

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**ADONIS RAY THOMPSON,**

**Appellant,**

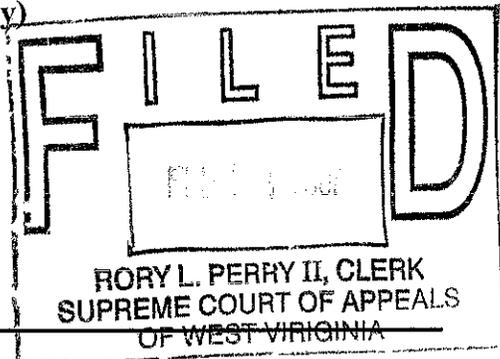
**v.**

**Supreme Court No. 062045**

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

**STATE OF WEST VIRGINIA,**

**Appellee.**



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**REPLY BRIEF OF APPELLANT**

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**POINT ONE: THE STATE CANNOT IGNORE THE EVENTS AT TRIAL TO CLAIM THAT THERE WAS NOT RELIANCE ON THE AUTOMATISM DEFENSE AT TRIAL (Responding to State's Brief, 11-14)**

The State claims that there was no reliance on a defense of automatism at trial. This is wrong for several reasons:

1. It is true that the word "automatism" does not appear in the record; but this is only half the story. The words "accident", "unconsciousness", and "loss of ability" are replete in the record. R. 312, 314-318, 332, 337, *c.f.* 423, *c.f.* 427-428, 454-459. The State ignores this fact. A plain reading of the record reveals that everyone in this case, whether they be prosecutor, defense counsel, or trial judge, knew that the defense in this case was that Mr. Thompson had no intent to fall asleep, but rather that it was an involuntary act beyond his control. This is the very definition of automatism as defined by Justice Cleckley in *State v. Hinkle*, 200 W.Va. 280, 286, 489 S.E.2d 257, 263 (1996). The fact that trial defense counsel did not know the precise word for an unusual legal doctrine is irrelevant<sup>1</sup>; it cannot be disputed that she understood that an involuntary act negated criminal liability, and thus presented evidence on that fact. R. 423, 427-428. As discussed in Appellant's Brief, the failure to instruct is either preserved by the reliance on the evidence as Justice Cleckley ruled in *Hinkle*, or in any event as plain error. Appellant's Brief (AB) 13. The State failed to address either of these points.

2. The prosecutor clearly understood what the defense was, given his efforts prior to trial to introduce evidence under W.Va. Rule of Evidence 404(b) to rebut the claim of accident. R. 312, 314-318. Similarly, the trial judge also understood the issue, considering her comments on that claim. The State ignores these actions in the record, claiming that no one knew that this was the defense. In fact, the prosecutor rested his case on Mr. Thompson's acts; he claimed in his

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<sup>1</sup> Neither should Mr. Thompson be punished for this ignorance either.

closing argument that Mr. Thompson's version of events was not credible, therefore the jury should not excuse his conduct as an accident. R. 459-463. This argument shows that the prosecutor understood the defense and was attempting to defeat it.

3. The State takes a position that is contrary to the automatism defense as established by this Court by claiming that Mr. Thompson is not entitled to the defense because he knew he had not slept in twenty-four (24) hours. Relying on law that does not apply to this case<sup>2</sup>, he attempts to claim the defense is inapplicable. SB 14. Justice Cleckley clearly held: 1) that automatism was available as a defense when the accused had made a conscious act to be in the situation that ultimately created the injury<sup>3</sup>; and 2) that the defense eliminated the mental state or voluntary nature of the act. *Hinkle*, 200 W.Va. at 258 & 263, 489 S.E.2d at 281 & 286. The key fact is that the critical moment in the defense is not the decision that puts the accused on the path to the involuntary act, it is the involuntary action itself. This Court has recognized this as the law, requiring that the State prove that the accused could reasonably foresee what was going to happen. *State v. Richeson*, 179 W.Va. 533, 535, 370 S.E.2d 728, 730 (1988). The State claims that Mr. Thompson's involuntary act of collapsing from exhaustion was foreseeable. SB 14. However, nothing was ever produced at trial by the prosecution to show that Mr. Thompson could reasonably foresee what was about to happen, and any attempt to claim otherwise is to twist the

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<sup>2</sup> The State cites a civil case on the sudden emergency defense and a New York case whose reasoning does not apply to *Hinkle*. The New York case addressed a situation where the defendant had an extensive history of epilepsy, not a situation like Mr. Thompson's, where he had never been placed in this situation before and made a well-reasoned decision that unfortunately had a tragic outcome. *People v. DeCina*, 138 N.E.2d 799, 803 (N.Y., 1956). Both cases predate *Hinkle*, and as such, are superceded by that holding.

