Opinion, Case No.21678 State of West Virginia v. David Leadingham

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1993 Term

No. 21678

STATE OF WEST VIRGINIA,
Plaintiff Below, Appellee
v.

DAVID LEADINGHAM,
Defendant Below, Appellant

Appeal from the Circuit Court of Raleigh County
Honorable Thomas Canterbury, Judge
Criminal Action Nos. 90-F-699; 90-F-736;
91-AP-417; 91-AP-418; 91-F-782

REVERSED AND REMANDED

Submitted: September 21, 1993
Filed: December 14, 1993

James A. McKowen
James B. Lees, Jr.
Hunt, Lees, Farrell & Kessler
Charleston, West Virginia
Attorneys for the Appellant

Kristen L. Keller
Chief Deputy Prosecuting Attorney of Raleigh County
Beckley, West Virginia
Attorney for the Appellee

JUSTICE McHUGH delivered the Opinion of the Court.

Chief Justice Workman dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. "A defendant cannot waive his state and federal constitutional privileges against self-incrimination and rights to assistance of counsel at court-appointed pre-trial psychiatric examinations except upon advice of counsel." Syl. pt. 3, State v. Jackson, 171 W. Va. 329, 298 S.E.2d 866 (1982).

2. Under the Fourteenth Amendment of the United States Constitution and article III, § 10 of the West Virginia Constitution, due process and fundamental fairness dictate that the police and the prosecuting attorney be precluded from using an undercover informant to penetrate the clinical environment of a psychiatric institution in order to elicit incriminating statements from a defendant who is undergoing a court-ordered psychiatric

evaluation. Any incriminating statements elicited from a defendant under these circumstances, upon proper motion by the defendant, shall be suppressed in the trial on the criminal charges to which the incriminating statements relate.

3. "'A judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice.' Syl. pt. 5, State v. Ocheltree, 170 W. Va. 68, 289 S.E.2d 742 (1982)." Syl. pt. 8, State v. Hays, 185 W. Va. 664, 408 S.E.2d 614 (1991).

McHugh, Justice:

David Leadingham was found guilty by a jury in the Circuit Court of Raleigh County of intimidation of judicial officers and witnesses, obstruction of justice, conspiracy to obstruct justice, conspiracy to commit first degree murder, reckless driving and threatening phone calls. Mr. Leadingham is now before this Court upon the appeal of his convictions.

I.

While Mr. Leadingham and his wife were in the process of getting a divorce, he allegedly threatened to kill his wife, her attorney, her attorney's wife and children, and persons attending the attorney's church and parochial school. Based upon these threats, a three-count indictment was issued against Mr. Leadingham on October 4, 1990, in which he was charged with obstruction of justice and intimidation of judicial officers and witnesses.

While Mr. Leadingham was confined in the Raleigh County jail on those charges, he met Walter Farris, an inmate who was serving a sentence for driving under the influence. Mr. Farris contends that Mr. Leadingham told him that he wanted his wife to be killed. Mr. Leadingham allegedly gave Mr. Farris the telephone number of his sister, Patsy Rose, and directed him to call her when he was released from jail.

After his release on March 15, 1991, Mr. Farris telephoned Ms. Rose to inquire about Mr. Leadingham. During their telephone conversation, Ms. Rose informed Mr. Farris that Mr. Leadingham was in Weston State Hospital where he was undergoing a court-ordered psychiatric evaluation. Mr. Leadingham was being evaluated at Weston State Hospital to determine whether he was competent to stand trial on the charges of obstruction of justice and intimidation of judicial officers and witnesses, and whether he suffered from mental illness. Ms. Rose and Mr. Farris then made plans to visit Mr. Leadingham at Weston State Hospital.

On March 22, 1991, the morning he was to visit Mr. Leadingham, Mr. Farris telephoned West Virginia State Trooper Jan Cahill at 1:30 a.m. and told him of the incriminating statements Mr. Leadingham had made while they were incarcerated together in the Raleigh County jail. Trooper Cahill then telephoned the prosecuting attorney at 2:00 a.m. because he thought she "might be a little bit more familiar with [Mr. Leadingham.]" Before Mr. Farris' first visit with Mr. Leadingham on the morning of March 22, 1991, Trooper Cahill provided him with a "hand-held pocket recorder." Mr. Farris and his wife then accompanied Ms. Rose to Weston State Hospital to visit Mr. Leadingham as they had previously planned. However, Mr. Farris did not speak privately with Mr. Leadingham during that visit, and thus did not use the tape recording device given to him by Trooper Cahill.

