IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2007 Term

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 33191

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee,

V.

WADE C. DAVIS,
Defendant Below, Appellant.

Appeal from the Circuit Court of Kanawha County
Honorable James C. Stucky, Judge
Criminal Action No. 04-F-3

REVERSED AND REMANDED

Submitted: March 13, 2007
Filed: April 5, 2007

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The Opinion of the Court was delivered PER CURIAM.

JUSTICES MAYNARD and BENJAMIN dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. "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." Syllabus point 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995).

2. "The trial court must instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error." Syllabus, *State v. Miller*, 184 W. Va. 367, 400 S.E.2d 611 (1990).

Per Curiam:

Wade C. Davis appeals from an order of the Circuit Court of Kanawha County sentencing him to a term of ten years imprisonment after a jury convicted him of second degree murder. Here, Mr. Davis argues that the circuit court committed reversible error by failing to instruct the jury that "intent" is an element of second degree murder. After a careful review of the briefs and record, we reverse and remand this case for a new trial.

I.

FACTUAL AND PROCEDURAL HISTORY

Around 11:45 p.m. on March 17, 2003, Mr. Davis pulled into a Go-Mart parking lot in Sissonville, West Virginia, to purchase gas for his vehicle. Mr. Davis had two companions with him, Todd Robins and Matt Hensley. Mr. Davis attempted to put gas in his vehicle but the pump was not turned on. Mr. Davis yelled to Mr. Hensley as he walked toward the store, "Tell them to turn the f—ing pumps on, please." At the time that Mr. Davis yelled, three other patrons were present, Eddie Lattea, his son Michael Lattea, and Donald Shaffer. The events that occurred after Mr. Davis yelled to Mr. Hensley were contested at trial.[1]

Either Eddie or Michael yelled out to Mr. Davis that "You have to pay for it

[1]As a result of the facts being hotly contested on every issue, and the necessity of a new trial, our review of the facts will be in summary fashion.

first you dumb mother f—."[2] Heated words were thereafter exchanged between Mr. Davis and Michael or Eddie. According to the testimony of Mr. Davis, he was attacked by Eddie, Michael and Donald. Mr. Davis procured a knife in an attempt to defend himself. During the altercation, Mr. Davis stabbed Eddie once in the back. Mr. Davis also stabbed Michael twice in the chest and twice in the head. Michael died as a result of the wounds.

Mr. Davis was subsequently indicted for murder in the first degree and malicious wounding. The trial began on December 6, 2004, and was conducted before a jury. Mr. Davis testified during the trial and explained his actions during the altercation as being in self-defense. He further testified that the killing was not intentional. During jury deliberations the jury asked the court, *on three separate occasions*, to respond to a question. The last note sent to the trial court asked the court to verify (1) whether second degree murder was with malice and unlawful, but without intent and (2) whether voluntary manslaughter was without malice, but with intent.[3] The circuit court responded to the question by reading to the jury its previous instructions on the elements of second degree murder and voluntary manslaughter. Thereafter, the jury returned with a verdict of guilty of second degree murder and not guilty of malicious wounding. Mr. Davis filed a post-trial motion seeking an acquittal or a new trial on the grounds that the court failed to properly

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[2]Mr. Davis testified that Michael made the statement. However, Eddie testified that he had made the statement.

[3]The other two questions posed by the jury are not at issue in this appeal.

instruct the jury that "intent" was an element of second degree murder. The motion was denied without a hearing. This appeal followed.

II.

STANDARD OF REVIEW

The only substantive issue presented in this appeal is whether the trial court properly responded to the jury's question on the difference between second degree murder and voluntary manslaughter.[4] In *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), we stated that in addressing the issue of a trial court's instruction to the jury, "[t]he basis of the objection determines the appropriate standard of review." *Guthrie*, 194 W. Va. at 671, 461 S.E.2d at 177. It was said in *Guthrie* that "if 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." *Id*. On the other hand, a "trial court has discretion in determining how best to respond to a jury question. We will review any such response for an abuse of discretion." *People v. Sanders*, 857 N.E.2d 948, 952 (Ill. App. Ct. 2006).

