the scene in a maroon truck with an orange trailer. Police in Carlisle, Pennsylvania, stopped a truck driven by the petitioner that matched this description and took the petitioner into custody.

[1] The petitioner appears by counsel Jason T. Gain. The State appears by Attorney General John B. McCuskey and Deputy Attorney General Andrea Nease Proper. Because a new Attorney General took office while this appeal was pending, his name has been substituted as counsel.

[2] At a status hearing prior to trial, the petitioner pled guilty, without a plea agreement, to felony possession of a firearm. The petitioner does not appeal his conviction or sentence for felony possession of a firearm.

Lieutenant William Christian and Captain Brendan Hall of the Berkeley County Sheriff's Department arrived at the police barracks in Carlisle and questioned the petitioner. The petitioner acknowledged that he was involved in an altercation but claimed that he acted in self-defense. The petitioner explained that the victim was driving in an erratic manner for several miles before pulling off to the side of the interstate, and the petitioner stopped behind the victim. Both drivers exited their vehicles and came face-to-face on the side of the road. The petitioner brought a shotgun to the confrontation and claimed that the victim first swung a knife at him, and then he hit the victim with his shotgun. The petitioner further stated that when he hit the victim, he stumbled and accidentally shot him.[3] The petitioner also admitted that he took the victim's wallet and left him on the side of the road without calling 9-1-1 or otherwise seeking assistance. The jury watched a video recording of the petitioner's interview with police.

The police searched the petitioner's truck and found a gold bracelet belonging to the victim, a pump action shotgun, one spent shell casing, and the broken fore-end of the shotgun. While unloading the shotgun, police noticed there was a second fired shell casing in the firearm. The autopsy revealed that the victim's cause of death was a "shotgun wound to the chest," and the manner of death was determined to be "homicide." Further, the State presented evidence that the petitioner's claim that he accidentally fired two rounds from the gun was belied by the type of shotgun involved, which required the petitioner to manually eject the first shell casing and chamber the second live round before firing again. The petitioner did not testify or present evidence.

At the jury instruction conference, the petitioner objected to instructing the jury that an initial aggressor cannot claim self-defense unless he first withdraws from combat and gives notice that he has done so. *See State v. Brooks*, 214 W. Va. 562, 567, 591 S.E.2d 120, 125 (2003) (opining that "[i]f a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it, and gives notice that he has done so" (quoting 6 Am. Jur. 2d *Assault and Battery* § 62 (1999))). The petitioner objected on the basis that this instruction presupposed that he was the initial aggressor, but the circuit court overruled this objection because the State presented evidence that the petitioner stopped behind the victim's truck on the side of the road and exited his vehicle with a shotgun. The circuit court disagreed, stating that the instruction simply described the conditions under which an initial aggressor may invoke self-defense. The court also pointed out that, although the victim had a knife when the petitioner encountered him, the petitioner did not know the victim had a weapon when he parked behind his truck and got out with a shotgun. The petitioner raised no other objections during the jury instruction conference.

After deliberation, the jury found the petitioner guilty of first-degree murder with a recommendation of no mercy, and guilty of using a firearm during the commission of a felony. The circuit court consecutively sentenced the petitioner to life imprisonment without parole for first-degree murder, ten years of imprisonment for use of a firearm during the commission of a felony, and five years of imprisonment for felony possession of a firearm.

[3] The petitioner stated that he fired the shotgun twice, but he did not hit the victim with the first shot.

On appeal, the petitioner argues that the circuit court erred by failing to properly instruct the jury on felony murder, self-defense, and voluntary manslaughter. The petitioner contends that the felony murder instruction was erroneous because it failed to inform the jury that he could not be convicted of felony murder if the underlying robbery was a "crime of opportunity" that occurred after the homicide. The petitioner also argues that the self-defense instruction was erroneous because 1) it did not inform the jury that he had no duty to retreat if he was not the initial aggressor, and 2) it did not inform the jury that it should acquit if the petitioner was "ultimately mistaken in his belief that lethal self-defense was necessary."

The petitioner claims that the court erred by overruling his objection to the self-defense instruction.[4] The petitioner does not argue that the self-defense instruction was legally incorrect, but he submits that it could have been stated in a more favorable way. We have held that

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

Syl. Pt. 4, in part, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). Regarding self-defense, this Court has held that

> "'[w]hen one without fault himself is attacked by another in such a manner or under such circumstances as to furnish reasonable grounds for apprehending a design to take away his life, or to do him some great bodily harm, and there is reasonable grounds for believing the danger imminent, that such design will be accomplished, and the person assaulted has reasonable ground to believe, and does believe, such danger is imminent, he may act upon such appearances and without retreating, kill his assailant, if he has reasonable grounds to believe, and does believe, that such killing is necessary in order to avoid the apparent danger; and the killing under such circumstances is excusable, although it may afterwards turn out, that the appearances were false, and that there was in fact neither design to do him some serious injury nor danger, that it would be done. But of all this the jury must judge from all the evidence and circumstances of the case.' Syl. Pt. 7, *State v. Cain*, 20 W. Va. 679 (1882)."

