STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

v.) No. 101299 (Monroe County 09-F-23)

Jonathan William Harrison Moore
Defendant Below, Petitioner

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

MEMORANDUM DECISION

Petitioner Jonathan William Harrison Moore files this timely appeal from a jury conviction for malicious assault. Petitioner challenges the trial court's jury instruction on self-defense. He also raises issues concerning Rule 404(b) evidence and asserts that he was denied effective assistance of counsel. Petitioner seeks a reversal of his conviction and sentence and a remand for a new trial. Respondent State of West Virginia has filed a timely Response, and petitioner has filed a Reply.

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.

Facts

Petitioner alleges that on July 9, 2008, he got into a physical altercation with a man named Jerry Rider in petitioner's effort to defend his brother, Michael Moore, who was primarily fighting with another man, Jason Burns. Alcoholic beverages had been consumed before the fight began. The trial testimony of petitioner and his brother concerning the events at issue differed from the trial testimony of Mr. Rider, Mr. Burns, and Jennifer Rider—Mr. Burns's girlfriend and Jerry Rider's daughter. The State indicates that the evidence at trial showed that petitioner intentionally and savagely attacked and beat Mr.

Rider. At the time of the fight, petitioner was 29-years-old and Mr. Rider was 46-years-old and disabled. The fighting ceased after Ms. Rider retrieved her father's gun from his residence and fired it into the air. The State indicates that Mr. Rider suffered several injuries to his face, including several upper jaw fractures and several complete breaks in the orbital bones below his eyes.

The State asserts that its witnesses corroborated Mr. Rider's testimony describing the unprovoked and vicious beating. Jennifer Rider testified that petitioner was not defending himself and that he intentionally kept beating her father to either kill him or hurt him badly. Conversely, petitioner's brother accused Mr. Burns of attacking him. Petitioner testified that when he tried to push past Mr. Rider to get to Mr. Burns in order to aid his brother, Mr. Rider grabbed him and went to strike him, after which they both fell down and hit a bunch of toys. Petitioner testified that he thought Mr. Rider was primarily injured in that fall. Petitioner testified that he never intended to injure Mr. Rider. Petitioner's primary theory of defense at trial was largely focused on self-defense. During trial, petitioner's trial counsel questioned both petitioner and his brother concerning their prior misdemeanors, which the State then followed-up on in its cross-examination about their prior instances of assaultive behavior.

The jury was presented with two conflicting versions of the events in question. The jury clearly found the State's witnesses to be more credible as reflected in its verdict finding petitioner guilty of the malicious assault of Jerry Rider in violation of West Virginia Code §61-2-9. Petitioner was sentenced to a period of incarceration of two to ten years.

404(b) Evidence

Petitioner asserts that the circuit court committed plain error by allowing the State to introduce evidence of his prior criminal record, including dismissed charges, for the purpose of arguing that he had acted in conformity with his prior conduct. Petitioner asserts that the State gave no notice of its intent to use this evidence under Rule 404(b) of the West Virginia Rules of Evidence; consequently, there was no *McGinnis*[1] hearing, no limiting instruction at the time the evidence was introduced, and the jury instructions given at the conclusion of the evidence merely stated that petitioner was on trial for the current accusation. Petitioner asserts that the State introduced his criminal record without any evidentiary justification and then argued to the jury that he should be convicted based on his prior bad conduct. Petitioner argues that this issue rises to the level of plain error because his trial counsel did not object, all of which resulted in a denial of his due process right to a fair trial.

[1] *State v. McGinnis,* 193 W.Va. 147, 455 S.E.2d 516 (1994).

The State asserts that its questioning of petitioner concerning his prior violent and assaultive behavior was directly relevant to disprove his claims that Mr. Rider's injuries were accidental, unintentional, and the result of self-defense. The State notes that petitioner's trial counsel first introduced evidence of the prior violent acts of petitioner and his brother through his direct examination of them at trial and that it was after they offered their version of events that the door was open for the State to refute their explanation with evidence and argument about their previous instances of violent assault. The State argues that this evidence, to which there was no objection by petitioner's trial counsel, met the standards of Syllabus Point 12 of *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974), cited in *State Willett,* 223 W.Va. 394, 402, 674 S.E.2d 602, 610 (2009)(Ketchum, J., concurring), which provides that evidence of collateral crimes and charges are admissible against an accused if it tends to establish intent or the absence of mistake or accident.