[4]We have construed Mr. Davis' assignment of error in two ways. First, he appears to contend that the trial court gave improper instructions on second degree murder in the initial charge to the jury. Second, he contends that in the trial court's response to the jury's last question, the court failed to inform the jury that intent was an element of second degree murder. We have reviewed the initial charge and find that those instructions properly outlined the law with respect to the elements of each offense of which Mr. Davis could have been convicted. We reject Mr. Davis' argument regarding the initial charge. It is Mr. Davis' second contention that has merit, and therefore, it will be fully examined.

III.

ARGUMENT

Mr. Davis did not object to the manner in which the trial court responded to the jury's last question until after the jury had returned its verdict. The State contends that because there was no timely objection, the issue was waived. This Court has held that "where a party does not make a clear, specific objection at trial to the charge that he challenges as erroneous, he forfeits his right to appeal unless the issue is so fundamental and prejudicial as to constitute 'plain error.'" *Guthrie*, 194 W. Va. at 671 n.13, 461 S.E.2d at 177 n.13. Rule 30 of the West Virginia Rules of Criminal Procedure provides that "any appellate court may, in the interest of justice, notice plain error in the giving . . . [of] an instruction, whether or not it has been made the subject of objection." *See* W. Va. R. Crim. P. 52 (defining harmless error and plain error). Thus, we have noted that, "[a]s a general proposition, this Court has discretionary authority to consider the legality and sufficiency of the trial court's charge under the plain error doctrine." *State v. Miller*, 194 W. Va. 3, 18, 459 S.E.2d 114, 129 (1995) (citations omitted).[5]

Mr. Davis argues that the issue raised by him should be addressed by this Court under the plain error doctrine. We agree. *See State v. Barker*, 176 W. Va. 553, 558, 346

[5]*Miller* made clear that "in West Virginia criminal cases[,] the sole bases for attacking an unobjected to jury charge are plain error and/or ineffective assistance of counsel." *Miller*, 194 W. Va. at 17 n.23, 459 S.E.2d at 128 n.23.

S.E.2d 344, 349 (1986) ("Failure to afford a criminal defendant the fundamental right to have the jury instructed on all essential elements of the offense charged has been recognized as plain error."). *See also Smith v. United States*, 549 A.2d 1119, 1123 (D.C. Ct. App. 1988) ("This ambiguous [supplemental] instruction coupled with the jury verdict returned shortly thereafter makes it clear to us that the conviction . . . is infected with plain error on a constitutional issue."); *Commonwealth v. Johnson*, 754 N.E.2d 685, 692 (Mass. 2001) ("Objections to these errors in the instructions on malice were not properly preserved. . . . Therefore, our review is limited to whether the error created a substantial likelihood of a miscarriage of justice. We conclude that the error did create a substantial likelihood of a miscarriage of justice."); *State v. Harmon*, 516 A.2d 1047, 1060 (N.J. 1986) ("It must be determined, then, whether the [supplemental] charge constituted plain error since there was no objection interposed by defendant to the recitation of these charges in this case."); *People v. Carnegie*, 425 N.Y.S.2d 39, 40 (1980) ("Although the defendant's counsel did not object [to the supplemental instruction], we think that in the context of this case, the interest of justice requires that the judgment be reversed and a new trial ordered.").

In Syllabus point 7 of *Miller* we set out the elements of the plain error doctrine as follows:

> 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, *Miller*. 194 W. Va. 3, 459 S.E.2d 114. We will address each element of the plain error doctrine separately.

1. There was an error. The first issue we must address is whether or not an error occurred in the trial court's response to the last question submitted by the jury. The last note sent to the trial court asked for clarification as follows:

> Can you please verify the following: Is 2nd degree with malice and unlawful *without intent* and voluntary manslaughter without malice and *with intent* in the heat of passion. Please verify the with and without intent.

(Emphasis in original). The trial court responded to the jury's question by calling the jury back into the courtroom and reading the following instructions on second degree murder and voluntary manslaughter:

> Before Wade C. Davis can be found guilty of the offense of murder in the second degree . . . the State must overcome his presumption of innocence and prove to your satisfaction, beyond a reasonable doubt, that:
>
> Wade C. Davis . . . did unlawfully and maliciously, but without deliberation or premeditation, kill Michael Allen Lattea.
>
> . . . .
>
> Voluntary manslaughter is a sudden intentional killing upon gross provocation and in the heat of passion.
>
> Voluntary manslaughter is committed when any person intentionally and unlawfully kills another person without malice but under excitement and heat of passion.

