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SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

ADONIS RAY THOMPSON,

Appellant,

v.

Supreme Court No. 062045

Circuit Court No. 05-F-272
(Kanawha County)

STATE OF WEST VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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INTRODUCTION

Luke Thompson was an incredibly smart, active, and precocious child of just under two and a half years. He could talk, say his ABC's, and was always inquisitive into things he did not understand. He was also a great deal more mobile than most children of his age. Unfortunately, Luke had a habit of getting into trouble: he would sneak out of the bedroom at night and get onto the stove to play with the knobs, would try to play with the knives from the kitchen, and sometimes escaped from his car seat despite his parents best efforts to watch him.

Adonis Thompson, Luke's father, recognized both the promise and the problem that Luke presented. He understood he had a gifted son, with intelligence not usually expected from one so young. He also saw that he had to protect Luke from himself, because that intelligence was not yet tempered with the wisdom of experience. Mr. Thompson found ways to keep his son comfortable to sleep through the night, to encourage his curiosity about the outside world while watching him closely, and to prevent dangerous escapes from the safety provided by Luke's car seat.

On the night of May 27, 2004, Mr. Thompson's concern for Luke's well being unknowingly set him on a path that would result in Luke's death. Over the preceding several days, heavy rains had fallen constantly on the Kanawha valley, causing Campbell's Creek outside the Thompson's trailer to flood several times. The electricity had been off, several of their family and neighbors had been driven from their homes, and a cold that Luke had that week all combined to give Mr. Thompson concern for his son Luke. Added to these issues was the fact that Mr. Thompson's employer had required a double shift of physically arduous labor from him that day and there was more flooding at their home that night. Faced with these problems, Mr. Thompson expended great effort to both keep Luke safe and help his family elsewhere in the

hollow who were also being flooded. These efforts kept both he and his son awake all night and well into the next morning.

When at 10:00 the next morning, Mr. Thompson arrived home, soaking wet, his priorities still lay with serving others before himself. Luke had finally fallen asleep in his car seat. Taking measure of the situation, Mr. Thompson realized the safest course was for him to run inside briefly to change into dry clothes, and then take Luke from the car through the still falling rain quickly into a nearby storage building that needed to be reorganized to accommodate family members who had been forced from their home by the floods the night before. With this plan, Luke could stay dry and asleep as long as possible, maybe even sleeping through the trip to the building. He felt, based on all he knew at that instant, that the car was safer for Luke than the powerless trailer that had been flooded out the night before.

Unfortunately, an unforeseen problem kept Mr. Thompson's plan from coming to fruition. His body had been compensating for hours, trying to keep up with the emergency demands that had been placed on him that night. While Mr. Thompson changed his clothes, in the dark, electric powerless, and unventilated trailer, his body failed him. As he finished changing, he shoved his feet into his boots, and then sat to tie their laces. In that moment, when he was bent over, in a posture closer to sleep than any he had been in for over twenty-eight (28) hours, his body overrode Mr. Thompson's mind and commanded rest. Without a conscious act on his part, Mr. Thompson was asleep.

Four hours later, still desperately tired, he was startled awake by the sound of the electricity returning. Instantly he realized what had happened. Summoning all the speed he had, he bolted for the door, racing to get to Luke. Tragically, Luke had remained in the car, also sleeping, in his car seat, until his death from hyperthermia. But Mr. Thompson did not give up:

he rushed Luke to a neighbor who was a nursing assistant who knew CPR, asking her for help and to call an ambulance. Seeing that his son was being helped by an expert, he hurried to get the word to Luke's mother to come as fast as she could. But it would not be enough. This time, Mr. Thompson could not protect his son from a limitation all humans suffer from – the need for rest.

This accident and tragedy, arising from the involuntary act of Mr. Thompson's body commanding rest, created another injustice – his prosecution for Luke's death. Despite the fact that this death clearly was an accident that occurred without any volitional act on Mr. Thompson's part, he was found guilty at trial. This verdict, and the preceding trial, had three fundamental, reversible errors:

- Mr. Thompson was convicted of a crime based solely on his commission of an involuntary, unconscious act, violating the Due Process Clauses of the United States and West Virginia Constitutions, as well as State v. Hinkle, 200 W.Va. 280, 489 S.E.2d 257 (1996).
- The trial judge compounded this error by refusing to instruct the jury that the statute he was charged under requires a gross deviation beyond the standard of care to be expected to be maintained by a reasonable careful person that is fundamentally of a higher degree than ordinary negligence, as required by State v. DeBerry, 185 W.Va. 512, 408 S.E.2d 91 (1991), again violating Mr. Thompson's right to Due Process of Law under the United States and West Virginia Constitutions.
- The evidence was insufficient to sustain a verdict of guilt under the facts and law presented at trial.

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PROCEEDINGS AND RULINGS BELOW

Adonis Ray Thompson was initially questioned by a deputy of the Kanawha County Sheriff's Office at Women's and Children's Hospital shortly after his arrival with his son, Luke, at the Emergency Room on May 28, 2004. He had no further contact with law enforcement for three months, when he was asked by the same deputy to sign a transcript of his statement from the hospital. This case was essentially inactive until after a new Prosecuting Attorney was elected in November 2004. Mr. Thompson was not indicted until May 2005. Never formally informed of his indictment or receiving any notice that the case would be considered by the grand jury, he took responsibility for himself and appeared at Magistrate Court as soon as he read of his indictment in the newspaper.

Mr. Thompson was tried for the single charge of child neglect resulting in death in violation of West Virginia Code 61-8D-4a (1997) (2005 Repl. Vol.) in the Circuit Court of Kanawha County in January 2006. He was found guilty at a contested jury trial and sentenced to an indeterminate term of three to fifteen years in prison.

Mr. Thompson's defense at trial was that the death was an accident; that it had occurred without volitional act on his part and was the unintended result of the unconscious and automatonic act of extreme physical exhaustion. While no legal motions were made by defense counsel, the State acknowledged the defense plan by moving the court to admit evidence under W.Va. Rule of Evidence 404(b) to rebut the defense. Mr. Thompson presented extensive evidence on the facts and circumstances surrounding the occurrences for those two days, including his own testimony.

During the trial, Mr. Thompson's counsel requested that the judge provide an instruction on the definition of child neglect to the jury. Her intent was to clarify to the jury the exact

standard of care which Mr. Thompson is to be held to under the law, as required by this Court in State v. DeBerry, 185 W.Va. 512, 408 S.E.2d 91 (1991). This instruction was ultimately refused by the trial court, resulting in the jury having no legal standard by which to define neglect and decide whether Mr. Thompson's actions met the requirements of the law.

The prosecution argued in its rebuttal argument that the unreasonableness of Mr. Thompson's decision, the fact on which the entire prosecution turns, could be judged, post-event, by the tragic outcome of the decision, as opposed to judging it based on the information available to him at the time the decision was made. In other words, the State asked the jury to look at this accident, not from the perspective of Mr. Thompson at the moment he made his decision, but instead, from the position of absolute clairvoyance with 20/20 hindsight. This factually and legally backwards argument ultimately resulted in a verdict of guilty from the jury without sufficient evidence to sustain the verdict.

STATEMENT OF FACTS

10:03 a.m., May 28, 2004, is a moment that stands frozen in time for Adonis Thompson. In that clear minute of thought, he made a decision, given all the facts and experience at his disposal, he believed was the best call he could make. With rain falling briskly around him, he surveyed the situation. On his left sat his car; nestled snugly in its backseat, his son, asleep in his car seat at last after being forced from his home the night before by rising floodwaters. To his right stood that home, a trailer, which at that moment was dark, without electric power or ventilation, potentially hiding unknown dangers from the flood and their hasty evacuation the night before. *See generally*, Trial Transcript (Tr.) 173 – 176.

Were there sharp objects on the floor he couldn't see? Could the reason there was no power be from a short in the wiring waiting to shock an unsuspecting child? Did vermin or snakes get into the trailer last night in an attempt to escape the water? Any of these dangers were possible, and Mr. Thompson had no way to determine the situation inside the home. *Id.*

On the other hand, Luke was sleeping quietly at last. *Id.* He had already been sick; afflicted with a common cold that small children are wont to have. Tr. 170. That alone had been enough for him to decide to evacuate the night before; what would he do if Luke's condition suddenly got worse and he couldn't get him to the hospital because of the rising water? *Id.* Their late night escape and the efforts that Mr. Thompson had to expend all through the night, to help both his son and his parents, also driven out by the flood, had kept Luke awake all night. Tr. 171 – 172. It couldn't be helped, but now, at last, Luke was dry and warm, sleeping quietly in his car seat. Tr. 174.

Thinking about that car seat for a moment gave him pause. Luke had a strange, love/hate relationship with his car seat. On the plus side, he loved his car seat. It was his preferred place

to sleep, preferably with his blanket pulled up over his head. Tr. 111. However, Luke was also a bit of a rascal, in that he always was trying to get out of the car seat when he wasn't supposed to. Recognizing the potential for serious danger to Luke, Mr. Thompson took steps to prevent Luke's escapes, by adding a simple childproof latch of his own design to the strap. *Id.* Now, in any situation, even with his child in the backseat of his car where a driver attentive to the road could not watch him constantly, Mr. Thompson knew Luke would be protected by his car seat.

Looking again to the darkened trailer, Mr. Thompson considered his responsibilities and his options. He was soaking wet, having been out in the rain all day the day before working a double shift as a laborer to put food on the table for Luke, and then out again in the rain all night protecting his son and helping his parents. Tr. 168 – 172. Mr. Thompson needed dry clothes, which were waiting for him in the trailer, so that he could go next door and clean out a space in the outbuilding for his parents to put what property they had managed to salvage from the water the night before. Tr. 174.

As he saw it, there were only two real options: he could take Luke into the dark trailer, exposing him again to the cold rain, aggravating his illness and waking the child again from his desperately needed sleep, or he could leave him where he was, thus keeping Luke warm, dry, and peaceful for the five short minutes that it would take for Mr. Thompson to run inside, change, and come back to take him into the outbuilding. Once there, he knew he would be able to make sure conditions would be safe for Luke. Tr. 174 – 175.

After considering the situation, Mr. Thompson chose the option he believed, based on all he knew at that moment, was the best one for Luke. The child was safer and better off in the car for those five minutes, where the risks were small, rather than in the dark trailer, where the

potential danger was much greater. Mr. Thompson walked inside, knowing he would return to Luke in only a few short minutes, ready to continue his labor to help his family. *Id.*

Unknown to Mr. Thompson, his body, running at full speed without sleep for the last twenty-eight (28) hours and completely physically exhausted, had at last run out of energy for him to call upon and was about to require a different result than the one he planned. He hurried inside, grabbed a warm soda bottle sitting on the counter as he passed it, and drank the dregs in the bottom. He moved immediately to the couch and picked his clothes up, dressing quickly in the dark. In seconds, putting a cigarette in his mouth out of habit, he was ready to go back out, as soon as he put on his boots. With his head down on his lap to tie his boots, his body, interpreting this as a moment to rest, overrode his conscious mind and commanded that he stop. Mr. Thompson collapsed, like a puppet with its strings cut. He was asleep. Tr. 175 – 176.

For four hours, Luke and Adonis Thompson slept together, only a few feet apart. As they slept, the temperature quietly began to rise, creating a silent danger to Luke. Because he involuntarily was unconscious, Mr. Thompson had no reason to believe Luke would still be in the car by this time, and neither did he realize he would sleep through it. But he did, and because of that temperature change, Luke died in that car seat where he was sleeping. Tr. 176.

The noise from the appliances in the trailer coming on with the restoration of electric power startled Mr. Thompson awake. Seeing the clock, he realized instantly what had happened. In a split-second he burst out the door, running to check on Luke. When he saw Luke was in trouble, his run became even faster. He got help, first rushing Luke to a neighbor who knew CPR, next getting her to call for an ambulance, and finally hurrying to get Luke's mother, still at his parents a short distance away. Although she was supposed to have come home much sooner, she had not, remaining at Mr. Thompson's parents much longer than anticipated. Mr. Thompson

arrived back at the house as the paramedics were loading Luke in the ambulance. He sped for Women's and Children's Hospital, praying that his son would be all right. Tr. 176 – 178.

Once there, he found out differently. Upset and disbelieving, he ran back through the sequence of events in his mind. Where had he gone wrong? What else could he have done? He understood that he had made the best call that he could, looking at Luke in the car; and he also understood that, despite the utter reasonableness of that decision, because of something he could not see coming, his own body shutting down, his son had not survived. *See generally* Tr. 178.

When the Deputy Sheriff arrived, Mr. Thompson made a full statement, confident in the knowledge that he had done what he thought best for his child. He had made every decision knowing that it was best for Luke; he had nothing to hide. Nothing more would happen for several months, until the Deputy returned to get him to sign his statement. Tr. 127 – 128.

For the next year, Mr. Thompson went on, rebuilding his family, doing the best he could. A new prosecutor was elected, but he thought nothing of it, until a day in early May when he read the newspaper. He was incredulous to learn that he had been indicted by the grand jury for child neglect resulting in death, in violation of West Virginia Code, § 61-8D-4a, for the death of his son. He had no idea, no warning, this was coming. Even then, faced with such an unjust accusation, he did what he knew was best; he proceeded immediately to the Magistrate Court to turn himself in, not waiting for the Sheriff to come arrest him.

At his trial, he was startled to learn that he was being accused of neglecting Luke because he involuntarily fell asleep. Listening to the prosecutor go on and on about how he cared more for himself than for Luke was impossible for him to fathom, ignoring as it did the fact that he had spent all day, all night, and again the next morning of that fateful day, with Luke's well-being foremost on his mind. *See generally* Tr. 215 – 219.

He saw how despite his best efforts to defend himself, the fact that he had not wanted to fall asleep seemed to mean nothing to anyone in the court. *Id.* He saw how his attorney's efforts to get the judge to explain to the jury what neglect really was fell on deaf ears. Tr. 186 – 189. He saw how the mere fact that Luke had died was enough to condemn him. Tr. 215 – 219.