Under the facts and circumstances of this case, the Court does not find plain error in this regard.

Jury Instruction on Self-Defense

Petitioner testified at trial that he was defending both himself and his brother. Petitioner states that the trial court's jury instruction on self-defense precluded the jury from considering an "imperfect" self-defense because the instruction required him, as well as his brother, to be faultless in order to benefit from his self-defense claim. Petitioner states that "imperfect" self-defense occurs when a defendant subjectively believes that he is defending himself but that belief is objectively unreasonable, or where the defendant was the aggressor or reacted with an unreasonable amount of force. Petitioner adds that this Court has not indicated whether "imperfect" self-defense can apply in malicious assault cases, although it has recognized "imperfect" self-defense in the context of murder prosecutions.[2]

Petitioner argues that because his trial counsel failed to object to the self-defense instruction, it was plain error for the trial court to give the instruction as it adversely affected petitioner's substantial rights, undercut his only valid defense, and seriously affected 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).

The State avers that petitioner's trial counsel did not request an instruction on

[2]*See State v. McCoy*, 219 W.Va. 130, 135 -136 n.11 , 632 S.E.2d 70, 75-76 n. 11 (2006).

"imperfect" self-defense.[3] The State argues that there was substantial evidence before the jury that contradicted petitioner's claims of self-defense, whether "perfect" or "imperfect," and that the trial court's failure to give, *sua sponte,* an "imperfect" self-defense instruction—where "imperfect" self-defense has never been recognized in West Virginia in the context of malicious assault—does not warrant a reversal of petitioner's conviction.

Whether a trial court has correctly instructed the jury is a question of law that is reviewed *de novo.* Syl. Pt. 1, *State* v. *Hinkle,* 200 W.Va. 280, 489 S.E.2d 257 (1996). Because the Court has never recognized "imperfect" self-defense in the context of malicious assault, the Court cannot find that the trial court committed plain error in failing to give an instruction on "imperfect" self-defense *sua sponte.*

Ineffective Assistance of Counsel

Petitioner asserts that his trial counsel was ineffective when he elicited testimony from him and other witnesses concerning his prior criminal record, as well as the criminal record of his brother. Petitioner argues that such evidence would otherwise have been inadmissible and could not possibly be explained away by trial counsel in a habeas proceeding because advising the jury that petitioner had committed a prior battery could not have been a valid trial strategy. Petitioner contends that his trial counsel's performance was so seriously deficient as to warrant a review in his direct criminal appeal and a reversal of his conviction.

Petitioner further argues that even evidence that is admissible under Rule 609 of the West Virginia Rules of Evidence is still subject to a determination of whether the prejudice of the evidence outweighs its probative value. Petitioner asserts that the evidence of his prior bad conduct was all the more prejudicial because the jury had been incorrectly instructed that he could only avail himself of self-defense if both he and his brother were faultless.

The State argues that petitioner has to demonstrate that the facts of his case are so extraordinary and the conduct of his counsel so severely prejudicial and devoid of any possible strategic purpose for this Court to make an exception to its rule that ineffective assistance of counsel claims should be developed in habeas proceedings. Syl. Pt. 10, *State Triplett,* 187 W.Va. 760, 421 S.E.2d 511 (1992). The Court has no way to determine from the record why petitioner's counsel proceeded in the manner in which he did. As we stated in *Triplett,* such issues should be developed in a habeas proceeding. *Id.* We express no

[3] In fact, the record reflects that the self-defense instruction offered by petitioner's trial counsel was given by the trial court.

opinion, however, on the merits of petitioner's ineffective assistance claims or of any habeas petition.

Conclusion

Having reviewed the record and the parties' arguments on appeal under the pertinent standards of review, this Court cannot find any error or an abuse of discretion by the trial court. Accordingly, 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