
NO. 33206

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

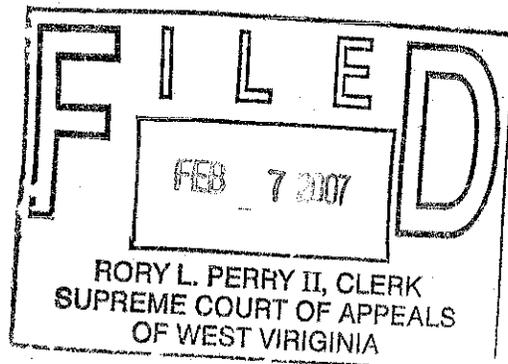
STATE OF WEST VIRGINIA,

Appellee,

v.

ADONIS RAY THOMPSON,

Appellant.



BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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BRIEF OF APPELLEE STATE OF WEST VIRGINIA

**KIND OF PROCEEDING AND
NATURE OF THE RULING BELOW**

Adonis Thompson (hereinafter Appellant) was convicted of one count of Child Neglect Resulting in Death. W. Va. Code § 61-8D-4a. Although the Appellant argues several assignments of error in fact, his brief invites this Court to ignore the law and decide this case by emotion, not reason. Appellant's goal is to convince this Court to reverse his conviction out of sympathy. He condemns the initial charging decision, blaming it on the newly elected prosecutor. (Appellant's Brief at 6). He claims the charge is "impossible to fathom," because he "spent all day, all night, and again the next morning of that fateful day, with [his son's] well being foremost on his mind," and that he was incredulous when he first discovered that a Kanawha County Grand Jury indicted him (Appellant's Brief at 1, 6.)

He asks this Court for mercy because he has lost a son, ignoring his own role in this result. One wonders if he would adopted the same strategy if he had left someone else's son in the back seat to die, or if a third party had abandoned his child. He argues that his decision to leave his two-year-old son alone while he changed into dry clothes was reasonable.

His claim to the moral high ground is undercut by his willingness to distort the record, concoct facts, and argue defenses never raised below.¹ The Appellant advocates a "moral position" that, by sheer coincidence, leads to the reversal of his conviction. His way is the only "moral way"; those that do not agree are vindictive and unjust. Given the nature of this case, the Appellant's position demonstrates a stunning lack of remorse.

The Appellee submits that the Appellant abandoned his 28-month-old child in a car with closed windows. He didn't forget him; he intentionally left him in his car. Although he claims he did this to protect his child from the rain, his home was a short distance from the car. He claims that he didn't want the child "out in the cold," but it was 80 degrees that day. Although he knew his son was sick, he left him alone in the back seat of his car. The Appellant knew he had been up the entire

¹At one point he writes:

Once [at the hospital], 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 has not survived. *See generally* Tr. 178.

(Appellant's Brief at 6.)

Appellant's recital is pure fiction. The Appellant did not "run back through the sequence of events in his mind when he arrived at the hospital." He did not testify that he had made "the best call he could" or that he believed his decision to be "utterly reasonable."

night, and had worked for 16 hours the previous day, but he went inside and “accidentally fell asleep” for five hours. When he awoke, his son was dead. Approximately an hour after his death, the child’s body temperature was 107 degrees.

Clearly, this is a tragic case. But it is the senselessness that makes it so, not the Appellant’s present plight. Had the Appellant rationally weighed his options, even for a moment, his son would might still be alive. This child was helpless, yet the one person who owed him the highest duty of care abandoned him, defenseless and terrified, strapped to a car seat, as the temperature inside the closed car steadily rose, until he died, alone.

STATEMENT OF THE FACTS

On May 24, 2004, the Appellant left his infant son Luke² in his car with three of the windows closed. The driver’s side window was slightly cracked. (R. at 73.) The Appellant then went into his home and fell asleep. After awakening five hours later he found his child in the back seat dead. Later medical examinations revealed that the child died of hyperthermia (R. at 90).³ At the time of his death his body temperature was 107 degrees.⁴ During the five hours Luke was alone in Appellant’s car, the external temperature was in the 80s. (Tr. 373.)

²Luke was born on January 3, 2002. He was two years and four months old when he died.

³The State’s medical examiner described hyperthermia as the inability to cool down through sweating. Thus, as the environmental temperature rose, the child’s body temperature also rose. Once the body reaches 106 degrees death ensues. There is no evidence suggesting how long it took Luke’s body to reach this temperature. (Tr. 393-94.)

⁴The State’s autopsy report states that Luke’s temperature was 42.2 (107 Fahrenheit) degrees centigrade approximately an hour after the Appellant first found him. (R. at 90.)

The Appellant, Luke's mother, and his son lived on the banks of Campbells Creek in Blount, Kanawha County, West Virginia.⁵ (Tr. 344.) The Appellant worked as a laborer for Ashford Mobile Home Movers. (Tr. 332, 412.)

