STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent,

vs) No. 11-0314 (Berkeley County 09-F-55)

Alfonso Frank Sanchez,
Defendant Below, Petitioner

FILED
October 21, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Alfonso F. Sanchez appeals his convictions for one count of Child Abuse Causing Serious Bodily Injury, West Virginia Code § 61-8D-3(b), and one count of Gross Child Neglect Creating Substantial Risk of Serious Bodily Injury, West Virginia Code § 61-8D-4(e).

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. 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.

I.

Petitioner asserts that the circuit court erred by refusing to dismiss his indictment for violation of the three-term rule of West Virginia Code § 62-3-21 and the one-term rule of West Virginia Code § 62-3-1. "This Court's standard of review concerning a motion to dismiss an indictment is, generally, *de novo*. However, in addition to the *de novo* standard, where the circuit court conducts an evidentiary hearing upon the motion, this Court's 'clearly erroneous' standard of review is invoked concerning the circuit court's findings of fact." Syl. Pt. 1, *State v. Grimes*, 226 W.Va. 411, 701 S.E.2d 449 (2009).

The three-term rules requires that a defendant be forever discharged from prosecution if the defendant is not tried within three terms of the circuit court, not including the term in which the indictment issued, unless one of the exceptions set forth in West Virginia Code § 62-3-21 exists. Petitioner was indicted during the February 2009 Term of the Circuit Court of Berkeley County. He went to trial during the May 2010 Term, which was the fourth term of court.

When denying the motion to dismiss the indictment, the circuit court ruled that the October 2009 Term was excused and did not count for purposes of the three-term rule. During that term, on or about November 20, 2009, the petitioner and the State submitted a proposed plea agreement to the circuit court wherein petitioner would plead guilty and receive probation. Without any objection, the court deferred acceptance of the plea agreement pending a pre-plea investigation and report; cancelled the petitioner's trial that had been set for December 15, 2009; and scheduled a new plea hearing for January 28, 2010. After receiving the report of the pre-plea investigation, the court rejected the plea agreement and set a new trial date.

A "continuance granted on the motion of the accused" is one of the exceptions to the three-term rule. W.Va. Code § 62-3-21. Although petitioner did not file a written motion to continue the December 15, 2009, trial, we find that the submission of the written plea agreement had the same intent and effect. With the submission of the proposed plea agreement, petitioner was asking the court to consider resolving the case on certain terms instead of proceeding to the December trial. Petitioner could have retained his December trial date, but instead chose to seek the benefit of a plea agreement. When the October 2009 Term is not counted, petitioner was tried within three unexcused terms of his indictment. Accordingly, we affirm the circuit court's decision that there was no violation of the three-term rule.

The one-term rule requires that a defendant be tried within the same term of court as the right is asserted. As we recognized in Syllabus Point 7 of *Good v. Handlan*, 176 W.Va. 145, 342 S.E.2d 111 (1986), the one-term rule is not limited to the term of the indictment, but is applicable to any term of court in which an accused asserts this right. Moreover, we have held that "[a] defendant must assert his speedy trial right under W.Va.Code, 62-3-1, the one-term rule, by a timely written motion." Syl. Pt. 2, *Keller v. Ferguson*, 177 W.Va. 616, 355 S.E.2d 405 (1987).

The circuit court found that petitioner had not invoked the one-term rule until he filed the motion to dismiss the indictment, which was filed during the same term that he ultimately went to trial. Petitioner argues, however, that his lawyer did invoke the one-term rule during a May 1, 2009, hearing. During this hearing, the State was arguing its motion to continue a

June 2009 trial date because its expert witness would be on vacation at that time. The following exchange took place:

> DEFENSE COUNSEL: I understand the great likelihood that your Honor would grant the State's motion in this case. I don't want to give up my client's right to a speedy trial. My understanding is that the next hearing in the other matter is not scheduled until June. So we have a fairly long extended schedule happening, and I think that it may be wise to have that matter take its course before we proceed with this might –
>
> (The court reporter indicated to speak louder.)
>
> THE COURT: Okay. So you're contesting the motion or you're not contesting the motion?
>
> DEFENSE COUNSEL: I'm preserving my client's right to a speedy trial. I would not object to the motion.

Upon a review of this exchange, we conclude that petitioner did not invoke the one-term rule. Counsel's request was not made in a written motion. Moreover, counsel did not expressly seek a trial during that same term of court. Counsel sought to preserve petitioner's right to a speedy trial while also expressing a desire to wait for a related proceeding to run its course. Given this desire, it appears that counsel was seeking to preserve petitioner's right to a speedy trial under the three-term rule, not the one-term rule. Accordingly, we affirm the circuit court's decision that there was no violation of the one-term rule.

II.

Petitioner also argues that the circuit court erred when it admitted evidence that the State offered at trial pursuant to Rule 404(b) of the West Virginia Rules of Evidence. Pursuant to Rule 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In the case *sub judice*, the State asserted that petitioner intentionally fractured the skull of his four-month-old daughter and then failed to obtain medical care for her. A CT scan of the infant's head revealed an acute skull fracture of the left side, as well as older, bi-frontal hematomas. Petitioner gave two videotaped statements to police. Initially, he denied any knowledge of the cause of the infant's injuries. However, in the second statement given ten

days later, petitioner stated that he had accidentally tripped over a chair in which the baby was lying, causing a metal bar of the chair to strike the baby's head. The State was permitted to offer at trial other portions of the petitioner's videotaped statements pursuant to Rule 404(b), including: (1) petitioner's statements about shaking this infant in the past and his concern that he had hurt her, although he denied any intent to harm; (2) petitioner's admission that in 2001 he "accidentally" broke the arm of another daughter who was then an infant; (3) petitioner's statement that, in the past, he bruised this infant's nose while wiping it; and (4) petitioner's statement that the infant had a scratch on her face. The evidence was subject to a pre-trial hearing pursuant to *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994), and was admitted for the purpose of showing intent, knowledge, and lack of mistake or accident.

This Court has articulated the following standard of review for an appeal of a trial court's admission of 404(b) evidence:

> The standard of review for a trial court's admission of evidence pursuant to Rule 404(b) involves a three-step analysis. First, we review for clear error the trial court's factual determination that there is sufficient evidence to show the other acts occurred. Second, we review *de novo* whether the trial court correctly found the evidence was admissible for a legitimate purpose. Third, we review for an abuse of discretion the trial court's conclusion that the "other acts" evidence is more probative than prejudicial under Rule 403 [of the West Virginia Rules of Evidence].

State v. LaRock, 196 W.Va. 294, 310-11, 470 S.E.2d 613, 629-30 (1996) (citations omitted).

Petitioner argues that his prior acts were clearly not relevant to prove intent, knowledge, or lack of mistake or accident, and that the evidence was not offered for a legitimate purpose. He argues that one of his charges was for negligence, and intent is not relevant to a negligence crime. Applying the *de novo* standard, we conclude that the evidence was offered for a proper purpose. Under the circumstances of this case, we find the evidence of other acts toward this infant and toward the petitioner's other child was relevant to the jury's consideration of petitioner's claim of accident in this case. Moreover, petitioner was also charged with abuse, which requires intent.

Petitioner further argues that the probative value of this 404(b) evidence, if any, was outweighed by its prejudicial effect, thus the evidence should have been excluded under Rule 403. After a careful consideration of the parties' arguments and the record, we conclude that the circuit court did not abuse its discretion in this regard.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: October 21, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Menis E. Ketchum
Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin