

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Respondent, Plaintiff below**

vs) No. 11-1095 (Jefferson County 10-F-102)

**James Mongold,
Petitioner, Defendant below**

FILED
September 7, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal with accompanying record, filed by counsel Christopher J. Prezioso, arises from the Circuit Court of Jefferson County, wherein petitioner was sentenced to five to twenty-five years incarceration, but was placed on probation for five years and ordered to register as a sex offender for life in lieu of serving this sentence in prison. This sentence followed his conviction by jury of one count of sexual abuse in the first degree, in violation of West Virginia Code § 61-8B-7. The sentencing order was entered by the circuit court on June 23, 2011. The State filed a response, by counsel Laura Young, in support of the circuit court's sentencing order. Petitioner submitted a reply to the State's response.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In February of 2011, a jury convicted petitioner of one count of first degree sexual abuse, in violation of West Virginia Code § 61-8B-7. Petitioner was originally scheduled for trial by jury on February 15, 2011. However, upon the State's motion to continue the trial due to illness of the prosecuting attorney, the circuit court continued the trial for another week. At trial, the State presented two witnesses during its case-in-chief, the juvenile victim and the investigating officer. The victim testified that in November of 2009, she was spending the evening at a family friend's home. On that evening, she was asked by this family friend to bring a box of broken Christmas lights to petitioner at his home nearby. The victim testified that over three different visits to petitioner's home that evening, he hugged her and touched her bottom; he touched and squeezed her breast over her shirt, while commenting that her breasts were getting big; he offered her twenty dollars to allow him to "suck on [her breasts];" and told her not to tell anybody. The victim testified that these three visits to petitioner's home occurred over a span of a few hours and that each time, she was sent over to petitioner's home concerning the box of Christmas lights. The victim further testified that she did not report any of the episodes that occurred between petitioner and her to anybody at her family friend's home that evening because

she was afraid they would not believe her. The victim testified that the next day, however, she reported the evening's events to her mother and grandmother because she trusted both of them. At the close of the State's evidence, petitioner motioned the circuit court for acquittal, which the circuit court denied. Petitioner subsequently presented testimony by the victim's family friend, the victim's mother, the victim's father, and petitioner. Petitioner denied making any physical contact with the victim and denied ever offering her any money or saying anything inappropriate to her. Petitioner again argued and moved for a judgment of acquittal, which the circuit court denied. The jury deliberated and found petitioner guilty of first degree sexual abuse. In May of 2011, the circuit court heard petitioner's post-trial motions, including his motion for a new trial. The circuit court denied this motion and shortly after, held petitioner's sentencing hearing. At sentencing, the circuit court considered arguments by the State and petitioner's counsel, petitioner's pre-sentence investigation report, and remarks made by the victim's father. Consequently, the circuit court sentenced petitioner to five to twenty-five years in prison, but suspended this sentence and in lieu of incarceration, placed petitioner on supervised probation for five years and ordered that petitioner register as a sex offender for life. Petitioner appeals his conviction for first degree sexual abuse, arguing two assignments of error.

In reviewing criminal trial convictions on appeal, we have held as follows:

“The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.’ Syl. Pt. 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).” Syl. Pt. 1, *State v. Juntilla*, 227 W.Va. 492, 711 S.E.2d 562 (2011).

Syl. Pt. 8, *State v. Stone*, 229 W.Va. 271, 728 S.E.2d 155 (2012).

“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 weighed, from which the jury could find guilt beyond a reasonable doubt.’ Syl. Pt. 3, in part, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).” Syl. Pt. 2, *State v. Juntilla*, 227 W.Va. 492, 711 S.E.2d 562 (2011).

Syl. Pt. 9, *State v. Stone*, 229 W.Va. 271, 728 S.E.2d 155 (2012). Moreover, we have directed as follows:

In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.

State v. LaRock, 196 W.Va. 294, 303 n.8, 470 S.E.2d 613, 622 n.8 (1996) (quoting Syl. Pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978)). In reviewing decisions concerning judgments of acquittal, we have held as follows:

“‘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).” Syl. pt. 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). Further, in reviewing a circuit court’s denial of a motion for a new trial, we have recognized as follows: “The question of whether a new trial should be granted is within the sound discretion of the trial court and is reviewable only in the case of abuse.” *Postlewait v. City of Wheeling*, No. 11-0206, 2012 WL 171324 (W.Va. Jan. 19, 2012) (quoting *State v. Crouch*, 191 W.Va. 272, 275, 445 S.E.2d 213, 216 (1994)). With these standards in mind, we turn to discuss the issues before us.