<sup>3</sup> This Court made no requirement that the accused have no knowledge of the fact he might have a problem. In fact, Justice Cleckley specifically rejected this in *Hinkle*, noting that the accused was entitled to the defense even though he had recognized well prior to engaging in the conduct that ultimately resulted in the alleged offense that he was suffering from a problem. *Hinkle*, 200 W.Va. at 258, 489 S.E.2d at 281. In any case, no evidence was provided at trial to show Mr. Thompson knew he was so tired that he was in danger of involuntarily falling asleep.

record *post hoc*. The State ignores the clear meaning of the law and tries to twist it to avoid the defense.

4. The State completely fails to address the cases cited in Appellant's Brief, pages 10-11 which recognizing sleep deprivation invokes the automatism defense, thus conceding their applicability. Nor does the State provide any evidence in the record showing Mr. Thompson reasonably knew he was about to collapse. The State decries Mr. Thompson for being unwilling to think through his options. SB 24. It is very easy, sitting in a warm, dry office, knowing it is not your child whom is being discussed, knowing the outcome that one of the potential decisions will have, knowing many facts outside the limited knowledge of Mr. Thompson. This accident was avoidable, but only if one looks at the situation in hindsight and knows that Mr. Thompson would involuntarily become unconscious. The facts speak for themselves; Mr. Thompson made a reasonable decision based on the facts as he saw them. No amount of second guessing can change the fact he had no way to know his body would fail him.

**POINT TWO: THE STATE ADMITS THAT THE INSTRUCTION GIVEN CREATES A PRESUMPTION OF NEGLIGENCE AND MISCHARACTERIZES *DEBERRY*, ATTEMPTING TO SHOW STANDARD OF CARE INSTRUCTION WAS NOT NECESSARY (Responding to State’s Brief, 16-20)**

The State concedes the trial court improperly instructed the jury “that the instruction creates a presumption of neglect from a single omission.”; and “...the Jury was permitted to presume neglect...” SB 19.

1. The State has admitted that the judge’s instruction shifted the burden from the State to prove that the act of leaving Luke in the car was an act of neglect, to creating a presumption that such an act was neglect, thereby imposing the burden on Mr. Thompson to prove that it was not neglect. Such burden shifting in a criminal case is constitutionally impermissible. *Pullin v. State*, 216 W.Va. 231, 235, 605 S.E.2d 803, 807 (2004), citing, e.g., *In re Winship*, 397 U.S. 358 (1970).
2. The State attempts to claim that such an error is harmless. SB 20. This Court has specifically refuted this idea. *Pullin*, 216 W.Va. at 235, 605 S.E.2d at 807, citing *Angel v. Mohn*, 162 W.Va. 795, 798, 253 S.E.2d 63, 66 (1979).
3. Moreover, the trial court cannot direct a verdict of guilt on any element of a criminal offense no matter how strong the prosecution’s evidence. The trial court did so here by instructing the jury that Mr. Thompson’s act of leaving Luke in the car constituted neglect.<sup>4</sup> Even if the prosecution’s evidence was overwhelming, which is certainly not the case here, this error invaded the province of the jury by making the decision for them. *See United States v.*

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<sup>4</sup> “[T]he defendant, Adonis Ray Thompson...did neglect his biological son...by unreasonably failing to exercise a minimum degree of care...in that he left the minor child alone in a car unattended for a period in excess of four hours.” R. 445-447. Nothing in this instruction allows the jury to determine whether leaving Luke in the car was a reasonable decision at the moment it was made. It assumes that this was neglect.

*Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977); *Carpenters v. United States*, 330 U.S. 395, 408 (1947).

4. The State attempts to claim that the instruction offered by the defense from *State v. Deberry*, 185 W.Va. 512, 408 S.E.2d 91 (1991), is inapplicable and not necessary. This is wrong for two reasons: The State has mischaracterized the change in the statute since *Deberry* was decided. The legislature has changed the statute directly at issue in *Deberry* since it was decided; however, the State admits the statute at issue in this case (W.Va. Code § 61-8D-4a), which is identical in all respects important to the instruction, i.e., the definition of neglect, has NOT changed since *Deberry*. Thus, *Deberry's* logic still applies and the remainder of the State's argument on this matter is meaningless.

