STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 101224 (Mercer County 06-F-100-DS)

Bucky Joe Proffitt,
Defendant Below, Petitioner

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

MEMORANDUM DECISION

Petitioner Bucky Joe Proffitt appeals the circuit court's order denying his motion for a new criminal trial based upon newly discovered evidence. The State filed a response brief.

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.

Linda Williams alleged that Petitioner Bucky Joe Proffitt sexually assaulted her while she was in his home on the morning of June 30, 2005. She was present that day to provide home health care services to a member of petitioner's family. Petitioner claimed that he and Williams had a brief, consensual sexual encounter. After a December 2006 jury trial, petitioner was found guilty of sexual assault in the second degree and was sentenced to ten to twenty-five years in prison. His direct petition for appeal was refused by this Court.

In March 2009, pursuant to Rule 33 of the West Virginia Rules of Criminal Procedure, petitioner filed a motion for new trial in the circuit court asserting newly discovered evidence. The circuit court held a hearing and denied the motion by order entered March 22, 2010. In this appeal, petitioner argues that the circuit court erred in denying his motion for new trial.

This Court reviews the rulings of a circuit court concerning a new trial under an abuse of discretion standard. Syl. Pt. 3, in part, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000). The factors which a defendant must prove when asserting a motion for new trial based upon newly discovered evidence are well-settled:

> A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.

Syl. Pt. 1, *Halstead v. Horton*, 38 W.Va. 727, 18 S.E. 953 (1894); Syl., *State v. Frazier*, 162 W.Va. 935, 253 S.E.2d 534 (1979); Syl. Pt. 1, *State v. William M.*, 225 W.Va. 256, 692 S.E.2d 299 (2010).

Petitioner asserted two instances of newly discovered evidence. First, he asserted that prior to his trial, the victim, and a man purporting to be the victim's lawyer, telephoned potential defense witnesses and threatened to sue them if they testified at petitioner's criminal trial. Petitioner explained that these potential witnesses, his relatives Duane and Robin Proffitt, did not reveal the threats until after his trial was over. The victim denied that this occurred. Upon a careful review of this matter, we conclude that the circuit court did not abuse its discretion in rejecting this as a basis for ordering a new trial. Defense counsel had already decided not to call Mr. and Mrs. Proffitt as witnesses for reasons unrelated to the alleged intimidation. Moreover, even if this intimidation occurred, this issue would only have gone toward discrediting or impeaching the victim. Finally, even if this occurred, it does not rise to a level sufficient to cause an opposite result at trial.

As his second ground for a new trial, petitioner asserted that on the day of the alleged assault, his cousin Calvin Proffitt was working in the driveway of petitioner's next-door-neighbor and observed the victim leave petitioner's home. Calvin Proffitt has averred that he saw the victim and petitioner engage in what appeared to be a friendly conversation as the victim was walking to her car. Calvin Proffitt has averred that he did not observe any

demeanor that would suggest that the victim had just been assaulted. Upon a careful review of this issue, we conclude that the circuit court did not abuse its discretion in rejecting this as a basis for a new trial. Although petitioner asserts that the evidence is conflicting, the circuit court made a factual finding that Calvin Proffitt had told petitioner about this evidence prior to trial. Accordingly, it is not "newly discovered" evidence. Moreover, the circuit court found that this evidence is not contradictory to the victim's trial testimony. The victim testified that she spoke to petitioner as she was leaving his house; she never said that she ran out, screamed, or engaged in similar actions.

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