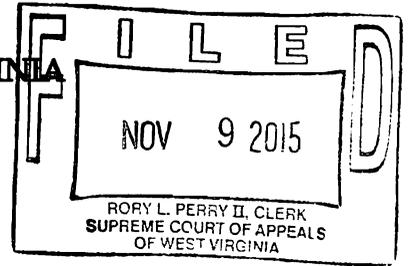


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Plaintiff Below, Respondent,

v.

Docket No.: 15-0581

ALVARO A. VILELA,

Defendant Below, Petitioner.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR.

A. WHETHER THE CIRCUIT COURT PROPERLY FOUND THAT THE PETITIONER WAIVED HIS RIGHT TO COUNSEL AND CONTINUED HIS MIRANDIZED STATEMENT TO THE POLICE?

B. WHETHER THE CIRCUIT COURT PROPERLY DENIED THE PETITIONER'S MOTION FOR ACQUITTAL?

II. STATEMENT OF THE CASE.

1. The Petitioner was convicted at a jury trial of indicted counts of felony Kidnaping and misdemeanor Attempted Extortion. The jury acquitted the Petitioner of the felonies of Assault During the Commission of a Felony and Extortion, and of fifteen misdemeanor counts of Unlawful Use of a Credit Card. The jury recommended mercy for the Kidnaping conviction. The Petitioner is sentenced to Life, with parole eligibility in ten years, for the Kidnaping, and one year in jail for the misdemeanor, to run consecutively.

2. The Petitioner was arrested at the scene at the time his kidnaping victim was rescued. The Petitioner was given his Miranda warnings, and waived his rights. During the course of being questioned by a State Trooper, the Petitioner asked for counsel and the Trooper ceased questioning. The Petitioner then recanted that request by initiating dialogue about the criminal investigation with the Trooper.

3. At the pre-trial suppression hearing, the trial court received the testimony of the Trooper, listened to the Petitioner's recorded statement, and had available to it a

transcribed copy of that statement. Upon consideration of this evidence, the trial court denied the Petitioner's suppression motion, ruling that the Petitioner recanted his request for counsel.

4. At trial, the jury received testimony and evidence from various witnesses, including the kidnapping victim, 75 year old Carol Dyall, and the Petitioner himself.

5. For the purposes of this appeal, the State finds that the Petitioner accurately summarizes the facts and history of the case.

6. The State asks this Court to affirm the rulings of the Circuit Court and the findings of the jury.

III. SUMMARY OF THE ARGUMENT.

The Petitioner fails to prove that the trial court erred in denying the Petitioner's motion to suppress, finding that the Petitioner recanted his request for counsel. State v. Kilmer, 190 W. Va. 617, 439 S.2d 881 (1993).

The Petitioner fails to prove that the jury lacked sufficient evidence upon which to convict him of Kidnaping and Attempted Extortion. State v. Grimes, 226 W.Va. 411, 701 S.E.2d 449 (2009); State v. Payne, 225 W.Va. 602, 694 S.E.2d 935 (2010).

The State respectfully asks this Court to affirm the jury's verdict.

IV. STATEMENT AS TO ORAL ARGUMENT.

If the Court were to choose this case for oral argument, disposition under *W.V.R.App.P.* 19 is appropriate.

V. ARGUMENT.

A. THE CIRCUIT COURT PROPERLY FOUND THAT THE PETITIONER WAIVED HIS RIGHT TO COUNSEL AND CONTINUED HIS MIRANDIZED STATEMENT TO THE POLICE.

1. Standard of Review.

This Court holds:

“Once a suspect in custody has expressed his clear, unequivocal desire to be represented by counsel, the police must deal with him as if he is thus represented. Thereafter, it is improper for the police to initiate any communication with the suspect other than through his legal representative, even for the limited purpose of seeking to persuade him to reconsider his decision on the presence of counsel.” Syllabus Point 1, State v. McNeal, W.Va., 251 S.E.2d 484 (1978).

