STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs.) No. 11-0269 (Wood County 09-F-225)

Michael Everett Barnhart,
Defendant Below, Petitioner

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

MEMORANDUM DECISION

Petitioner Michael Everett Barnhart seeks to overturn his conviction for Attempted Sexual Assault in the Second Degree. The State filed a summary 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 was indicted for abduction, attempted sexual assault in the second degree, and attempted sexual abuse in the first degree, arising out of an attack on a sixteen-year-old girl in a wooded area between Parkersburg High School and the Wee Federal Credit Union in Parkersburg on March 27, 2009. The victim stated that her assailant grabbed her from behind, placed his hand over her mouth, and attempted to pull off her pants by grabbing them about her waist. The victim was knocked to the ground during the struggle but fought back. The assailant fled and the victim followed him until he jumped into a car and drove off. The victim noted the license plate of the car as either "8NC620" or "6NC620." The victim ran home and a family member called the police who arrived shortly thereafter. The victim provided a description of the assailant and the car he was driving. On examination, the victim was found to have a cut on her head. She later reported having scratches around her waist.

Within the hour, the investigating officer traced the "8NC620" license plate to a car that matched the victim's description and was eventually found to be owned by petitioner's girlfriend. When the investigating officer arrived at the girlfriend's residence, he found the car and noted that its engine was still warm. The officer knocked on the door of the residence and petitioner answered. When questioned, petitioner admitted to having visited an ATM at

the Wee Federal Credit Union that morning but said he had walked to the ATM. Video footage from a camera near the ATM showed an unclear image of a man driving a car to the ATM. At the same time that the car appeared on the video, petitioner's bank account was accessed from the ATM.

Later that day, the investigating officer, the victim, and the detective assigned to the case visited the scene of the crime. The victim later identified two possible assailants from a photo array. One was petitioner; the other was a man named Blackwell (first name unknown).

The abduction charge was dismissed at the close of the State's case-in-chief. Petitioner did not testify during his two-day trial. The jury returned a guilty verdict on the count of attempted sexual Assault in the second-degree. Petitioner's post-trial motions for acquittal and a new trial were denied by the circuit court. Petitioner was sentenced to a term of not less than one nor more than three years in prison.

"'This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed de novo.' Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996)." Syl. Pt. 1, *State v. Murray*, 220 W.Va. 735, 649 S.E.2d 509 (2007) (per curiam).

Petitioner challenges his conviction on four grounds.

Petitioner's first assignment of error is that the State made comments during its closing argument that drew the jury's attention to petitioner's decision not to testify and inferred to the jury that only he could have rebutted the State's evidence. Petitioner notes that his counsel did not object to the comments but argues that the statements were prejudicial and constitute plain error.

> An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

Syl. Pt. 7, *State v. LaRock*, 196 W.Va. 294, 470 S.E.2d 613 (1996).

The State's closing comments to which petitioner objects are:

> Most importantly, although words have value, they're not facts. They are not facts. The facts are that the only witnesses [the investigating officer, the detective, and the victim] who testified at this trial, who were actually in the wooded area on the morning of Friday, March 27, 2009, were three people who were actually there. Not you, not me, not any of the other witnesses, just three people testified to you and gave you evidence who were there that day.
>
> They're the only people who testified that day and each of the three of them had no problem with mud. Those facts and the presence of the large number of leaves on the ground not in a condition that would indicate they'd been trampled down or matted down as a result of rain, those facts tell you that mud is not a problem here. And there's no evidence that it was. All the evidence shows, all the evidence of the witnesses who were actually there that morning, all of them say and tell you the same thing, and you are bound to follow the evidence. You're bound to make your decision on the basis of the evidence.

When read in context of the State's entire closing argument, it is apparent that these comments were not made to highlight the fact that petitioner did not testify but to summarize the State's evidence in response to one of petitioner's defenses: none of the witnesses who had been at the scene of the crime had testified to having mud on their shoes or clothing. Furthermore, the circuit court instructed the jury that opening statements and closing arguments were not evidence; that petitioner had no duty to testify; and that petitioner's decision not to testify could not be considered as evidence showing, or tending to show, the slightest degree of guilt.

This Court has "scrupulously protected a defendant's right to remain silent," *Murray*, 220 W.Va. at 739, 649 S.E.2d 513, and consistently reversed prosecutors' statements that suggest a defendant should have testified or that direct the jury's attention to the fact that a defendant did not testify. *Id*. at 742, 649 S.E.2d at 516. However, in the instant appeal, we find that the State's comments did not constitute reversible error because the comments do not rise to the level of plain error that substantially affected petitioner's rights or seriously affected the fairness, integrity, and reputation of his judicial proceeding.

