

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State of West Virginia,
Plaintiff Below, Respondent**

vs.) No.11-0165 (Marion County 09-F-200)

**Samuel David Rollins,
Defendant Below, Petitioner**

FILED

December 2, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner, defendant below, Samuel David Rollins seeks reversal of his conviction for murder in the first degree with mercy. Respondent has filed its response.

This Court has considered the parties' briefs and the record on appeal. 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 May 10, 2011. 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 shot and killed Christopher Martin (decedent) on Friday, June 26, 2009, following an argument between the two men regarding decedent's wife, Christy Martin. On the day of the shooting, petitioner and his friend Sheldon Hampton went to Paul Cumberledge's residence located at 827 Fourth Street in Fairmont. While there, petitioner met Christy Martin. The group spent several hours together and ended up smoking marijuana on a porch at the back of 827 Fourth Street.

At about the same time and just down the street at 835 Fourth Street, decedent was drinking beer with Nicholas Briggs, Keith Leavengood, and another man. Leavengood left to buy marijuana from petitioner and Hampton at 827 Fourth Street (Cumberledge's residence). While there, Leavengood saw Christy Martin on the porch. Upon his return to 835 Fourth Street, Leavengood told decedent that his wife was with three men at 827 Fourth Street. Immediately thereafter, decedent walked to 827 Fourth Street. Briggs followed.

Decedent walked down the driveway at 827 Fourth Street, around to the back of the house, and up the stairs to the porch. He was yelling, calling his wife a “whore,” and accusing her of having sexual relations with the men on the porch. Decedent had his fist clenched and was wearing brass knuckles. He grabbed his wife then let her go. She ran into Cumberledge’s apartment and locked the door. Decedent continued to scream and began beating on the door of the apartment. As this was happening, petitioner and Hampton went down the steps and stood near the porch. Petitioner then removed a gun from a makeshift holster inside his shorts and placed it in his outside pocket.

Decedent told petitioner, Hampton, and Cumberledge that he was going to get his guns and his friends then come back and beat their “asses” and “kill you niggers.” (Petitioner and Sheldon are African-American. Decedent was Caucasian.) Decedent went back down the steps to where petitioner and Hampton were standing and repeated his threats to kill petitioner and Hampton. Decedent then put his hand in his pocket and began to walk back up the driveway toward Fourth Street.

When and where petitioner starting shooting at decedent were highly contested at trial. Petitioner contends that he and decedent were face-to-face and about ten feet apart when he fired his first shot. The State claims that petitioner began chasing decedent after the first shot. Then, as decedent ran up the driveway and into the street, petitioner followed and continued to fire. When decedent reached Fourth Street, he grabbed himself under his right shoulder blade and cried out for help. Decedent ran back to 835 Fourth Street before he collapsed. He died shortly thereafter as a result of internal bleeding from a single gunshot wound. The bullet entered decedent’s back and lodged in his left lung.

Petitioner ran back down the driveway and told Christy Martin he had shot her husband and that her husband would “never use those brass knuckles again.” Petitioner told Briggs that decedent “disrespected” him.

Petitioner voluntarily turned himself into the police that evening. He was given his Miranda rights and waived them. While Police Officer Murray was processing petitioner, petitioner made four phone calls. Petitioner’s first call was to his girlfriend Mercedes Corbin to whom he said: “I wish I never done that s—. The dude I got had a five-year-old and a seven-year-old, all over some dumb s---.” Petitioner’s second call was to Mariah/Mara Davison to whom he said: “[T]hat s--- was dumb. I didn’t have to shoot [the] dude, I just did, and now I got to do all this extra s---.” Petitioner’s third call was to Whitney Yerace. He asked her to bring him some clothing because the police were going to seize his. The final call was to Devany (last name unknown) to whom he said: “I don’t know if he had a weapon or not. He reached in his pocket and I shot.”

The circuit court granted Petitioner's motion to hire an investigator to interview the State's witnesses, including Nicholas Briggs. During Briggs's interview, the investigator learned that Briggs had misidentified the location of 827 Fourth on a diagram of the crime scene. At a pretrial hearing on the first day of the trial, the State asked for the investigator's recorded interviews of the State's witnesses. Petitioner objected on the ground that he was not required to turn over his investigator's recordings under Rule 16(b)(2) of the West Virginia Rules of Criminal Procedure. The circuit court noted the objection and ordered petitioner to give the recordings to the State so that the State could compare what the witnesses had said to the investigator with what they had said to the State. Petitioner could not comply because the investigator had the recordings and was out of town. Thereafter, the circuit court suppressed any mention of the investigator or Briggs's error in identifying 827 Fourth Street on the diagram.

Petitioner's bifurcated jury trial resulted in a first degree murder verdict with a recommendation of mercy. At sentencing, Petitioner received life with mercy and his motions for acquittal and a new trial were denied.