Luke's mother, Courtney Ferrell, described Luke as "hyperactive" and "articulate." (Tr. 399-400.) She also testified that he was a "danger to himself" and needed constant supervision, "I couldn't leave him unattended for even a couple of seconds without him getting into something." (Tr. 401.) On one occasion he climbed on top of the stove and played with the oven knobs. On another she found him playing with knives. (*Id.*)

The couple allegedly tried several different methods to restrain their son. First, they put Luke in a toddler bed, but he climbed out and opened the bedroom door. They tried letting him sleep between them, but he would "shimmy" down to the bottom of the bed and leave the bedroom. (Tr. 401-02.) Their final solution was to confine him to his car seat. To prevent him from moving the Appellant rigged a plastic device to the seat's buckle rendering it impossible for Luke to unbuckle the straps.

Appellant's counsel falsely claims that Luke "loved his car seat" and that it was "his preferred place to sleep, preferably with his blanket pulled up over his head."⁶ (Appellant's Brief

⁵The Appellant is Luke's biological father. The defense did not contest that he was the child's father as contemplated by the statute, and owed him a legal duty of care.

⁶Counsel directs this court to page 111 (355) of the trial transcript as support for his claim. In fact, this page covers testimony from the Appellant's neighbor about prior acts of neglect she had witnessed:

Q: All right. And you have told us about one occasion, another occasion when he was left in the car.

A: Yes. That same week that Luke -- the same week Lukie died I was --

at 3-4.) There is no evidence supporting this claim. Instead, the record suggests that the couple improperly used Luke's baby seat as a babysitter. Two weeks before Luke died the couple left him alone in the back seat of their car for 20 to 30 minutes. (Tr. 354; R. at 33.) On another occasion the Appellant's neighbor, Janet Elswick, found Luke strapped to his baby seat, alone on the living room couch while the Appellant was in the back bedroom sleeping. (Tr. 355-56).

The day he died, Luke was running a fever. (Tr. 403.) The Appellant worked until 9:30 that evening.⁷ (Tr. 414.) The bulk of his day was spent trying to move a customer's trailer to the top of a nearby hill. (Tr. 412-13.) He described the work as arduous. (Tr. 413-14.) After briefly shopping for medicine with his wife and child, the Appellant was home by 11:00 p.m. (Tr. 414.)

the phone rang about 7:00 o'clock in the morning. It was [the Appellant's] boss. He said that Donnie (the Appellant) hadn't showed up for work, would I possibly go over and wake him up or tell him.

So, I went over there, and I knocked on the door. Nobody answered. Then I knocked again, and the door come open. And there was a chair beside the door with a blanket over it, and I thought maybe it was Donnie, maybe he fell asleep. But then Lukie pulls the blanket over his head, and he's strapped in the car seat with a plastic thing up around his neck like this, where he couldn't get out of the car seat, sitting in a chair covered up.

So I had to go into the house, into the hallway to holler to get his attention.

(Tr. 355.)

Appellant's counsel has completely misrepresented the tenor of this witness's testimony. There are no facts suggesting that Luke "loved his car seat" or that it was his "preferred place to sleep." In fact, the testimony demonstrates the exact opposite. That Luke had to be strapped into this seat with a plastic device in order to prevent his escape.

⁷Neither the State nor the defense established when he went to work that day but a contemporaneous DHHR report stated that the Appellant worked a 16-hour shift. (R. at 61.)

That evening it rained heavily causing Campbells Creek to flood the area around the Appellant's home. At 3:00 a.m. the Appellant took his family to his father's house. (Tr. 171.) After speaking with his father and stepmother, and awakening their neighbors, the family drove to a friend's house on Morgans Creek. (Tr. 416.) They spent the rest of the early morning hours driving from place to place.⁸

The Appellant and his family returned home at 10:00 a.m. (Tr. 416.) Ms. Ferrell took the couple's minivan to the store to buy cigarettes. She had been driving the previous evening, not the Appellant. (Tr. 407). In fact, she left Luke with his father because she had been driving all night and felt too tired to stay with her son. (*Id.*) She planned to come right back. Instead, she remained with the Appellant's parents for the rest of the day. (Tr. 407.)

The Appellant left Luke in his car, and went into the house to change into dry clothes. Although Appellant's counsel claims that the Appellant reached this decision after agonizing over the alternatives, the record does not suggest that he took any time to consider all of his options. There is no evidence that he considered wrapping his child in his blanket, or staying with his son until the rain stopped, or simply using an umbrella.

He testified:

Q: And who was going to keep Luke?

A: Luke was staying with me. And I was getting out of the car, I realized that it was still raining, and I got to thinking about the fact that he had been sick. And, you know, he just fell asleep, the weather was bad. I didn't want to get him no sicker than he already was. And I just sat down. I'm going to be in

⁸The Appellant claims that his son's well-being was foremost in his mind that night. (Appellant's Brief at 6.) The record demonstrates that his son, running a fever, spent the entire night in the Appellant's car, as the Appellant's wife drove from place to place. There is no evidence that the Appellant placed his child's interests above his need to drive all evening.

the house five minutes, change clothes and boots. My clothes were folded on the couch. I didn't even have to go back in the bedroom. So, I said "Okay, I'll leave him in the car for five minutes while I go to change, come back out, I'll get him and take him to the building with me where it's dry and heated."⁹

(Tr. 418.)

He later testified:

- A. After thinking about it, I just – I figured he's safer in the car for the next five minutes than he is being traipsed through the rain two or three times and out in the cold and getting wet – especially if he had just – he hadn't been asleep 15 of 20 minutes and hadn't slept most of the night. And with us giving him the medication and stuff, I knew he needed his rest and he need to stay dry and warm. And that was – that was really my sole intention for leaving him in the car.

(Tr. 422.)

The Appellant adamantly claims that he made the "best call" he could. In fact, he chose the path of least resistance. The Appellant's car was parked five feet from the front of his trailer. (Tr. 419.) There is no evidence supporting his contention that his son would have been exposed to the rain for any significant period of time.

⁹Defense counsel describes Appellant's thought process thus:

To his right stood the 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.

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 his home. *Id.*

(Appellant's Brief at 3, emphasis added.)

There is *no evidence* remotely suggesting that the Appellant considered these factors, or that these factors even existed. These statements are pure fiction.

The Appellant walked into his home,¹⁰ changed out of his wet clothes, took a swig of soda, and grabbed a cigarette. When he sat down to tie his shoes, he fell asleep:

Well, at that point I sat down to tie my shoes is that last thing I remember until the power came back on. I woke up, I was bent – I was still bent over with my chest touching my knees where I had been tying my shoes. And as the power came on I could only think of one thing: that was getting outside to check on the baby.

(Tr. 420.)

The Appellant maintained that he had fallen asleep accidentally:

Q: And again, did you go to sleep on purpose or by accident ?

A: 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. 428.)

He awoke at 3:00 p.m. to find his son, still in his car seat, dead. He had left him in the car for five hours.¹¹ The Appellant ran to his neighbor's home begging her to "Please save my baby."

¹⁰The Appellant testified that his car was parked five feet from the end of his trailer. (Tr. 419.) Although he could not see the back seat of his car from inside his home he risked it: "I thought if I could not make one trip with him, that's only one time he's got to be out in the rain. You know, if I'm going to be in the house five minutes. I'm 10 ½ miles up Campbells Creek, you know, he's safe five feet off the end of the trailer." (*Id.*)

¹¹Stanford University School of Medicine published a study showing that a car's temperature can rise dramatically even on mild days. The study found that a car's interior temperature can rise by 40 degrees within an hour, with 80 percent of that increase occurring in the first 30 minutes. The study also found that cracking the windows makes little or no difference.

We demonstrated that on sunny days, even when the ambient temperature is mild or relatively cool, there is a rapid and significant heating of the interior of vehicles. On days when the ambient temperature was 72 [degrees], we showed that the internal vehicle temperature can reach 117 degrees within 60 minutes, with 80% of the temperature rise occurring in the first 30 minutes. In general, after 60 minutes, one can expect a 40 [degree] increase in internal temperatures for ambient temperatures spanning 72 to 96 [degrees], putting children and pets at significant

(Tr. 360.) The neighbor described Luke as blue with white around his lips. He did not have a pulse and was “extremely warm.” (Tr. 341.) She performed CPR for 15 to 20 minutes. (Tr. 342.) When she asked the Appellant what had happened, he responded “I just fell asleep for a few minutes.” (*Id.* at 104.)

ASSIGNMENTS OF ERROR

Appellant’s assignments of error are as follows:

- I. Mr. Thompson was convicted of a crime based solely upon his commission of an involuntary, unconscious, and automatic 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.

risk. We also determined that cracking windows is *not effective in decreasing* either the rate of heat rise or the maximum temperature attained.

Catherine McLaren, M.D., Jan Null, CCM, James Quinn, M.D., *Heat Stress from Enclosed Vehicles: Moderate Ambient Temperatures Cause Significant Temperature Rise in Closed Vehicles*, (2005) Pediatrics, <http://www.pediatrics.org/cgi/content/full/116/1/e109>.

An infant’s core temperature rises faster than that of an adult subjected to same environment. (*Id.*)

In 2003, at least 42 children died from hyperthermia after being left in a car. Jennifer Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Criminally Negligent Parents*, 100 N.W. U. L. Rev. 807, 815 (2006).

