STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

v.) No. 101331 (Berkeley County 08-F-157)

Freddy Lavender
Defendant Below, Petitioner

FILED
April 18, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Freddy Lavender files this timely appeal from his convictions of one count of first degree sexual assault, two counts of sexual abuse by a parent, custodian, or guardian, and two counts of first degree sexual abuse following a jury trial. Petitioner asserts that the circuit court erred in not granting his motion for judgment of acquittal, in refusing to give his Jury Instruction No. 3, and by imposing a disproportionate sentence. Petitioner seeks a reversal of his convictions and a remand for a new trial. Respondent State of West Virginia has filed a timely 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.

At trial, the State presented the testimony of the victim, who is a daughter of petitioner's girlfriend with whom he shared a home. The victim was twelve-years-old at the time of trial and around nine-years-old when the abuse began. The victim testified that petitioner began by touching her "private" through her pants and that he later did so after pulling her pants down. The victim also testified that on Sunday, March 9, 2008, while her mother was at work, petitioner locked the door to the bedroom she was in and endeavored to have anal intercourse with her. The victim testified that she was wearing a blue shirt at the

time, which she took off and threw into her closet because something wet got on it, although she did not know what it was. The victim reported the incident at school the next day.

Deputy Palmer, the investigating officer, testified at trial that he found the victim's shirt in her closet where she said it would be. The victim's shirt was sent to the crime laboratory for DNA testing. Jason Hodges of the West Virginia State Police Crime Lab was qualified as an expert in forensic serology at trial and testified that petitioner's sperm cells were found on the shirt.

The forensic nurse, who examined the victim the day following the attempted anal intercourse, was qualified as an expert at trial and testified that her examination of the victim revealed a "t-shaped" tear in the rectal area that would have been caused within seventy-two hours and, that in her opinion, the bruising in the victim's anal area was due to blunt force trauma. The injuries were documented by photographs taken during the forensic exam, which were admitted into evidence and published to the jury.

After the State rested, petitioner moved for a judgment of acquittal. The State agreed to dismiss one of the counts of first degree sexual assault, which involved an incident predating the sexual assault on March 9, 2008. The motion for acquittal as to the remaining counts was denied.

Petitioner then presented his witnesses–his minor daughter from a prior relationship, his daughter's mother, and himself–each of whom testified as to possible reasons the victim might have fabricated her allegations. Petitioner denied any wrong-doing during his testimony, and both he and the victim's mother testified concerning possible alternative theories as to how petitioner's sperm might have gotten onto the victim's shirt. Petitioner rested, and the State chose not to present a case in rebuttal.

Petitioner offered Jury Instruction No. 3, which called for the jury, in part, to scrutinize with care and caution the victim's testimony if the jury believed that such testimony was uncorroborated. The circuit court refused to give this instruction on the basis that there was sufficient corroborating evidence of the victim's allegations.

The jury returned a verdict finding petitioner guilty on all remaining counts. Petitioner's post-trial motions for a new trial and for judgment notwithstanding the verdict were denied. The circuit court sentenced petitioner to terms of incarceration as follows: twenty-five to 100 years for the first degree sexual assault conviction, ten to twenty years for both of the sexual abuse by a parent, custodian, guardian, or person of trust convictions, and five to twenty-five years for both of the first degree sexual abuse convictions. The circuit

court ordered the sentences to run consecutively resulting in an aggregate sentence of fifty-five to 190 years.

Jury Instruction

"As 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).

Petitioner asserts that the circuit court erred in refusing to give his Jury Instruction No. 3. The circuit court found sufficient corroboration of the victim's testimony to refuse the instruction, including the presence of petitioner's semen on the victim's shirt and the photographs of the victim's injuries. Petitioner argues that any corroboration found by the circuit court was negated by the material inconsistencies and discrepancies in the victim's testimony at trial and in her statements made during the course of the underlying investigation. Petitioner asserts that even with corroboration, it was still within the court's discretion to give the instruction.

The State argues that the circuit court properly exercised its discretion in refusing to give this jury instruction. In Syllabus Point 5 of *State v. Payne*, 167 W.Va. 252, 280 S.E.2d 72 (1981), the Court stated that "[w]here the State's case is based upon the uncorroborated and uncontradicted identification testimony of a prosecuting witness, it is error not to instruct the jury upon request that, if they believe from the evidence in the case that the crime charged against the defendant rests alone on the testimony of the prosecuting witness, then the jury should scrutinize such testimony with care and caution." The State argues that such an instruction is not applicable unless the identification of the perpetrator is an issue, which it was not in the case-at-bar. The State notes that the jurors were instructed that they were the judges of the credibility and weight to be given to the testimony of each witness.

Motions for Acquittal

"'Upon a motion to direct a verdict for the defendant, the evidence is to be viewed in the light most favorable to the prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt. *State v. West*, 153 W.Va. 325 [168 S.E.2d 716] (1969).' Syllabus Point 1, *State v. Fischer*, 158 W.Va. 72, 211 S.E.2d 666 (1974)." Syl. Pt. 3, *State v. Taylor*, 200 W.Va. 661, 490 S.E.2d 748 (1997) (per curiam). In reviewing the sufficiency of the evidence on appeal, the question is whether any

rational trier of fact could have found the essential elements of a crime proved beyond a reasonable doubt. Syl. Pt. 2, *State v. Hughes*, 197 W.Va. 518, 476 S.E.2d 189 (1996).

Petitioner argues that the circuit court erred in failing to direct a verdict in his favor at the close of the State's case and at the close of all of the evidence.[1] Petitioner asserts that even considering the evidence in the light most favorable to the State, and giving the State the benefit of any evidence in doubt, and crediting the State with all inferences and credibility assessments that the jury could have drawn from the evidence, reasonable minds could not have reached the same conclusion on his guilt as to any of the charges against him. *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995). Petitioner states that he impeached the victim's trial testimony with her prior inconsistent statements and offered possible motives for the victim's fabrication of the charges. Petitioner notes his own trial testimony during which he denied the charges against him and attempted to give a reasonable and rational explanation as to how his DNA might have gotten on the victim's shirt, other than by a sexual encounter with the victim.

The State asserts that the circuit court properly exercised its discretion in denying the motions for acquittal as the evidence was plainly sufficient for the jury to find beyond a reasonable doubt that petitioner was guilty of the crimes charged. The State points to the victim's testimony concerning the abuse and assault; the testimony and documentation from medical personnel regarding the recent anal tear and rectal bruising found on the victim the day after the incident; and the results of the DNA testing which found petitioner's sperm on the victim's shirt. The State maintains that the evidence was sufficient to allow the question to go to the jury, which clearly found the victim's testimony to be credible and the medical and forensic evidence compelling.

Sentencing

"Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syl. Pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).

Petitioner asserts that the circuit court erred in sentencing. Petitioner states that he had no significant prior criminal history, had maintained regular employment, had regularly paid

[1] Although petitioner states in his petition for appeal that his motions for a directed verdict were refused, under Rule 29 of the West Virginia Rules of Criminal Procedure, motions for directed verdict were abolished and motions for judgment of acquittal are to be used in their place.

child support, and had provided moral support to his daughter. Petitioner states that although he respected the jury's decision, he could not admit to something he had not done. Petitioner argues that his sentence of fifty-five to 190 years shocks the conscience, offends fundamental notions of human dignity, and is disproportionate to the character and degree of the offense. Petitioner maintains that, at a minimum, concurrent sentencing should have been imposed.

The State argues that under Syllabus Point 4 of *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982), sentences imposed within statutory limits, which are not based upon an impermissible factor, are not subject to appellate review. The State also argues that a sentencing court has broad discretion in imposing sentences. The State notes that petitioner's sentences are within statutory limits and that petitioner failed to identify any impermissible factor in sentencing. Under West Virginia Code §61-11-21, sentences for two or more convictions are to run consecutively unless the circuit court, in its discretion, orders them to run concurrently. The State argues that the circuit court did not abuse its discretion in sentencing petitioner, whose sentences are within statutory limits.

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 in either petitioner's trial or his sentencing. Accordingly, we affirm.

Affirmed.

ISSUED: April 18, 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