STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 10-4019 (Fayette County 10-F-78)

Matthew S. Dixon,
Defendant Below, Petitioner

FILED
November 15, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Matthew S. Dixon appeals the circuit court's order sentencing him to serve one to three years, after his conviction of second offense battery on a police officer. This appeal was timely perfected by counsel, with petitioner's appendix accompanying the petition. The State has filed its response.

This Court has considered the parties' briefs and the record on appeal. 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.

Petitioner was arrested after an altercation in his parents' home. Petitioner's father called police, and officers from both Fayette County and Oak Hill arrived at the home. Although the witness testimony is inconsistent regarding petitioner's intent, there is no dispute that a deputy received an injury to his eye when petitioner elbowed him. Petitioner was indicted on one count of battery against his father, and two counts of battery on a police officer. At trial, counsel for the petitioner requested a jury instruction for the lesser included offense of assault on a police officer, but the circuit court ruled that since contact was made the jury could decide whether said contact was intentional or not; thus, the requested jury instruction was not given. Petitioner was found guilty of one count of battery on a police officer, and was acquitted on one count of battery on a police officer and one count of battery.

On appeal, petitioner argues that the circuit court erred in failing to give a jury instruction on the lesser included offense of assault on a police officer.

> A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not mislead by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

Syl. Pt. 4, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). In short, "[a]s a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*." Syl. Pt. 1, *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996).

With regard to lesser included offenses, this Court has stated that "'[t]he test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense.' Syllabus Point 1, *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981) [overruled on other grounds]." Syl. Pt. 7, *State v. Noll*, 223 W.Va. 6, 672 S.E.2d 142 (2008). However, "[w]here there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction." *State v. Biehl*, 224 W.Va. 584, 590, 687 S.E.2d 367, 373 (2009) (quoting Syl. Pt. 2, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982)). In the present case, although the testimony is somewhat contradictory as to petitioner's intent in striking or making contact with the police officer, the evidence is clear that the officer was in fact struck by petitioner. Thus, the circuit court did not abuse its discretion in refusing to give an instruction on assault on a police officer as a lesser included offense.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 15, 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