Petitioner first argues that the circuit court committed reversible error when it failed to grant a judgment of acquittal at the close of the State’s case-in-chief and again at the conclusion of all evidence. Petitioner was convicted of first degree sexual abuse, in violation of West Virginia Code § 61-8B-7(a). Pursuant to the Code, one is guilty of committing first degree sexual abuse when (1) he or she subjects another person to sexual contact without consent and that lack of consent results from forcible compulsion, (2) he or she subjects another person to sexual contact who is physically helpless, or (3) when he or she is fourteen years old or older and subjects one who is younger than twelve years old to sexual contact. Petitioner argues that, at trial, the State failed to present sufficient evidence to meet its burden of proving first degree sexual abuse when it only presented two witnesses and no physical evidence. Petitioner asserts that Patrolman Norris’s testimony was based only on what was relayed to him by the victim’s mother and his observations during his interview with the victim. Petitioner argues that neither Patrolman Norris nor any other investigating officer conducted any further investigation when petitioner asserts that the victim’s incredible testimony could have been caused by her parents’ contentious relationship. Petitioner asserts that the victim’s testimony was incredible because it created more questions than answers. For instance, petitioner challenges the victim’s failure to tell anybody about petitioner’s behavior that same evening after she left petitioner’s home.

Petitioner next argues that the circuit court committed reversible error when it failed to grant petitioner's motion for a new trial. When petitioner originally motioned the circuit court for a new trial, he argued that the verdict did not comport with the evidence, that the original trial date should not have been moved, the victim gave false or perjured testimony, and petitioner was innocent of his convicted crime. Petitioner asserts that the victim's trial testimony was not credible because she testified on direct examination that her breast had been touched from the front of her body; she testified the same at the preliminary hearing and at her interview. However, on cross examination at trial, the victim testified that the touching occurred from behind her body. Petitioner further argues that the circuit court should not have granted the State's motion for continuance of the original trial date because petitioner was prepared for trial and this time extension allowed the State more time to prepare for trial when there were six other prosecuting attorneys who could have stepped in for petitioner's trial.

The State responds, arguing that the circuit court did not err in not acquitting petitioner at either the close of State's evidence or at the conclusion of trial, nor did the circuit court err in denying petitioner's motion for a new trial. The State first clarifies that at the preliminary hearing, the victim's testimony was that she agreed with the prosecuting attorney when asked if petitioner "touched and squeezed" her breasts; the victim was not asked to describe the relative positions of her and petitioner's bodies or from which direction he touched her. Moreover, the State argues, any distinction concerning this detail would be irrelevant because the crucial element of the crime focuses on whether any sexual contact occurred between petitioner and the victim and whether this contact was for the purpose of sexual gratification. The State argues that the only uncontested element of petitioner's charge at trial was whether he made this sexual contact. The State further argues that the jury is the sole judge of witnesses' credibility. Here, the circuit court instructed the jury of this responsibility and that the jury's verdict reflects that it found the victim's testimony credible and that petitioner committed first degree sexual abuse against her. The State further asserts a circuit court has the discretion to grant a continuance for trial, relying on Syllabus Point 13 of *State v. Elswick*, 225 W.Va. 285, 693 S.E.2d 38 (2010). The State argues that here, the circuit court did not err in granting the prosecuting attorney's motion for continuance because the prosecuting attorney for petitioner's case was ill. Petitioner's reply asserts that even though the only disputed element of his charge at trial was whether sexual contact occurred, this dispute should not diminish his arguments concerning this element.

The Court finds no error in the circuit court's rulings to deny petitioner's motions for acquittal or for a new trial. The record on appeal includes transcripts of petitioner's proceedings. A review of the trial transcript in the record, viewed in the light most favorable to the prosecution, supports the jury's verdict and we find no error by the circuit court in denying petitioner's motions for acquittal. Petitioner's testimony at trial that denied misconduct toward the victim neither negates nor bears more weight than the victim's testimony. Moreover, our review of the appellate record also reflects that the circuit court did not abuse its discretion in continuing petitioner's original trial date to the next week or in denying petitioner's motion for a new trial. Accordingly, we find no error by the circuit court.

For the foregoing reasons, we find no abuse of discretion in the circuit court's trial and post-trial rulings and consequently, we affirm petitioner's conviction and sentence.

Affirmed.

ISSUED: September 7, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh