

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

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

vs.) **No. 11-1191** (Harrison County 10-F-90-3)

**Dallas Wade Butler,
Defendant Below, Petitioner**

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

MEMORANDUM DECISION

Petitioner's appeal, by counsel Jerry Blair, arises from the Circuit Court of Harrison County's July 14, 2011, order sentencing petitioner following his conviction of kidnapping and malicious assault. The State, by counsel Laura Young, has filed its 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.

During the May of 2010 term, a Harrison County Grand Jury indicted petitioner on one count of malicious assault and one count of kidnapping. These charges stemmed from events that transpired on January 17, 2010, during which petitioner repeatedly hit his ex-wife, Barbara Price. According to testimony during petitioner's jury trial, Ms. Price was doing laundry at her mother's house when petitioner arrived in a vehicle. Upon approaching petitioner, he called Ms. Price a "dirty whore" and began hitting her. Ms. Price further testified that petitioner told her she was leaving the home with him. When she refused, petitioner threatened members of her family, and Ms. Price testified that petitioner had a knife in his possession throughout the ordeal. The two left the premises, and petitioner continued to physically assault Ms. Price, telling her how much he hated her and that she needed to die. According to her testimony, Ms. Price attempted to flee on one occasion, but petitioner hit her so hard she blacked out. Ms. Price further testified that petitioner threatened to cut her and throw her in a well so as to conceal his crime. Eventually, petitioner returned Ms. Price home and told her family she had a seizure. Her family called 911, and Ms. Price told the responding emergency personnel that petitioner caused her injuries. Ms. Price remained hospitalized for several days, including treatment in the intensive care unit.

Following a jury trial, petitioner was convicted on both counts and a recidivist information was filed. Petitioner admitted he was the same individual named in the information, and he was thereafter sentenced to life, with mercy, in prison for the offense of kidnapping, and a

concurrent term of four to ten years of incarceration for malicious assault. On appeal, petitioner alleges two assignments of error. These assignments of error, as well as the State's response thereto, are addressed in turn below.

To begin, petitioner argues that the circuit court erred by denying his motion for judgment of acquittal and for a new trial as to the charge of kidnapping because the evidence was clearly insufficient to support his conviction in regard to this charge. Specifically, petitioner argues that there was no evidence presented that he was acting with the motive to avoid arrest or capture by the police. Petitioner argues that the indictment charged him with kidnapping the victim "for the purpose of shielding or protecting himself from bodily harm or of evading capture or arrest." He further argues that "Article III, Section 14 of the West Virginia Constitution prohibits a material variance between the charge in the indictment and the proof which convicts an accused." Syl. Pt. 6, *State v. Bennett*, 157 W.Va. 702, 203 S.E.2d 699 (1974). According to petitioner, the State's evidence was that he intended to hurt or kill the victim, but not that he was evading arrest or capture, or that he was shielding himself or avoiding bodily harm. In fact, petitioner argues that there was no evidence that law enforcement was even looking for him. Petitioner argues that this is a material element of the crime of kidnapping, as alleged, and that according to Syllabus Point 4 of *State v. Pendry*, 159 W.Va. 738, 227 S.E.2d 210 (1976), the jury is not allowed to infer such evidence.

In response, the State argues that the evidence was sufficient to support petitioner's conviction for kidnapping because the evidence established that petitioner moved the victim by force from one location to another to avoid arrest for a crime. According to the State, the evidence established that petitioner invaded the home where the victim was doing laundry, physically assaulted her and threatened her life, then removed her from the home when others arrived. The State argues that petitioner then continued to assault the victim while she drove, took her to his home, and then explicitly told her that he would kill her and hide her body so he would not go to prison. From that evidence, the State argues, it is clear that petitioner moved the victim from a place of relative safety where other individuals were to his own home to prevent the victim from reporting the assault to the police. Only when the victim convinced petitioner that she would lie about how she received her injuries did he agree to release her. As such, the jury could conclude, beyond a reasonable doubt, that petitioner was guilty of kidnapping. The State analogizes to our decision in *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989), wherein the Court examined the question of whether or not a kidnapping was ancillary to a sexual assault. According to the State, that case is analogous because we noted that the movement of the victim in that case increased the risk of harm, but decreased the risk that the criminal acts would be interrupted or discovered.