III. The State failed to produce evidence sufficient to sustain a verdict of guilty as a matter of law.

ARGUMENT

I. **SINCE WEST VIRGINIA CODE § 61-8D-4a PUNISHES OMISSIONS, NOT ACTS, THE STATE PROVED THE ACTUS REUS OF THE OFFENSE.**

A. The Standard of Review.

In *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), this Court adopted the federal standard of review for sufficiency of the evidence claims as set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979): A verdict of guilty will not be set aside due to insufficiency of the evidence if, reviewing the evidence in the light most favorable to the prosecution, the appellate court finds that “any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” *Guthrie*, 194 W. Va. at 668, 461 S.E.2d at 173. The Court made it clear that the burden is on the defendant to overturn the presumption of correctness in a jury’s verdict, and that the State is entitled to all inferences in favor of that verdict.¹²

The refusal of a trial court to give an instruction is reviewed for abuse of discretion. Syl. pt. 1, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996). A trial court is under no obligation to give instructions that are incorrect as a matter of law. Syl. pt. 4, *State v. Guthrie*. Nor is it required to give instructions that are duplicative or irrelevant. *State v. Boggess*, 204 W. Va. 267, 273, 512 S.E.2d 189, 195 (1998).

¹² “[A] criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution.” *Guthrie*, 194 W. Va. at 669, 461 S.E.2d at 175.

No party may assign as error the giving or refusal to give an instruction unless he objects thereto before the arguments to the jury are begun, stating distinctly, as to any given instruction, the matter to which he objects and the grounds of his objection; but the court or any appellate court, may, in the interest of justice, notice plain error in the giving or refusal to give an instruction, whether or not it has been made subject to an objection.

Syl. pt. 1, *Shia v. Chvasta*, 180 W. Va. 510, 377 S.E.2d 644 (1989).

When a party does not object to the admission of evidence, the court reviews for plain error. W. Va. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 732 (1993). To prevail under this exacting standard of review the Appellant must prove that there is an error, that is plain, and that affects substantial rights. Syl. pt. 7, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). An error affects substantial rights only if “the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect.” Syl. pt. 7, *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996).

B. Discussion.

Appellant first claims that the State failed to prove the actus reus of the offense. He further claims that the trial court failed to instruct the jury, *sua sponte*, on the defense theory of automatism. This assignment of error is without merit and ignores the basic principles of criminal law.

Appellant claims that he relied upon an automatism defense at trial. This is clearly wrong. Defense counsel did not utter the words automatism or unconsciousness once. Nor did she request a jury instruction on this defense. Appellant’s present counsel claims:

Everybody in this case was well aware that the defense to violation of W. Va. Code § 61-8D-4a was one of an involuntary, unconscious, automatic act. Mr. Thompson’s defense counsel presented extensive evidence on the subject, including the testimony of Mr. Thompson personally. . . .

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.

(Appellant's Brief at 13.)

Counsel's argument is without merit. Neither the court, the State, nor even defense counsel could have known that the Appellant was pursuing an automatism defense. It was never mentioned—not during opening, closing, cross-examination or direct examination.

Instead of addressing the record, as it exists, counsel offers this Court an assignment of error based on a premise he cannot prove. He has constructed it from whole cloth. The argument need not fit the record, the record may be manipulated, *post hac*, to fit the argument.

The Appellant also claims that the trial court's failure to instruct the jury on a defense which trial counsel never raised constituted plain error. A trial court does not err when it fails to instruct the jury regarding a defense not argued by defense counsel.

1. **West Virginia Code § 61-8D-4a punishes failures to act, not acts.**

The proposition that failure to act, when there is a statutory duty to act, may constitute the appropriate *actus reus* is black letter criminal law. *See People v. Beardsley*, 113 N.W. 1128, 1129 (Mich. 1907) (“under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter”).

There are at least four situations in which the failure to act may constitute a breach of legal duty. One can be held criminally liable: first, where a statute imposes a duty of care to another; second, where one stands in certain status relationship to

another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.

Jones v. United States, 308 F.2d 307 (C.A.D.C. 1962) (footnotes omitted).

This Court has recognized the Legislature's authority to prescribe certain parental duties. *C.f.* Syl pt. 5, *In re Wills*, 157 W. Va. 225, 207 S.E.2d 129 (1973) (fundamental right of natural parent to custody of minor may be limited or terminated by state if there is evidence of abuse or neglect); Syl. pt. 3, *Wyatt v. Wyatt*, 185 W. Va. 472, 408 S.E.2d 51 (1991) (duty to support child financially is "basic duty owed by parent to child"); *State ex. rel. Sale v. Goldman*, 208 W. Va. 186, 199, 539 S.E.2d 446, 459 (2000) (juvenile curfew ordinance does not unconstitutionally infringe upon right of parental privacy); *see generally State v. Kirk N.*, 214 W. Va. 730, 737, 591 S.E.2d 288, 295 (2003) (parents are a child's natural guardians).

