STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) No. 11-0211 (Kanawha County 10-F-202)

Freddie Lee Bragg,
Defendant Below, Petitioner

FILED
February 10, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner appeals the circuit court's order sentencing him to a total of fifty-three to eighty years in prison based upon jury convictions of three counts of third degree sexual assault and six counts of sexual abuse by a parent, guardian or custodian. The appeal was deemed timely perfected by counsel with the record from the circuit court accompanying the petition. The State of West Virginia ("the State") has filed its response. Petitioner appears by counsel Crystal L. Walden. The State appears by counsel Jacob Morgenstern.

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 March 24, 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.

Relying on the plain error doctrine, petitioner challenges the admission into evidence of a videotape made during his processing phase[1] in which the arresting officer explained the charges against him, including incest.[2] After being told the charges against him, petitioner asked the arresting officer to explain the elements of incest. When the officer began to explain that "[i]t's with a relative, or—", petitioner responded "[s]he is not kin to me. She is my step-daughter's daughter."

[1] Petitioner received *Miranda* warnings at the time of his arrest at his home, before he was processed.

[2] The grand jury subsequently did not indict him on charges of incest despite the initial charge for such offense.

The State filed a motion to admit the videotape of this statement at trial as a statement against interest. A suppression hearing was held at which trial counsel initially objected to the admission of the videotape. After the circuit court ruled during the suppression hearing that the State was not allowed to suggest that the statement on the videotape indicated that petitioner was guilty based upon the fact that he did not deny that the molestation occurred, trial counsel indicated that with that understanding, he had "no problem" with the admission of the videotape.[3]

At trial, the videotape was admitted into evidence and played for the jury. The arresting officer did not comment during his trial testimony on the conclusions to be drawn from petitioner's statement regarding incest.

On appeal, asserting plain error, petitioner argues that the admission of the videotape was a violation of his constitutional right to avoid self-incrimination. He also argues that the videotaped statement was irrelevant as he was not on trial for incest. While petitioner concedes in his petition for appeal that "the word 'relevancy' did not make its way into [trial] counsel's objections," he contends that the issue of relevancy was implicitly raised when trial counsel argued that petitioner was not even indicted on incest. Finally, he argues that the use of the videotape by the State constituted an improper use of Rule 404(b) evidence.

Petitioner concedes in his petition for appeal that his trial counsel withdrew his objection to the admission of the videotape and that the errors asserted in his petition must be reviewed under the plain error standard. "'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.' Syllabus point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). " Syl. Pt. 1, *State v. Davis*, 220 W.Va. 590, 648 S.E.2d 354 (2007) (per curiam). The Court notes that while the trial counsel initially objected to the admission of the videotape, he admittedly withdrew his objection and further indicated that he had "no problem" with its admission.

"Under the 'plain error' doctrine, 'waiver' of error must be distinguished from 'forfeiture' of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined." Syl. Pt. 8, in part, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). Further,"'[a] trial court's evidentiary rulings, as well as its application of the Rules of Evidence, are subject to review under an abuse of discretion standard.' Syl. Pt. 4, *State v. Rodoussakis*, 204 W.Va. 58, 511 S.E.2d 469 (1998)." Syl. Pt. 3, *State v. Larry M.*, 215 W.Va. 358, 599 S.E.2d 781 (2004) (per curiam).

The Court concludes that there was a waiver of any alleged error in the admissibility of the videotape. The State in its response asserted, arguendo, that even if there had been no waiver, the

---

[3] This Court's affirmance does not foreclose petitioner from challenging his counsel's actions on this issue in a habeas corpus proceeding.

plain error rule must fail given the "avalanche" of evidence presented to the jury demonstrating petitioner's guilt. The State contends that, as such, petitioner could not satisfy the elements of the plain error doctrine which require that substantial rights be affected in such a manner so as to seriously affect the fairness, integrity, or public reputation of the judicial proceedings. The Court is persuaded by this argument and holds that even if waiver had not occurred, there was no demonstration of plain error.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: February 10, 2012

CONCURRED IN BY:

Justice Robin Jean Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum
Justice Brent D. Benjamin