5. The State never addresses the points made by Mr. Thompson in his brief, where he discusses the fact that neglect requires more than some deviation below the standard of care expected from a parent. AB 16-20. Because *Deberry* clearly defined neglect, is a correct statement of the law and was not included in the trial court's instruction, its refusal to give that instruction, as requested by defense counsel at trial, constitutes reversible and prejudicial error to Mr. Thompson. *State v. Derr*, 192 W.Va. 165, 180, 451 S.E.2d 731, 746 (1994).

6. The fact remains, without the proffered instruction, an instruction directly taken from this Court's only definition of criminal neglect, the jury was without any standard to determine what neglect was. Instead, they were instructed that what Mr. Thompson had done WAS neglect, to his manifest prejudice. R. 445-447.

**POINT THREE: SUFFICIENCY OF THE EVIDENCE CANNOT BE MADE IN CHILD NEGLECT CASES BY A POST-EVENT ANALYSIS OF EVENTS TAKING INTO ACCOUNT FACTS UNKNOWN AT THE TIME OF DECISION, MISCONSTRUING THE STATUTE TO DO SO (Responding to State's Brief, 1-9, 12-13, and 22-24)**

The State argues that its evidence was sufficient to support Mr. Thompson's conviction. It does so by relying on the bad outcome of Mr. Thompson's reasonable decision, completely ignoring the reasonableness of the decision at the time it was made. It reaches this conclusion by misconstruing the statute to allow it to second guess a parent's decision. This is wrong for several reasons:

1. W.Va. Code § 61-8D-4a (1997) contains within it a requirement of reasonableness. "Neglect" means the unreasonable failure by a parent..." W.Va. Code § 61-8D-1 (providing definitions of terms in subsequent sections). Reasonableness has been determined by the courts in every context to rest upon determinations made based on the facts known at the time the decision was made, not based on 20/20 hindsight. *See generally, e.g., c.f., Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("It is all too tempting...to second-guess [a decision] after [an adverse result], and it is all too easy for a court, examining [the decision] after it has proved [unwise], to conclude that a particular act or omission of [the person] was unreasonable."); *Resource Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 637 (4<sup>th</sup> Cir., 2005); *Patton v. Gaston*, 207 W.Va. 168, 174, 530 S.E.2d 167, 173 (1999).
2. The State instead substitutes a "Monday-morning quarterbacking" viewpoint, second guessing the decision that was made, solely based on the tragic outcome. SB 7, 20, 22-24. The State admits this, talking about what might have been, going on about the various options that it sees now, with plenty of time, in a dry, calm, environment. SB 23-24. Unfortunately, Mr.

Thompson never had that opportunity; he was on the scene and made a reasonable decision, based clearly on the problems that he saw. The State's view ignores these facts.

3. After going on at length complaining about the Appellant's view of the facts, the State proceeds to twist the facts to suit its own purposes, attempting to accomplish the goal it accuses Appellant of pursuing<sup>5</sup> – convincing this Court on emotion simply because a child died.

4. The State does its best to refute Mr. Thompson's assertions that he was doing the best for his family, claiming that he only was interested in himself. SB 2. The only way to reach such a conclusion is to ignore the facts. Here are the undisputed facts: 1) Mr. Thompson worked a double shift that day to provide for his family (R. 412-413); 2) Luke had been ill and Mr. Thompson had sought appropriate medication for him (R. 414); 3) Mr. Thompson observed that the weather conditions and recognized that flooding had created a dangerous situation for Luke, Ms. Ferrell, and himself (R. 414-415); 4) Mr. Thompson recognized that his duty to his family meant his entire family, not just Luke, and he performed that duty by helping his parents to escape from the flood that night<sup>6</sup> (R. 415-416); 5) Mr. Thompson worked tirelessly that evening not only to help his family, but other neighbors as well whose homes and lives were threatened

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<sup>5</sup> Appellant specifically denies any misstatement of fact throughout its brief. Every fact mentioned anywhere in the brief is either directly contained in the record or is reasonably inferable from the facts and circumstances described. Further, every reasonable inference was verified by counsel through discussions with Mr. Thompson of the facts to be certain that these inferences were in fact accurate depictions of the facts and not in error. Mr. Thompson will not engage in attacks on the State, disputing evidence or re-writing the facts. See SB 2, 3, and 6.