Mr. Farris later contacted Mr. Leadingham to arrange a second visit to Weston State Hospital. On the second visit, which took place on March 29, 1991, Trooper Cahill drove Mr. Farris and his wife to Weston State Hospital and provided Mr. Farris with a tape-recording device. When hospital security found the recording device after searching Mr. Farris, they advised him that he could not bring the device into the hospital. Mr. Farris then brought the tape recording device to Trooper Cahill, who was waiting for him outside in his vehicle, and returned to visit Mr. Leadingham.

Mr. Farris alleges that, during the visit, Mr. Leadingham told him that he wanted him to kill his wife's attorney. Mr. Leadingham allegedly gave Mr. Farris a description of the attorney's office and its entry.

On May 6, 1991, Mr. Leadingham's trial began on the charges of obstruction of justice and intimidation of witnesses stemming from his earlier threats to kill his wife, her attorney, her attorney's family, and members of

the attorney's church and parochial school. When the prosecuting attorney read out the names of Mr. and Mrs. Farris, who were subpoenaed by the State, during voir dire, Ms. Rose, upon hearing their names, purportedly found Mr. and Mrs. Farris and told them to "get out of town." By the end of the day on May 6, 1991, the jury had not yet been sworn in. That same day, Mr. and Mrs. Farris received and recorded two telephone calls from Ms. Rose urging them to leave town. The next morning, Mr. and Mrs. Farris gave the tape recordings of the telephone calls to Detective Robertson. The tapes were later played by the State in the judge's chambers with the defense present.

Mr. Leadingham's attorney moved for both a continuance of the trial and to be removed as counsel. Both motions, to which the State objected, were granted by the circuit court. Thereafter, Mr. Leadingham and Ms. Rose were arrested on the charge that they conspired to commit murder. On May 15, 1991, they were both indicted by a grand jury on the charges of conspiracy to commit murder, and of obstruction of justice at the May 6, 1991, trial.

Mr. Leadingham's principal defense to all of the charges against him was insanity. At the trial on all of those charges, Mr. Leadingham's counsel moved to suppress all statements alleged to have been made by Mr. Leadingham to Mr. Farris on or after March 22, 1991. That motion was denied by the circuit court. Defense counsel also objected to the prosecution calling Mr. Leadingham's former treating psychiatrist, who treated him for a "mixed bipolar disorder," to testify on matters counsel believed to be beyond those reached by the psychiatrist during treatment. That motion was also denied. Defense counsel also made three motions for a mistrial and a motion for a directed verdict, all of which were denied by the circuit court.

Mr. Leadingham was ultimately convicted by the jury of all of the charges against him. He now appeals his convictions.

II.

The first issue we shall address in this appeal is whether the circuit court erred in admitting the statements made by Mr. Leadingham to Mr. Farris regarding the alleged murder conspiracy on and after March 29, 1991. In support of their arguments, both parties rely on a line of decisions issued by the Supreme Court of the United States, beginning with Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964).

The primary focus of the Massiah line of decisions concerned a defendant's rights under the Sixth Amendment of the United States Constitution. The Sixth Amendment provides, in relevant part, that "[i]n all criminal proceedings, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." Massiah also touched upon the rights of a defendant under the Fifth Amendment of the United States Constitution. The Fifth Amendment provides, in pertinent part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]"

A. Massiah and its Progeny

In Massiah, the petitioner and his co-conspirator were indicted for violating federal narcotics laws. The petitioner, after retaining a lawyer and pleading not guilty, was released on bail along with his co-conspirator. The co-conspirator then, in cooperation with government agents, allowed a radio transmitter to be installed in his car so that conversations between the co- conspirator and the petitioner could be overheard by a government agent. The incriminating statements made by the petitioner to his co-conspirator in the car were used against him at trial.