> Before Wade C. Davis can be convicted of voluntary manslaughter . . . the State of West Virginia must overcome the presumption that he is innocent and prove, beyond a reasonable doubt, that:
>
> Wade C. Davis . . . did intentionally and unlawfully, without malice, deliberation or premeditation, but under sudden excitement and heat of passion, kill Michael Allen Lattea.

Mr. Davis contends that the instruction on second degree murder is inaccurate because it omitted the element of intent. We disagree. The instruction is correct insofar as our case law has indicated that the terms malice and intent may be used interchangeably.[6] That is, an instruction that properly defines malice will supply information regarding intent. *See People v. Goecke*, 579 N.W.2d 868, 878 (Mich. 1998) ("Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or

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[6]On this point,

> [W]e discussed the concept of malice in *State v. Hatfield*, 169 W. Va. 191, 198, 286 S.E.2d 402, 407 (1982), and stated that it "'is often used as a substitute for specific intent [to] kill or an intentional killing. We then concluded in *Hatfield*: "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." 169 W. Va. at 198, 286 S.E.2d at 407-08.

State v. Jenkins, 191 W. Va. 87, 92, 443 S.E.2d 244, 249 (1994). (internal quotations and citation omitted) (footnotes omitted).

great bodily harm."). In this case, the trial court's definition of malice in its initial charge properly addressed the issue of intent for first degree murder and second degree murder. *See* Syl. pt. 6, *State v. Milam*, 159 W. Va. 691, 226 S.E.2d 433 (1976) ("When instructions are read as a whole and adequately advise the jury of all necessary elements for their consideration, the fact that a single instruction is incomplete or lacks a particular element will not constitute grounds for disturbing a jury verdict.").

Even though the trial court's initial charge to the jury properly defined malice so as to include the requirement of showing an intentional killing, the reply to the jury's last inquiry was nonresponsive to the jury's question and was misleading.[7] It has been observed that "[w]hen the jury requests more instructions upon a particular phase of the case, the trial court is under a duty to instruct them in a plain, clear manner so as to enlighten rather than confuse them." *Smith v. State*, 596 S.E.2d 13, 15 (Ga. Ct. App. 2004). *See also People v. Sanders*, 857 N.E.2d 948, 952 (Ill. App. 2006) ("In responding to a jury question, the trial court must do so with specificity and accuracy."). Moreover, "[i]t is not error to recharge only on the specific question so long as the recharge taken alone does not leave an erroneous impression in the minds of the jury." *Davis v. State*, 629 S.E.2d 537, 539 (Ga. App. 2006).

[7]The State vigorously maintains, and we agree, that the element of intent was outlined with respect to second degree murder in the instructions as a whole. However, "[t]he [State's] argument that the court's main charge clearly included this element is unavailing because the court's erroneous [response] constitutes 'the last words heard by the jury from the court before the jury reached its verdict.'" *People v. Simpkins*, 571 N.Y.S.2d 1 (1991) (quoting *People v. Carnegie*, 425 N.Y.S.2d 39, 40 (1980)).

However, "[t]he . . . giving of a response that provides no answer to the particular question of law posed [by the jury] has been held to be prejudicial error." *People v. Tomes*, 672 N.E.2d 289 (Ill. App. Ct. 1996). *See also People v. Curet*, 683 N.Y.S.2d 602, 603 (1998) ("[A] simple rereading of a charge may, in itself, constitute reversible error in that the jurors may have been left without adequate guidance.").

It is quite clear from the jury's question that they did not understand the trial court's initial charge, which defined malice as including the element of intent. That is, the jury's question clearly indicates that they failed to understand that malice was previously defined as including intent, for purposes of second degree murder. *See Brown v. State*, 610 So. 2d 579, 581 (Fla. Dist. Ct. App. 1992) ("We may assume that the jurors could not adequately remember the definitions of manslaughter and second-degree murder, since they requested reinstruction."). The trial court's re-reading of its instructions on second degree murder and voluntary manslaughter did not clarify the matter. In fact, the trial court's response supported the jury's erroneous belief that a showing of intent was necessary for voluntary manslaughter, but not for second degree murder. *See State v. Wyatt*, 198 W. Va. 530, 539-40, 482 S.E.2d 147, 156-57 (1996) ("[R]e-reading of a portion of instructions 'is usually not error', but error may arise where the portion read omits a related portion of the charge which explains or expands upon the re-read portion."); *State v. Pannell*, 175 W. Va. 35, 39, 330 S.E.2d 844, 848 (1985) ("[W]e can envision a situation where the trial court's selective re-reading of instructions would unfairly prejudice the jury."). "Under these