<sup>6</sup> The State implies that it was improper to keep Luke in the car that evening, claiming that Mr. Thompson has some unspecified "need to drive all evening." SB 6, FN 8. The State does not describe what this supposed "need" was, and the record provides no evidence that there was any "need", other than the fact that Mr. Thompson, Ms. Ferrell, and Luke had to evacuate their home in a flood emergency, could not go to his parent's home because they too were flooded out, and was forced to wait in the only shelter he had for Luke – his car – until the floodwaters subsided the next morning. In fact, Mr. Thompson made several attempts to return home that evening, but was turned back by the floodwaters. R. 335. This is not a "need to drive all evening." It is a father, husband, and son doing the best he can for his family with the meager resources at his disposal.

by the flood (R. 415-416); 6) Mr. Thompson and Ms. Ferrell continued the next morning to help their family, making arrangements for them to salvage what they could, going to the length of taking off from work to help his family (R. 417); 7) Mr. Thompson was soaking wet and needed dry clothes in order to continue working to help his entire family (R. 418); 8) Mr. Thompson assessed all the factors as he saw them at the moment, making the best decision that he saw available to ensure Luke's well-being.

5. The State further asserts that Mr. Thompson, by leaving Luke in the car, took a risk, ignoring the potential consequences of that decision. SB 7, 14. There is no evidence in the record that Mr. Thompson knowingly ignored a potential consequence of his decision to leave Luke in the car. There is absolutely none, unless Mr. Thompson is required to be clairvoyant and foresee that he would enter the trailer and collapse from exhaustion. Given all Mr. Thompson's effort in the previous twenty-four (24) hours to insure the safety of his family, including Luke, it is ludicrous to suggest, as the State does, that Mr. Thompson could foresee his collapse from exhaustion before he returned to the car.

6. The State has offered nothing in the way of evidence to demonstrate that Mr. Thompson's decision to leave Luke in the car for a few minutes was not reasonable. How was it not – Mr. Thompson was coming back in a few minutes. The State's argument only makes sense if Mr. Thompson consciously knew he was putting Luke at serious risk by leaving him for a few minutes. There is no evidence of that in the record.

7. Under the State's interpretation, if a parent elected to do anything with a child that resulted in death, the parent's decision regarding the child may be second-guessed; that the fact that the child died could be reverse engineered to determine that their decision was unreasonable, no matter how reasonable the decision from the point of view of the actor, and thus, support

criminal liability. The State is trying to divert the issue from this fact: that Mr. Thompson made a reasonable decision that went tragically wrong, and unfortunately for the State, the law does not allow for prosecution of accidents such as this.

**POINT FOUR: THERE IS NO REQUIREMENT IN LAW FOR A  
DEFENDANT TO RENEW HIS MOTION FOR  
JUDGMENT OF ACQUITTAL AT CLOSE OF  
EVIDENCE TO AVOID WAIVER (Responding to State's  
Brief, 21-22)**

The State attempts to convince this court that his assignment of error for sufficiency of the evidence is waived for failure to renew his motion for judgment of acquittal at the close of evidence. This is wrong for several reasons:

1. Neither this Court nor the Fourth Circuit has ever held that to preserve a sufficiency challenge for appeal a defendant must renew his motion for judgment of acquittal at the close of evidence. The Supreme Court of the United States has held that sufficiency of the evidence is a constitutional requirement imposed by the Fourteenth Amendment without which the conviction cannot stand. *Jackson v. Virginia*, 443 U.S. 307, 318 (1979). In addition, this Court has reversed convictions for sufficiency while noting only the motion at the close of the State's case. *See, e.g., State v. Fiske*, 216 W.Va. 365, 367, 607 S.E.2d 471, 473 (2004).

2. Further, such a determination is not necessary to resolve this case and is highly (and overly) formalistic. Such a requirement would go far beyond the usual rule of preserving an issue for appeal; it effectively says that in order to preserve, the defendant must preserve TWICE. This is nonsense. Just as this Court has eliminated the need for exceptions to preserve objections, eliminated the need for continuous objections to each question in a string, and eliminated other similar redundancies, there is no need for this absurd rule proposed by the State.

**RELIEF REQUESTED**

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

Respectfully submitted,

ADONIS RAY THOMPSON, Appellant

BY COUNSEL:



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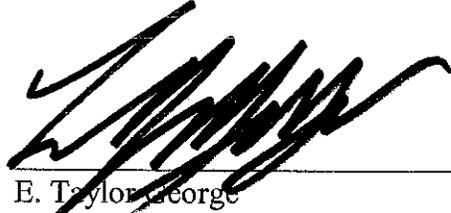
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**CERTIFICATE OF SERVICE**

I, E. Taylor George, hereby certify that on 21 February 2007, a copy of the foregoing **Reply Brief for Appellant** was mailed to Mr. Robert D. Goldberg, Office of the Attorney General, 1900 Kanawha Boulevard, East, State Capitol Room E26, Charleston, West Virginia 25305.



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