We have previously held as follows:

"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. 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. 7, *State v. White*, 228 W.Va. 530, 722 S.E.2d 566 (2011). Simply put, the Court finds no merit in petitioner’s argument in regard to the sufficiency of the evidence for his kidnapping conviction. As the State noted, we have previously addressed a similar instance of kidnapping wherein the victim was seized in an open area where neighboring residents could see and hear her. *State v. Fortner*, 182 W.Va. 345, 363, 387 S.E.2d 812, 829 (1990). Her captors then transported the victim to an isolated wooded area and sexually assaulted her for approximately two hours before returning her to the vehicle and driving her around while discussing how to keep her from going to the police. *Id.*, 182 W.Va. at 363, 387 S.E.2d at 830. Following a second sexual assault, the victim in that case was finally able to secure her release. *Id.* In upholding the petitioner’s conviction for kidnapping in that matter, we found that the kidnapping was not incidental to the sexual assault, as the petitioner therein argued. Specifically, the Court held that

In these circumstances, we cannot say that the instances of detention and transportation of the victim were merely incidental to the commission of the sexual offenses. Clearly, in each case the movement of the victim increased her risk of harm while decreasing the risk that the criminal acts of her assailants would be interrupted or discovered. The time she was held both before and after the sexual assaults, the distances she was transported, and the change in her captors’ intent all support the conclusion that the restraint and movement of the victim were not merely incidental to the sexual offenses.

Id. In that matter, there was no evidence that the police were actively trying to apprehend the petitioner, only that he participated in kidnapping the victim in an attempt to prevent his arrest for a crime. The Court finds that this is highly analogous to the instant matter, wherein petitioner kidnapped the victim by removing her from her mother’s home in an attempt to conceal his attacks on her and to prevent his arrest. The victim’s testimony below supports the conviction, specifically through her testimony as to petitioner’s multiple threats to cut her up and throw her in a well so as not to be arrested in relation to the crimes. For these reasons, the Court finds the evidence below was sufficient to support petitioner’s conviction for kidnapping, and that the circuit court did not err in denying petitioner’s motion for judgment of acquittal and a new trial.

As to his second assignment of error, petitioner argues that the circuit court erred in denying his motion for judgment of acquittal and a new trial in regard to the conviction of malicious assault. Specifically, petitioner argues that it was error to allow his conviction based upon evidence establishing that petitioner used only his hands during his attacks on the victim. Petitioner argues that secondary sources, relying on a line of cases including *State v. Daniel*, 144 W.Va. 551, 109 S.E.2d 32 (1959), state that a wound must be inflicted with a weapon. Petitioner

admits that the circuit court found *Daniel* inapplicable, but argues that whether the circuit court erred in applying this case is not settled law since the “issue in malicious wounding cases is confused and not uniformly applied from circuit to circuit.” Petitioner states that this Court should therefore resolve the issue.

In response, the State argues that petitioner is misapplying the holding in *Daniel*, as that decision simply condemns fatal variance between the indictment and the evidence adduced at trial. According to the State, the *Daniel* decision allows for conviction following an indictment that alleges injury by means of a blow with the fist as long as the evidence at trial supports that allegation. In the present matter, the State argues that the petitioner struck the victim with his fists so many times that she lost count, and that the victim further suffered an acute head injury that required several days of hospital treatment. Therefore, according to the State, the proof in the proceedings below was that petitioner struck the victim in the head, causing an acute subdural hematoma, and there was no fatal variance between the indictment and the proof. For these reasons, the State argues that petitioner’s conviction for malicious assault was proper.

Because petitioner’s argument on this assignment of error is essentially a challenge to the sufficiency of the evidence below, the same standard of review from *White*, 228 W.Va. 530, 722 S.E.2d 566 (2011), is applicable. Upon review, the Court finds no merit to petitioner’s argument. Specifically, a simple reading of the malicious assault statute shows that a weapon was unnecessary to obtain a conviction for this crime as alleged in the indictment. West Virginia Code § 61-2-9(a) states, in relevant part, that “[i]f any person maliciously shoot, stab, cut or wound any person, or by any means cause him bodily injury with intent to maim, disfigure, disable or kill, he shall, except where it is otherwise provided, be guilty of a felony.” Petitioner’s specific argument is that to constitute a wound, the injury must be inflicted by a weapon. However, that argument misstates the statute at issue and the specific wording of the indictment. In the indictment, the State did not allege that petitioner maliciously shot, stabbed, cut, or wounded the victim, but rather that he “committed the offense of Malicious Assault by unlawfully, intentionally, feloniously and maliciously wounding any person or by any means causing her bodily injury with the intent to maim, disfigure[,] disable or kill.” Upon review of the record, the Court finds that the proof adduced at trial conformed to the crime as alleged in the indictment. The indictment specifically stated that petitioner struck the victim with his hands and fists causing her injuries, and the evidence at trial supported this allegation. As such, the circuit court was correct that *Daniel* did not apply because there was no fatal variance between the indictment and the proof at trial. Therefore, the circuit court did not err in denying petitioner’s motion for judgment of acquittal or new trial because the evidence was sufficient to support petitioner’s conviction.

For the foregoing reasons, we affirm.

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