The Massiah Court, after granting certiorari, held that incriminating statements deliberately elicited by government agents from the petitioner, after he had been indicted and in the absence of his attorney, denied the petitioner his right to counsel under the Sixth Amendment. The Court concluded that the petitioner's own incriminating statements under these circumstances could not be used by the prosecution against him at trial.

In United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980), while the defendant was incarcerated in jail pending his trial for armed robbery, government agents contacted an informant who was

incarcerated in the same cellblock as the defendant, and asked him to be alert of any statements made by the fellow prisoners. The defendant was ultimately convicted on the basis of incriminating statements he had made during conversations with the informant while he was incarcerated.

The Henry Court, in its analysis, recognized that:

An accused speaking to a known Government agent is typically aware that his statements may be used against him. The adversary positions at that stage are well established; the parties are then 'arm's-length' adversaries.

When the accused is in the company of a fellow inmate who is acting by prearrangement as a Government agent, the same cannot be said. Conversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal to persons known to be Government agents. . . .

Moreover, the concept of a knowing and voluntary waiver of Sixth Amendment rights does not apply in the context of communications with an undisclosed undercover informant acting for the Government. . . .

Finally, [the defendant's] incarceration at the time he was engaged in conversation by [the informant] is also a relevant factor . . . . [T]he mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents.

447 U.S. at 273-74, 100 S. Ct. at 2188, 65 L. Ed. 2d at 124. The Court held that by intentionally creating a situation likely to induce the defendant to make incriminating statements without the assistance of counsel, the government violated his Sixth Amendment right to counsel. Id.

Next, in Maine v. Moulton, 474 U.S. 159, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985), the court was faced with the issue of whether the defendant's Sixth Amendment right to the assistance of counsel was violated when incriminating statements made by him to his co-defendant, a secret government informant, after indictment and at a meeting between the two to plan their defense for trial, were admitted at trial. The Court, in reaffirming that the "Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent[,]" reaffirmed that Massiah "states a sensible solution to a difficult problem." Id. at 176, 179, 106 S. Ct. at 487, 489, 88 L. Ed. 2d at 496, 498. The court explained:

The police have an interest in the thorough investigation of crimes for which formal charges have already been filed. They also have an interest in investigating new or additional crimes. Investigations of either type of crime may require surveillance of individuals already under indictment. Moreover, law enforcement officials investigating an individual suspected of committing one crime and formally charged with having committed another crime obviously seek to discover evidence useful at a trial of either crime. In seeking evidence pertaining to pending charges, however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused. To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in Massiah. On the other hand, to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily frustrate the public's interest in the investigation of criminal activities. Consequently, incriminating statements pertaining to pending charges are inadmissible at the trial of those charges, notwithstanding the fact that the police were also investigating other crimes, if, in obtaining this evidence, the State violated the Sixth Amendment by knowingly circumventing the accused's right to the assistance of counsel.

Id. at 179-80, 106 S. Ct. at 489, 88 L. Ed. 2d at 498-99 (footnotes omitted).

In Kuhlmann v. Wilson, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986), the defendant was incarcerated after his arraignment on charges arising from a robbery and murder, with an inmate who had agreed to work with the police as an informant. The informant was directed by the police not to ask the defendant any questions, and

to merely listen to what the defendant may say in his presence. The defendant voluntarily made incriminating statements to the informant, which were reported by the informant to the police.

The Kuhlmann court reversed the Court of Appeals' holding that the defendant's right to counsel was violated. The Supreme Court held the Court of Appeals' decision was clear error in light of the provisions of 28 U. S. C. § 2254(d), which requires that the state court's factual findings be accorded the presumption of correctness. Id. at 459, 106 S. Ct. at 2630, 91 L. Ed. 2d at 385. The court recognized that

the primary concern of the Massiah line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. Since 'the Sixth Amendment is not violated whenever--by luck or happenstance--the State obtains incriminating statements from the accused after the right to counsel has attached,' . . . a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

Id. at 459, 106 S. Ct. at 2630, 91 L. Ed. 2d at 384-85. (emphasis added and citation omitted).