In the end, Mr. Thompson was found guilty of committing an act that he did not voluntarily do; that of neglecting his son by losing conscious control of his body and involuntarily becoming unconscious. Tr. 226. He was denied the jury instructions that might have exonerated him, and ultimately accused of deciding unreasonably how to care for Luke best, from the point of view of one who had the luxury of hindsight. Tr. 186-189, 214-219.

ASSIGNMENTS OF ERROR

I. MR. THOMPSON WAS CONVICTED OF A CRIME BASED SOLELY UPON HIS COMMISSION OF AN INVOLUNTARY, UNCONSCIOUS, AND AUTOMATONIC ACT, IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS, IN THAT NO *ACTUS REUS* WAS REQUIRED TO CONVICT HIM.

II. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE PROPER STANDARD OF CARE REQUIRED TO CONVICT IN CASES OF CHILD NEGLECT – THAT OF GREATER THAN CRIMINAL NEGLIGENCE – RENDERS MR. THOMPSON'S CONVICTION INVALID AS A DENIAL OF DUE PROCESS OF LAW UNDER THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS.

III. THE STATE FAILED TO PRODUCE EVIDENCE SUFFICIENT TO SUSTAIN A VERDICT OF GUILTY AS A MATTER OF LAW.

DISCUSSION OF LAW

I. MR. THOMPSON WAS CONVICTED OF A CRIME BASED SOLELY UPON HIS COMMISSION OF AN INVOLUNTARY, UNCONSCIOUS, AND AUTOMATONIC ACT, IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS, IN THAT NO *ACTUS REUS* WAS REQUIRED TO CONVICT HIM.

It is an elementary point of criminal law, articulable by any first-year law student, that every crime has two essential parts: the *Actus Reus* (meaning a specific voluntary physical action undertaken or omitted) and a *Mens Rea* (a guilty state of mind). Each is required to have been present simultaneously by the person accused; without either one, there is no crime. 1 Wayne R. LaFave, *Substantive Criminal Law*, § 1.2(b) (2d ed. 2003). Where there is a failure of proof beyond a reasonable doubt of either of these basic elements, a conviction is a denial of due process of law under the 14th Amendment of the United States Constitution and Article III, § 10 of the West Virginia Constitution. *See* State v. Barnhart, 211 W.Va. 155, 158, 563 S.E.2d 820, 823 (2002); Payne v. Gundy, 196 W.Va. 82, 87, 468 S.E.2d 335, 340 (1996). In the case at bar, Mr. Thompson was convicted without committing a voluntary act. This occurred because a proper jury instruction explaining to the jury that they must find such an act was not given. Thus, the jury could not know that they must find such an act to convict, and the verdict is fatally flawed.

A. STANDARD OF REVIEW

The question of whether the jury was properly and adequately instructed is a question of law, making the standard of review *de novo*. The Court must consider all that the jury heard and, from the standpoint of the jury, determine whether the jury was misled in any way, whether it had an understanding of the issues and its duty to determine those issues, and if the error was

prejudicial when viewed in light of the entire record, reverse the conviction. State v. Hinkle, 200 W.Va. 280, 285, 489 S.E.2d 257, 262 (1996), citing State v. Guthrie, 194 W.Va. 657, 671, 461 S.E.2d 163, 177 (1995).

B. UNCONSCIOUS ACTS ARE A COMPLETE DEFENSE

It is well-settled law in the United States and this state that the commission of a crime requires a voluntary act on the part of the person charged with the crime. Hinkle, 200 W.Va. at 286, 489 S.E.2d at 263. It is an essential element of any offense, and its failure to be proven by the State by competent evidence is fatal to the prosecution of the case.

A component of this rule is that an unconscious or involuntary act by a person, often referred to as automatism, will not support criminal liability. *Id.* Thus, if the criminal liability is based on the unconscious acts of a person, that act alone cannot sustain a criminal charge. In the words of Justice Cleckley, "It has been a long-recognized tenet of criminal jurisprudence that the State punishes only voluntary acts...Thus...a person cannot be held responsible for an act he or she commits while unconscious." Hinkle, 200 W.Va. at 287, 489 S.E.2d at 264.

Automatism covers a wide-range of disorders and conditions that can cause involuntary or unconscious acts. These range from common medical conditions, such as epilepsy, to the more exotic, such as unusual brain disorders that cause unexpected unconsciousness, through more common ailments, like sleep deprivation.[1] Courts around the United States, including this Court, recognize this condition exists and acknowledge its viability as a defense. *See* Hinkle, 200 W.Va. at 282, 489 S.E.2d at 259; McLain v. State, 678 N.E.2d 104 (Ind., 1997) (Sleep

[1] This defense does not reach the subject of intoxication in any form and this appeal does not suggest that it should. Intoxication is not an issue in any way in Mr. Thompson's case. No allegation was ever made that he had any alcohol or any drug in his body at the time of the events in question.

deprivation invoked automatism defense); People v. Dunigan, 421 N.E.2d 1319 (Ill.App.Ct., 1981) (Recognizing sleep of accused is part of automatism defense); People v. Freeman, 142 P.2d 435 (Cal.Ct.App., 1943); State v. Bush, 595 S.E.2d 715 (N.C.Ct.App., 2004); D.L. Jones v. State, 648 P.2d 1251 (Okla.Crim.App., 1982); Smith v. Commonwealth, 268 S.W.2d 937 (Ky., 1954); Barrett v. Commonwealth, 585 S.E.2d 355 (Va.Ct.App., 2003).