circumstances, we conclude that the supplemental instructions were [error], notwithstanding the correctness of the initial charge. It is evident, as the jury's last question revealed, that the jury did not comprehend the original charge and remain[ed] perplexed about the elements of the crime[.]" *People v. Ciervo*, 506 N.Y.S.2d 462, 464 (1986) (internal quotations and citations omitted). *See also People v. Derr*, 806 N.E.2d 237, 244 (Ill. App. Ct. 2004) ("The failure to provide a proper answer to the jurors' inquiry constituted an abuse of the trial judge's discretion and infected the trial's outcome with error.").

Error in this case is similar to that which was addressed in *State v. Smith*, 403 S.E.2d 162 (S.C. Ct. App. 1991). In *Smith*, the defendant was prosecuted for murder. During the trial court's charge to the jury it instructed the jury on murder, voluntary manslaughter and involuntary manslaughter. While the jury was deliberating, it sent the following question to the trial court: "With voluntary manslaughter, to have legal provocation, does a person need to be struck himself, or is it enough to see someone else being assaulted for there to be enough cause to act?" *Smith*, 403 S.E.2d at 163. The trial court responded to the question by merely restating the previous charge on voluntary manslaughter. The defendant was subsequently convicted of murder. On appeal the defendant argued that the trial court's response to the jury's question was error. The appellate court agreed and granted a new trial. In so doing, the appellate court made the following observations:

> The error of the trial judge is manifest and twofold. In the first place, he did not answer the question asked. Moreover, his response was misleading.

. . . .

> Of course, we do not mean to imply that the trial judge intentionally failed to answer the question asked by the jury or that he intended to mislead the jury by his response. To the contrary, it appears that he made a conscientious effort to fairly and fully respond. His error resulted from how he went about responding. It is not always sufficient for a judge to simply open a charge book and read a generic statement of the law to a jury, no matter how correct that statement may be in the abstract. This is particularly true where, as here, the judge is called upon to answer a well-framed question following the initial charge. Quite often, the judge must tailor, mold and even sculpt the law in fashioning an answer to fit the question. In this respect, the judge must be an artist, not a mere technician.

Smith, 403 S.E.2d at 163-64.

In the instant case, the trial court's reading of its previous charge on second degree murder and voluntary manslaughter was not responsive to the jury's question and, as a consequence, the court committed error by failing to clarify the jury's misunderstanding of the law on the issues presented by the question. *See Commonwealth v. Frederick*, 475 A.2d 754, 763 (Pa. 1984) ("It is the duty of the court to clarify issues for the jury[.]").

2. The error was plain. We have determined that the trial court's response to the jury's last question was error. The issue to be addressed now is whether the error was plain. We have held that "[t]o be 'plain,' the error must be 'clear' or 'obvious.'" Syl. pt. 8, in part, *Miller*, 194 W. Va. 3, 459 S.E.2d 114. In *State v. Myers*, 204 W. Va. 449, 513 S.E.2d 676 (1998), we elaborated upon this element of the plain error doctrine as follows:

> Under plain error analysis, an error may be "plain" in two contexts. First, an error may be plain under existing law, which means that the plainness of the error is predicated upon legal principles that the litigants and trial court knew or should have known at the time of the prosecution. Second, an error may be plain because of a new legal principle that did not exist at the time of the prosecution, *i.e*., the error was unclear at the time of trial; however, it becomes plain on appeal because the applicable law has been clarified.

Syl. pt. 6, *Myers*, 204 W. Va. 449, 513 S.E.2d 676.

The last question submitted by the jury stated, in effect, that "intent" was not an element of second degree murder. The State argued below and in this appeal that "intent to kill is not an element of the crime of second degree murder." This argument has no merit. Our cases have made clear that:

> Intent is an element of second degree murder. . . .
>
> A conviction for second degree murder cannot be sustained without proof beyond a reasonable doubt that the accused had the requisite criminal intent. In regard to second degree murder, the requisite criminal intent would be the intent to do great bodily harm, or a criminal intent aimed at life, or the intent to commit a specific felony, or the intent to commit an act involving all the wickedness of a felony.