The Legislature may punish parents for omissions as well as acts. *See Commonwealth v. Raposo*, 595 N.E.2d 773, 778 n.1 (Mass. 1992) (Abrams, J., concurring), and statutes cited therein.

West Virginia Code § 61-8D-4a(a) states, in part:

(a) If any parent . . . shall neglect a child under his or her care, custody and control and by such neglect cause the death of said child, then such parent, guardian or custodian shall be guilty of a felony. . . .

Neglect is defined as:

(6) "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.

W. Va. Code § 61-8D-1(6) (emphasis added).

To procure a conviction under this statute the State must prove that defendant unreasonably failed to provide a minimum degree of care, and that this failure resulted in his child's death.

2. **The Appellant failed to supervise and care for his son.**

The State proved that the Appellant left his two-year-old son inside his car for five hours. His failure to supervise his child resulted in the child's death. The Appellant knew that his son was wholly dependent upon him for care and support. He knew that he was the only adult present. He knew that he was leaving his infant son in a place where he could not see or care for him. He knew that his child was prone to dangerous conduct, and that he required constant supervision. Indeed, he was the one who modified Luke's car seat so that he could not unbuckle it.

The Appellant also knew that he had not slept in 24 hours. He knew that 18 of those hours had been spent doing physically demanding work. He willingly spent the rest of the evening riding from place to place with his son strapped to his baby seat. Once he arrived home he went into his house and, allegedly, collapsed from exhaustion. His unconscious condition was not the result of a pre-existing sleep disorder or medical condition, nor was it an involuntary reflex. His collapse was a foreseeable result of his volitional conduct.

Automatism should not be a cognizable defense to a claim of neglect when the defendant has knowingly, and unreasonably created the conditions rendering his failure to act foreseeable. *C.f. Lewis v. Kirk*, 168 W. Va. 199, 283 S.E.2d 846 (1981) (in civil matters party may not rely on sudden emergency doctrine where his own conduct created the emergency); *People v. DeCina*, 138 N.E.2d 799, 803-804 (N.Y. 1956) (actus reus proven by conduct of epileptic driver prior to seizure resulting in accident including driver's knowledge that seizures were foreseeable).

II. THE CONDUCT PROSCRIBED BY WEST VIRGINIA CODE § 61-8D-4a IS NEGLIGENCE, NOT NEGLIGENCE; THUS, THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE LAW OF CRIMINAL NEGLIGENCE WAS NOT AN ABUSE OF DISCRETION.

A. Standard of Review.

A trial court's refusal to give an instruction is reviewed for abuse of discretion. Syl. pt. 1, *State v. Hinkle*, 200 W. Va. 280, 489 S.E.2d 257 (1996). A trial court is under no obligation to give instructions that are incorrect as a matter of law. Syl. pt. 4, *State v. Guthrie*, *supra*. Nor is it required to give instructions that are duplicative or irrelevant. *State v. Boggess*, 204 W. Va. at 273, 512 S.E.2d at 195.

“Where instructions given clearly lay down the law of the case, it is not error to refuse other instructions on the same subject. The court need not repeat instructions already substantially given.” Syl. pt. 4, *State v. Johnson*, 157 W. Va. 341, 201 S.E.2d 309 (1973).

B. Discussion.

1. The plain meaning of West Virginia Code § 61-8D-4a requires proof of neglect as defined by West Virginia Code § 61-8D-1(6), not gross negligence.

The Appellant's proposed instruction would have read, “child neglect require[s] 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. 430.)

This language comes from *State v. Deberry*, 185 W. Va. 512, 515-516, 408 S.E.2d 91, 94-95 (1991). Although the Appellant characterizes *Deberry* as the “gold standard,” it was decided six years before the Legislature passed West Virginia Code § 61-8D-4a (1997). There have been

changes to the law since this Court decided *Deberry*. In 1996, the Legislature amended West Virginia Code § 61-8D-4¹³ to include a provision punishing a parent who *grossly neglects* a child. See W. Va. Code § 61-8D-4(c). The Legislature did not include a similar provision in § 61-8D-4a.

Had the Legislature intended Code § 61-8D-4a to require proof of gross negligence, it could have said so. Had the Legislature intended to equate “neglect” with “gross negligence,” it would not have amended W. Va. Code § 61-8D-4(c) to include the term “gross neglect.”

The Appellant is asking this Court to rewrite an unambiguous statute. See *Crockett v. Andrews*, 153 W. Va. 714, 715, 172 S.E.2d 384, 385 (1970) (Court will give effect to plain meaning of unambiguous statute without resorting to rules of statutory construction). The statute’s language is plain. It requires proof that: (1) a parent (2) neglected his child (3) under his care (4) resulting in death. The Code defines neglect as “the unreasonable failure by a parent . . . to exercise a minimum degree of care to assure said minor child’s physical safety or health.” W. Va. Code § 61-8D-1(6).