Finally, the Supreme Court has held that the sixth amendment decisions in Massiah, Henry and Moulton do not apply in cases where charges have not been filed against the defendant for the offense which is the subject of the interrogation, and the Sixth Amendment right to counsel has not attached. Illinois v. Perkins, 496 U.S. 292, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990). In Perkins, police placed an undercover agent in a cell with the defendant who was incarcerated on charges other than the murder the agent was investigating. The court held that the undercover agent posing as a fellow inmate did not need to give Miranda warnings to the incarcerated defendant because the Miranda concerns of a "'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate." Id. at 296, 110 S. Ct. at 2397, 110 L. Ed. 2d at 251. The court further held that the Massiah line of decisions did not apply because the subject of the interrogation was related to a separate offense for which no charges had been filed.

We believe that certain factors identified in the Massiah line of decisions should be taken into consideration by circuit courts in determining whether to grant motions to suppress incriminating statements elicited by an undercover informant working for the police from a defendant whose Sixth Amendment right to counsel has already attached. Thus, in considering whether to grant a motion to suppress incriminating statements elicited from a defendant by an undercover agent working for police, the circuit court should consider whether: (1) the police, through the use of an undercover agent, have intentionally created a situation likely to induce the defendant to make incriminating statements without the assistance of counsel; (2) the incriminating statements relate to an offense for which the defendant has already been indicted or the right to counsel has otherwise attached; (3) the police or prosecuting attorney knowingly circumvented the defendant's right to counsel and deliberately elicited incriminating statements from the defendant; and (4) the defendant has shown that the police and the undercover agent have taken some action, beyond mere listening, that was induced to elicit incriminating statements from the defendant.

B. Due Process

While the Massiah factors would otherwise be applicable to this case, they are not controlling in light of the peculiar facts before us. Massiah assumes that there are no questions concerning the mental condition of the defendant. Nor in Massiah were the police and the prosecuting attorney, in a surreptitious attempt to obtain incriminating evidence against the defendant, seeking to penetrate the clinical environment where the court-ordered psychiatric evaluation of the defendant was occurring.

What this Court finds so compelling is the fact that Mr. Leadingham, at the time he allegedly made the incriminating statements, was not incarcerated in jail nor was he released on bail awaiting trial. Instead, he was confined in a psychiatric hospital for a court-ordered psychiatric evaluation. This Court is greatly troubled by a police practice that would allow an undercover informant to obtain incriminating statements from a defendant who is in a psychiatric facility for a court-ordered psychiatric evaluation. While this Court is fully cognizant of

the State's interest in prosecuting crimes and protecting the public, there is nothing in the record before us that would even suggest that sending Mr. Farris to a psychiatric institution to elicit incriminating statements from Mr. Leadingham was crucial to solving the crime or protecting the public.

Equally compelling is the fact that Trooper Cahill testified that at no time did he or anyone else try to ascertain what Mr. Leadingham's mental condition was at the time he was in Weston State Hospital for a court-ordered psychiatric evaluation. Moreover, when Trooper Cahill contacted Trooper Gary McGraw of the Criminal Investigative Service of the State Police in Beckley to inquire whether it would be a problem for Mr. Farris to wear a "wire" into Weston State Hospital, Trooper McGraw, after making inquiries, advised him that the hospital staff "didn't want to be part of it[.]" Yet, despite the wishes of hospital staff, Trooper Cahill sent Mr. Farris to Weston State Hospital with a recording device. The recording device was removed from Mr. Farris by hospital staff once Mr. Farris went through the scanner.

While Mr. Leadingham was in Weston State Hospital, the evaluators determined that he was suffering from a bipolar disorder. In a forensic evaluation dated March 30, 1991, B. M. Hirani, M. D. reported that Mr. Leadingham suffers from a "Bipolar Disorder" which "occurs from mental illness[,]" and that he "would need continued and ongoing psychiatric care and supervision." Moreover, in his court assessment, conducted on March 29, 1991, Robert W. Solomon, Ed.D. found that Mr. Leadingham "is not responsible for criminal conduct, because at the time of the alleged offense, he was suffering from a mental illness or disease which made it impossible for him to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law." Thus, Mr. Leadingham's mental condition was clearly in question at the time Mr. Farris visited him at Weston State Hospital.