When considered as a whole, there is a simple reason why automatism is a real defense and addressed in this manner. "The deterrent function of the criminal law would not be served by imposing sanctions for involuntary action, as such action cannot be deterred." 1 Wayne R. LaFave, *Substantive Criminal Law*, § 6.1(c). There likewise is no reason to punish involuntary action for retributive purposes. *Id.* Imprisoning a person who has not, of his own accord, done anything wrong would be something that the law never requires – a futile act. State v. Varner, 212 W.Va. 532, 537, 575 S.E.2d 142, 147 (2002) (internal citations omitted).

C. LEGAL EFFECT OF AUTOMATISM DEFENSE

As a preliminary matter, this defense is a "real" defense, as opposed to an affirmative defense, in that it is one based on elimination of one of the basic elements of the crime. Once it is raised by the defense, "the State must disprove it beyond a reasonable doubt in order to meet its burden of proof with respect to the elements of the crime." Hinkle, 200 W.Va. at 286, 489 S.E.2d at 263. Failure to do so is fatal to any conviction derived therefrom.

This Court examined the defense of automatism and laid down the specific legal rules pertaining to the administration of such cases in Hinkle. There, Justice Cleckley examined the defense and found it had several unique qualities.

Most importantly, as in this case, he found the defense was not dependent on a mental disease or defect. Hinkle, 200 W.Va. at 285, 489 S.E.2d at 262. The causes of unconsciousness can be quite diverse, as evidenced by the non-exclusive list that was included in this Court's opinion: epilepsy, concussion, gunshot wounds, sleepwalking, heart attacks, and brain disorders. *Id.* In Hinkle, the cause was a suspected, but not proven, brain disorder. The accused voluntarily got into his vehicle to drive, but the involuntary act of losing consciousness, due to the disorder, excused his resulting commission of a homicide, a fact scenario remarkably similar to Mr. Thompson's case. Hinkle, 200 W.Va. at 282, 489 S.E.2d at 259. This Court's holding was clearly based on the premise that the act of falling unconscious, if involuntary, excused the resulting harm.

This list could include other causes as well. The Supreme Court of Indiana addressed a similar situation regarding a person who was suffering from sleep deprivation. In McClain v. State, 678 N.E.2d 104 (Ind., 1997), the defendant was accused of assaulting police officers after having no sleep on a flight from Japan to the United States the day before, while sleeping only three hours in the forty-eight hours prior to his arrest. McClain, 678 N.E.2d at 105. That court found that this fact scenario did present the necessary elements of the defense of unconsciousness or automatism. McClain, 678 N.E.2d at 107.

The other critical point that this Court has made about unconsciousness is that the decision of whether it is a defense to the particular facts of a case is solely within the province of the jury. Hinkle, 200 W.Va. at 286, 489 S.E.2d at 263. Such a decision is based on the facts of the case and necessarily requires a properly instructed jury in order to make that determination. To that end, this Court held that when there is reasonable evidence on the defense of an involuntary act due to unconsciousness, "[a]n instruction on the defense of unconsciousness is

required...." *Id.* It is undisputed that reasonable evidence on this defense was raised by Mr. Thompson. He testified at trial: "I never even knew it was coming. It was purely by accident. When I sat down, it was physically over. I don't remember falling asleep. I don't remember doing much of anything after I sat down." Tr. 184.

D. CONCLUSION

Everyone in this case was well aware that the defense to violation of W.Va. Code § 61-8D-4a was one of an involuntary, unconscious, automatonic act. Mr. Thompson's defense counsel presented extensive evidence on the subject, including the testimony of Mr. Thompson personally. Tr. 154 – 184. Further, the State clearly understood this was going to be the case prior to trial, so much so that they felt the need to seek court permission to introduce evidence under West Virginia Rule of Evidence 404(b) addressing the absence of accident to rebut the defense that this unconsciousness was involuntary. Tr. 67 – 69. Through these actions, the trial court clearly was on notice this defense was presented at trial and the error in failing to instruct on the defense is preserved for appeal, in much the same manner as Justice Cleckley deemed the error in Hinkle preserved. *See* Hinkle, 200 W.Va. at 287, 489 S.E.2d at 264.[2]

It was absolutely undisputed at trial that Mr. Thompson was in fact unconscious. Further, the State never addressed how he became unconscious, presenting no evidence that his collapse

[2] Assuming *arguendo* this is not enough to preserve the error, the plain error analysis under State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995), is sufficient to allow this appeal to proceed. As discussed above, there clearly has been an error without waiver. Based on the facts presented by Mr. Thompson at trial, and the actions of the State, with the cooperation of the trial judge, it was apparent to all in the courtroom that the automatism defense was presented and lack of an instruction was plainly obvious. Because this is a real defense going to the elements of the offense, lack of an instruction could not be more prejudicial, and so, substantial rights of the accused are clearly affected and a miscarriage of justice that seriously affects the fairness and integrity of judicial proceedings in this tragic accident has occurred. *See* Hinkle, 200 W.Va. at 286, 489 S.E.2d at 263.

was not an involuntary act. Without evidence regarding this, there simply is not enough evidence to convict, in that, without an *actus reus*, there is no evidence, no matter how it is weighed, from which the jury could find guilt beyond a reasonable doubt. Guthrie, 194 W.Va. at 669, 461 S.E.2d at 175.

No instruction on the defense of automatism was given by the trial court. As a result, there is no way that the jury could have properly considered the defense and the subject of the need for a voluntary act. Thus, the jury's verdict rests upon a conclusion that violates a fundamental part of due process of law, and the trial court must be reversed.

II. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE PROPER STANDARD OF CARE REQUIRED TO CONVICT IN CASES OF CHILD NEGLECT – THAT OF GREATER THAN CRIMINAL NEGLIGENCE – RENDERS MR. THOMPSON'S CONVICTION INVALID AS A DENIAL OF DUE PROCESS OF LAW UNDER THE UNITED STATES AND WEST VIRGINIA CONSTITUTIONS.

Without a proper explanation of the law that the jury must apply to decide the case, there is little chance that a verdict based on that law will be forthcoming. Instead, the jury decides issues based on factors outside the law, or with a skewed and incomplete view of what the law really is, and a denial of due process occurs, violating the 14th Amendment of the United States Constitution and Article III, § 10 of the West Virginia Constitution. Here, the jury was prevented from receiving the proper legal standard, resulting in their verdict being without a proper legal basis.

A. STANDARD OF REVIEW

Jury instructions are subject to several differing standards of review, in succession. The refusal of the trial court to give a requested instruction is reviewed for abuse of discretion, with this Court examining the instructions "as a whole to determine if they sufficiently cover the issues in the case and focus on the facts presented by the evidence." Hinkle, 200 W.Va. at 285, 489 S.E.2d at 262 (internal citations omitted).

When the question involves whether an instruction offered by the defense should be given, the question must be asked if the instruction itself is correct. This determination is made *de novo*. State v. LaRock, 196 W.Va. 294, 308, 470 S.E.2d 613, 627 (1996). The defense is entitled to an instruction that reflects any defense theory for which the evidence provides a foundation. *Id.* Refusal to give such an instruction is reviewed for abuse of discretion, but is not

subject to a harmless error analysis. State v. Derr, 192 W.Va. 165, 180, 451 S.E.2d 731, 746 (1994); LaRock, 196 W.Va. at 308, 470 S.E.2d at 627 (internal citations omitted).

The final step in the analysis, whether the jury was properly and adequately instructed, is a question of law, under the *de novo* standard of review. The Court must consider all that the jury heard and, from the standpoint of the jury, determine whether the jury was misled in any way, whether it had an understanding of the issues and its duty to determine those issues, and if the error was prejudicial when viewed in light of the entire record, reverse the conviction. Hinkle, 200 W.Va. at 285, 489 S.E.2d at 262 (internal citations omitted).

B. PROPOSED JURY INSTRUCTION ON CHILD NEGLECT

The offense detailed in W.Va. Code § 61-8D-4a requires that the custodian neglect a child under his care, and by that neglect cause the death of the child. Mr. Thompson proposed an instruction to the trial court that showed the relationship of the term "neglect" with regard to the standard of care that an accused is to be held to in cases of child neglect. Tr. 186 – 187. The instruction was a direct quote from this Court's opinion in State v. DeBerry, 185 W.Va. 512, 408 S.E.2d 91 (1991).

The instruction offered requested that the Court instruct the jury that "child neglect required a gross deviation beyond the standard of care to be expected to be maintained by a reasonable careful person under like circumstances and that it requires significantly more than ordinary negligence." Tr. 186; DeBerry, 185 W.Va. at 515, 408 S.E.2d at 94. The standard offered in this instruction was this Court's exact words from DeBerry, which is the gold standard of this Court to describe the standard of care to be maintained by the adult accused of child

neglect. DeBerry, 185 W.Va. at 516, 408 S.E.2d at 95. This standard is critical to the proper finding of guilt in child neglect cases.