State v. Haddox, 166 W. Va. 630, 632, 276 S.E.2d 788, 790 (1981) (rejecting State's argument that intent was not element of second degree murder). Therefore, the trial court's failure to correct the jury's misunderstanding, by not specifically stating that "intent" was, in fact, an element of second degree murder, was plainly error under our existing law.

3. The error affected substantial rights. The next step in our analysis requires a determination of whether the error affected Mr. Davis' substantial rights. We have indicated that:

> To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.

Syl. pt. 9, in part, *Miller,* 194 W. Va. 3, 459 S.E.2d 114. Moreover,

> [i]n determining whether the assigned plain error affected the "substantial rights" of a defendant, the defendant need not establish that in a trial without the error a reasonable jury would have acquitted; rather, the defendant need only demonstrate the jury verdict in his or her case was actually affected by the assigned but unobjected to error.

Syl. pt. 3, *State v. Marple*, 197 W. Va. 47, 475 S.E.2d 47, (1996).

We have little difficulty in finding that the trial court's error affected Mr. Davis' substantial rights. We have made clear that "[t]he trial court must instruct the jury on all essential elements of the offenses charged, and the failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error." Syl., *State v. Miller*, 184 W. Va. 367, 400 S.E.2d 611 (1990). Further, "an incomplete instruction constitutes reversible error where the omission involves an element of the crime." *Id*., 184 W. Va. at 368 n.1, 400 S.E.2d at 612 n.1. In this case, the trial court's response to the jury question "allowed the jury to convict [Mr. Davis] of

[second] degree murder without necessarily finding that [Mr. Davis] had possessed [an] intent to kill the victim." *People v. Tenner*, 626 N.E.2d 138, 155 (Ill. 1994). In essence, the trial court's response "relieved the [State] of its burden to prove [second degree murder] beyond a reasonable doubt. We cannot assume in fairness that the error made no difference in the jury's verdict." *Commonwealth v. Lennon*, 504 N.E.2d 1051, 1054 (Mass. 1987).

4. The error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. We recognized in *State v. Marple*, 197 W. Va. 47, 475 S.E.2d 47 (1996), that:

> Once a defendant has established the first three requirements of [the plain error doctrine], we have the authority to correct the error, but we are not required to do so unless a fundamental miscarriage of justice has occurred. Otherwise, we will not reverse unless, in our discretion, we find the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Marple, 197 W. Va. at 52, 475 S.E.2d at 52 (citations omitted). We are compelled to exercise our discretion in this case to find that the error seriously affected the fairness of the trial inasmuch as the jury convicted Mr. Davis of second degree murder upon the erroneous belief that this crime did not require an intent to kill. "In the final analysis, we conclude that in the circumstances [of this case] the [supplemental] charge did have the clear capacity to mislead the jury on an essential element of the offense, and to lead it to a result it otherwise might not have reached." *State v. Harmon*, 516 A.2d 1047, 1062 (N.J. 1980). That is, the trial court's error "created a substantial likelihood of a miscarriage of justice. The conviction

on th[e] indictment must be reversed for that reason." *Commonwealth v. Johnson*, 754 N.E.2d 685, 693-694 (Mass. 2001).

IV.

CONCLUSION

Mr. Davis' conviction and sentence for second degree murder is reversed, and this case is remanded for further proceedings consistent with this opinion.[8]

Reversed and Remanded.

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[8]We note that "[u]pon retrial of a criminal defendant, who has previously been convicted of second degree murder under a general homicide indictment, the court may not impose judgment for a more serious degree of homicide than that imposed at the original trial." Syl. Pt. 1, *State v. Young*, 173 W. Va. 1, 311 S.E.2d 118 (1983). "[W]ell established double jeopardy principles . . . preclude a higher conviction on retrial where the defendant has been implicitly acquitted of such higher offense by his conviction of a lesser included offense at the original trial." *State ex rel. Young v. Morgan*, 173 W. Va. 452, 454, 317 S.E.2d 812, 813 (1984).