Syl. Pt. 1, State v. Clawson, 165 W. Va. 588, 270 S.E.2d 659 (1980), and:

2. “When a criminal defendant requests counsel, it is the duty of those in whose custody he is, to secure counsel for the accused within a reasonable time. In the interim, no interrogation shall be conducted, under any guise or by any artifice. W.Va. Const. Art. 3, § 5 and W.Va. Const. Art. 3, § 14.” Syllabus Point 1, State v. Bradley, 163 W.Va. 148, 255 S.E.2d 356 (1979).

3. “If after requesting counsel an accused shall recant his request, there is a heavy burden upon the state to prove his waiver of right to counsel.” Syllabus Point 2, State v. Bradley, 163 W.Va. 148, 255 S.E.2d 356 (1979).

4. “There can be no interrogation of a person accused of committing a crime after he requests counsel, until counsel is provided except that if the suspect recants his request before counsel can be provided with reasonable

dispatch, interrogation may be conducted.” Syllabus Point 3, *State v. Bradley*, 163 W.Va. 148, 255 S.E.2d 356 (1979).

Syl. Pts. 2-4, *State v. Easter*, 172 W. Va. 338, 305 S.E.2d 294 (1983).

In evaluating whether there has been a recantation of the request for counsel, this

Court holds:

“For a recantation of a request for counsel to be effective: (1) the accused must initiate a conversation; and (2) must knowingly and intelligently, under the totality of the circumstances, waive his right to counsel.” Syl. Pt. 1, *State v. Crouch*, 178 W.Va. 221, 358 S.E.2d 782 (1987).

Syl. Pt. 2, *State v. Kilmer*, 190 W. Va. 617, 439 S.2d 881 (1993).

When considering the trial court’s decision on a motion to suppress a confession,

this Court holds:

“ ‘ ‘ A trial court’s decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.” Syllabus Point 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).’ Syl. pt. 7, *State v. Hickman*, 175 W.Va. 709, 338 S.E.2d 188 (1985).” Syllabus Point 2, *State v. Stewart*, 180 W.Va. 173, 375 S.E.2d 805 (1988).

Syl. Pt. 1, *State v. Farley*, 192 W. Va. 247, 452 S.E.2d 50 (1994).

2. Discussion.

There is no dispute between the parties that the Petitioner was in custody in the back of a State Trooper vehicle at the time he gave his statement to Trooper Hill, that the Petitioner was given his *Miranda* warnings and waived his rights before speaking

with Trooper Hill, or that the Petitioner asked for counsel during the course of the statement and Trooper Hill immediately ceased questioning and honored the Petitioner's request.

The only issue in dispute between the parties is whether the Petitioner recanted that request for counsel. The trial court found that the Petitioner did recant by initiating a conversation with Trooper Hill regarding Hill's investigation and asking Hill again to retrieve the Petitioner's cellphone from where the Petitioner hid it under his mattress. During the course of the interview, prior to the request for counsel, the Petitioner wanted Trooper Hill to retrieve the cellphone because the Petitioner felt that a video he made on his phone would explain everything:

Arthur Vilela [the Petitioner, A.V.]: She [the victim, Ms. Dyall] has something wrong in her past.

Trooper Hill [Hill]: What? What did she do wrong in her past?

A.V.: She killed a man. She poisoned a man. Joel Sager in San Francisco.

Hill: She poisoned Joel Sager in San Francisco and it killed him?

A.V.: Yes. I have a video of her in my cellphone.

Hill: Okay.

A.V.: It's in my bedroom under my mattress. It's iPhone, black iPhone. She poisoned that man like 30 years ago.

Hill: Okay.

A.V.: And then because I knew about it because I pray to God and I have the Holy Spirit and I had the revelation that she did that, okay, and she was astonished and she was real surprised how I would know that because I told her that I have the Holy Spirit and he told me that. And then after I told her that she tried to—she poisoned me one tome, okay. She got some herbs from Tokyo and then she used them on me and she was going to use them on me the last day I was there to pack up all my things. The Holy Spirit told me—are you a believer? Do you believe in God?

Hill: Yes, I worship God.

A.V.: Okay. So you know that the Holy Spirit talks to you, do you know that?

Hill: Yes, I do.