In Syl. pt. 1, *State v. Deberry*, this Court held:

In order to obtain a conviction under W. Va. Code § 61-8D-4(b) [1988], the State must prove that the defendant neglected a minor child with the meaning of the term “neglect,” *as that term is defined* in W. Va. Code § 61-8D-1(6)[1988], which definition is “the unreasonable failure by a parent . . . to exercise a minimum degree of care to assure said child’s physical safety and health.” Furthermore, the State must prove that such neglect caused serious bodily injury. However, there is no requirement to prove criminal intent in a prosecution under W. Va. Code § 61-8D-4(b) [1988].

(Emphasis added.)

Neither statute requires the State to prove criminal negligence, it requires a finding of neglect. See *Deberry*, 185 W. Va. at 515, 408 S.E.2d at 94 (Court does *not use* the words neglect and

¹³The statute the *Deberry* Court addressed in its opinion.

negligence interchangeably). Neglect, as used in the statute, is not a degree of negligence. “We note that W. Va. Code § 61-8D-4(b)[1988] *does not establish a standard of negligence*, such as ‘reckless disregard’ which is contained in the state’s vehicular negligent homicide statute . . .”) *Deberry*, 185 W. Va. at 516 n.6, 408 S.E.2d at 95 n.6 (emphasis added). An “unreasonable failure” does not require a finding of negligence. Intentionally or knowingly neglecting a child to the point of death also constitutes an “unreasonable failure” to provide a “minimum degree of care.”¹⁴

Admittedly, the Court found that a showing of neglect requires more than ordinary negligence, but it did not find that these terms were synonymous: “Our decision is limited to holding that W. Va. Code § 61-8D-4(b) [1988] *requires neglect*, which as defined by W. Va. Code § 61-8D-1(6) [1988] is, fundamentally, of a higher degree than ordinary negligence.” *Deberry*, 185 W. Va. at 516, 408 S.E.2d at 95 (emphasis added).

In *State v. Deberry*, this Court found that the terms “unreasonable failure” and “minimum degree of care” did not render the statute void for vagueness. It also found that the Legislature had the authority to proscribe neglect, without requiring intent:

We agree with the State’s contention that W. Va. Code § 61-8D-4(b) [1988] and W. Va. Code § 61-8D-1(6) are not ambiguous. *Clearly, the legislature intended to impose a standard of neglect*, as opposed to requiring intent, by enacting W. Va. Code § 61-8D-4(b)[1988].

Deberry, 185 W. Va. at 515, 259 S.E.2d at 94 (emphasis added).

The Court explicitly rejected comparisons between neglect and “reckless disregard.” See *Deberry*, 185 W. Va. at 516 n.6, 408 S.E.2d at 95 n.6 (citing *State v. Vollmer*, 163 W. Va. 711, 259 S.E.2d 837 (1979)). On previous occasions this Court has held that “gross negligence” is

¹⁴If a defendant intentionally neglects his child with the intent to cause the child’s death, he is guilty of first degree murder. W. Va. Code § 61-8D-2(a).

synonymous with “reckless disregard.” See *Peak v. Ratliff*, 185 W. Va. 548, 552 n.4, 408 S.E.2d 300, 304 n.4 (1991) (for purposes of W. Va. Code §17C-5-2(d) terms gross negligence and reckless disregard are synonymous); *Baker v. Ohio R. Co.*, 51 W. Va. 423, 41 S.E. 148 (1902) (criminal negligence is wanton and willful recklessness disregard of the lives of passengers). But see *Mandolidis v. Elkins Industries Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978) (gross negligence not the same as reckless disregard for human safety for purposes of suing employer for workplace injuries); *Stone v. Rudolph*, 127 W. Va. 335, 32 S.E.2d 742 (1944) (gross negligence falls short of reckless disregard of consequences sufficient to prove willful and intentional wrong).

The trial court’s instructions were taken directly from the statute. It defined the standard of conduct unambiguously. (Tr. 445-46.) The jury was instructed, according to the law, and it’s refusal to give Appellant’s jury instruction was not an abuse of discretion.

Indeed, even if this Court were to equate neglect with gross negligence, the trial court’s instructions are still proper. A court need not instruct the jury about an issue twice. Refusal to give a duplicative instruction does not constitute an abuse of discretion. “Where instructions given clearly lay down the law of the case, it is not error to refuse other instructions on the same subject. The court need not repeat instructions already substantially given.” Syl. pt. 4, *State v. Johnson*, *supra*.

2. **The trial court’s instructions did not direct a verdict for the State.**

The court instructed the jury, in part:

4. did neglect his biological son, Luke Alexander Thompson,
5. by unreasonably failing to exercise a minimum degree of care to assure the physical safety of the minor, Luke Alexander Thompson,

6. *in that he left the minor child alone in a car unattended for a period in excess of four hours.*
7. and that said neglect caused the death of said Luke Alexander Thompson.