This Court has previously recognized that the pre-trial psychiatric examination is a "critical stage" of an adversarial criminal process. State v. Jackson, 171 W. Va. 329, 335, 298 S.E.2d 866, 872 (1982). We found in Jackson that

[w]hen a court, on its own or the State's motion, orders a pre-trial psychiatric examination of a defendant, we can presume there is a question about defendant's competency or mental condition. To guarantee that state and federal constitutional rights are scrupulously honored in these circumstances, we find that no waiver of these rights will be effective without advice of counsel.

Id. at 336, 298 S.E.2d at 873. We articulated this finding in syllabus point 3 of Jackson: "A defendant cannot waive his state and federal constitutional privileges against self-incrimination and rights to assistance of counsel at court-appointed pre-trial psychiatric examinations except upon advice of counsel." Moreover, W. Va. Const. art. III, § 10 states that "[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." Inherent in article III, § 10 of the West Virginia Constitution is the concept of substantive due process. State ex rel. Harris v. Calendine, 160 W. Va. 172, 179, 233 S.E.2d 318, 324 (1977). Similarly, the Supreme Court of the United States has interpreted "the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Reno v. Flores, ___ U.S. ___, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1, 16 (1993) (citations omitted and emphasis in original). The Supreme Court has explained that "[s]o-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' Rochin v. California, 342 U.S. 165, 172 (1952), or interferes with rights 'implicit in the concept of ordered liberty,' Palko v. Connecticut, 302 U.S. 319, 325-326 (1937)." United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct. 2095, 2101, 95 L. Ed. 2d 697, 708 (1987) (footnote added). "Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression[.]'" DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 196, 109 S. Ct. 998, 1003, 103 L. Ed. 2d 249, 259 (1989) (citation omitted). Thus, when the State's action in obtaining incriminating evidence against a defendant is overzealous or outrageous and infringes upon a defendant's constitutional rights under the Fourteenth Amendment of the United States Constitution and W. Va. Const. art. III, § 10, due process and fundamental fairness preclude the State from using such evidence against the defendant. See generally State v. Hinkle, 169 W. Va. 271 n. 3, 286 S.E.2d 699 n. 3 (1982).

It logically follows from Jackson and the state and federal due process clauses that while a defendant is hospitalized in a psychiatric facility for a court-ordered psychiatric examination, his or her constitutional rights should be scrupulously honored. By sending an undercover informant to the psychiatric facility to obtain incriminating statements from a defendant while he or she is hospitalized for a court-ordered psychiatric evaluation, without ascertaining his or her mental condition, the police fail to scrupulously honor the defendant's constitutional rights. Due process and fundamental fairness preclude the admission of incriminating statements which are obtained from a defendant by an undercover informant who elicits such statements while the defendant is hospitalized in a psychiatric institution for a court-ordered psychiatric evaluation.
Thus, we hold that under the Fourteenth Amendment of the United States Constitution and article III, § 10 of the West Virginia Constitution, due process and fundamental fairness dictate that the police and the prosecuting attorney be precluded from using an undercover informant to penetrate the clinical environment of a psychiatric institution in order to elicit incriminating statements from a defendant who is undergoing a court-ordered psychiatric evaluation. Any incriminating statements elicited from a defendant under these circumstances, upon proper motion by the defendant, shall be suppressed in the trial on the criminal charges to which the incriminating statements relate.

We conclude that the incriminating statements obtained by Mr. Farris from Mr. Leadingham should have been suppressed. Therefore, we shall remand this case to the circuit court for a new trial.

III.

Mr. Leadingham also contends that the circuit court erred in refusing to grant his motion for a mistrial, including a motion for a mistrial made during the State's rebuttal argument for impermissible argument and prosecutorial misconduct. Mr. Leadingham objects to the following statements by the prosecuting attorney in closing argument, and asserts that they were clearly prejudicial:

The proof in this case leaves no doubt that this defendant has engaged in a course and conduct that destroys the system. No one's dead, but you can kill it. And you can kill it by a verdict of not guilty or you can save it. And you can tell Mrs. Leadingham and every other victim in this case they were right when we asked them to trust us and we would protect them; or you can let everyone know they were wrong to trust us and we can't protect them.