C. MR. THOMPSON WAS ENTITLED TO A NEGLECT INSTRUCTION

As discussed briefly above, Mr. Thompson was entitled to a jury instruction addressing the legal standard of neglect with which he was charged. This Court has stated numerous times "[a] criminal defendant is entitled to an instruction on the theory of [his] defense if [he] has offered a basis in evidence for the instruction, and if the instruction has support in law. Hinkle, 200 W.Va. at 285, 489 S.E.2d at 262, citing LaRock, 196 W.Va. at 308, 470 S.E.2d at 627. It is undisputed that these two prongs were met at trial.

In State v. Derr, 192 W.Va. 165, 180, 451 S.E.2d 731, 746 (1994), this court stated the following three part test for when defense instructions should be given, along with the admonishment that failure to do so was reversible error: (1) the instruction is a correct statement of law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense. Derr, 192 W.Va. at 180, 451 S.E.2d at 746.

Under this analysis, Mr. Thompson's proposed instruction relating to the definition of criminal neglect meets this test. First, the proposed instruction was a correct statement of law, in that it was a direct quote from this Court's pronouncement in DeBerry. The instruction addressed the specifics of what criminal neglect is, providing clear markers for the jury to determine exactly what standard of care was required of Mr. Thompson.

Second, this same information was not adequately covered in the trial court's instructions that were given. The court's instruction on the law of child neglect causing death was as follows:

> The Court instructs the jury that if any parent, guardian, or custodian shall neglect a child under his or her care, custody, or control, and by such neglect cause the death of said child, then such parent, guardian, or custodian shall by guilty of a felony.
>
> Further, the Court instructs the jury that the term "neglect" means the unreasonable failure by a parent, guardian, or any person voluntarily accepting a supervisory role towards a minor child to exercise a minimum degree of care to assure said minor child's physical safety or health.
>
> The Court instructs the jury that the term "unreasonable" as contained in the definition of "neglect" means unwise, senseless, or not rational.
>
> ***
>
> Felonious child neglect causing death does not require proof of criminal intent; rather, the State must prove the defendant neglected the minor child by unreasonably failing to exercise a minimum degree of care to assure the safety or health and that said neglect causes the death of a minor child.
>
> Tr. 201 – 202

Nowhere does the court provide anything more than simple definitions of the words from the statute. The actual discussion of the law of child neglect is confined in the charge completely to those definitions and takes up less than a page in the written version of the instructions that were given to the jury. *Id.* No guidance is given to the jury to help them make the necessary judgment that is their role in the judicial process; instead only abstract concepts of grammar and law are postulated. Never is the concept that this Court discussed in DeBerry, that of the gross deviation from the standard of care, discussed or explained to the jury.

Instead, what happened was that the trial court buried the distinction. In the charge to the jury, the court implies that, as a matter of law, the act of leaving the child in the car was neglectful. The court stated:

> The State of West Virginia must...prove...beyond a reasonable doubt that...the defendant, Adonis Ray Thompson...did neglect his biological son...by failing to exercise the minimum degree of care to assure the physical safety or health of the minor...in that he left the minor child in a car unattended for a period exceeding four hours....
>
> Tr. 202 – 203

The court's instruction amounts to a directed verdict. It assumes that the act of leaving the child in the car was neglectful and leaves them only the question of whether the fact that the child was in the car caused his death – a fact that was not disputed at the trial. Thus, the jury was prevented by the trial judge from being able to address the question of whether the act was, in fact, within the definition of neglect, the very issue that Mr. Thompson raised in his proposed jury instruction.

Finally, this proposed instruction went to the very heart of the case, whether Mr. Thompson had legally neglected his child. Without that instruction, many of the defense's arguments about the reasonableness of Mr. Thompson's actions became meaningless, because the jury did not have the correct framework in which to assess them. This clearly resulted in prejudice.

This Court has even gone further, quoting the U.S. Second Circuit Court of Appeals, when it said "[i]f these prerequisites [of State v. Derr] are met, the trial court abuses its discretion in refusing the instruction 'no matter how tenuous that defense may appear to the trial court." Hinkle, 200 W.Va. at 285, 489 S.E.2d at 262, quoting United States v. Dove, 916 F.2d 41, 47 (2nd Cir., 1990). The Dove court further pointed out that the entire point of its ruling, much like

the cases from this Court on the subject, that a trial court has an obligation to see that instructions that address the defense theory are adequately included, and that, as a result, a "balanced charge" is provided to the jury. Dove, 916 F.2d at 42.

D. CONCLUSION

When the instructions in this case are viewed as a whole, it becomes clear that they are totally inadequate. Never once, despite Mr. Thompson's best efforts, was the question of what he had to do in order to have neglected his child addressed. The jury had the bare bones definitions mouthed at them, and were given a single page with nothing more useful upon it. This is insufficient.

Had Mr. Thompson's proposed instruction been given, there is a reasonable likelihood the outcome would have been different. In that situation, the jury would have been able to clearly understand the standard of care Mr. Thompson was expected to provide. They would have seen how his actions conformed with the standard of reasonableness laid down by the legislature. Most importantly, the jury would have been given the tools to recognize that Mr. Thompson's actions, when viewed in the totality of the circumstances, were not such a gross deviation below the standard of care to sustain a charge of child neglect.

This failure by the trial court was highly prejudicial and not subject to a harmless error analysis. It resulted in a denial of due process to Mr. Thompson. The case must be reversed.

III. THE STATE FAILED TO PRODUCE EVIDENCE SUFFICIENT TO SUSTAIN A VERDICT OF GUILTY AS A MATTER OF LAW.

When the jury does not have sufficient evidence to find guilt beyond a reasonable doubt, yet nonetheless returns a verdict of guilty, the accused is denied due process of law required by the 14th Amendment of the United States Constitution and Article III, § 10 of the West Virginia Constitution. This due process violation occurred in Mr. Thompson's case.

A. STANDARD OF REVIEW

The sufficiency of the evidence is judged under two standards. Decisions made by the trial court are reviewed *de novo*, while questions of the jury's verdict are decided under a more deferential review. State v. Guthrie, 194 W.Va. 657, 668, 461 S.E.2d 163, 174 (1995). That standard is inquiry beyond a reasonable doubt, that is, "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." *Id.*

B. THE FACTS PRESENTED AT TRIAL DO NOT MEET THIS STANDARD

For a finding of guilty to be upheld, the jury must be able to reach a finding of guilt beyond a reasonable doubt on every element of the crime. As previously addressed, this is sorely lacking as to both the issues of a voluntary act and neglect. However, it is also impossible to reach on the issue of the reasonableness of Mr. Thompson's decision.

The prosecutor's closing argument clearly shows the problem here. In several places in her rebuttal, the prosecutor states that the fact the child died makes it clear that the decision to leave him there for a few minutes was unreasonable. Tr. 215 – 219. The argument can be encapsulated simply: because something bad happened as a result, something improper

happened before it. Of course, this is the classical logical fallacy, so beloved of Professor Cady, *post hoc ergo propter hoc* (after this, therefore, because of this). Wikipedia, *Post Hoc Ergo Propter Hoc* (visited July 17, 2006) < http://en.wikipedia.org/wiki/Post_hoc_ergo_propter_hoc>.

Of course, the error of this argument is apparent. It turns the question to be decided on its head; instead of deciding whether the decision was reasonable at the moment it was made, it requires that the reasonableness be decided based on the outcome. The facts of this case are evident; Mr. Thompson, a loving, thoughtful, and caring parent, made a reasonable decision to leave Luke in his car seat for a few minutes to protect the child from the dangers of illness by dragging him through the rain, from the dangers of injury in a dark, unventilated, and potentially hazardous environment of a trailer that had been flooded out a few hours before, and from the dangers of injury from escaping from his car seat. Only by succumbing to the legally irrational mindset of judging Mr. Thompson's reasonable actions by the emotional outcome, judging them purely because his child died as the State improperly requested, by deciding simply, without law, that someone must be held responsible for this accident, can this well-considered and reasonable decision be converted to unreasonableness. An unforeseen, tragic event does not turn a reasonable decision into an unreasonable one, based completely on hindsight.

C. CONCLUSION

When viewed in the clear light of day, without emotion of loss or anger of revenge, the lack of support for this verdict becomes clear, and it is exposed for what it really is – a *non sequitur* (it does not follow). Wikipedia, *Non Sequitur (logic)* (visited July 17, 2006) <http://en.wikipedia.org/wiki/Non_sequitur_%28logic%29>. It must be reversed.

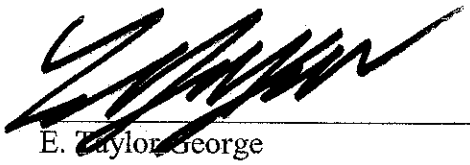
RELIEF REQUESTED

Mr. Thompson respectfully requests this Court to reverse his conviction and sentence and remand his case for a new trial.

Respectfully submitted,

ADONIS RAY THOMPSON, Appellant

BY COUNSEL:



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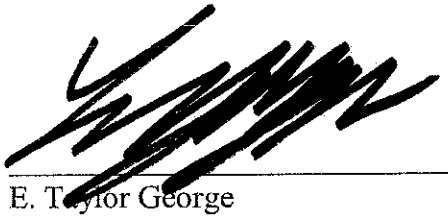
CERTIFICATE OF SERVICE

I, E. Taylor George, hereby certify that on 3 January 2007, a copy of the foregoing **Brief for Appellant** was mailed to Ms. Dawn Warfield, Office of the Attorney General, 1900 Kanawha Boulevard, East, State Capitol Room E26, Charleston, West Virginia 25305.



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