

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

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

vs) **No. 101439** (Wayne County 09-F-115)

**Vicki L. Stepp,
Defendant Below, Petitioner**

FILED
April 29, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Vicki L. Stepp appeals her convictions for three counts of delivery of a controlled substance, to wit, oxycodone pills. She was sentenced to concurrent terms of one to fifteen years in prison. The State filed a summary response.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, 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.

Alleged Juror Misconduct

During petitioner's February 2010 trial, her lawyer approached the bench and informed the court that he believed three jurors were sleeping during a portion of the lead police investigator's direct testimony. Neither the judge nor the prosecuting attorney had observed any juror sleeping. Petitioner's counsel moved for mistrial, which the court denied. At the conclusion of the trial, the judge indicated that after the issue was brought to his attention, he closely observed the jurors for the remainder of the trial and all were awake.

Petitioner complains that the court abused its discretion by not questioning the jurors to determine if any of them were, in fact, asleep. She also asserts that the jurors' inattention caused her to not receive a fair trial. The State responds that petitioner's counsel was not absolutely certain that jurors were sleeping and, that even assuming *arguendo* they were

asleep, it would not have been prejudicial to the petitioner because the police officer's testimony was harmful to the defense.

This Court has held that “[a] motion for a new trial on the ground of the misconduct of a jury is addressed to the sound discretion of the court, which as a rule will not be disturbed on appeal where it appears that defendant was not injured by the misconduct or influence complained of.” Syl. Pt. 7, in part, *State v. Johnson*, 111 W.Va. 653, 164 S.E. 31 (1932); Syl. Pt. 1, in part, *State v. Sutphin*, 195 W.Va. 551, 466 S.E.2d 402 (1995). We conclude that petitioner has not demonstrated that she was injured or that the trial court abused its discretion.

Evidentiary Issues

Petitioner also asserts that she is entitled to a new trial because the State introduced witness testimony concerning the bad reputation of her place of employment, the Wildcat II bar. In this case, petitioner was accused of selling controlled substances to a police confidential informant while she was in this bar. Petitioner testified in her own defense and denied the allegations. On cross-examination, the prosecuting attorney was permitted to ask whether she had knowledge of other people engaging in drug activity in the bar, and knowledge of other people being charged with drug crimes arising out of illegal conduct in the bar. Petitioner argues that she was convicted based upon the bar's bad reputation, which was irrelevant to whether she committed the crimes charged and was unfairly prejudicial. She argues this evidence should have been excluded under Rules 401, 402, and 403 of the West Virginia Rules of Evidence.

The State responds that the prosecutor was merely testing petitioner's credibility and that credibility is always relevant. The State also argues that any prejudicial effect of these questions to petitioner was *de minimis* because the investigating officers had already testified about illegal drug activity at the Wildcat II.

This Court applies an abuse of discretion standard of review to a circuit court's rulings on the admissibility of evidence. Syl. Pt. 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983). Upon a review of the transcript, we find no error. The trial court expressly limited the questioning to areas of petitioner's own knowledge, the answers to these questions could assist the jury in assessing petitioner's credibility, and this area of inquiry was not extensive. Moreover, there was sufficient other evidence to sustain petitioner's conviction, specifically, the testimony of the confidential informant that he made three separate controlled purchases of drugs from petitioner.

Prosecutor's Comments

Petitioner also asserts error because during closing argument, the prosecutor twice referred to the Wildcat II bar as a “center of drug activity” and said that the bar was “targeted and rightfully so and necessarily so.” Similar to her arguments on the evidentiary issue, she argues that she was convicted because the prosecutor turned her case into a referendum against the bar where she was employed.

The State responds that petitioner’s counsel failed to object to these comments during trial, thus this issue was waived. The State also asserts that the prosecutor was only arguing evidence that was admitted during the testimony of police officers, and that even if the comments were improper, they were not so unduly prejudicial as to warrant a reversal.

Because there was no objection at trial, petitioner must prove that the comments constituted plain error. “To trigger application of the ‘plain error’ doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.” Syl. Pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). “Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.” Syl. Pt. 6, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995).

Upon a review of this matter, we do not find plain error. Even assuming that the prosecutor’s comments were improper, given the other evidence at trial, they did not affect petitioner’s substantial rights or seriously affect the fairness, integrity, or public reputation of the proceedings. Absent the remarks, the evidence at trial was sufficient to convict.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: April 29, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh