STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 101633 (Kanawha County 10-F-519)

Daniel Lee Jordan,
Defendant Below, Petitioner

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

MEMORANDUM DECISION

Petitioner Daniel Lee Jordan appeals his conviction for Sexual Abuse in the First Degree and Abuse by a Parent, Guardian, Custodian, or Person in a Position of Trust. The State has filed a response brief and petitioner has filed a reply 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 prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

In February of 2010, petitioner and his wife babysat his wife's four-year-old female cousin, M.B. The next day, M.B. reported to her mother an incident of sexual contact with petitioner. M.B.'s mother contacted police and M.B. was interviewed by Deputy C. E. O'Neal of the Kanawha County Sheriff's Department. Separately, M.B.'s mother also reported the allegation to M.B.'s pediatrician, who recommended that M.B. undergo a physical examination at Charleston Area Medical Center's Women and Children's Hospital. Detective Samantha Ferrell of the Sheriff's Department told M.B.'s mother not to schedule this examination because the detective would make the arrangements. Detective Ferrell made an appointment for M.B. to be evaluated at the Child Advocacy Center at Women and Children's Hospital.

At the Child Advocacy Center, M.B. was interviewed by social worker Maureen Runyon. The interview was video-recorded and Detective Ferrell observed from another room. Ms. Runyon asked M.B. questions designed to elicit whether M.B. had been subjected to inappropriate sexual contact. Although unresponsive to most of Ms. Runyon's questions, M.B. indicated that petitioner had her touch his penis while they were in a bathroom at petitioner's home. During the interview, Ms. Runyon left the interview room to converse with Detective Runyon. At a suppression hearing, Ms. Runyon and Detective Ferrell both testified that Runyon had inquired of the detective whether there were any other questions to ask M.B. Detective Ferrell testified that she "believe[s]" she told Ms. Runyon what M.B. had told Deputy O'Neal, and she had Ms. Runyon ask questions so that the detective would not need to re-interview the child. Ms. Runyon resumed interviewing M.B. and obtained additional information from the child, including that M.B. had touched petitioner "on the clothes" over his genitalia instead of "on the skin."

M.B. was then given a physical examination by a doctor at the Child Advocacy Center, but the physical examination produced no evidence. At the conclusion of the complete evaluation, Ms. Runyon recommended that M.B. receive counseling and referred the matter back to the Sheriff's Department.

Petitioner gave two statements to police that were audio recorded and played for the jury at trial. Initially, petitioner denied any sexual contact with M.B. However, as the questioning progressed, he stated that he was masturbating in a small bathroom off of his bedroom when M.B. walked into the room unexpectedly. Petitioner indicated that he told her to leave and he stood up and ejaculated. Petitioner says he tried to pull up his pants, but M.B. reached out and "grabbed" his penis. Petitioner testified similarly at his trial.

Counsel for both sides agreed that M.B. was unavailable to testify at trial. The circuit court denied a defense motion to suppress and allowed the State to play at trial the videotape of Ms. Runyon's interview of M.B. The circuit court precluded the witnesses from testifying as to what M.B. had told them.

At the July 12 - 13, 2010, trial, the jury found petitioner guilty of Sexual Abuse in the First Degree in violation of West Virginia Code § 61-8B-7, and Abuse by a Parent, Guardian, Custodian, or Person in a Position of Trust in violation of West Virginia Code § 61-8D-5. Petitioner was sentenced to the statutory terms of incarceration, ordered to run consecutively, for a total of fifteen to forty-five years in prison. The circuit court also imposed forty years of post-release sexual offender supervision pursuant to West Virginia Code § 61-12-26.

Petitioner argued to the circuit court, and he argues in this direct appeal, that the admission of M.B.'s videotaped statement at his trial violated his right of Confrontation as

guaranteed by the Sixth Amendment to the United States Constitution and Section 14 of Article III of the West Virginia Constitution. He relies upon the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny, as well as our decision in *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006).

The circuit court rejected this argument, finding that M.B.'s statement to Ms. Runyon was given primarily for purposes of medical treatment and thus was not testimonial in nature and did not fall under the mandate of *Crawford* and *Mechling*. The State argues that the circuit court was correct because a person can have multiple purposes for giving an interview and a reasonable person in this situation would not have had the primary purpose of establishing or proving past events potentially relevant to a criminal prosecution. The child had previously been questioned by police. The Runyon interview was in the course of an overall evaluation conducted at Women and Children's Hospital. During a well-child visit, M.B.'s pediatrician had advised M.B.'s mother to obtain such an evaluation at this hospital. The information garnered in the Runyon interview was available to the medical doctor who performed the physical examination at the hospital. Moreover, Ms. Runyon testified that the purpose of her interview was to determine whether the child needed follow-up care and, at the conclusion of the interview and physical examination, Ms. Runyon recommended that M.B. receive counseling.

We decline to rule upon whether M.B.'s statement was testimonial and admitted in violation of *Crawford* and *Mechling*. Instead, we focus our decision on whether, even assuming that the statement was testimonial and should have been excluded, the error was nonetheless harmless. The Supreme Court left open in *Crawford* whether Confrontation Clause violations are subject to harmless error analysis. *Crawford*, 541 U.S. at 42, n. 1. Virtually all courts have found that harmless error does apply to *Crawford* violations. 30A Charles Alan Wright, et al., *Federal Practice and Procedure*, § 6371.2 (Supp. 2010). Under *Chapman v. California*, 386 U.S. 18 (1967), a violation of a constitutional right is harmless if the State proves the violation was harmless beyond a reasonable doubt. This Court adopted the standard set forth in *Chapman* when it held in Syllabus Point 20 of *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974), that "[e]rrors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction." *State v. Farmer*, 193 W.Va. 84, 90, 454 S.E.2d 378, 384 (1994).

Upon a review of the record, we conclude that even assuming M.B.'s interview should have been excluded under *Crawford* and *Mechling*, any error was harmless beyond a reasonable doubt. A review of the transcript of the interview reveals that M.B. failed to respond to many of Ms. Runyon's questions. At most, M.B. indicated in response to Runyon's questions that petitioner had her touch his penis through his clothing. When asked,

"did anything come out of" petitioner's penis, M.B. nodded negatively. By contrast, petitioner's own statements to police and his trial testimony were far more inculpatory. He admitted that the four-year old M.B. touched his penis while he was masturbating and ejaculating. He stated that the girl may have gotten ejaculate on her. Although petitioner claimed that he had not asked M.B. to touch him, the jury could weigh petitioner's credibility in light of the circumstances. [1] Moreover, the State presented corroborating evidence including the testimony of M.B.'s mother that M.B. had spent the night in petitioner's care and behaved differently upon returning home. M.B.'s mother testified that upon returning home, M.B. was a little quieter than usual; would not play with her brother, which was extremely unusual; and "didn't really fool with" [interact] with her father.

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

[1] The jury's conclusion was ultimately confirmed to be correct. Post-trial, petitioner admitted both to an evaluating psychiatrist, and to the circuit court during the sentencing hearing, that he had *asked* M.B. to touch his penis during this masturbation incident. He indicated a curiosity about what it would feel like to have a young child touch his penis.