However, as pointed out by the State, the circuit court gave a curative instruction to the jury. The circuit court instructed that:

Ladies and gentlemen of the jury, let me just again remind you that argument of counsel is argument of counsel. They have a right to address you in final summation, but you heard the evidence. You are the sole judges of the evidence as I've instructed you. I've given you the law and the case will be deliberated and decided by you, each one, on those standards and those standards alone.

Thus, in light of the judge's curative instruction to the jury, we cannot say that the statements of the prosecuting attorney in closing argument clearly prejudiced Mr. Leadingham or resulted in manifest injustice. See State v. Ocheltree, 170 W. Va. 68, 289 S.E.2d 742 (1982). As we recognized in syllabus point 8 of State v. Hays, 185 W. Va. 664, 408 S.E.2d 614 (1991): "'A judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice.' Syl. pt. 5, State v. Ocheltree, 170 W. Va. 68, 289 S.E.2d 742 (1982)."

We caution, however, on remand of this case for a new trial, that a prosecuting attorney is in a quasi-judicial role and "is required to avoid the role of a partisan, eager to convict," and must "set a tone of fairness and impartiality[.]" Syl. pt. 1, in pertinent part, State v. Critzer, 167 W. Va. 655, 280 S.E.2d 288 (1981).

IV.

Mr. Leadingham's final assignments of error, which were only briefly discussed in his appeal brief, involve first, whether the circuit court erred in permitting the state to call his former treating psychiatrist to give an opinion beyond those reached by the psychiatrist during his treatment of Mr. Leadingham, and second, whether the

circuit court erred in denying his motion for a directed verdict on the ground that he was not guilty by reason of insanity based upon the court-ordered evaluation by Weston State Hospital.

Mr. Leadingham contends that by calling his treating psychiatrist, Basil Roebuck, M.D., and allowing him to testify against Mr. Leadingham as an expert, the trial court violated the physician-patient relationship. Yet, counsel on behalf of Mr. Leadingham advised the circuit court, in camera, that he had no objection to Dr. Roebuck testifying regarding the "facts and opinions and/or conclusions" reached by Dr. Roebuck while he was treating Mr. Leadingham, but that he objected to him being allowed to testify regarding Mr. Leadingham's competency and legal sanity. Mr. Leadingham's counsel believed Dr. Roebuck could testify regarding his treatment of Mr. Leadingham but not as to whether he believed Mr. Leadingham was sane. Counsel on behalf of Mr. Leadingham does not cite any authority to support his assertion that the circuit court committed reversible error in allowing Dr. Roebuck to testify regarding Mr. Leadingham's sanity.

We point out, however, that the admissibility of testimony by an expert witness under W. Va. R. Evid. 703 is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong. Syl. pt. 6, Helmick v. Potomac Edison Co., 185 W. Va. 269, 406 S.E.2d 700, cert. denied, ___ U.S. ___, 112 S. Ct. 301, 116 L. Ed. 2d 244 (1991). Based upon the record before us, we do not believe that the trial court's decision to allow Dr. Roebuck to testify regarding his opinion as to whether Mr. Leadingham was sane was clearly wrong.

With respect to the issue of whether the circuit court erred in refusing to direct a verdict of not guilty by reason of insanity, we recognize that the jury heard conflicting evidence as to Mr. Leadingham's sanity at the time he allegedly committed the crimes for which he was charged. Dr. Solomon, the psychologist who evaluated Mr. Leadingham at Weston State Hospital, found that, although he was competent to stand trial, he was not criminally responsible for his actions prior to his evaluation at Weston State Hospital. Dr. Roebuck, Mr. Leadingham's treating physician, testified on rebuttal that there was nothing in Dr. Solomon's diagnosis of bipolar disorder without psychosis that would indicate insanity. While the State has the burden of proving sanity beyond a reasonable doubt, that "'does not mean that the sanity evidence must be entirely without contradictions.'" State v. McWilliams, 177 W. Va. 369, 379, 352 S.E.2d 120, 130 (1986) (citation omitted). We believe that the sanity issue was properly presented to the jury and there was sufficient evidence from which the jury could conclude beyond a reasonable doubt that Mr. Leadingham was sane.

V.

For the reasons stated herein, we reverse and remand this case to the circuit court for a new trial.

Reversed and Remanded..