(Tr. 446-47, emphasis added.)

The Appellant did not object to this instruction at trial. “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. 8, *State v. Garrett*, 195 W. Va. 630, 466 S.E.2d 481 (2004). “When reviewing challenges to jury instructions, we generally look first to the record of the trial court proceedings to ensure that the claimed instructional error has been properly preserved for appellate review.” *State v. Allen*, 208 W. Va. 144, 150-151, 539 S.E.2d 87, 93-94 (1999).

This Court may recognize “grave instructional error” if the giving of the instruction constitutes plain error. *State v. Richards*, 195 W. Va. 544, 547, 466 S.E.2d 395, 398 (1995). In order to trigger the Plain Error Doctrine, this Court must find that there is error, that is plain, that affects substantial rights, and seriously affects the fairness, integrity, or public reputation of the judicial proceeding.” Syl. pt. 7, *State v. Miller, supra*.

This State concedes that the instruction creates a presumption of neglect from a single omission. *See Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993)(defendant has a fundamental right to conviction only upon proof of each element beyond a reasonable doubt).

The instruction did not result in a directed verdict for the State. Although the jury was permitted to presume neglect from proof of certain facts, it still had to find these facts beyond a reasonable doubt. *Rose v. Clark*, 478 U.S. 570, 579 (1986).

Such instructions are amenable to harmless error analysis. (*Id.*) Thus this Court must decide if the evidence was “so dispositive of [neglect] that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption.” *Rose*, 478 U.S. at 584.

Merely contesting the issue of neglect does not preclude this Court from finding harmless error. “But our harmless error cases do not turn on whether the defendant conceded the factual issue on which the error bore. Rather, we have held that ‘*Chapman* mandates consideration of the entire record prior to reversing a conviction for constitutional errors that may be harmless.’” (*Id.*)

In the case at bar the evidence of neglect was overwhelming. The Appellant intentionally left his son in his car. He then fell asleep for five hours. The defense argued that the Appellant’s conduct was reasonable. The evidence did not support the defense’s theory of the case.

There is little to no evidence suggesting that the Appellant weighed his options, or considered the risks he created before acting. He artificially narrowed his choices to two options: leave the child in the car; or, take him inside. There is no evidence that he weighed the utility of changing into dry clothes, against the potential risks. Clearly, he did not want his son to get wet, but that is not the point. There were others ways of accomplishing this end which did not entail the same risks.

Because there is overwhelming evidence of neglect, the trial court’s instruction, although error, was harmless.

III. THE EVIDENCE ADDUCED BY THE STATE WAS SUFFICIENT.

A. The Standard of Review.

In *State v. Guthrie, supra*, this Court adopted the federal standard of review for sufficiency of the evidence claims as set forth in *Jackson v. Virginia, supra*: A verdict of guilty will not be set

aside due to insufficiency of the evidence if, reviewing the evidence in the light most favorable to the prosecution, the appellate court finds that “any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” *Guthrie*, 194 W. Va. at 668, 461 S.E.2d at 173. The Court made it clear that the burden is on the defendant to overturn the presumption of correctness in a jury’s verdict, and that the State is entitled to all inferences in favor of that verdict.¹⁵

B. Discussion.

1. **Because the Appellant failed to renew his motion for a judgment of acquittal at the close of all of the evidence, he has waived this assignment of error, and this Court should only reverse if the record reveals a manifest miscarriage of justice.**

Defense counsel moved for a judgment of acquittal at the close of the State’s case. (Tr. 395.) The court denied the motion. (Tr. 396.) Defense counsel did not renew that motion at the close of its case-in-chief, nor does the record contain any post-trial motions on this issue.

Several federal courts have held that if a defendant does not renew a motion for judgment of acquittal at the close of trial, appellate review is limited to whether there was a manifest miscarriage of justice. *United States v. Price*, 134 F.3d 340, 350 (6th Cir. 1998), and cases cited therein; *United States v. Booker*, 436 F.3d 238, 241 (C.A.D.C. 2006). Several state courts have adopted the same position. See *State v. Chen*, 884 P.2d 392, 396 (Hawaii App. 1994); *State v. Hawkins*, 105 P.3d 902, 903 (Or. App. 2005), *State v. Andrezzi*, 798 A.2d 372, 374 (R.I. 2002), *State v. Barbera*, 872 A.2d 309, 311 (Vt. 2005), *McCracken v. State*, 800 A.2d 593, 614 (Md. App. 2003),

¹⁵ “[A] criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution.” *Guthrie*, 194 W. Va. at 669, 461 S.E.2d at 175.

Allen v. Molyneaux, 760 N.E.2d 461, 468 (Ohio App. 2001), *Farbotnik v. State*, 850 P.2d 594, 604 (Wyo. 1993); *but see McClora v. State*, 870 So.2d 120 (Fla. App. 2003).

The Appellee suggests that this Court adopt the same position. Rule 29(a) of the West Virginia Rules of Criminal Procedure is identical to Rule 29(a) of the Federal Rules of Criminal Procedure. Although federal interpretations of an identical statutes are not binding, they are persuasive, as is the case law from sister states.

2. **The State introduced sufficient evidence in support of the conviction.**

Under any standard of review it is clear that the State introduced sufficient evidence supporting the Appellant's conviction. The Appellant intentionally left his son in his car. Then he fell asleep. Although the Appellant argues that falling asleep with his child still in the car somehow exonerates him; in fact, it is just more evidence of his negligence. He had a duty to consider his exhaustion before deciding to leave his son in his car. There is no evidence that he did. He had a duty not to fall asleep. *See, e.g., Lipscomb v. O'Brien*, 25 S.E.2d 261 (Va. 1943) (falling asleep at the wheel violation of driver's duty to keep a lookout).

The Appellant does not deny that he left his son in the backseat of his car, or that he fell asleep for five hours. He claims that he did not "act" and that his decision to leave his son in the car was reasonable given the circumstances which existed at the time he made his decision. (Appellant's Brief at 21.) He claims that the jury's verdict could not have been based on the evidence, but was returned out of a desire for revenge. This is rank speculation.

The Appellee does agree that the facts of this case are "evident." (Appellant's Brief at 22.) The Appellee does not agree with the Appellant's spin on these facts. The evidence does not

demonstrate that the Appellant was a "loving, thoughtful, and caring parent." The evidence proves that on at least two prior occasions, he had left his son strapped to his baby seat with no supervision.

Nor was the Appellant's decision reasonable. The Appellant knew that he was tired, knew that he had not slept in almost 24 hours. Yet, this did not factor into his decision. It was clearly foreseeable that he would fall asleep. Indeed, a reasonable jury could have found his "explanation" incredible. The Appellant claims that he fell asleep sitting down with his torso resting on his knees. He also claims that he was in the same position when he awoke five hours later.

He now claims that he did not take his son with him because of "the dangers of illness," "dangers from injury in the dark," and from the "dangers of injury from escaping his car seat." (Appellant's Brief at 22.) But the Appellant never testified that he considered any of these risks before acting.

A reasonable jury could find that the Appellant came home wet and tired. His child was asleep in the back seat, not making any noise. The Appellant wanted to go inside and change his wet clothes. In order to take his son with him he would have to expend the effort to unbuckle him from his seat, pick him up and carry him inside. Because he was wet and tired the Appellant didn't want to take the extra time, or expend the extra effort. So he took a risk, ignoring the potential consequences of his act.

Even if this Court were to accept the Appellant's position the outcome would be no different. The Appellant is asking this Court find that it was reasonable for him to think that his son would be safer inside his car, with the windows shut, strapped to a car seat, without any supervision. The Appellant would have you believe that he rationally balanced the enormous risks involved against the utility of his conduct. He thought that this helpless two year old would be better off alone.

In fact the Appellant did no such thing. Indeed, Appellant's willingness to embellish the facts on this issue demonstrates his recognition of this fact. The evidence, even taken in a light favorable to the Appellant, demonstrates that he gave little thought to his decision, and that he failed to consider other reasonable alternatives such as carrying his child inside under an umbrella. If, as the Appellant now argues, he believed he was only faced with two choices, it is not because it was so, it was because of the Appellant's unwillingness to think through his options.

The real tragedy of this case is that Luke's death was avoidable. Had his father stopped and thought about what he was doing, just for an extra moment, he might have realized that leaving his son alone in his car was not reasonable. A reasonable jury might find that the Appellant broke one of the cardinal rules of reasonable parenting: Never leave your two-year-old child alone and out of your sight.

The Appellant was not faced with a sudden emergency. The circumstances did not make it physically impossible for him to exercise reasonable care. When balanced against the Appellant's need for dry clothing, a drink, and a cigarette, the scales of reason tip decisively in favor of the child.

The Appellant gambled with the life of his son. A reasonable jury could have found that the reward, *i.e.* dry clothes, a quick swig of soda, and a cigarette, were not worth the risk. A reasonable jury could have found the Appellant's conduct neglectful.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Kanawha County should be affirmed by this Honorable Court

Respectfully submitted,

STATE OF WEST VIRGINIA,
Appellee,

by Counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL



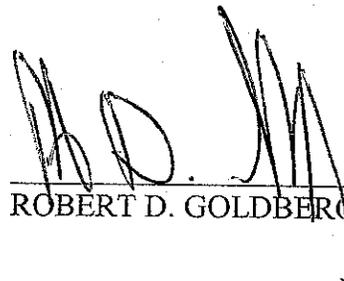
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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing *Brief of Appellee State of West Virginia* was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 7th day of February, 2007, addressed as follows:

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