Petitioner's second assignment of error is that the circuit court abused its discretion in denying his motion to suppress the photo array identification because the procedure did not comport with the Eyewitness Identification Act ("Act"), West Virginia Code §§ 62-1E-1 to -3 (2007). Section 62-1E-2 of the Act requires as follows:

> (a) Before a lineup, the eyewitness should be given the following three instructions:
>
> (1) That the perpetrator might or might not be present in the lineup;
>
> (2) That the eyewitness is not required to make an identification; and
>
> (3) That it is as important to exclude innocent persons as it is to identify the perpetrator.

The detective who administered the photo array testified at a pretrial hearing that he read the following statement to the victim before he gave her the photo array:

> You will be asked to look at a group of photographs. The fact that the photographs are shown to you should not influence your judgment. You should not conclude or guess that the photographs contain the picture of the person who committed this crime. You are not obligated to identify anyone. It is just as important to free innocent persons from suspicion as to identify guilty parties. Please do not discuss this case with any other witnesses, nor indicate in any way that you have identified someone.

In *State v. Lilly*, 194 W.Va. 595, 600, 461 S.E.2d 101, 106 (1996) (internal citations and footnote omitted), we set forth the standard of review for motions to suppress:

> [W]e first review a circuit court's findings of fact when ruling on a motion to suppress evidence under the clearly erroneous standard. Second, we review *de novo* questions of law and the circuit court's ultimate conclusion as to the constitutionality of the law enforcement action. Under the clearly erroneous standard, a circuit court's decision ordinarily will be affirmed unless it is unsupported by substantial evidence; based on an erroneous interpretation of applicable law; or, in light of the entire record, this Court is left with a firm and definite conviction that a mistake has been made. When we review the denial of a motion to suppress, we consider the evidence in the light most favorable to the prosecution.

Although not stated word-for-word, each of the components of West Virginia Code § 62-1E-2 is present in the statement that the detective read to the victim. Therefore, when viewed in the light most favorable to the prosecution, we find that the circuit court did not clearly err in denying petitioner's motion to suppress the photo array identification.

Petitioner's third assignment of error is that the circuit court erred in denying his motion to admit relevant evidence thus preventing him from presenting a complete defense in violation of the Sixth and Fourteenth Amendments of the United States Constitution and Article III, § 14 of the West Virginia Constitution. The evidence in question was the victim's juvenile record, and comments she placed on her Myspace page three weeks before the attack regarding needing money and to "smoke some f'ng weed." Petitioner states that he intended to use the victim's juvenile records and Myspace comments as motive evidence to support his defense that he was the victim of a failed robbery attempt.

> It has been continually recognized that this Court allocates significant discretion to the circuit court in making evidentiary rulings of this nature. Indeed, "[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" Syl. Pt. 10, *State v. Huffman,* 141 W.Va. 55, 87 S.E.2d. 541 (1955), *overruled on other grounds, State ex rel. R.L. v. Bedell,* 192 W.Va. 435, 452 S.E.2d 893 (1994).

State v. Rash, 226 W.Va. 35, 48, 697 S.E.2d 71, 84 (2010) (per curiam).

The circuit court reviewed the proffered evidence *in camera* and considered the arguments of both parties before ruling on the admissibility of the evidence. The circuit court determined that the victim had no juvenile records that were admissible or relevant to the trial and the victim was not on probation for any juvenile offense at the time of the crime. The circuit court's ruling is supported by West Virginia Code § 49-7-1 (regarding the confidentially of juvenile records) and Rule 404(b) of the West Virginia Rules of Evidence. Therefore, we find that the circuit court did not abuse its discretion in denying petitioner's motion.

Petitioner's fourth and last assignment of error is that the circuit court erred in denying his post-judgment motions for acquittal and a new trial because there was insufficient evidence from which the jury could find beyond a reasonable doubt that petitioner was the assailant and that he had attempted sexual intercourse or sexual intrusion with the victim.

Petitioner argues that the victim did not identify him as her assailant in court and her photo array identification was inconclusive. He notes that the only witnesses to identify him at trial were the law enforcement officers who participated in the case. He also asserts that the police did not investigate Blackwell (the other person named by the victim in the photo array), or the owner of a car with licence plate number 6NC620, and that the physical evidence was inconsistent with the victim's testimony.

Petitioner further argues that merely holding someone by the front of the pants, without more, is not a sufficiently overt act to support a conviction of either attempted sexual intercourse as defined by West Virginia Code § 61-8B-1(7), or sexual intrusion as defined by West Virginia Code § 61-8B-1(8).

In Syllabus Point 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995), we held the following:

> A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessment that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. . . .

Under this standard, we find that sufficient evidence was adduced at trial to support a verdict of guilt beyond a reasonable doubt. The State established petitioner's intent to commit the offense along with an overt act toward committing the offense.

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