

Malice

West Virginia–Proposed Jury Instruction

The word malice, as used in these instructions, is used in a technical sense. It may be either express or implied and it includes not only anger, hatred and revenge, but other unjustifiable motives. It may be inferred or implied by you from all of the evidence in this case if you find such inference is reasonable from facts and circumstances in this case which have been proven to your satisfaction beyond all reasonable doubt. It may be inferred from any deliberate and cruel act done by the Defendant without any reasonable provocation or excuse, however sudden. Malice is not confined to ill-will toward any one or more particular persons, but malice is every evil design in general; and by it is meant that the fact has been attended by such circumstances as are ordinarily symptoms of a wicked, depraved and malignant spirit, and carry with them the plain indications of a heart, regardless of social duty, fatally bent upon mischief. It is not necessary that malice must have existed for any particular length of time and it may first come into existence at the time of the act or at any previous time.

State v. Jenkins (W.V. 1994)

"The Court instructs the jury that to convict one of murder, it is not necessary that malice should exist in the heart of the defendant . . . against the deceased. If the jury believes from the evidence that the defendant . . . was guilty of shooting with a deadly weapon, such as a .30-.30 rifle, the deceased and of killing him, the intent, the malice and the wilfulness, deliberation and premeditation may be inferred from the act, and such malice may not be directed against any particular person, but such acts by [the defendant] have shown a heart regardless of social duty and fatally bent on mischief."

Exercise: If you were defense counsel, what objection would you make to this jury instruction?

Footnote: The Supreme Court of Appeals of West Virginia found the jury instruction erroneous in this case, in part, on the grounds that the trial court erred in failing to state that 1st degree murder requires that malice be shown by the defendant against the victim. The results doesn't follow from cases previously decided by the court and seems not to have been followed after *Jenkins*. The more generally accepted rule is, as stated in the West Virginia proposed jury instructions: "Malice is not confined to ill will toward any one or more particular persons. The trial court in *Jenkins*, instructed the jury that: "[I]t is not necessary that malice should exist in the heart of the defendant . . . against the deceased." And this is clearly, notwithstanding the peculiar statements in *Jenkins* to the contrary, an accurate statement of the law.

The court found other objections to the jury instructions but then, unfortunately, obscured its objections by its decision in *State ex. rel. Hall v. Liller* (W.V. 2000).

State v. Boggess (W.V. 1998)

Malice is an essential element of Murder in the First Degree and Murder in the Second Degree. The term "malice" as used in these instructions is defined as that condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which may be inferred from the acts committed or the words spoke.

The word "malice" is used in a technical sense and included not only anger, hatred and revenge, but every unlawful and unjustifiable motive.

"Malice" is not confined to ill will or to any one or more particular persons, but is intended to denote an action flowing from a wicked or corrupt motive, done with an evil mind and purpose and wrongful intention, where the act has been attended by circumstances showing such a reckless disregard for human life as to necessarily include a formed designed against the life of another. . . .

It is reasonable to infer that a person ordinarily intends to do that which he does or which is the natural or probable consequence of his knowing acts. The jury may draw the inference that a person intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonable have expected to result from any intentional act or conscious omission.

Any such inference drawn is entitled to be considered by the jury in determining whether or not the State has proved beyond a reasonable doubt the required criminal intent.

Accordingly, if a man with a deadly weapon in his possession under circumstances which you do not believe afforded him excuse, justification or provocation for his conduct, gives a fatal or lethal wound to a deceased, then in those circumstances, "malice" and "intent to kill" may be inferred from the intentional use of a deadly weapon. (Emphasis added.)

State ex. rel. Hall v. Liller (W.V. 2000)

“The Court instructs the jury that malice means any wrongful act done willfully or purposely, an action flowing from a wicked and corrupt mind, a thing done with evil mind when such act has been accompanied by such circumstances as carry in them the plain indications of a heart regardless of social duty and fatally bent on mischief; that malice is a state of mind and can be deduced from attending circumstance such as the act itself and the manner, means and circumstances under which it is done; therefore, if the jury believes from all the evidence in this case, that at the time and place alleged in the indictment in this case, the said defendant . . . shot and killed [the victim] and that such killing was done intentionally, wilfully, premeditatedly, feloniously, unlawfully and with malice as defined above, then the jury may find the defendant . . . guilty of murder in the first degree as charged in the indictment in this case.”

State v. Carey (W.V. 2001)

[In *State v. Carey*, the court gave the WV proposed jury instruction on malice, plus the following instruction:]

The Court instructs the jury that homicide committed feloniously and unlawfully but without malice will constitute voluntary manslaughter. Malice, express or implied, is an essential element of murder in the first or second degree. And if absent, the homicide is of no higher grade than voluntary manslaughter. The Court instructs the jury that there is a permissible inference of fact that a person intends that which he or she does, or which is the immediate and necessary consequence of his or her act.

Malice and intent can be inferred by the jury from the defendant's use of a deadly weapon under circumstances which you do not believe afforded the defendant excuse, justification, or provocation for his conduct.

“malice aforethought”

–Jury Instruction in the Waco, Texas, Branch Dividians case (1993)

"To kill with malice aforethought" means either to kill another person deliberately and intentionally, or to act with callous and wanton disregard for human life. To find malice aforethought, you need not be convinced that the Defendant under consideration hated for the persons killed, or felt ill-will toward the victim at the time.

In determining whether the killing was with malice aforethought, you may consider the use of a weapon or instrument and the manner in which death was caused.

You should consider all the facts and circumstances preceding, surrounding, and following the killing which tend to shed light upon the condition of mind of each Defendant, before and at the time of the killing. No fact, no matter how small, no circumstance, no matter how trivial, which bears upon the questions of malice aforethought should escape your careful consideration.”

Generally Allowable Inferences as to Malice

“In a murder case, an instruction that a jury may infer malice and the intent to kill where the State proves beyond a reasonable doubt that the defendant, without lawful justification, excuse or provocation, shot the victim with a firearm, does not unconstitutionally shift the burden of proof.” Syllabus Point 2, *State v. Browning*, 199 W.Va. 417, 485 S.E.2d 1 (1997).