A.V.: So the Holy Spirit talks to me and told me that.

Hill: Told you—the Holy Spirit told you she was going to poison you?

A.V.: She has everything—the confession is on the phone.

Hill: Okay.

A.V.: That's it.

Hill: Okay.

A.V. I told her God, you know, you have to pay for this because I'm here—I'm here to help you but you have to pay. You have to help me to go back to my kids.

Hill: Okay. So—

A.V.: I was here on a mission just for her.

Hill: So your mission—the Holy Spirit told you that she needs to pay for her sin killing that man?

A.V.: Not for the sins but she needs to—she has a price to pay.

Hill: As a result of her killing those people?

A.V.: Yes.

Hill: So what did you want? How much money did you want from her?

A.V.: Whatever she wanted to take to give to me.

Hill: About how much was she trying to give you?

A.V.: I don't know.

Hill: How much did you request from her? You had something in mind.

A.V.: Yeah, because—

Hill: It was around what?

A.V.: Four hundred.

Hill: Around \$400,000?

A.V.: Yeah.

Hill: So you wanted around \$400,000 of her money to go back to France; is that correct?

A.V.: I just told you.

Hill: Is that correct? It is a yes or a no.

A.V.: Can I have a lawyer, please?

[A.R. 53-56.]

The parties agree that the Petitioner requested counsel at this point. The parties also agree that Trooper Hill then immediately ceased his interview with the Petitioner:

Hill: You want a lawyer? Yes, you may. I appreciate you talking and being a man about it—

[A.R. 56.]

The recorded statement was played for the trial court at the suppression hearing.

[A.R. 158.] Trooper Hill testified at the suppression hearing that at this point in the recorded statement one could hear he (Hill) get up and start to get out of the vehicle.

[A.R. 166-167.]

But, the Petitioner interrupted Trooper Hill's departure, initiating further conversation about the criminal investigation by asking:

A.V.: You have to go get my iPhone, please.

Hill: Your iPhone?

A.V.: Yes. It is inside under my mattress.

[A.R. 56.]

Trooper Hill cautiously warned the Petitioner, and then sought clarification from the Petitioner as to whether he wanted an lawyer or not :

Hill: *Well, hold on. Let me stop you. Let me stop you. You said you wanted a lawyer. If you want a lawyer then I'm not going to do this stuff. I'm going to stop talking to you. You and I aren't going to talk any more. Do you want to talk with me and have me continue to do this or do you want me to get you a lawyer? It's up to you. Do you want to talk to me and have*

me go up there and deal with this iPhone and continue to listen to your story or do you want a lawyer and you can do everything through him?

A.V.: Whatever is easy for me.

Hill: Partner, *I can't tell you what to do. You're an adult, you have to make this decision yourself.* We can continue to converse like gentlemen or you can converse with an attorney.

[A.R. 56 (emphasis added).]

The Petitioner initiated the conversation after Trooper Hill plainly told him questioning was stopped. Trooper Hill warned the Petitioner and was simply trying to confirm the Petitioner's intentions about a lawyer. Not in response to Trooper Hill's question about obtaining a lawyer, the Petitioner then volunteered: "I am going to be in jail forever." [A.R. 56.]

Trooper Hill again asked what the Petitioner wanted:

Hill: I don't know that. I'm not a judge. I don't know what your fate is. I don't know what happens from here to you. All I can do is try to make sense of how all this happened. Now, if you want your story to be told of how all this happened and you want to be up front and honest then I'm your guy. If you want to try to sweep stuff under the rug you can do that too and I can get up and leave this car.

A.V.: I told you already what I have to tell you.

Hill: Okay. Can I ask you some questions or do you want an attorney?

A.V.: Go ahead.

[A.R. 57.]

Based on this recorded statement, and the suppression testimony of Trooper Hill (the Petitioner did not testify), the trial court ruled that the Petitioner recanted his request for counsel, and that the statement was voluntarily given. [A.R. 137-140.]