Syl. Pt. 4, *State v. Dinger*, 218 W. Va. 225, 624 S.E.2d 572 (2005). Upon our review of the record, it appears that the self-defense instruction reflected a correct statement of the law and was

[4] Although the petitioner did not precisely object on the grounds that he pursues on appeal, we will liberally construe his objection to the self-defense instruction in this case.

supported by the evidence adduced at trial.[5] After reviewing the self-defense instruction as a whole, we conclude that the court did not abuse its discretion when it overruled the petitioner's objection.

The petitioner also argues that the circuit court erred when it failed to instruct the jury that it could not convict on a felony murder theory if it found that the underlying robbery occurred as a "crime of opportunity" after the homicide took place, and that voluntary manslaughter instruction was erroneous because it did not state that provocation and heat of passion are states of mind that could eliminate the element of malice in a murder charge.

"The 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 (1982); *accord* Syl. Pt. 6, in part, *State v. Angel*, 154 W. Va. 615, 177 S.E.2d 562 (1970) (holding that "to have objections to instructions considered on appeal it is necessary . . . to state distinctly the matter to which he objects and the ground for his objection in the trial court."); W. Va. R. Crim. P. 30 (providing that "[n]o party may assign as error the giving or the refusal to give an instruction . . . unless that party objects thereto before the arguments to the jury are begun, stating distinctly the matter to which that party objects and the grounds of the objection"). Here, the petitioner concedes that he did not timely object to the circuit court's jury instructions for felony-murder or voluntary manslaughter. Thus, we conclude that he waived these objections.

The petitioner also asks this Court to review these issues for plain error. "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. Pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Regarding allegations of plain error in jury instructions, "this Court will not ordinarily recognize plain error under such circumstances, even of constitutional magnitude, where the giving of the erroneous instruction did not substantially impair the truth-finding function of the trial." Syl. Pt. 2, in part, *State v. Hutchinson*, 176 W. Va. 172, 342 S.E.2d 138 (1986).

The petitioner argues that the circuit court should have instructed the jury that "[t]he mere coincidence of homicide and felony is not enough to satisfy the requirements of the felony-murder doctrine" because the robbery of the victim was a crime of opportunity that occurred after he shot the victim. *See State ex rel. Painter v. Zakaib*, 186 W. Va. 82, 83, 411 S.E.2d 25, 26 (1991). But the jury verdict form did not, and was not required to, distinguish between willful, deliberate, premediated murder and felony murder, and the petitioner does not argue that the first-degree murder jury instruction was erroneous. *See* Syl. Pt. 5, in part, *Stuckey v. Trent*, 202 W. Va. 498, 505 S.E.2d 417 (1998) (holding that the State may propound alternate theories of first-degree

[5] In relevant part, the self-defense instruction informed the jury that the petitioner could invoke self-defense if he was not the aggressor and if he "had reasonable grounds to believe, and actually did believe that he was in imminent danger of death or serious bodily injury from which he or she could save himself only by using deadly force[.]" This instruction further informed the jury that an aggressor cannot invoke self-defense "unless he or she in good faith first withdraws from combat at a time and in a manner to let the other person know that he or she is withdrawing, or intends to withdraw, from further aggressive action."

murder "provided that the two theories are distinguished for the jury through court instructions[,]" and that due process does not require the jury verdict form to distinguish between the theories). Because it is unknown whether the jury convicted the petitioner under a felony murder theory or a willful, deliberate, premeditated murder theory, he has not demonstrated that this instruction either affected his substantial rights or substantially impaired the truth-finding function of the trial, and we decline to apply the plain error doctrine to this issue.

Finally, the petitioner argues that the circuit court's voluntary manslaughter jury instruction was erroneous because it did not state that "acting in the heat of passion arising from sudden provocation was 'the single most important factor in determining the degree of culpability attaching to an unlawful homicide[.]'" *See State v. Starkey*, 161 W. Va. 517, 526-27, 244 S.E.2d 219, 225 (1978), *overruled on other grounds by* Syl. Pt. 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995). But after *Starkey* was decided, we held that "[g]ross 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." Syl. Pt. 3, *State v. McGuire*, 200 W. Va. 823, 490 S.E.2d 912 (1997). Thus, the petitioner's requested instruction is not an accurate statement of the law of voluntary manslaughter, and he has not demonstrated error. Accordingly, we decline to apply the plain error doctrine to this alleged error.

For the reasons stated, we affirm.

Affirmed.

ISSUED: September 16, 2025

CONCURRED IN BY:

Chief Justice William R. Wooton
Justice C. Haley Bunn
Justice Charles S. Trump IV
Justice Thomas H. Ewing
Senior Status Justice John A. Hutchison