STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 101533 (Cabell County 07-F-128)

Charles Blevins,
Defendant Below, Petitioner

FILED
June 24, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Charles Blevins appeals his conviction for first degree murder with a recommendation of mercy. The State filed a response brief.

This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's order entered in this appeal on March 3, 2011. 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 admitted that he "pistol whipped" and then twice shot Travis Huff, resulting in Huff's death. Petitioner asserts that he acted because he thought Huff was stealing his money. At trial, petitioner's primary defense was diminished capacity due to severe alcohol intoxication. The jury found him guilty of first degree murder and recommended mercy. In May of 2009 he was sentenced to life with the possibility of parole. He was re-sentenced on November 8, 2010, for purposes of pursuing this direct appeal.

I.

In his first assignment of error, petitioner argues that the circuit court gave an incomplete instruction on the State's failure to preserve evidence. He asserts that State Police troopers who responded to the crime scene prepared a sketched diagram of the crime scene with measurements. This diagram was not included in the final police report. The court instructed the jury that "evidence regarding sketches and diagrams reflecting measurements and placement of items which may be relevant to this case are missing and have been lost or destroyed."

Petitioner argues that the court failed to explain how the jury could consider the fact that the evidence was missing. He argues that the court should have gone further and instructed the jury that, in considering this lost or destroyed evidence, the jury should scrutinize such with great care and caution. He also argues that the jurors should have been advised that they could draw an inference unfavorable to the State because of the missing diagram. The State responds that, despite the ample opportunity to do so, petitioner has failed to produce case law necessary to support his proposed instructions.

The following standard of review is applied:

> 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, as 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). Further, "[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).

Regarding the State's obligation to preserve evidence, we held the following in Syllabus Point 2 of *State v. Osakalumi*, 194 W.Va. 758, 461 S.E.2d 504 (1995):

> When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant's request for it, would have been subject to disclosure under either West Virginia Rule of Criminal Procedure 16 or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. In determining what consequences should flow from the State's breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction.

Petitioner asserts that, had the scene diagram been available, he could have used it to argue for a conviction on the lesser included offense of second degree murder. He suggests that the diagram would have assisted him in the cross-examination of State's witness Brooke Lusk. However, petitioner fails to explain how the diagram would have been helpful in this cross-examination. A review of the transcript shows that Ms. Lusk is a neighbor who heard yelling, looked out her window, and observed petitioner kicking on the door of a trailer. She testified that petitioner walked out of her sight and then she heard a gunshot. Inasmuch as petitioner admitted shooting the victim, which Ms. Lusk did not see, we fail to see how the diagram would have been helpful in the cross-examination of Lusk. Moreover, the troopers also marked and photographed evidence, which photographs were apparently made available to petitioner (he does not aver that the photographs were withheld from him or lost). Thus, even accepting that the State had a duty to preserve the diagram and breached that duty, we find that under the facts and circumstances of this particular case, no consequences should flow from that breach. When all of the instructions are read as a whole, we conclude that the jury was sufficiently instructed.

II.

In his second assignment of error, petitioner asserts that the circuit court erred by permitting the jury to take notes without giving the proper instructions on how the notes were to be used during deliberations. This Court addressed juror note-taking in Syllabus Point 5, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992):

> It is a permissible practice to allow jurors to take notes on the evidence during trial as long as proper voir dire is permitted concerning the jurors' capacity to take notes, and a cautionary instruction is given concerning the proper and improper uses of note-taking. The ultimate decision on whether to allow note-taking by the jury lies within the sound discretion of the trial court.

The circuit court instructed the jurors that they could take notes, but that they were not required to do so. However, petitioner argues that the court failed to conduct voir dire on each juror's ability to take notes; that the jury was not told that notes are only an aid to memory and should not be given precedence over an independent recollection; and that note-taking should not distract from the proceedings. The State responds that petitioner failed to request voir dire or instructions on this issue during trial, and did not otherwise object. Moreover, the State argues that our *Triplett* opinion did not hold that it is automatically error if there was no voir dire or specific cautionary instruction regarding note-taking.

When a defendant fails to object, the only means by which this Court can find error would be to invoke the plain error doctrine. "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects 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). "To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the

circuit, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice." Syl. Pt. 9, in part, *Miller*. Petitioner fails to explain how the outcome of his trial was in any way prejudiced by the circuit court's handling of the jury's note-taking, thus he has not met his burden of persuasion on this issue.

III.

In his final assignment of error, petitioner asserts that his trial counsel provided ineffective assistance of counsel by failing to object to the admission of certain photographs and his co-defendant's police statement. This Court's ability to review a claim of ineffective assistance of counsel is very limited on direct appeal. Such a claim would be more appropriately developed in a petition for writ of habeas corpus. Syl. Pt. 11, *State v. Garrett*, 195 W.Va. 630, 466 S.E.2d 481 (1995); Syl. Pt. 10, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992). Accordingly, we decline to rule on any claims of ineffective assistance of counsel in the context of this direct appeal. If he desires, petitioner may pursue a petition for writ of post-conviction habeas corpus. We express no opinion on the merits of petitioner's ineffective assistance claims or of any habeas petition.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 24, 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