Petitioner challenges his conviction on five grounds

Petitioner's first assignment of error is that the circuit court failed to properly apply the balancing test under Rule 403 of the West Virginia Rules of Evidence, and as a result, improperly excluded the testimony of defense witness and surveyor, Norman Kronjaeger. Petitioner intended to call Mr. Kronjaeger to testify to the angles the shots would have had to have taken to strike decedent and thereby prove that petitioner's first shot struck decedent. Petitioner argues that the angles of the shots were clearly material and relevant to his defense and concludes that excluding Kronjaeger's testimony deprived him of a witness crucial to his defense.

Rule 403 of the West Virginia Rules of Evidence provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . .

As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse. Syl. Pt. 10, in part, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Syl. Pt. 4, *State v. Winebarger*, 217 W.Va. 117, 617 S.E.2d 467 (2005).

In ruling against the testimony, the circuit court said:

Mr. Kronjeager's expertise is in measuring static monuments, whether they be property corners or that sort of thing. But in this situation, this is a dynamic situation where things are moving, the shooter was moving, the victim was moving, the gun was moving, and I don't think it would be helpful to the jury or to the Court to hear his testimony as it might relate to certain angles and distances and that sort of thing given that dynamic situation.

We agree with the circuit court's reasoning and find that it did not abuse its discretion in excluding Mr. Kronjeager's testimony. Mr. Kronjaeger is a surveyor, not a crime scene reconstructionist or an expert in firearms or ballistics. Therefore, the probative value of his testimony was substantially outweighed by the danger of confusing the issues or misleading the jury.

Petitioner's second assignment of error is that the circuit court erred in denying his motion to suppress Officer Murray's testimony about petitioner's telephone conversations because the statements were unreliable hearsay.

[T]he action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion. Syllabus Point 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955).

Syl. Pt. 6, *State v. Rash*, 226 W.Va. 35, 697 S.E.2d 71 (2010) (per curiam).

We find that the circuit court did not abuse its discretion in allowing Officer Murray to testify about petitioner's phone conversations. Petitioner's statements were non-hearsay admissions of a party opponent admissible under Rule 801(d)(2) of the West Virginia Rules of Evidence. Furthermore, when he made the calls, petitioner had been advised of, and had waived, his Miranda rights; did not ask for privacy; and knew that Officer Murray, who was seated just a few feet away, could hear petitioner's side of the conversations.

Petitioner's third assignment of error is that the circuit court improperly instructed the jury about malice and mercy during the guilt phase of the trial. Regarding malice, petitioner argues that the circuit court instructed the jury that it could presume malice from the use of a firearm, without stating *in the same instruction* that the State was required to prove malice beyond a reasonable doubt. The circuit court then instructed the jury regarding self defense and the lesser included offense of voluntary manslaughter. Petitioner argues that, when read together, those instructions reveal that the circuit court believed, as a matter of law, that the

jury could find the petitioner acted with a legal justification, excuse, or provocation, thereby eliminating the malice inference and the requirement that the State had to prove malice beyond a reasonable doubt.

Petitioner also argues that the court improperly instructed the jurors during the guilt phase of the trial about sentencing and granting mercy if the jury found petitioner guilty of first degree murder.

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 misled 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, so 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. Syllabus Point 4, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 8, *State v. Foster*, 221 W.Va. 629, 656 S.E.2d 74 (2007) (per curiam).

We find that in viewing the charge to the jury as a whole, the circuit court did not abuse its discretion in its formulation of the jury charge. Although the reasonable doubt language was not in the malice instruction cited by petitioner, it is clearly stated in other instructions. Moreover, the malice instruction correctly stated the law. Nor did the circuit court instruct the jury that it could presume or conclude that petitioner acted with malice simply because he used a gun. Instead, the circuit court instructed that the jury could infer malice *only if* the jury believed Petitioner did not have an excuse or justification for his conduct.

Regarding petitioner's assertion that the court abused its discretion when, during the guilt phase of his bifurcated trial, it instructed the jury on the subject of mercy and sentencing, any error was harmless because the jury made a recommendation of mercy and the court sentenced petitioner accordingly.

Petitioner's fourth assignment of error is that the circuit court erred in excluding any mention of petitioner's investigator or Briggs's error in identifying 827 Fourth Street on the diagram because petitioner was unable to give to the State his investigator's recording of Briggs's interview. Petitioner argues that the circuit court's ruling violated West Virginia

Rules of Criminal Procedure 16(b)(2) (regarding disclosure of evidence by the defendant), and 26.2 (regarding the production of witness statements), and precluded him from effectively cross-examining Briggs.

We find that the circuit court abused its discretion in ordering the defense to give its investigator's recording of Briggs's interview to the State. However, in accordance with Rule of Criminal Procedure 52(a), the error was harmless because petitioner's inability to cross-examine Briggs (about the fact that he incorrectly located the house at 827 Fourth Street on a diagram) did not affect petitioner's substantial rights.

For the reasons stated above, we reject petitioner's fifth and final assignment of error, that the circuit court's cumulative errors prevented petitioner from receiving a fair trial.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: December 2, 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