The trial court's decision was neither plainly wrong nor clearly against the weight of the evidence presented. State v. Farley, supra. From this exchange, it is plain that the Petitioner initiated the conversation, after his request for counsel was honored, by asking Trooper Hill to retrieve the iPhone from under the Petitioner's mattress. The Petitioner was previously *Mirandized*, and acknowledged that he understood those rights when he waived them. Trooper Hill cautioned the Petitioner about not talking further if he wanted an attorney to be present. The Petitioner, under the totality of the circumstances, knowingly and intelligently recanted his request for counsel. State v. Kilmer, supra. The recantation took place immediately after the right to counsel was invoked, such that counsel could not have been obtained prior to the recantation. State v. Easter, supra.

The State asks this Court to affirm the trial court's ruling.

B. THE CIRCUIT COURT PROPERLY DENIED THE PETITIONER'S MOTIONS FOR ACQUITTAL.

1. Standard of review.

The standard of review utilized by this Court when reviewing the denial of a motion for acquittal is:

“Upon a motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to the prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.’ *State v. West*, 153 W. Va. 325 [168 S.E.2d 716] (1969).” Syllabus Point 1, *State v. Fischer*, 158 W. Va. 72, 211 S.E.2d 666 (1974).

Syl. Pt. 5, *State v. Grimes*, 226 W.Va. 411, 701 S.E.2d 449 (2009); Syl. Pt. 3, *State v. Taylor*, 200 W. Va. 661, 490 S.E.2d 748 (1997).

The standard for reviewing the sufficiency of evidence to support a conviction is:

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. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighted, from which the jury could find guilt beyond a

reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled. Syllabus Point 3, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 9, *State v. Payne*, 225 W.Va. 602, 694 S.E.2d 935 (2010)(quoting *Guthrie* in part).

The Petitioner accurately summarizes the trial testimony in his Brief at pages 8-30. The State does not need to reiterate that evidence here. Viewed in the light most favorable to the State, and with all inferences and credibility determinations credited to the State, the jury had sufficient evidence before it that the Petitioner abducted Ms. Dyall from her home and kept her locked up in a house for ten days in Berkeley County.

Ms. Dyall testified to her kidnapping by the Petitioner, the Petitioner's securing the attic, doors and windows of the house where she was held with wood and screws, and the Petitioner's attempts to extort money from her through his false allegations that she poisoned Joel Sager in San Francisco and it killed him.

Ms. Dyall's testimony was corroborated by the testimony of the police officers who rescued her, her friends who reported her missing, and her bank and financial advisors who were alerted to look for suspicious activity with her accounts.

While the Petitioner denied having committed the charged offenses, his own testimony corroborated significant details of Ms. Dyall's testimony.

The Petitioner's argument on appeal is directed almost exclusively at Ms. Dyall's credibility. Credibility is the jury's prerogative. *Payne, supra*.

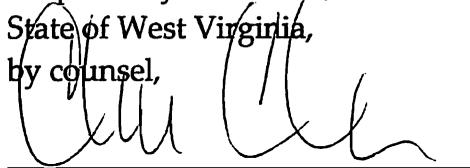
The Petitioner fails to prove that the trial court erred in denying the motions for acquittal or that the jury lacked sufficient evidence to convict him of felony Kidnaping and misdemeanor Attempted Extortion. Grimes, supra; Payne, supra.

The State asks this Court to affirm the jury's verdict and the trial court's ruling.

VI. CONCLUSION.

For the foregoing reasons, the Respondent respectfully requests this Court to affirm the Circuit Court's rulings and the jury's verdict.

Respectfully submitted,
State of West Virginia,
by counsel,

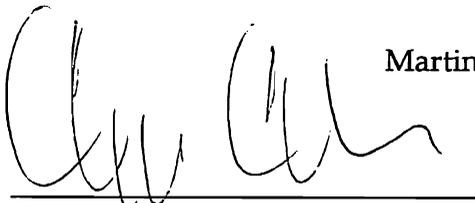


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the foregoing on November 5, 2015, by hand-delivery, first-class mail, postage prepaid, facsimile to:

B. Craig Manford
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Martinsburg, West Virginia 25401



Christopher C. Quasebarth